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**HOW FEMINIST LEGAL THEORY CAN HELP TO SAFEGUARD THE RIGHTS  
AND INTERESTS OF DISADVANTAGED WOMEN AND GIRLS DURING CRISES:  
LESSONS FROM THE COVID-19 PANDEMIC AND SOUTH AFRICA**

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## ABSTRACT

Periods of global and national crisis have a tendency to upend progress made with respect to women's and girls' equality. Laws and policies created during these periods, seemingly neutral on their face, are often hastily constructed in a bid to ensure swift crisis management and an amelioration of immediate harm. These policies, however, fail to take into account the unique lived realities of women and girls, in general, and disadvantaged women and girls, in particular. Such oversight results in the unfavourable inevitability that they will be prevented from enjoying rights and freedoms on an equal basis with men. The COVID-19 pandemic represents a manifestation of such a crisis scenario as the measures employed by governments to deal with the virus have resulted in the exacerbation of already-existing gender inequalities, risks and vulnerabilities.

This dissertation seeks to investigate South Africa's response to the COVID-19 pandemic as a case study of a crisis and the adverse impact of this response on the rights and interests of disadvantaged women and girls in the country. A feminist lens, in the form of Feminist Legal Theory, is used to elucidate this disproportionate impact. In order to assess and evaluate South Africa's response, this dissertation analyses the obligations that are placed on State parties to ensure the protection of women's equality during crises as they are contained in regional and international human rights instruments. With a particular focus on the Convention on the Elimination of Discrimination Against Women, the Maputo Protocol and the recommendations of their respective institutional bodies, this dissertation finds that there is a clear duty on State parties to take positive steps to implement and create gender-responsive mitigation measures to ensure that virus-containment strategies do not result in discrimination along gendered and socioeconomic lines, albeit indirectly.

Having regard to these obligations, this dissertation finds that South Africa has failed to adequately safeguard the rights of its women and girls during this crisis. The government's mitigation policies in various sectors were either absent, gender-blind, or not sufficiently responsive so as to ensure adequate protection of the rights of women and girls as a heterogeneous group. Lessons gleaned from South Africa reveal a pressing need for the inclusion and amplification of the voices of the most vulnerable in future crisis decision-making.

**How Feminist Legal Theory Can Help to Safeguard the Rights and Interests of  
Disadvantaged Women and Girls: Lessons from the COVID-19 Pandemic and South  
Africa**

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## CHAPTER ONE

### INTRODUCTION AND BACKGROUND

#### 1.1 Introduction

During times of crisis and public emergency, it is often human rights that are called into contention.<sup>1</sup> Extraordinary circumstances alter the ways in which human rights are accessed and enforced, impacting the lives and interests of all who possess them. Although this adverse impact is felt generally, periods of widespread crisis have routinely resulted in the deepening of the historical inequalities that exist between men and women, resulting in the disproportionate suffering of women and girls and particularly of those with intersecting vulnerabilities as consequences of race and class.<sup>2</sup> The most recent example of one such crisis, at the time of writing this dissertation, is that of the COVID-19 pandemic – a global health catastrophe which began its pillage in late 2019. Available literature on the socioeconomic impact of the COVID-19 pandemic has revealed that it has stagnated and, in some areas, even eroded decades worth of advancement in the field of gender equality globally, including in South Africa. The issue of gender equality during periods of crisis is an important and pervasive human rights concern, yet comprehensive safeguards thereto continue to evade crisis decision-makers with each novel catastrophe. This dissertation will seek to investigate South Africa's response to COVID-19 as a crisis case study and will analyse the response from the perspective of women and girls. Feminist Legal Theory, as an extension of the feminist lens, will be used as an analytical tool against which to measure and critique South Africa's response in relation to its domestic and international law obligations with respect to women and girls in times of crisis, with a focus on the rights to non-discrimination (in employment and education) and the right to be free from gender-based violence.

#### 1.2 Background: the effect of the COVID-19 crisis on women and girl's employment and economic disparity, education and experience of violence globally

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<sup>1</sup> Ghanim Alnajjar 'Human Rights in a Crisis Situation: The Case of Kuwait after Occupation' (2001) 23 *Hum. Rts. Q.* 188 at 188.

<sup>2</sup> Enzamaria Tramontana 'Women's Rights and Gender Equality during the COVID-19 Pandemic' (2021) 87 *Questions of International Law – Zoom In* 5 at 5.

At this point in the dissertation, I believe it is first necessary to contextualise the devastating impact that the COVID-19 pandemic and its attendant response measures have had on women and girls in the abovementioned areas globally, before specifically looking at its domestic impact (which forms the focus of the next chapter), in order to avert presumptions that South Africa's situation is an isolated one. To do so, some of the common response measures and its effects in several countries are discussed.

Experts have suggested that the COVID-19 pandemic has posed the most severe hurdle to global policy since the global financial crisis that took place in 2008.<sup>3</sup> Frequently described as 'unprecedented,' the virus and its attendant management would prove a challenging force to quell.<sup>4</sup> In an effort to mitigate the adverse social, economic and health consequences of the virus, governments globally adopted response strategies aimed at slowing down the rate of transmission and thereby sought to avoid an exacerbated collapse of private and public systems. Several governments initially followed the counsel of national and international health experts who would begin to dominate public discourse at the height of the pandemic.<sup>5</sup> Many governments, of which South Africa is included, issued countrywide states of emergencies or invoked its emergency powers during the pandemic's initial stages.<sup>6</sup> For some governments the decision not to declare a state of emergency or to employ emergency measures had little to do with intrinsic legal constraints but was instead borne out of a lack of awareness of, or a reluctance to acknowledge, the severity of the virus.<sup>7</sup>

Many countries imposed lockdowns, some nationwide and others region-specific, which involved the immediate closure of both public and private state entities.<sup>8</sup> At the juvenile stage of public and global policy responses to COVID-19, the majority of countries required and ordered the closure of all workplaces, save those deemed essential work.<sup>9</sup> As of 1 May 2020, the governments of all countries (barring Belarus, Tajikistan and Rwanda) required the

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<sup>3</sup> Sonia Palmieri and Sarah Childs 'Patience, Ladies: Gender-Sensitive Parliamentary Responses in a Time of Crisis' (2020) 22 *European Journal of Law Reform* 468 at 469.

<sup>4</sup> Lincoln Leehang Lau, Natalee Hung and Kendall Wilson 'COVID-19 Response Strategies: Considering Inequalities Between and Within Countries' (2020) 19 *International Journal for Equity in Health* 137 at 1.

<sup>5</sup> Palmieri op cit note 3 at 469.

<sup>6</sup> Council of Europe 'Venice Commission Observatory on Emergency Situations', available at <https://www.venice.coe.int/files/EmergencyPowersObservatory//T06-E.htm>, accessed on 18 January 2023.

<sup>7</sup> Joelle Grogan 'States of Emergency: Analysing Global Use of Emergency Powers in Response to COVID-19' (2020) 22 *European Journal of Law Reform* 338 at 343.

<sup>8</sup> Palmieri op cit note 3 at 471.

<sup>9</sup> Thomas Hale, Noam Angrist & Raphael Goldszmidt et al 'A Global Panel Database of Pandemic Policies (Oxford COVID-19 Government Response Tracker)' (2021) 5 *Nature Human Behaviour* 529.

closure of schools at some levels or at all levels.<sup>10</sup> By the middle of 2020, governments across countries had oscillated between easing and intensifying prohibitions on public gatherings, including those gatherings in accordance with religious institutions. Additionally, citizens who were not part of an essential workforce were mandated to stay at home with adherence to this requirement being observed and enforced by police officials.<sup>11</sup> Most governments made it an obligation for all citizens to wear masks (primarily indoors and in public spaces), one of the few mitigation measures that has continued to operate two years after the pandemic had been declared a global health emergency.<sup>12</sup>

Much of the available literature predicated on an analysis of gender disparities as a consequence of the COVID-19 pandemic centre around the direct impacts of the virus on men and women as it pertains to health outcomes. For example, numerous studies have been devoted to analysing the adverse effect of COVID-19 from a biological perspective.<sup>13</sup> It is becoming increasingly evident, however, that there are long-lasting, indirect consequences of the virus (and subsequent containments measures) beyond those that are immediately felt that are equally as severe or, arguably, outperform in severity. One such consequence is the proliferation and exacerbation of health and socio-economic disparities amongst marginalised groups. At the intersection of these marginalised groups are poor or disadvantaged<sup>14</sup> women and girls who continue to suffer disproportionately in the health, social and economic landscapes. Such policy outcomes are not unique to one specific country but rather indicative of a concerning worldwide trend.

### 1.2.1 Economic and Employment disparity

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<sup>10</sup> Edouard Mathieu, Hannah Ritchie & Lucas Rodes-Guirao et al ‘Coronavirus Pandemic (COVID-19)’ (2020) available at <https://ourworldindata.org/policy-responses-covid#citation>, accessed on 30 January 2023.

<sup>11</sup> Palmieri op cit note 3 at 471.

<sup>12</sup> Ibid; Mathieu op cit note 10.

<sup>13</sup> Luisa S Flor, Joseph Friedman & Cory N Spencer et al. ‘Quantifying the Effects of the COVID-19 Pandemic on Gender Equality on Health, Social and Economic Indicators: A Comprehensive Review of Data from March, 2020, to September, 2021’ (2022) 399 *Lancet* 2381 at 2381.

<sup>14</sup> In this dissertation, reference to ‘disadvantaged,’ is as it appears on the website of the European Institute for Gender Equality, and which means ‘Groups of persons that experience a higher risk of poverty, social exclusion, discrimination and violence than the general population, including, but not limited to, ethnic minorities, migrants, people with disabilities, isolated elderly people and children.’ European Institute for Gender Equality (EIGE) ‘Glossary and Thesaurus ‘Disadvantaged Groups’” available at [https://eige.europa.eu/publications-resources/thesaurus/terms/1174?language\\_content\\_entity=en#:~:text=Groups%20of%20persons%20that%20experience,isolated%20elderly%20people%20and%20children.](https://eige.europa.eu/publications-resources/thesaurus/terms/1174?language_content_entity=en#:~:text=Groups%20of%20persons%20that%20experience,isolated%20elderly%20people%20and%20children.), accessed on 8 September 2023.

In a study utilising the administrative and survey data collected across 193 countries, the women reported higher rates of pandemic-related job losses relative to the men.<sup>15</sup> This disparity was even more pronounced in the regions of North Africa, the Middle East, Latin America and the Caribbean.<sup>16</sup> In the same study, it was reported that Sub-Saharan Africa reported the greatest degree of income loss as a consequence of the pandemic when compared to those countries in which high incomes and salaries were more common.<sup>17</sup> A further reading of the data analysis revealed that, of those who had reported high rates of income loss, women typically fared significantly worse than their male counterparts, especially in the regions of Asia, Oceania and Sub-Saharan Africa.<sup>18</sup> Employment sectors such as retail, hotel, food and entertainment services were some of the most adversely affected by the pandemic and women's overrepresentation in these sectors can consequently account for women's disproportionately negative economic outcome.<sup>19</sup>

Perhaps one of the most prolific and significant drivers of women's economic hardship throughout the pandemic, of which the effects have endured years later, is the fact of the global increase in women's care and domestic workloads as a consequence of containment measures.<sup>20</sup> Care work can be performed with or without remuneration.<sup>21</sup> In the case of the former, such work is characteristically undertaken in both public and private spaces and includes those who work in the home of another (domestic workers) or those who work in the hospitality industry, among others.<sup>22</sup> In the case of unpaid care or domestic work, this includes work that is undertaken at home for the purpose of maintaining the person's own household and includes cooking, cleaning and care of other household or family members.<sup>23</sup> Although women have historically carried the burden of care work, COVID-19 and the universal mitigation efforts that would follow has only served to exacerbate this division and make these

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<sup>15</sup> Flor op cit note 13 at 2389.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

<sup>19</sup> Naila Kabeer, Shahra Razavi & Yana van der Meulen Rodgers 'Feminist Economic Perspectives on the COVID-19 Pandemic' (2021) 27 *Feminist Economics* 1-29 at 7.

<sup>20</sup> Elena Camilletti and Zahrah Nesbitt-Ahmed 'COVID-19 and a "Crisis of Care": A Feminist Analysis of Public Policy Responses to Paid and Unpaid Care and Domestic Work' (2022) 161 *International Labour Review* 195 at 196.

<sup>21</sup> Ibid at 200.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

disparities even more pronounced.<sup>24</sup> School closures and the shutdown of formal care institutions have left women having to emulate these facilities in the home.<sup>25</sup> The stark disparities between men and women's adoption of care work (that is, caring for others) following the pandemic was most prominent in high-income countries.<sup>26</sup> Additionally, women reported higher rates of an increase in chore responsibilities in the regions of central and eastern Europe and in central Asia.<sup>27</sup> The economic significance of this increase in care and domestic responsibilities is that, for many women globally, this burden would culminate in a large number of women having to give up their employment, and thus financial security, to attend to this encumbrance.<sup>28</sup> In cases where women retain their employment, it is likely that the increased home burden will nevertheless prevent them from advancing in their careers.<sup>29</sup>

In all cases, it is true that women who were poorer, employed in low-wage occupations or who worked in informal sectors of the economy where they had little access to benefits or social protection, had experienced significant financial setbacks in this regard. Given the fact that the majority of these women were women of colour, it is thus the case that this was and is the social group most economically affected by the pandemic.<sup>30</sup> In accordance with this assertion, a study conducted in the US revealed that unemployment rates following the pandemic were higher for Black and Hispanic women than they were for other social groups.<sup>31</sup>

### 1.2.2 Disparity in educational access

It is estimated that around 90 percent of children globally had not been in school during the COVID-19 pandemic, differing in duration across regions and at various stages of the pandemic.<sup>32</sup> The shift to remote learning represented a major hindrance to the ability of children from poorer households to continue with their studies. Issues such as electricity scarcity, connectivity and lack of technological equipment meant that access to education became a near

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<sup>24</sup> Heinrich Boll Stiftung 'Hard-Won Progress on Gender Equality Destroyed: The Impact of the COVID-19 Crisis on Women and the LGBTIQ' (2021) available at <https://eu.boell.org/en/2021/06/29/hard-won-progress-gender-equality-destroyed-impact-covid-19-crisis-women-and-lgbtiq?cv=1>, accessed on 24 September 2023.

<sup>25</sup> Enzamaría op cit note 2 at 7.

<sup>26</sup> Flor op cit note 13 at 2389.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid.

<sup>29</sup> Op cit note 2 at 7.

<sup>30</sup> Kabeer op cit note 19 at 8.

<sup>31</sup> Ibid.

<sup>32</sup> Jean Grugel, Matt Barlow, Tallulah Lines et al. *The Gendered Face of COVID-19 in the Global South: The Development, Gender and Health Nexus* (2022) ch 5 at 137.

impossibility for around 500 million children as a consequence of the pandemic.<sup>33</sup> It has once again become evident, however, that this data aggregation can further be divided along gendered lines.

Male and boy learners in central and eastern Europe, central, southeast and east Asia and those in Oceania were more likely than female learners to have sufficient access to online learning facilities.<sup>34</sup> Data from sub-Saharan Africa similarly revealed that female students from poorer households were more adversely affected by issues concerning online learning than male students – with the latter’s access to educational resources often taking precedence in the home.<sup>35</sup> Additionally, it has been reported that women and girls in sub-Saharan Africa and Latin America were less likely to return to school in the aftermath of the 2020 school closures than their male counterparts.<sup>36</sup> In South Africa in particular, the government reported that as many as 300, 000 students had not returned to school following the initial school closures, the majority of which were girls.<sup>37</sup> The move to online learning also resulted in many female learners having to share the burden of unpaid care work alongside other female family members in the home, further disrupting their access to and quality of education.<sup>38</sup>

Another consequence of the pandemic representing an impediment to girls’ access to education came in the form of teenage pregnancies, the number of which had increased significantly following the imposition of worldwide lockdowns.<sup>39</sup> Such an increase poses a threat to girls’ education as there are many countries that prohibit pregnant girls from going to school.<sup>40</sup> Beyond educational concerns, school closures have also meant that many learners from poorer households have, worryingly, also lost access to what would, for some, constitute their only source of food, social support and safety.<sup>41</sup>

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<sup>33</sup> Ibid at 138.

<sup>34</sup> Op cit note 13 at 2390.

<sup>35</sup> Op cit note 32 at 138.

<sup>36</sup> Ibid.

<sup>37</sup> Ibid.

<sup>38</sup> Ibid; Op cit note 13 at 2393; Margaret Chitiga, Martin Henseler, Ramos Emmanuel Mabugu, Hélène Maisonnave ‘How COVID-19 Pandemic Worsens the Economic Situation of Women in South Africa’ (2022) 34 *The European Journal of Developmental Research* 1627 at 1630.

<sup>39</sup> Op cit note 32 at 139.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

### 1.2.3 Gender-Based Violence

The measures implemented to curtail the spread of the COVID-19 virus and thereby reduce its impact on countries' socioeconomic and healthcare systems have resulted in a sharp increase in the number of cases of gender-based violence reported worldwide.<sup>42</sup> Often referred to interchangeably as Violence Against Women (VAW), such acts typically take the form of physical, verbal and sexual abuse.<sup>43</sup> It has routinely been described as a 'shadow pandemic' and is a direct consequence of the imposition of stay-at-home orders as many women were forcibly confined to homes which they shared with their abusers.<sup>44</sup> In a study conducted by UN Women utilising the data from 13 countries, forty-five percent of women had reported that they had experienced some manifestation of VAW following the start of the pandemic.<sup>45</sup> Moreover, the data reveals that unemployed women and women living in rural areas were among the social groups most affected by VAW during the pandemic, with younger women and women living with children making up additional risk factors.<sup>46</sup> This data supports the assertion that poorer women have been the social group most affected by the pandemic in all spheres of life.

### 1.3 Statement of purpose and rationale for this dissertation

The above analysis reveals a pertinent need to safeguard the rights of women and girls, especially disadvantaged women and girls, during times of crisis such as that characterised by the COVID-19 pandemic. While such an analysis of the disparate consequences of a crisis is important for conceptualising the state of gender equality, something further must be explored in order to preserve the progression of gender equality in future. This minor dissertation will seek to argue that the responses adopted by lawmakers and decision-makers to a crisis may either enhance protection of the rights and interests of disadvantaged women and girls or diminish such protection. It will do so by evaluating the South African government's response to COVID-19, the crisis in this study, and the effect that this response had on the rights and interests of its disadvantaged women and girls. In particular, it will posit that a State's response to a crisis, through the imposition or enforcement of legislation, policies and other governmental strategies, will fail to safeguard the rights of disadvantaged women and girls in

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<sup>42</sup> Op cit note 2 at 14.

<sup>43</sup> UN Women and Women Count Measuring the Shadow Pandemic: Violence Against Women During COVID-19 (2021) available at <https://data.unwomen.org/sites/default/files/documents/Publications/Measuring-shadow-pandemic.pdf>, accessed on 12 February 2023 at 3.

<sup>44</sup> Ibid at 4.

<sup>45</sup> Ibid at 5.

<sup>46</sup> Ibid.

crises if it does not account for the pre-existing socio-economic and socio-cultural status of this group.

Further, in order to evaluate the rights and interests at stake (namely the rights to economic and educational non-discrimination and to freedom from violence), there is a need to understand the exact obligations of States toward their female citizens during crises in respect of these rights, as provided for by international human rights law instruments.

Thus, this dissertation will contribute to existing literature on crises and women's rights by providing an investigation of South Africa's response, in particular, to the COVID-19 pandemic through a feminist lens. South Africa is chosen as the focus of this research owing to the fact that, despite its formally expressed commitment to the advancement of women's rights, the analysis provided in the following chapter will demonstrate that this commitment was not enough to save its women and girls from the fate of their global counterparts. An analysis of South Africa's international obligations in respect of women and girls' rights to economic and educational non-discrimination and to freedom from violence, as they manifest both generally and during periods of crisis or disaster, is further necessary and will be explored in chapter 3. The use of Feminist Legal Theory as an analytical device will serve to contextualise the gender and class inequalities and thereby potentially aid in the development of future plans of action that are sensitive to the existing societal structure and to the place of disadvantaged women and girls within this structure. This is further detailed later in this chapter.

#### **1.4 Statement of research problem/question**

The question that this dissertation seeks to answer is how Feminist Legal Theory (hereafter 'FLT') can help to contextualise and safeguard the rights of disadvantaged women and girls in South Africa during times of crisis, such as a pandemic.

In furtherance of this aim, the following questions will be considered in this research:

(a) What effect did South Africa's response to the COVID-19 pandemic have on its disadvantaged women and girls, in particular in the areas of women's economic and employment disparity, women's education and women and girls' experience of gender-based violence?



(b) How did South Africa's response compare to the country's obligations in terms of international human rights law in respect of these rights of women and girls generally and also during periods of crisis?

(c) How can FLT contextualise the adverse impact of the pandemic on disadvantaged women and girls in South Africa and what recommendations can be made to the government, using Feminist Legal Theory as a tool, to develop comprehensive legal and policy-driven strategies to mitigate these adverse impacts on disadvantaged women and girls in times of future crisis?

## **1.5 Research methodology**

In conducting this research use will be made of the desktop methodology and approach. As such, recourse will primarily be had to secondary literature taken from textbooks and journal articles, as well as reports by pertinent organisations, that are relevant to my research question. As this dissertation has as its focus the feminist investigation of South Africa's response to the COVID-19 crisis and the manner in which such response relates to the rights and interests of disadvantaged women and girls in the country, primary legal sources such as national legislation and regional and international human rights instruments will similarly be a main area of examination. As the mode of research for this dissertation takes the form of a desktop analysis, no human participants will be required and thus no ethics approval is necessary.

As aforementioned, a feminist lens in the form of FLT will be employed as an analytical device against which to critique South Africa's response to the crisis. At this point it is apt to introduce the concept of FLT and its potential use in this analysis.

### **1.5.1 Feminist Legal Theory (FLT)**

While the pandemic and its attendant lockdown laws and regulations may certainly explain why men and women have suffered holistically throughout the period of worldwide lockdown, an analysis of the measures alone will not explain why women have demonstrably been rendered more socially and economically worse-off following the pandemic than their male counterparts. In order to account for this shortcoming, regard needs to be had to the pre-existing social and economic positions and place of women and men within society, in general, and within South African society, in particular. To this end, it can be argued that FLT is the exact

envisaged perspective that is missing from the discourse.<sup>47</sup> FLT seeks to highlight the ways in which the law and policy may serve to continually subjugate women's position and vulnerabilities within society. Explained further, FLT recognises that the law or policy has the potential to either uphold and codify women's subordinate position by turning a blind eye to the existing inequalities facing women, or, conversely, such law or policy may be used as a tool for the upliftment of women and girls in society through the express cognisance of the challenges facing them.<sup>48</sup> In this way, the law and policy will be able to identify the root causes of these gender inequalities which will, in turn, equip lawmakers with the knowledge to innovate new ways of drafting laws, strategies and policies that will redress, and not deepen, these inequalities.<sup>49</sup> FLT seeks to effect substantive equality in the law and policy as well as substantive outcomes for women.<sup>50</sup> The goals of FLT in the context of women's rights are thus to identify if law or policy may adversely impact on these rights and how it does so; and, how such laws or policies may be transformed in order to safeguard these rights.

In light of these goals, and in Chapter 3 of this dissertation, the Convention on the Elimination of Discrimination Against Women (CEDAW)<sup>51</sup> and the Maputo Protocol,<sup>52</sup> instruments created from a feminist response to human rights law,<sup>53</sup> will be used as embodiments and applications of FLT in the practical, legislative sense.<sup>54</sup> The articles and provisions contained therein, especially those pertaining to economic and educational non-

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<sup>47</sup> Tovar Y 'Contributions of the Critical Legal Feminist Theory in the Analysis of the Situation of Women in Labour Market Policies during the COVID-19 Pandemic in Latin America' (2022) 5 *Annals of Bioethics and Clinical Applications* 1 at 2.

<sup>48</sup> Linda Sudiono 'The Vulnerability of Women in Dealing with COVID-19 Pandemic: Feminist Legal Theory Approach' (2021) 7 *Hasanuddin Law Review* 241 at 251.

<sup>49</sup> *Ibid* at 252.

<sup>50</sup> Robin West 'Women in the Legal Academy: A Brief History of Feminist Legal Theory' (2018) 87 *Fordham Law Review* 977 at 987.

<sup>51</sup> UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13.

<sup>52</sup> African Union, *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, 11 July 2003.

<sup>53</sup> Karen Engle 'International Human Rights and Feminism: When Discourses Meet' (1992) 13 *Michigan Journal of International Law* 517 at 520.

<sup>54</sup> For references to CEDAW as embodying elements of FLT, see Hilary Charlesworth, Christine Chinkin and Shelley Wright 'Feminist Approaches to International Law' (1991) 85 *American Journal of International Law* 613 at 644; and Catherine Powell and Adrian K Wing 'Introduction to the Symposium on Feminist Approaches to International Law Thirty Years On: Still Alienating Oscar?' (2022) 116 *AJIL Unbound* 259 at 261. For references to Maputo Protocol as embodying FLT, see Theodora Mkali and Annika Rudman 'A Gender Perspective on Electoral Processes in Malawi: the Right of Malawian Women to Participate in the Political Process under the Maputo Protocol' (2019) 35 *Southern African Public Law* 1 at 6; and Rachel Rebouché 'Health and Reproductive Rights in the Protocol to the African Charter: Competing Influences and Unsettling Questions' (2009) 16 *Wash & Lee J Civ Rts & Soc Just* 79 at 96.

discrimination and to gender-based violence, will thus arguably serve as useful instructions against which South Africa's response to the COVID-19 pandemic can be measured.

At this point I must clarify that FLT, in the context of this dissertation, is to be utilised as an inclusive term. In other words, reference to 'women' or 'girls' in this context refers not only to those women and girls who are biologically female and identify as such, but also to those who identify with the female gender (transgender women) or who do not ascribe to any gender (non-binary) but who nevertheless, as a consequence of behaviour, external appearance or social perception, experience the 'female' archetype of oppression under the patriarchy. While such an inclusive expression of FLT is not the standard, there is support for this inclusion among the anti-essentialist (or post-modern) theorists of legal feminism (which will be explored in more detail below).<sup>55</sup>

In the South African context, the parameters of FLT may be used to identify the ways in which the lockdown regulations, as provided for in the Disaster Management Act,<sup>56</sup> as well as other legislative and policy measures taken during this time ultimately failed to take into account the economic, educational and security interests of disadvantaged women and girls in the country and therefore proved an impediment to the realisation of their human rights in this regard. FLT may thus aid the development of comprehensive laws, strategies and policies, and the enforcement of such measures already in existence, that are sensitive to the interests and position of women and girls in the country.<sup>57</sup>

While Feminist Legal Theories all seek to utilise the law and policy as a mechanism for the upliftment of women and girls within society, there are nevertheless different conceptions of this mode of thinking. FLT can be divided into: the theory of formal equality; the theory of cultural feminism; the dominance theory; and the anti-essentialist (or post-modern) theories.<sup>58</sup>

### **1.5.1.1 Prominent Feminist Legal Theories**

The formal equality/equal treatment branch of feminist legal theory advocates for sameness in the treatment of women and men, both socially and through the law, and is grounded by the

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<sup>55</sup> Demoya R. Gordon 'Transgender Legal Advocacy: What do Feminist Legal Theories Have to Offer?' (2009) 97 *California Law Review* 1719 at 1724.

<sup>56</sup> 57 of 2002.

<sup>57</sup> Sudiono op cit note 48 at 252.

<sup>58</sup> Mafuku Tholaine Matadi 'Balancing the Scales Between Governments' Response to the COVID-19 Pandemic and the Fulfilment of Women and Girls' Rights in South Africa' (2020) 9 *African Journal of Governance and Development* 160 at 162.

notion that there should be no discrimination in the law between women and men.<sup>59</sup> However, while this theory may in some sense prevent discrimination against women and girls, it is inadequate at doing so substantially as it fails to recognise that the pre-existing subjugation of women and girls in society warrants the need for laws and policies that specifically target women and that aim to provide them with redress.<sup>60</sup> Advocating for equality, in this regard, will yield no meaningful advancement of women and girls in society as it will fail to address the underlying causes of this inequality. The cultural feminism theory seeks to emphasise the need to take cognisance of the different positions, knowledge and feelings of men and women in society.<sup>61</sup> However, this theory places a heavy reliance on the role of pregnancy and motherhood in giving effect to these differences.<sup>62</sup> The dominance theory of feminism identifies an imbalance in power relations between men and women as the source of women's subjugation and gender inequality.<sup>63</sup> Resultantly, the theory posits that men are the dominant and default group and that, as a result of their social dominance, they have been able to create a system of law and society that solidifies their position as superior to marginalised groups such as women.<sup>64</sup>

However, it is also imperative to recognise that there are dimensions beyond just gender, such as those of race and class, that dictate and affect the severity of the law's adverse consequences. This is where the anti-essentialist feminist legal theory may prove useful in this dissertation and in the quest for the development of future laws and response strategies that will take the interests of all people into account.<sup>65</sup> Thus, the anti-essentialist feminist legal theory maintains that there is no one homogenous group of women.<sup>66</sup> Instead, women's subordination manifests differently depending on aspects such as age, race, sexuality and class.<sup>67</sup> Thus, there is a recognition that, while there are circumstances affecting women

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<sup>59</sup> Matadi *ibid.*; Sudiono *op cit* note 48 at 253.

<sup>60</sup> Sudiono *ibid.*; Cynthia Grant Bowman and Elizabeth M. Schneider 'Feminist Legal Theory, Feminist Lawmaking, and the Legal Profession' (1998) 67 *Fordham Law Review* 249 at 252.

<sup>61</sup> Matadi *op cit* note 58 at 163; Martha Albertson Fineman 'Feminist Legal Theory' (2005) 13 *American University Journal of Gender, Social Policy and the Law* 13 at 17.

<sup>62</sup> Matadi *op cit* note 58 at 163.

<sup>63</sup> Matadi *ibid.*; Nancy Levit and Robert R. M. Verchick *Feminist Legal Theory (Second Edition): A Primer* 2 ed (2016) 20.

<sup>64</sup> Matadi *ibid.*

<sup>65</sup> Sudiono *op cit* note 48 at 252.

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*; Nancy E Dowd 'Masculinities and Feminist Legal Theory' (2008) 23 *Wisconsin Journal of Law, Gender and Society* 201 at 203.

generally, lived experiences vary between each woman.<sup>68</sup> Thus, laws and policies will similarly not prove useful in protecting the interests of all women if it views women as a single group - as a means to effect legal certainty - and accordingly develops with this singularity in mind.<sup>69</sup> Legislation, policies and regulations that are blind to the inherent differences between groups of women will not succeed in advancing women, instead they will only serve to perpetuate social inequalities that will yet again affect marginalised and vulnerable groups of women to an even greater degree.<sup>70</sup> As will be extrapolated in the next Chapter, South Africa, the case study in this dissertation, is a country in which there exists vast differences in the lived experiences of men and women, as well as between women as an intersectional group. Anti-essentialist feminist legal theory will thus be the theoretical vantagepoint relied on in this dissertation through which to analyse the actions of the South African government as it can speak to women's and girls' needs in general, as well as to the needs of specific groups of women which, for purposes of this dissertation, are those who are disadvantaged.

FLT is thus useful in that it may not only explain why the legislative and policy response to the COVID-19 pandemic may have adversely affected the position of women and girls in South Africa relative to men and boys, but it may also serve as a conceptual basis on which to develop future laws, policies and response measures that will not set back advancements on women's rights back in times warranting a similar national response.

## 1.6 Chapter outline

The first and current Chapter of this minor dissertation has sought to contextualise the issue of the abuse of women's and girls' rights during crises, generally, before positioning the most recent global health crisis – COVID-19 – as a South African crisis case study on which this dissertation is based. It has introduced the areas of focus of the research, namely the areas of women and girls' economic agency, their education and their experience of violence, and has introduced a feminist lens in the form of FLT as an analytical device with which to evaluate South Africa's response to the crisis. The rationale for this research is also stated. The remainder of this Chapter focusses on outlining the proceeding Chapters of this dissertation.

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<sup>68</sup> Jane Wong 'The Anti-Essentialism v Essentialism Debate in Feminist Legal Theory: The Debate and Beyond' (1999) 5 *William and Mary Journal of Women and the Law* 273 at 284; Sudiono op cit note 48 at 252.

<sup>69</sup> Sudiono *ibid.*

<sup>70</sup> Bowman and Schneider op cit note 60 at 253; Sudiono *ibid.*

Chapter 2 is dedicated to the detailed exploration of the perspective of South African disadvantaged women and girls' during the pandemic in the areas of employment and economic parity, education and gender-based violence. It will then seek to explain the disproportionate impact of the pandemic by contextualising the place of women and girls' in the current South African socio-cultural order.

Chapter 3 of this dissertation discusses South Africa's international law obligations with respect to women and girls during a time of crisis. In particular, hard law and soft law in respect of the rights of women and girls' to non-discrimination (economic and education) and to be free from violence, generally and during crises, will be examined in detail.

Chapter 4 aims to apply FLT to the context of the COVID-19 crisis in South Africa. In particular, it measures South Africa's response to the pandemic against its feminist international law obligations as outlined in Chapter 3. It discusses the ways in which South Africa's response aligned with or, conversely, deviated from its human rights duties as enshrined in the previous Chapter.

Chapter 5 will conclude the findings of the research and will posit recommendations for future rights safeguards as drawn from FLT.

## CHAPTER TWO

### THE COVID-19 PANDEMIC IN SOUTH AFRICA: EXPLAINING THE DISPROPORTIONATE IMPACT ON WOMEN AND GIRLS

#### 2.1 Introduction

As demonstrated in the preceding chapter, the COVID-19 pandemic and the governmental responses thereto have exacerbated pre-existing gender inequalities, risks and vulnerabilities between men and women across the world.<sup>71</sup> While it is true that the COVID-19 pandemic has had a devastating impact on the overall wellbeing of the vast majority of the world's population, it is widely in concurrence that it is women (and girls) who will bear the brunt of the adverse social and economic effects of the crisis.<sup>72</sup> This statement is especially true for women and girls in South Africa, particularly black women and girls, who already occupy an inferior position in the country both socially and economically and resultantly face attendant everyday challenges. This Chapter assesses the impact of the COVID-19 pandemic on women and girls in South Africa in the areas of economic and educational disparity and experience of GBV by, first, considering the reasons for women and girls' unequal footing prior to the pandemic and, consequently, how the measures employed during the pandemic only served to exacerbate this disadvantageous position.

#### 2.2 Women and Girls in the South African Social Order

In her article titled 'Law, Gender and Inequality in South Africa,' Albertyn characterises South Africa as embodying 'a deeply patriarchal society in which women have been subordinated to men in public and private life.'<sup>73</sup> What is of interest, however, is the fact that this subordination does not appear to be legally endorsed – in fact, the opposite is evident. Unlike those legislative frameworks of some other countries, the South African legislative framework confers equal rights and guarantees on both men and women and to members of all social classes.<sup>74</sup> This can be attributed to its Constitution and its attendant Bill of Rights, hailed as the supreme law within

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<sup>71</sup> Matadi op cite note 58 at 169.

<sup>72</sup> Jessica A Peck 'The Disproportionate Impact of COVID-19 on Women Relative to Men: A Conservation of Resources Perspective' (2020) 28 *Gender, Work, and Organisation* 484 at 485.

<sup>73</sup> Catherine Albertyn 'Law, Gender and Inequality in South Africa' (2011) 39 *Oxford Development Studies* 139 at 140.

<sup>74</sup> Constitution of the Republic of South Africa, 1996. See subsec (3) of s 9: '(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.'

the country, which many still regard as one of the most progressive pieces of legislation today.<sup>75</sup> Moreover, in the years following its transition to democracy, South Africa had been particularly commended for its legislative and policy commitment to the rights of its women and girls due, in large part, to the involvement of feminist organisations in ensuring that the voices of women were prioritised in the legal drafting process.<sup>76</sup> How, then, does one explain women's adverse pandemic outcomes despite this *de jure* equal status?

One must arguably look to the social and cultural practices to further contextualise the reasons for women's and girl's continued subordination and the exacerbation thereof during periods of crisis such as that of the COVID-19 pandemic. As Ramparsad correctly posits, 'It is important to recognise the role that patriarchy and discrimination play in how women are viewed, their contribution to the household, the economic value that their work holds and all the stereotypes that are present within our communities.'<sup>77</sup>

It is maintained that the socially and culturally unequal position of women and girls in South African society is, above all else, the primary contributing factor to the discrimination which they face, both in economic and educational outcomes and in their experience of violence in general times as well as in times of strife.<sup>78</sup>

Culture and gender roles, stereotypes and discrimination are inextricably intertwined, as notions of the role of men and women are informed by one's immediate cultural landscape.<sup>79</sup> As the practice of one's culture is viewed largely as exempt from the interference of public bodies and officials, the danger of unencumbered and harmful cultural beliefs and traditions that subjugate women and girls further exempt such beliefs from legal scrutiny and only perpetuates their inferior treatment.<sup>80</sup>

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<sup>75</sup> Constitution *ibid*; Carmine Rustin 'What Gender Legislative Reforms Have Meant for Women in South Africa' (2021) 25 *Law, Democracy and Development* 47 at 48.

<sup>76</sup> Rustin *ibid*.

<sup>77</sup> Nitasha Ramparsad 'The Gendered Impact of Pandemics on Poor Women: The Case of COVID-19 in South Africa' (2021) 77 *HTS Teologiese Studies/Theological Studies* 1 at 2.

<sup>78</sup> Kristina Bentley 'Women's Human Rights and the Feminisation of Poverty in South Africa' (2004) 31 *Review of African Political Economy* 247 at 248.

<sup>79</sup> Catherine Albertyn 'The Stubborn Persistence of Patriarchy: Gender Equality and Cultural Diversity in South Africa' (2009) 2 *Constitutional Court Review* 165 at 171.

<sup>80</sup> *Ibid* at 174 and 175.



### 2.2.1 Socio-cultural drivers of women's and girls' adverse economic outcomes before the COVID-19 pandemic

Women's economic inequality and the 'feminisation of poverty' in South Africa is seen as both a symptom and a cause of the discriminatory outcomes that women face.<sup>81</sup> Poverty in South Africa is 'feminised' because women in the country fall victim thereto at significantly higher rates when compared to their male counterparts.<sup>82</sup> Moreover, poor women additionally experience poverty more severely than poor men.<sup>83</sup> One reason for such poverty is that prevailing gender norms and roles play a significant role both in the careers that women choose or are forced to pursue, as well as in the perceived value of women's contribution both domestically and within the economy.<sup>84</sup> Research has revealed that such gender roles and their perpetuation initially manifest within the home.<sup>85</sup> Accordingly, girls and women are expected to be caretakers, nurturers and homemakers as such qualities are viewed as intrinsically feminine. It can be argued that this social perception of the role of women pushes them into careers of a similar nature, such as those in the hospitality, domestic work, service and caretaking industries.<sup>86</sup> Work in these industries, routinely deemed 'unskilled' or of 'low-value, inevitably takes the hardest hit during periods of crisis – thereby resulting in women's compounded financial suffering.<sup>87</sup> Due to the perceived 'innate' tendency to possess these qualities, any work that stereotypically requires them is seemingly indistinguishable from domestic responsibilities and is seen as giving effect to women's intrinsic motivation, thereby 'justifying' its lack of formal recognition and adequate remuneration.<sup>88</sup>

Because women in South Africa are burdened with a disproportionate share of the household labour as a consequence of stereotypical gender roles, they are routinely unable to participate in the economy on an equal scale to men, resulting in an inability to secure financial

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<sup>81</sup> Bentley op cit note 78 at 247.

<sup>82</sup> Rustin op cit note 75 at 55.

<sup>83</sup> Ibid.

<sup>84</sup> Puseletso Precious Mofokeng *Changing Gender roles in the Household: A Case Study of Lamontville in KwaZulu-Natal Province, South Africa* (LLM Thesis, University of Kwa-Zulu Natal, 2021) 11 and 12.

<sup>85</sup> Rebecca Helman and Kopano Ratele 'Everyday (In)equality at Home: Complex Constructions of Gender in South African Families' (2016) 9 *Global Health Action* 1-22 <http://dx.doi.org/10.3402/gha.v9.31122>.

<sup>86</sup> Daniela Casale and Dorrit Posel 'Gender Inequality and the COVID-19 Crisis: Evidence from a Large National Survey during South Africa's Lockdown' (2021) 17 *Research in Social Stratification and Mobility* 100569 at 100569; Richard Anker *Gender and Jobs: Sex-Segregation of Occupations in the World* (1998) 23.

<sup>87</sup> International Labour Organisation 'The Gender Gap in Employment: What's Holding Women Back?' (2017) available at <https://www.ilo.org/infostories/en-GB/Stories/Employment/barriers-women#intro>, accessed on 19 September 2023.

<sup>88</sup> Kathrin Leuze and Susanne Straub 'Why Do Occupations Dominated by Women Pay Less? How 'Female-Typical' Work Tasks and Workingtime Arrangements Affect the Gender Wage Gap among Higher Education Graduates' (2016) 30 *Work, Employment and Society* 802 at 807; Mofokeng op cit note 84 at 10.

security or growth in the same way that men do.<sup>89</sup> Women are thus put in a financially precarious position. Additionally, there exists in some parts of South Africa the cultural belief that men are to be the financial providers and heads of the household, while women and children, on the other hand, are to be the beneficiaries thereof.<sup>90</sup> This sets women up for a lifetime of financial dependency leaving them unable to fend for themselves during vulnerable periods. From the aforementioned it is clear that harmful beliefs and stereotypes about the roles of men and women in South African society means that women are more likely to be placed in an economically insecure position ripe for exacerbation by a global health crisis such as the COVID-19 pandemic.

### **2.2.2. Socio-cultural drivers of women and girls' educational inequality**

One of the most crucial points at which socio-cultural gender norms pose a threat to the quality of life of the girl-child is through the social enforcement of the idea that the pursuit of education is best left to the boy-child as there is no utility in a woman's education.<sup>91</sup> Although not as explicitly advocated for in recent decades, a woman's pursuit of education is still seen by many in South Africa as fruitless for her sole worth is tied to her relationship with and proximity to a man.<sup>92</sup>

### **2.2.3 Socio-cultural drivers of GBV in South Africa**

While girls are taught to submit, boys who grow up in those same traditional South African societies understand that their role as future men will be to head the household and to have authority over the land on which it resides as well as the people who reside within it.<sup>93</sup> There is an attendant expectation that such a man is within his authority to employ any means necessary to keep his household 'in line,' even if he has to resort to physical force in order to do so.<sup>94</sup> Such attitudes arguably lay the foundation for the normalisation of physical violence against women and girls within the home in which they live and, eventually, against women and girls who bear no relation to the perpetrator.

Women's economic inequality, as abovementioned, is one of the most pervasive causes of their experience of GBV. Where women are financially dependent on the men in their lives

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<sup>89</sup> Mofokeng op cit note 84 at 11.

<sup>90</sup> Wonke Buqa 'Gender-Based Violence in South Africa: A Narrative Reflection' (2022) 78 *HTS Teologiese Studies/Theological Studies* 1 at 2.

<sup>91</sup> Samuel Akpan Basse and Ncha Gabriel Bubu 'Gender Inequality in Africa: A Re-examination of Cultural Values' (2019) 11 *Multidisciplinary Research Journal* 21 at 33.

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid* at 27.

<sup>94</sup> *Ibid.*

they may lack the economic capacity to leave the relationship should it turn abusive, forcing them to endure domestic violence in order to remain off the streets.<sup>95</sup> Certain sociocultural belief systems, such as those facilitated through organised religion and its attendant practices, similarly confine women and children to environments in which they are subjected to domestic abuse even where they may not necessarily face financial anchorage.<sup>96</sup> One manifestation of such an ideology is the belief, in some religions and cultures, that divorce or separation is seen as eliciting condemnation from others who ascribe to that religion.<sup>97</sup> Moreover, in order to live up to the social pressure to assume the role of the ‘good wife’ or the ‘good mother,’ it is maintained by many in South Africa that a woman who faces domestic violence at the hands of her partner should suffer through such abuse for the sake of her children who ought to grow up with both parents present in the home.<sup>98</sup> Bolstered by socio-cultural perceptions of gender is the issue of male entitlement which undoubtedly lends itself toward the perpetuation of GBV. In the context of interpersonal relationships between men and women, this entitlement may, for example, result in the harmful belief that sex is owed to a man within his partnership, thereby rendering the consent of the woman inconsequential thereto and henceforth providing a distorted justification for the perpetration of sexual abuse within a marriage.<sup>99</sup>

GBV is thus not only perpetuated by way of these sociocultural attitudes and beliefs, but is also sometimes justified by them. Because such beliefs are deeply entrenched, any attempts to improve the position of women and girls in a meaningful capacity must take them into account.

In the section to follow, the immediate impact of the above socio-cultural conditions will be made evident by considering, in detail, how the measures taken during the COVID-19 pandemic created the optimum environment for the exacerbation of these adverse conditions for women and girls. In particular, how South African women and girls fared in the categories of economic and educational outcomes and GBV during the COVID-19 pandemic will be explored.

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<sup>95</sup> Christine Hughes, Mara Bolis, Rebecca Fries and Stephanie Finigan ‘Women’s Economic Inequality and Domestic Violence: Exploring the Links and Empowering Women’ (2015) 23 *Gender and Development* 279 at 284.

<sup>96</sup> Buqa op cit note 90 at 2.

<sup>97</sup> Ibid.

<sup>98</sup> M.C Moreroa and M.B Rapanyane ‘A Growing Outcry of Gender-based Violence and Gender Inequality in South Africa: An Afrocentric Perspective’ (2021) 10 *African Journal of Gender, Society and Development (formerly Journal of Gender, Information and Development in Africa)* 7 at 14.

<sup>99</sup> Ibid at 14.

## **2.3 How COVID-19 worsened women and girls' socio-economic position: An overview of the immediate challenges facing South African women and girls as a consequence of the COVID-19 pandemic**

### **2.3.1 Economic challenges facing South African women and girls as a result of the COVID-19 pandemic**

As stated, one of the areas that was greatly affected by the COVID-19 pandemic worldwide was the economic and financial realm.<sup>100</sup> The same is undoubtedly true for South Africa, both for its men and for its women and children.<sup>101</sup> However, it is crucial to note that this impact also manifested disproportionately between men and women. As previously articulated, women in South Africa are already at an economic disadvantage relative to men in the country. To illustrate this point further, a 2021 report conducted by Statistics South Africa revealed that men in South Africa are more likely to be involved in paid employment than women, who are conversely more likely to be involved in informal or unpaid labour (such as reproductive work).<sup>102</sup> The report further revealed that the rate of unemployment is higher for women than it is for men and is the highest for black African women.<sup>103</sup> The cessation of certain forms of economic activity within South Africa as a result of the pandemic's lockdown measures resulted in job losses that disproportionately affected women in the country as approximately two thirds of the overall job losses were suffered by women.<sup>104</sup> Moreover, the burden of women's unpaid reproductive labour, which persists even in times of global pandemics, was similarly heightened by the pandemic and attendant lockdown measures following mechanisms such as school closures and closures of other care facilities which thereby forced women to take on additional work at home, and with many having to prioritise such work over their 'formal' employment.<sup>105</sup> This burden is notably greater for women in the country who are poorer than others.<sup>106</sup>

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<sup>100</sup> UN Women & the United Nations Population Fund (UNFPA) 'Rapid Gender Assessment (RGA) on the Impact of COVID-19 on Women and Men in South Africa' (2020), available at <https://data.unwomen.org/sites/default/files/documents/Publications/SA%20RGA%20report.pdf>, accessed on 16 May 2022 at 5.

<sup>101</sup> Ibid.

<sup>102</sup> Statistics South Africa 'South African Labour Market is More Favourable to Men than Women' (2021) available at <https://www.statssa.gov.za/?p=14606>, accessed on 1 June 2022.

<sup>103</sup> Ibid.

<sup>104</sup> Odile Mackett 'The Effects of COVID-19 on Women in South Africa: An Analysis Using the Social Provisioning Framework' (2020) 18 *Social and Health Sciences* 70 at 77.

<sup>105</sup> Ibid.

<sup>106</sup> Rampersad op cit note 77 at 2.

### 2.3.2 Educational challenges facing South African girls as a result of the COVID-19 pandemic

In March of 2020 the South African government followed the actions of many other world authorities by mandating nationwide school closures in an effort to contain the spread of the COVID-19 virus.<sup>107</sup> Initially, for an approximate and consecutive series of 70 days, South African students were prohibited from physically attending school.<sup>108</sup> What would follow in the remainder of the year was a pattern of restrictions on school attendance that would be: tightened; then relaxed when the number of COVID-19 cases decreased; and then tightened again when cases were on the incline.<sup>109</sup> Cumulatively, it is believed that an entire third of the 2020 school year had been lost as a result of COVID-19 disruptions – leaving many learners behind on schooling.<sup>110</sup> The adoption of remote learning as a substitute for in-person learning, while in some way ensuring that learning could still take place, would prove less than ideal as the output yielded differed with each learner as a result of several factors, such as learners' access to electricity or the internet.<sup>111</sup> As such, vulnerable learners from poor socio-economic backgrounds and who did not have access to the internet or any technological aid were yet again more susceptible to education disruptions, and this was even truer for socio-economically disadvantaged girls.<sup>112</sup> The education of economically-disadvantaged girls in South Africa is more likely to suffer under the measures adopted by schools under COVID-19 than that of boy learners under the same regime.<sup>113</sup> One of the reasons for the aforementioned statement is that studies have demonstrated that girls in Sub-Saharan Africa are less technologically literate than boys, with the consequence that more girls would be severely disadvantaged as a result of the remote learning medium of teaching.<sup>114</sup> Additionally, when girls are prevented from attending school they simultaneously lose access to their support structures, such as their friends or teachers, and, for many girls in the country who experience violence in the home, they also lose access to their safe haven further making learning difficult.<sup>115</sup> Moreover, even when girls

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<sup>107</sup> Zoe Duby, Kim Jonas & Brittany Bunce et al 'Navigating Education in the Context of COVID-19 Lockdowns and School Closures: Challenges and Resilience Among Adolescent Girls and Young Women in South Africa' (2022) 7 *Frontiers in Education* 1-14 at 2.

<sup>108</sup> Ibid.

<sup>109</sup> Ibid.

<sup>110</sup> Ibid.

<sup>111</sup> Ibid.

<sup>112</sup> UN Women op cit note 100 at 23; Duby ibid.

<sup>113</sup> Duby op cit note 107 at 3.

<sup>114</sup> Ibid.

<sup>115</sup> Ibid; Servaas Van Der Berg, Chris Van Wyk and Rebecca Selkirk (2020) *Schools in the time of COVID-19: Possible Implications for Enrolment, Repetition and Dropout Stellenbosch Economic Working Papers WP20/2020* Stellenbosch: Department Of Economics, University Of Stellenbosch 1-28 at 10.

in South Africa are able to continue learning remotely, their ability to learn at home is further adversely impacted by interruptions and obligations that characteristically befall young women at home, such as having to shoulder the burden of excessive housework or childrearing tasks.<sup>116</sup> This is once again especially true for economically disadvantaged young girls, whose household burden is resultantly compounded by their family's financial circumstances.<sup>117</sup>

The COVID-19 pandemic has therefore displayed a similar disproportionately negative consequence for South African girls' in the context of education, as it has displayed in the economic position of the country's women.

### 2.3.3 COVID-19 and Gender-Based Violence in South Africa

In a statement by UN Women, it was reported that there is a higher prevalence of gender-based violence in times of emergency - whether such emergencies take the form of financial, war-related or illness-related emergencies.<sup>118</sup> The truth of this statement has yet again been displayed by the recent COVID-19 pandemic which saw a universal increase in reports of all kinds of violence against women and girls globally.<sup>119</sup> This increase is especially evident in the South African context where 92% of both women and men in the country have reported a perceived increase in gender-based violence (GBV) since the start of the pandemic.<sup>120</sup> Although the South African government's imposition of a nationwide lockdown may have adequately served its purpose in curtailing the spread of the virus, the lockdown has nevertheless had devastating side-effects, particularly for women in the country who are already plagued by an ongoing and lethal pandemic of GBV.<sup>121</sup> As an upshot of the national lockdown and the implementation of measures to restrict the movement of citizens, abused women have been forced to remain confined with their abusers and have lost crucial access to their support structures as the operation of support services had largely come to a halt during the

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<sup>116</sup> Ibid at 9.

<sup>117</sup> Ibid.

<sup>118</sup> Kola O Odeku 'Exponential Increase in Endemic Gender-Based Violence during COVID-19 Lockdown in South Africa' (2021) 19 *Gender and Behaviour* 17918 at 17918; UN Women 'Infographic: The Shadow Pandemic – Violence Against Women and Girls and COVID-19' (2020) available at <https://www.unwomen.org/en/digital-library/multimedia/2020/4/infographic-covid19-violence-against-women-and-girls>, accessed on 30 May 2022.

<sup>119</sup> UN Women 'The Shadow Pandemic: Violence Against Women during COVID-19' (2020) available at <https://www.unwomen.org/en/news/in-focus/in-focus-gender-equality-in-covid-19-response/violence-against-women-during-covid-19>, accessed on 31 May 2022.

<sup>120</sup> UN Women op cit note 100 at 38.

<sup>121</sup> Amaechi KE, TD Thobejane and R Rasalokwane 'Feminist Reflections on the Impact of the South African National COVID-19 Lockdown on the Upsurge of Gender Based Violence in Mahwelereng Township of Limpopo Province, South Africa' (2021) 19 *Gender and Behaviour* 17186 at 17187.

lockdown.<sup>122</sup> Alternatively, where aid facilities were able to transition to offering online services, this largely excluded women and girls who had no means of accessing these technological services - either because they had no internet or device, or because they did not feel safe enough to access these facilities while in the homes with their abusers.<sup>123</sup> Abused women's danger in this regard is compounded by the economic effect of the pandemic which places additional stress on their abusers and results in increased domestic violence as an outlet for the abuser's frustrations.<sup>124</sup>

As can be seen, the worst effects of this increase in GBV have once again been felt in those communities that are less economically well-off, such as those characterised by informal settlements and rural living.<sup>125</sup> It is, however, important to note that GBV in the country transcends and penetrates all notions of age, race, class and ethnicity.<sup>126</sup>

## **2.4 Concluding observations**

As is evident from the overview above, although boasting a substantive legislative framework aimed at ensuring equal enjoyment and protection of the rights of women with men, such framework was ultimately inadequate, during the COVID-19 pandemic, at safeguarding previous achievements made in gender equality. The negative impact seen in areas such as the economic position of women in the country, the quality of and opportunity for education for girls in the country, and the exacerbation of gender-based violence perpetrated against both women and girls in the country has, regrettably, been the most pronounced for poor, black women and girls. Above being able to recognise that it is poor women and girls who bore and continue to bear the brunt of the worst aspects of the COVID-19 pandemic, the abovementioned demonstrates that it is imperative that one make a serious and genuine effort to understand and critique the social elements already at play between women and men that enable sweeping laws and policies, such as those promulgated during the COVID-19 pandemic, to have such an adverse result if one is to devise a helpful framework for gender equality during future crises.

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<sup>122</sup> Odeku op cit note 118 at 17918 and 17921.

<sup>123</sup> Ibid at 17921.

<sup>124</sup> Ibid at 17919.

<sup>125</sup> Amaechi op cit note 121.

<sup>126</sup> Odeku op cit note 118 at 17920.

## CHAPTER 3

### INTERNATIONAL HUMAN RIGHTS LAW PERTAINING TO WOMEN AND GIRLS IN TIMES OF CRISIS

#### 3.1 Introduction

In the previous two Chapters, this dissertation highlighted three main areas of focus in which disadvantaged women and girls in South Africa suffered disproportionately during the COVID-19 crisis, namely in the areas of economic (unemployment) and educational outcomes and GBV. This Chapter will aim to analyse South Africa's human rights obligations in respect of these areas in order to defend or condemn the measures implemented (as will be explored in the next Chapter). In particular, this chapter engages with the international law framework as it relates to women's and girl's rights during times of crisis. It begins by outlining the status of international human rights law instruments both generally and within the South African context. The chapter then situates the COVID-19 crisis within the international human rights law regime by assessing the applicability and impact of derogations and limitations. The Convention on the Elimination of Discrimination Against Women and the Maputo Protocol are then presented as living documents of feminist legal theory in action and are posited as benchmarks against which to measure women's and girls' rights to economic (employment) and educational non-discrimination and to be free from violence (GBV in particular).

#### 3.2 Status of international human rights instruments in the international legal framework

The analysis of State's obligations insofar as they pertain to the protection of women and girl's rights during crises which will follow later in this chapter will focus primarily on the content of treaties, known otherwise as 'hard law.' Hard law refers to that body of law that confers legally binding duties on State parties, which conversely attributes legally enforceable rights to public and private actors against the State in question.<sup>127</sup> Additionally, hard law makes provision for the establishment of 'an authority for interpreting and implementing the law.'<sup>128</sup> The ratification of a treaty by a State is of great significance as it entrenches a State's duty to implement domestic legislation and policy in accordance with and in furtherance of the obligations contained in the given treaty. The legally-binding nature of treaties is thus

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<sup>127</sup> Kenneth W. Abbott and Duncan Snidal 'Hard and Soft Law in International Governance' (2000) 54 *International Organisation* 421 at 421.

<sup>128</sup> *Ibid.*



significant for the purpose of this paper as women and girls who have had their rights infringed possess a means through which to hold the state accountable.

Soft law, by contrast, includes declarations, general recommendations and guiding principles and is understood to have a supplementary function in that the text contained in these documents proves instrumental in guiding the interpretation of treaties. Despite ongoing and oftentimes conflicting discourse surrounding the position of soft law in international human rights' promotion, protection and enforcement, jurisprudence of international human rights courts points to the consistent use of soft legal texts as valid interpretational tools.<sup>129</sup> This dissertation will thus fall short if it fails to consider these documents.

As a point of departure, States have the following obligations under international law: the obligations to respect, protect and fulfil.<sup>130</sup> In terms of the obligation to 'respect,' this outlines a negative duty of individuals and institutions to refrain from direct conduct that will adversely interfere with the human rights of other individuals.<sup>131</sup> To 'protect' constitutes the positive duty of a state party to respond to human rights abuses and a negative duty to ensure that it is not the one perpetrating the abuse.<sup>132</sup> The duty to 'fulfil' human rights entails a positive obligation of a State party to ensure the provision of facilities necessary to realise and enjoy such rights.<sup>133</sup>

### **3.2.1 The legal status of International human rights law in South Africa**

It must be established that international human rights law is relevant insofar as the State must be held accountable to the responsibilities set forth therein. In order to determine the role of international law and its theoretical constituents in South Africa, regard must first be had to section 39(1) of its Constitution, in which it is stated that:<sup>134</sup>

- (1) When interpreting the Bill of Rights, a court, tribunal or forum (b) must consider international law; and (c) may consider foreign law.

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<sup>129</sup> That courts are under a duty to utilise soft law as an analytical and guiding principal in their adjudication of cases before them was made clear in the case of *Ahmadou Sadio Diallo* (Republic of Guinea v. Democratic Republic of the Congo), in which the International Court of Justice stated that: '[The Court] believes that it should ascribe great weight to the interpretation adopted by this independent body (the Human Rights Committee) that was established specifically to supervise the application of that treaty' para 66.

<sup>130</sup> David Jason Karp 'What is the Responsibility to Respect Human Rights? Reconsidering the 'Respect, Protect and Fulfil' Framework' (2020) 12 *International Theory* 83 at 84.

<sup>131</sup> *Ibid* at 86.

<sup>132</sup> *Ibid*.

<sup>133</sup> *Ibid*.

<sup>134</sup> *Supra* note 74 s39(1).

In addition to the above, the legal status of international agreements in South Africa is further regulated by section 231 which, in broad terms, provides that an international agreement is binding on the State only once it has been approved by the National Assembly and the National Council of Provinces.<sup>135</sup> Constitutional Court jurisprudence suggests that the degree of importance attached to an international law provision is dependent on whether or not the Republic is legally bound by the provision.<sup>136</sup> The question, then, of the legal relevance of norms and standards articulated in international instruments that are not legally-binding domestically is thus brought to the fore. This category would include both what is recognised as hard law, in the case of internationally-binding instruments that have been ratified but which have not yet been incorporated into South African domestic law (as required under s231(4)), as well as soft law (which, as aforementioned, is not recognised as legally-binding both domestically and internationally). This question can arguably be answered with reference to the Constitutional Court case of *S v Makwanyane*,<sup>137</sup> in which Chief Justice Chaskalson stated that the duty to consider international law as referenced in section 35(1) of the interim Constitution,<sup>138</sup> must be interpreted as a duty to consider both ‘non-binding as well as binding [international] law.’<sup>139</sup>

South Africa is therefore bound to afford great weight to international human rights law norms and standards pertaining to the rights of women and girls where a global crisis necessitates action that may implicate these rights. Such an obligation is clearly made apparent by the country’s Constitution.

### **3.3 Situating the COVID-19 response within the human rights arena: States’ obligation to manage and curtail the spread of epidemic diseases**

During times of crisis such as a public health emergencies, international human rights law makes provision for State parties to restrict certain rights and freedoms of its citizens in order to give effect to and uphold other, more urgent, rights and freedoms.<sup>140</sup> Derogations from

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<sup>135</sup> Ibid s231(2).

<sup>136</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC). In this case, the Constitutional Court held that ‘the relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary. However, where the relevant principle of international law binds South Africa,<sup>28</sup> it may be directly applicable.’ para 26.

<sup>137</sup> 1995 (3) SA 391 (CC) para 35.

<sup>138</sup> Constitution of the Republic of South Africa 2000 of 1993.

<sup>139</sup> Supra note 137 para 35.

<sup>140</sup> OSCE and ODIHR ‘Human Rights and Gender Equality during Public Emergencies: How Women are Impacted by Restrictions to Fundamental Freedoms and Human Rights: Observations from the COVID-19 Pandemic’ (2020) at 8.

human rights obligations in times of emergency are viewed as necessary and useful in order for governments to confront the immediate disaster, provided that such measures are lawful and are not permanent.<sup>141</sup> In the context of the COVID-19 pandemic, governments were thus permitted to impose restrictive measures to mitigate the spread of the virus such as enforced lockdowns and blanket school and business closures.<sup>142</sup> Justification for these measures can be found in Article 12(2)(c) of the International Covenant on Economic, Social and Cultural Rights (hereafter ICESCR), ratified by South Africa in January of 2015, as a component of the right to health.<sup>143</sup> Additionally, Article 6 of the International Covenant on Civil and Political Rights (ICCPR), which South Africa had ratified in December of 1998),<sup>144</sup> imposes a similar obligation on States as a necessary condition of the right to life.<sup>145</sup>

Article 4 of the ICCPR permits States to temporarily derogate from and restrict certain obligations under the Covenant during periods of ‘public emergency,’ provided that the measures taken, importantly, do not amount to discrimination on specified grounds.<sup>146</sup> In article 4(2) of the ICCPR, however, it is stated that no derogation may be made from State’s obligations in respect of, inter alia, the right to life (Article 6), the right to freedom from torture and inhumane treatment (article 7) and the right to freedom of thought, conscience and religion.<sup>147</sup> Importantly, the Committee on Economic, Social and Cultural Rights (CESCR) has declared that States may not derogate from their obligations to ensure the protection of the right to employment and the right to equal access thereto during times of public emergency.<sup>148</sup>

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<sup>141</sup> Emilie M. Hafner-Burton, Laurence R. Helfer and Christopher J. Fariss ‘Emergency and Escape: Explaining Derogations from Human Rights Treaties’ (2011) 65 *International Organization* 673 at 673.

<sup>142</sup> See Audrey Lebreton ‘COVID-19 Pandemic and Derogation to Human Rights’ (2020) 7 *Journal of Law and the Biosciences* 1-15 in which Lebreton states that derogations to human rights in times of emergency need to adhere to legitimate requirements and should not adversely affect vulnerable persons.

<sup>143</sup> UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3. Art 12(2)(c) states the following: ‘(2) The steps to be taken by the State parties to the present Covenant to achieve the full realisation of this right shall include those necessary for:... (c) the prevention, treatment and control of epidemic, endemic, occupational and other diseases.’<sup>143</sup>

<sup>144</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

<sup>145</sup> UN Human Rights Committee (HRC), *General Comment no. 36, Article 6 (Right to Life)*, 3 September 2019, CCPR/C/GC/35 para 26.

<sup>146</sup> Supra note 144 Art 4; Kujo E. McDave ‘Human Rights Protection in the Wake of the COVID-19 Pandemic’ (2022) 6 *African Journal of Law and Human Rights* 62 at 64.

<sup>147</sup> Supra note 144 Art 4(2).

<sup>148</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 18: The Right to Work (Art. 6 of the Covenant)*, 6 February 2006, E/C.12/GC/18 para. 31.

Additionally, during such periods, States may not derogate from their obligation to ensure that all citizens have equal, indiscriminatory access to education.<sup>149</sup>

Derogations, however, are not the only form of restrictions. Limitations are permissible only when they are ‘prescribed by law’ and when they serve as a reasonable, necessary and proportionate means in pursuit of a legitimate aim, and when such limitation is on grounds permitted in regard to said right.<sup>150</sup> In respect of the latter, this requirement is not met where the limitation infringes on the right’s minimum core.<sup>151</sup> Inherent in the minimum core obligations is the immediate obligation to ensure that there is no discrimination in the enjoyment of the rights between men and women.<sup>152</sup> That a law or policy might have an adverse effect on women does not make it inherently discriminatory. Instead, such differential treatment, whether direct or indirect, will amount to discrimination only where the justification for the difference in treatment is neither reasonable nor objective or where the aim sought to be realised is not in proportion to the means employed.<sup>153</sup> The aforementioned qualifications serve as safeguards to human rights (and by extension women’s rights) during times of crisis, emergency or disaster in general international law.

### **3.4 Women’s and girl’s rights during times of crisis – CEDAW, Maputo Protocol and the Feminist Lens**

That situations of public emergency and crisis have a tendency to deepen the inequalities that exist between men and women, as well as those inequalities that exist between differing groups of women, is a fact that has been discussed and evidenced in the preceding chapters of this dissertation. Such a disproportionate impact, borne out of blanket response measures ignorant of women’s economic, political and social standing, has laid bare the need to recruit the use of a feminist-lens in the analysis of laws and policies invoked in emergency response measures that will emphasise the need for States to take due cognisance of the unique realities facing women and girls and to take positive steps toward upholding their human rights during this period. The proceeding sections of this Chapter will attempt to convey the utility of CEDAW

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<sup>149</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)*, 8 December 1999, E/C.12/1999/10 para 57.

<sup>150</sup> *Supra* note 144 Art 22; *Op cit* note 2 at 8.

<sup>151</sup> *Ibid* at 9.

<sup>152</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20 at 3; UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, 14 December 1990, E/1991/23 at 1.

<sup>153</sup> *Ibid* CESCR GC 20 at 5; *Op cit* note 2 at 9.

and the Maputo Protocol in this regard by framing the instruments as authoritative documents embodying the marriage of international human rights law and feminism in the arena of crisis-response measures.

### **3.4.1 CEDAW and its General Recommendations pertaining to women and girls in crisis**

The genesis of CEDAW<sup>154</sup> (ratified by South Africa in 1995) and the subsequent advancements made by the Committee on the Elimination of Discrimination Against Women (hereafter the CEDAW Committee) have been invaluable in the protection and development of the human rights of women and girls. Whereas other human rights instruments, on their face, formally convey equal rights and entitlements upon all persons, CEDAW endows State parties with duties to ensure that the right to equality and non-discrimination in the application of its provisions can be substantively realised.<sup>155</sup> To this end, CEDAW's substantive arm instructs State parties to aim beyond formal equality – States must acknowledge the differences between men and women and must even engage with social and cultural attitudes that promote gender discrimination.<sup>156</sup> Substantive equality in the enjoyment of rights and freedoms has earlier in this dissertation been described as one of the aims of FLT.<sup>157</sup> It has also been shown that FLT instructs the law and policy-makers to take cognisance of the of the socio-legal impediments to women's equality and the ways in which further law or policy may entrench these impediments, and thereafter compels legislative and policy reform to effect women's empowerment.<sup>158</sup> CEDAW is a legally-binding document that, from the outset, is informed by this acknowledgement of women's subjugation and the unique circumstances befalling them and thus has the express aim of serving as a safeguard to women's equality.<sup>159</sup> In light of this, I make the argument that CEDAW is an application and embodiment of FLT in the practical, legislative sense. Further, it can be argued that CEDAW, despite claims to the contrary, is capable of an anti-essentialist interpretation. As the reader might recall, anti-essentialist FLT emphasises the need to acknowledge the intersectionality of women and the ways in which factors such as race, ethnicity and class may also affect equality outcomes.<sup>160</sup> Criticisms

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<sup>154</sup> Supra note 51.

<sup>155</sup> Op cit note 140 at 14.

<sup>156</sup> Yolanda Tarisayi Chekera-Radu 'The Relevance of Substantive Equality in the African Human Rights System's Jurisprudence to Women's Land and Property Rights' (2017) 1 *African Human Rights Yearbook* 41 at 51; UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures*, 2004 para 8.

<sup>157</sup> West op cit note 50.

<sup>158</sup> Op cit note 48 at 251.

<sup>159</sup> Supra note 51 Art 2.

<sup>160</sup> Dowd op cit note 67 at 203.

levelled against CEDAW often make the claim that it is representative of women as a homogenous, monolithic group.<sup>161</sup> However, recent guidance provided by the CEDAW Committee points to an express instruction for States to take heed of women's intersectional identities in their application of the Convention, some of which will be explored below.<sup>162</sup>

CEDAW does not contain a derogation clause, meaning that in times of public emergency and crisis States are still required to comply with the obligations set forth therein. This duty was made clear by the CEDAW Committee in its General Recommendation No. 30 on Women in Conflict Prevention, Conflict and Post-Conflict Situations, in which it is stated that 'State parties' obligations continue to apply during conflict or states of emergency without discrimination.'<sup>163</sup> Similarly, in General Recommendation No. 28, the Committee states that State obligations under the Convention persist even during states of emergency and periods of natural disasters.<sup>164</sup>

Article 2 of CEDAW requires State parties to eliminate all forms of discrimination against women and to formulate laws and policies in order to facilitate this objective 'without delay.'<sup>165</sup> That a comprehensive legal and policy framework must be instated 'without delay' is significant for present purposes as 'other considerations' may arguably include periods of public emergency and thus States cannot ever justifiably renege on these duties and must instead seek international assistance when periods of crisis threaten its compliance therewith.<sup>166</sup> It would seem that the duty to uphold women's equality by 'appropriate means' and 'appropriate measures,' as referenced in Articles 2 and 3 respectively, is distinct from implementation clauses in other international human rights instruments that constrain this principle to what can be implemented within a State's available resources. As such, State parties must devise 'a policy that will be appropriate for its particular legal, political, economic, administrative and institutional framework and that can respond to the particular obstacles and

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<sup>161</sup> Dianne Otto 'Women's Rights' in Daniel Moeckli, Sangeeta Shaha and Sandesh Sivakumaran (eds) *International Human Rights Law* (2010) 357.

<sup>162</sup> See General Recommendation No. 26 on Women Migrant Workers (CEDAW/C/2009/WP.1/R) para 14; Frances Raday 'Gender and Democratic Citizenship: The Impact of CEDAW' (2012) 10 *International Journal of Constitutional Law* 512 at 514.

<sup>163</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations*, 1 November 2013, CEDAW/C/GC/30 para 2.

<sup>164</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 16 December 2010, CEDAW/C/GC/28 para 11.

<sup>165</sup> *Supra* note 51 Art 2.

<sup>166</sup> *Op cit* note 164 para 29.

resistance to the elimination of discrimination against women existing in that State party.’<sup>167</sup> State parties must also be able to defend the measures taken to give effect to the obligations in the Charter, and the assessment of the appropriateness thereof ultimately rests in the hands of the CEDAW Committee.<sup>168</sup> That States must be able to justify the appropriateness of their efforts to implement policy and legislation aimed at eliminating discrimination and empowering women and girls is a safeguard that is paramount in maintaining State accountability in crisis prevention and response measures.

In order to give effect to the requirements under Article 2, State parties must: refrain from creating and upholding laws and policy that directly or indirectly impede on women’s ability to enjoy the full spectrum of their rights on an equal basis with men, ensure that private actors do not discriminate against women and ensure that positive action is undertaken by governments to fulfil and promote the objectives set forth in Article 2.<sup>169</sup> The Committee’s inclusion of the phrase ‘directly or indirectly’ is crucial to the present analysis of women’s rights during crises as it ensures that States cannot circumvent their obligations by disseminating crisis law and policy that is not *blatantly* discriminatory – instead, where States implement sweeping crisis measures they will be in breach of their obligations when these measures inevitably have a disproportionately adverse impact on women and girls. As a measure of State accountability, The CEDAW Committee implores States to report and monitor all legal measures taken thereby to effect the promotion and preservation of women and girls’ rights during conflict, crisis and public emergencies and to make available sex-disaggregated data to this effect.<sup>170</sup>

In General Recommendation No. 37 on disaster risk reduction as it pertains to women’s rights, the CEDAW Committee states that State parties must adopt and implement law and policy that is sensitive to the gendered dimensions of disaster risk and that upholds principles of equality and non-discrimination especially with regard to the rights of marginalised and disadvantaged women and girls.<sup>171</sup> To this end, it is imperative that States have a mechanism through which to assess and gather data that is disaggregated not only by sex but also by region and ethnicity, and this mechanism should be regarded as a benchmark against which to monitor

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<sup>167</sup> Ibid para 23.

<sup>168</sup> Ibid.

<sup>169</sup> Ibid para 9.

<sup>170</sup> Ibid para 82.

<sup>171</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 37 on the gender-related dimensions of disaster risk reduction in the context of climate change* (2018) C/GC/37.

the implementation of States' obligations in respect of various issues.<sup>172</sup> Additionally, disaster-management planning and intervention must ensure the participation of women at all levels of government and society<sup>173</sup> as well as ensure the ability of women and girls to access justice during periods of disaster.<sup>174</sup>

### **3.4.2 The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol) and the African Commission**

The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (the Maputo Protocol)<sup>175</sup> supplements the African Charter on Human and People's Rights (African Charter)<sup>176</sup> and is a comprehensive regional treaty that seeks to promote the rights of women and girls on the African continent. The provisions therein reflect the complete range of women's rights by including women's (and girls') civil, political, social, economic and cultural rights. Moreover, interwoven throughout the Protocol is an understanding that women within the African continent are not a homogenous group and are characterised by intersecting metrics of age, race and economic status. South Africa has ratified the Protocol and is therefore, as previously discussed, under an obligation to respect, promote and implement the rights therein. It can be argued that, as the Protocol embodies an intersectional, comprehensive statement of and commitment toward women's rights borne out of the inadequacies of other regional instruments, it serves as another useful manifestation of an anti-essentialist feminist legal theoretical framework against which a State's commitment to women's human rights can be assessed.<sup>177</sup>

The Maputo Protocol, like CEDAW, does not contain a derogation clause. Implicit in that fact is the understanding that a State cannot derogate from or renege upon its duties and commitments therein even in times of crisis or public emergency. In contrast to the provisions and interpretations of CEDAW by the CEDAW Committee, however, is the lack of interpretative guidance provided by the African Commission (the implementation and monitoring body of the Protocol) on the applicability and implementation of the Protocol's obligations in times of crisis, disaster or public emergency.

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<sup>172</sup> Ibid para 40

<sup>173</sup> Ibid para 32.

<sup>174</sup> Ibid para 37.

<sup>175</sup> Supra note 52.

<sup>176</sup> Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

<sup>177</sup> Ashwanee Budoo *The Role of Gender Budgeting in Implementing the Obligation to Provide Resources to Realise Women's Human Rights in Africa* (LLM thesis, University of Pretoria, 2016) 243.



Article 2 of the Protocol enjoins State parties to ‘combat all forms of discrimination’ by means of ‘appropriate’ measures.<sup>178</sup> This obligation is not dependant on a State’s available resources and is thus an obligation that should be immediately realised. The most important obligations under this Article for purposes of this dissertation are States’ positive obligations ‘to integrate a gender perspective in their policy decisions, legislation and development plans’<sup>179</sup> and ‘to take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist.’<sup>180</sup> In the context of crisis and public emergency, this provision provides direct instruction for State parties to take heed of the position of women in society and the attendant ways in which nationwide policy might exacerbate women’s already inferior standing. As such, it can be argued that where a State fails to prioritise and make provision for the protection of women (and girls’) rights during periods of crisis, such State will be in breach of its’ obligations under Article 2.

### **3.4.3 CEDAW and the Protocol : Economic issues - The Right to Equality in Employment**

This right to work is well-established in regional and international human rights instruments including in article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). In international human rights law, the right to work is seen as an essential right for the realisation of other human rights and is an inalienable component of human dignity.<sup>181</sup> States are prohibited from directly infringing on this right and are mandated to ensure that no other party infringes on this right of its citizens.<sup>182</sup> Additionally, states must promote this right by actively implementing measures that will ensure its full realisation.<sup>183</sup> In the case of marginalised and vulnerable groups, states are under a specific duty to refrain from adopting measures that will lead to discrimination and unequal treatment in their right to employment.<sup>184</sup>

Under CEDAW and the Protocol, this right takes on a gendered dimension. With regard to women’s equality in and access to employment under CEDAW, Article 11 orders State parties to ensure the right of women to, inter alia, equal employment opportunities for women,<sup>185</sup> the right to social security in cases of unemployment<sup>186</sup> and to take appropriate measures to provide support that would allow women to tend to both their familial as well as

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<sup>178</sup> Supra note 52 Art 2(1).

<sup>179</sup> Ibid Art 2(1)(c).

<sup>180</sup> Ibid Art 2(1)(c).

<sup>181</sup> Supra note 148 para 1.

<sup>182</sup> Ibid para 22.

<sup>183</sup> Ibid.

<sup>184</sup> Ibid para 31.

<sup>185</sup> Supra note 51 Art 11(1)(b).

<sup>186</sup> Ibid Art 11(1)(c).

employment obligations.<sup>187</sup> Recognising the tendency of conflict and crisis situations to disproportionately impede on women's enjoyment of these rights, the CEDAW Committee posits that in times of crisis and public emergency, States must, *inter alia*:

[E]nsure that economic recovery strategies promote gender equality as a necessary precondition for a sustainable post-conflict economy, and target women working in both the formal and the informal employment sectors; and design specific interventions to leverage opportunities for women's economic empowerment.<sup>188</sup>

The CEDAW Committee qualifies this obligation by placing a positive duty on State parties to specifically ensure these interventions for disadvantaged groups of women.<sup>189</sup>

Article 13 of the Protocol similarly enjoins State parties 'to adopt and enforce legislative and other measures to guarantee women equal opportunities in work and career advancement and other economic opportunities.'<sup>190</sup> To give effect to this obligation, State parties must ensure that women have equal access to employment<sup>191</sup> and must ensure the provision of a mechanism that will provide protection and social assistance to women in the informal sector.<sup>192</sup> Women are disproportionately affected by job losses in times of crisis owing to the fact that they are overrepresented in the informal economy which consistently bears the brunt during periods of social and economic disruption. As such, in order for States to comply with their obligation in terms of Article 13, they must effectively implement social policies that address these inequities in order to mitigate the adverse economic impact on women.

#### **3.4.4. CEDAW and the Protocol: the right to equality in education**

In terms of regional and international human rights law, the right to education is articulated across a number of instruments, including Article 11 of the ACHPR<sup>193</sup> and African Charter on the Rights and Welfare of the Child,<sup>194</sup> Article 13 of the ICESCR<sup>195</sup> and Article 28 of the Convention on the Rights of the Child.<sup>196</sup> Many of these international instruments additionally

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<sup>187</sup> Ibid Art 11(2)(c).

<sup>188</sup> Op cit note 163 para 52(b).

<sup>189</sup> Ibid.

<sup>190</sup> Supra note 52 Art 13.

<sup>191</sup> Ibid Art 13(a).

<sup>192</sup> Ibid Art 13(f).

<sup>193</sup> Supra note 176.

<sup>194</sup> Organization of African Unity (OAU), *African Charter on the Rights and Welfare of the Child*, 11 July 1990, CAB/LEG/24.9/49 (1990).

<sup>195</sup> Supra note 143.

<sup>196</sup> UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3.

contain non-discrimination provisions which, in conjunction, prohibit discrimination in the field of education based on race, gender and other factors. According to international law practice, in order to give effect to this right to education of its citizens under ‘normal circumstances,’ State parties must ensure: that there are an adequate number of educational facilities open to children within its territory (availability); that these institutions are indiscriminately accessible (accessibility); that the quality of the education is acceptable (acceptability); and that the education is malleable enough to adequately cater for changing circumstances.<sup>197</sup> These obligations of States are seen as non-derogable and, as such, remain in effect even during times of global crisis, such as that represented by the COVID-19 pandemic.<sup>198</sup>

Article 10 of CEDAW encompasses States’ duty to ensure that all appropriate measures are taken to ensure that women and girls have access to educational facilities and opportunities on an equal basis with men.<sup>199</sup> This equality must be ensured at all levels of education and must include women and girls who fall into the categories of disadvantaged or marginalised persons.<sup>200</sup> An obligation that is especially pertinent with regard to women and girls’ equitable access to education during times of crisis is arguably the duty of States ‘to eradicate and reform policies, regulatory directives and practices that directly or indirectly discriminate against girls or women in the education sector.’<sup>201</sup> In order to protect the right of women and girls to education, State parties additionally have a duty to ensure the provision of educational institutions that can be accessed physically or, where this is not possible, such access must be provided technologically.<sup>202</sup> Thus, where a State fails to make provision for either method of access during a time of crisis, particularly for women and girls, such State will be in breach of its educational obligations. A State will also be in breach of its obligations if fails to take ‘appropriate measures’ to ensure the right of disadvantaged women and girls to education by failing to, inter alia, ‘address the low socioeconomic status and living conditions, in particular

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<sup>197</sup> Op cit note 149 para 6.

<sup>198</sup> Amnesty International ‘South Africa: Failing to Learn the Lessons? The Impact of COVID-19 on a Broken and Unequal Education System’ (2021) available at <https://www.amnesty.org/en/documents/afr53/3344/2021/en/>, accessed on 13 May 2023 at 22.

<sup>199</sup> Supra note 51 Art 10.

<sup>200</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), General recommendation No. 36 on the right of girls and women to education, 27 November 2017, CEDAW/C/GC/36 para 20.

<sup>201</sup> Ibid para 24(e).

<sup>202</sup> Ibid para 29.

of indigenous girls and women and of those from minority groups, that are barriers to gaining access to education.<sup>203</sup>

Article 12 of the Protocol states that State parties should take ‘all appropriate measures to eliminate all forms of discrimination against women and guarantee equal opportunity and access in the sphere of education and training.’<sup>204</sup> As discussed in preceding chapters, school closures and remote learning, often brought about by periods of nationwide crisis, have the effect of disproportionately affecting girls’ access to and quality of education due to, inter alia, the education of male children being preferred and girls being overwhelmed by an increased care burden in the home. Such an outcome would amount to indirect discrimination and State parties thus have an obligation to take active steps to mitigate this disparate impact by ensuring that crisis response measures are cognisant of the vulnerabilities that women and girls would face in accessing education.

#### **3.4.5 CEDAW and the Protocol: the right to freedom from GBV**

As gender-based violence affects women and girls disproportionately it is widely accepted that acts of such a nature are a direct infringement on women and girls’ rights to equality, to life, to liberty and security of person and to be free from torture.<sup>205</sup> In order to give effect to these rights under ‘normal circumstances,’ States are generally seen as having a duty to avert instances of GBV, to prosecute perpetrators of GBV and to provide support and compensation to victims of GBV.<sup>206</sup> Moreover, under international human rights law, States may never derogate from their obligations in respect of, inter alia, the right to life or to freedom from torture or ill-treatment, even in times of emergency.<sup>207</sup> Therefore, States retain their duty to prevent, prosecute and ensure remedies, through their legal framework, with regard to GBV especially during times of crisis.<sup>208</sup>

The subject of much criticism regarding CEDAW, however, is its lack of a provision directly relating to violence against women (VAW).<sup>209</sup> Instead, GBV is treated as an infringement of the right to non-discrimination and equality as expressed in General

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<sup>203</sup> Ibid para 45(b).

<sup>204</sup> Supra note 52 Art 12(1)(a).

<sup>205</sup> Op cit note 2 at 14.

<sup>206</sup> Ibid at 15.

<sup>207</sup> Supra note 144 Art 4(2).

<sup>208</sup> Op cit note 2 at 15.

<sup>209</sup> Rhoda Reddock ‘CEDAW and Violence Against Women: Reflections After 40 Years’ (2022) 28 *Violence Against Women* 1723 at 1724.

Recommendation 19.<sup>210</sup> The work of the Special Rapporteur on Violence Against Women and Girls, its causes and consequences, has been invaluable in addressing this normative aperture.<sup>211</sup> Included in its mandate are the obligations, inter alia: to visit countries, observe the state of violence against women therein and to issue country-specific recommendations to curb this violence; and to address individual complaints of VAW made by citizens of a country to the government of that country.<sup>212</sup> Moreover, the mandate of the Special Rapporteur solidified VAW as a human rights infringement under the international human rights structure. In its report on the state of gender-based violence during the COVID-19 pandemic, the Special Rapporteur observed that women and girls globally, particularly disadvantaged women and girls, fell victim to rights abuses as a consequence of ‘gender-blind’ containment measures which culminated in a worldwide uptick in the incidence of GBV.<sup>213</sup> As such, the Special Rapporteur recommended that States ‘take a gender-sensitive, intersectional approach’ to the crisis through, inter alia: strengthening the enforcement of existing GBV legislation and commitments; ensuring that women are well-represented and participate in pandemic policy-making; ensuring that GBV support services (such as shelters and hotlines) are deemed essential, remain operational and are sufficiently available; and, by ensuring that data around GBV during the pandemic is accurate and continually updated.<sup>214</sup>

Many of the recommendations of the Special Rapporteur were also shared by the CEDAW Committee. As such, the CEDAW Committee places a number of specific obligations on State parties to mitigate the risk of GBV during crises. In order to minimise this incidence and thereby safeguard a number of human rights, States must, inter alia: provide support structures for women and girls affected by GBV that is accessible to all women<sup>215</sup> and should develop mechanisms that allow for the monitoring and assessment of GBV interventions.<sup>216</sup>

Article 4 of the Protocol enjoins State parties to take appropriate and effective measures to eliminate violence against women by enacting legislative and other preventative and remedial measures.<sup>217</sup> Importantly, States ‘must identify the causes and consequences of

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<sup>210</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 19: Violence against women*, 1992 para 1.

<sup>211</sup> Yakin Erturk and Bandana Purkayastha ‘Linking Research, Policy and Action: A Look at the Work of the Special Rapporteur on Violence Against Women’ (2012) 60 *Current Sociology* 142 at 144.

<sup>212</sup> *Ibid* at 145.

<sup>213</sup> UN General Assembly, *Report of the Special Rapporteur on violence against women, its causes and consequences*, 24 July 2020, A/75/144 para 6.

<sup>214</sup> *Ibid* para 91.

<sup>215</sup> *Op cit* note 171 para 57(c).

<sup>216</sup> *Ibid* para 57(d).

<sup>217</sup> *Supra* note 52 Art 4(2).

violence against women and take appropriate measures to prevent and eliminate such violence.’<sup>218</sup> In the context of crises, disasters and emergencies, this provision arguably entails the recognition that periods of crisis consistently exacerbate experiences of GBV leading to gross infringements of the rights and freedoms of women and girls. In order to prevent such violence, laws and policies adopted during times of crisis must adequately prepare for this. Moreover, State parties ought to ‘establish mechanisms and accessible services for effective information, rehabilitation and reparation for victims of violence against women.’<sup>219</sup> In times of crisis, such as public health emergencies, which often necessitate the shutdown of social support services, questions of concern arise as to the ability of a State to carry out these measures. It is likely that States would be unable to ensure physical access to support services in these circumstances, but it is arguable that such inability does not absolve States of the duty to provide alternative means of access, for instance, through remote and technological means.

### **3.5 Guidelines that specifically address the rights of women and girls during COVID-19**

Many institutions have consolidated the aforementioned obligations and adapted them into comprehensive policy guidelines which States must follow in order to safeguard the rights of women and girls during the COVID-19 pandemic.

In its Guidance Note on CEDAW and COVID-19<sup>220</sup> the CEDAW Committee outlined States’ obligations to ensure that measures taken to manage COVID-19 did not have the effect of directly or indirectly discriminating against women and girls.<sup>221</sup> The policy also reiterated State’s duty to protect women and girls from violence, to promote women’s economic empowerment and to ensure women’s participation in matters related to policy and crisis-response.<sup>222</sup> State obligations in regard to the reduction of GBV required State’s to ensure that response strategies made provision for the continued availability and accessibility of shelters and domestic violence hotlines.<sup>223</sup> In order to ensure equality in education in the midst of school closures, State parties were under an obligation to provide alternative education and free and inclusive educational tools that can be accessed by women and girls from all economic backgrounds.<sup>224</sup> Additionally, State parties are to ensure that the pandemic response-strategies

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<sup>218</sup> Ibid Art 4(2)(c).

<sup>219</sup> Supra note 52 Art 4(2)(f).

<sup>220</sup> Office of the United Nations High Commissioner for Human Rights (OHCHR) ‘Guidance Note on CEDAW and COVID-19’ (2020) available at [https://www.ohchr.org/Documents/HRBodies/TB/COVID19/Guidance\\_Note.docx](https://www.ohchr.org/Documents/HRBodies/TB/COVID19/Guidance_Note.docx), accessed on 5 May 2023.

<sup>221</sup> Ibid at 1.

<sup>222</sup> Ibid.

<sup>223</sup> Ibid at 2.

<sup>224</sup> Ibid.

are alive to and address women's inferior economic position and that they establish systems of social protection for women.<sup>225</sup>

Additionally, the African Commission produced a policy guideline to protect African women and girls' rights during the pandemic.<sup>226</sup> To safeguard women's economic equality, State parties are instructed, *inter alia*: to incorporate the informal sector in risk-assessment and economic mitigation policies; provide for increased job security in disadvantaged sectors; and provide financial compensation to women in order to facilitate their empowerment.<sup>227</sup> To mitigate the impact of GBV, the Commission obliges State parties, *inter alia*: to provide alternative and technological GBV reporting mechanisms; to prioritise cases of GBV in the court system; and to establish temporary shelters as well as to make women and girls sufficiently aware of GBV response services.<sup>228</sup> As a generalised measure, the African Commission emphasises the responsibility of State parties to ensure that data and information is collected and that it is adequately aggregated along gendered, racial and financial lines.<sup>229</sup>

### 3.6 Concluding remarks

CEDAW, the Protocol and the attendant general recommendations from the CEDAW Committee and African Commission thus contain an enumeration of obligations that are applicable to State parties in periods of crisis, public emergency and disaster. Both documents serve as a comprehensive and credible means by which to assess and monitor States implementation of their human rights commitments to women and girls and ensure that measures adopted by State parties during crisis prevention and response are sensitive to and actively incorporate the unique needs of women of all groups. That the provisions in CEDAW and the Protocol are grounded in feminist legal theory (FLT), particularly anti-essentialist theory, is evident in that many of the aforementioned obligations recognise that positive special measures are required for the protection of the rights of intersecting groups of women and girls, both in general and especially during periods of crisis. In this way both instruments are useful benchmarks, informed by FLT, against which State actions during crises can be scrutinised.

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<sup>225</sup> *Ibid.*

<sup>226</sup> African Union (AU) 'Seven Possible Actions: A guide to protect African women's rights during COVID-19' (2020) available at <https://www.ohchr.org/sites/default/files/Documents/Issues/Women/7ActionsFinal.pdf>, accessed on 7 May 2023.

<sup>227</sup> *Ibid* at 1.

<sup>228</sup> *Ibid* at 3.

<sup>229</sup> *Ibid* at 7.

## CHAPTER 4

### APPLICATION OF SOUTH AFRICA'S INTERNATIONAL AND REGIONAL HUMAN RIGHTS LAW OBLIGATIONS AND FLT TO THE COVID-19 CONTEXT IN SA: WHAT HAPPENED? WHAT SHOULD HAVE HAPPENED?

#### 4.1 Introduction

The chapter begins by outlining the legal authority for South Africa's COVID-19 response and its subsequent progression. It draws on the previous chapter by assessing the South African government's response measures in relation to women's and girl's economic and educational equality and their experience of GBV during the COVID-19 pandemic against those mandated by CEDAW, the Maputo Protocol and their respective institutional bodies in times of crisis and disaster.

#### 4.2 National State of Disaster

The spread of the COVID-19 virus necessitated an urgent governmental response that would mitigate the risks posed to the health and lives of the public. The responses undertaken by many countries came in the form of declarations of nationwide states of emergencies or states of disaster, as previously outlined.<sup>230</sup> As the previous chapter articulated, states of emergencies or disasters justify a State's use of temporary measures that may derogate from or place restrictions on many of the rights and freedoms of its citizens.<sup>231</sup> In the context of South Africa, the legal mechanisms through which to facilitate the nationwide lockdown and other containment measures could similarly take the form of either a declaration of a state of emergency, in terms of section 37 of the Constitution,<sup>232</sup> or by declaring a state of national disaster in accordance with the Disaster Management Act (hereafter the DMA).<sup>233</sup>

In terms of section 37, a State of Emergency may only be declared when 'the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency; and the declaration is necessary to restore peace and order.'<sup>234</sup> Furthermore, such declaration of emergency may only be in effect 'prospectively' and 'for no more than 21 days from the date of the declaration' subject to any extension made by the National

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<sup>230</sup> Elmien Du Plessis, Dewald van Niekerk, Bernd Rosenkranz et al. 'After the COVID-19 State of Disaster in South Africa' (2022) 6 *Nature Human Behaviour* 901 at 901.

<sup>231</sup> Ibid.

<sup>232</sup> Supra note 74.

<sup>233</sup> Supra note 56.

<sup>234</sup> Supra note 74 s 37(1)(a-b).



Assembly.<sup>235</sup> The Constitution permits derogation from certain of the rights within the Bill of Rights during states of emergency, however, such derogation is only permitted if it ‘is strictly required by the emergency’ and if the legislation is, inter alia, in accordance with South Africa’s international law obligations.<sup>236</sup> However, no derogation may be permitted in respect of the list of non-derogable rights contained in this section, which include the right to equality (with respect to unfair discrimination solely on the listed grounds), the right to life and the right to human dignity.<sup>237</sup> The rules applicable to states of emergency make provision for judicial and parliamentary supervision and oversight as evidenced in subsection (3).<sup>238</sup> It is evident that a state of emergency is characterised by the imposition of incredibly stringent, invasive and far-reaching measures that are really only justified when peace and order are threatened.<sup>239</sup> In light of this, it has been argued that the South African government’s decision not to declare a state of emergency amidst the COVID-19 pandemic was correct in that such an action is not warranted as an initial measure in managing a public health emergency.<sup>240</sup>

In accordance with the DMA, South Africa declared a national state of disaster on the 15 March 2020 and was the first country to do so on the African continent.<sup>241</sup> In terms of Section 1 of the DMA, a disaster refers to:<sup>242</sup>

[A] progressive or sudden, widespread or localised, natural or human caused occurrence which causes or threatens to cause death, injury or disease, damage to property, infrastructure or the environment or disruption of the life of a community and is of a magnitude that exceeds the ability of those affected by the disaster to cope with its effects using only their own resources.

The Minister of Co-operative Governance and Traditional Affairs declared a state of disaster under section 27 of the DMA, citing the existence of ‘special circumstances’ warranting this

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<sup>235</sup> Ibid s37(2)(a-b).

<sup>236</sup> Ibid s37(4).

<sup>237</sup> Ibid s37(5).

<sup>238</sup> Ciara Staunton, Carmen Swanepoel and Melodie Lubaschaigne ‘Between a Rock and a Hard Place: COVID-19 and South Africa’s Response’ (2020) 7 *Journal of Law and the Biosciences* 1-12 at 4; Supra note 74: s37(3) states that: ‘Any competent court may decide on the validity of a declaration of a state of emergency; any extension of a declaration of a state of emergency; or any legislation enacted, or other action taken, in consequence of a declaration of a state of emergency.’

<sup>239</sup> Op cit note 220.

<sup>240</sup> Melodie Labuschaigne and Ciara Staunton ‘COVID-19: State of Disaster in South Africa’ (2020) available at <https://verfassungsblog.de/covid-19-state-of-disaster-in-south-africa/>, accessed on 25 April 2023.

<sup>241</sup> Du Plessis op cit note 230 at 901.

<sup>242</sup> Supra note 56 s 1.

declaration.<sup>243</sup> Section 27(2) lists the extensive powers available to the Minister in order to circumvent the increased severity of the disaster and to mitigate its adverse effects.<sup>244</sup> Of these powers include the power to issue regulations regarding the movement of persons<sup>245</sup> as well as to facilitate a post-disaster recovery response.<sup>246</sup> According to the Minister, the issuance of regulations in respect of the powers listed in section 27(2) was necessary in the midst of COVID-19 as it would ‘assist and protect the public, provide relief to the public, protect property, prevent disruption or deal with the destructive and other effects of the disaster.’<sup>247</sup>

The above outlines the legal (and to some, moral) justification for the government’s response, presenting it as a legitimate means through which to safeguard the health of the general public, as would be consistent with its international law obligations.<sup>248</sup> That is not to say, however, that the declaration of the State of Disaster was wholly uncontested. In fact, many individual and institutional bodies challenged its imposition.<sup>249</sup> These arguments were largely administrative and centred around the proportionality, rationality, legitimacy and legality of the State of Disaster. These court cases are beyond the scope of this dissertation as none of them had a direct bearing on the rights of women and girls during this time. What is left to evaluate is South Africa’s compliance with the feminist arm of these obligations, namely, to what degree South Africa has complied with the obligations set out in CEDAW and the Protocol regarding women and girls in crisis. The analysis to follow considers the impact of the above measures on the rights of women and girls in South Africa in relation to their economic and educational outcomes and their experience of GBV.

### 4.3 Government’s economic response measures

It has been demonstrated that women are disproportionately economically impacted by crises as they are overrepresented in the informal sector as well as the paid and unpaid care sectors, both of which are negatively impacted by business closures. This is especially true for poorer women, who also tend to be women of colour and who tend to work in the informal economy where there is an additional lack of social security. As previously demonstrated, South African

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<sup>243</sup> Department of Co-operative Governance and Traditional Affairs regulations in GN 313 GG 43096 of 15 March 2020. See supra note 56 s 37(1)(a)-(b).

<sup>244</sup> Supra note 56 s27(2).

<sup>245</sup> Ibid s27(2)(f).

<sup>246</sup> Ibid s27(2)(m).

<sup>247</sup> Ibid s27(3).

<sup>248</sup> See section 3.2 of this dissertation.

<sup>249</sup> See, for example, *De Beer v President of the Republic of South Africa* (2020) ZAGPPHC 184; *Esau v Minister of Cooperative Governance and Traditional Affairs* (2020) ZAWCHC 56; *Freedom Front Plus v President of the Republic of South Africa* (2020) ZAGPPHC 266.

women's right to work, when compared to that of the men, has been adversely affected by the COVID-19 pandemic owing to their overrepresentation in sectors of the economy that have been financially affected following governmentally-endorsed containment methods, as well as their inability to progress in their careers as a consequence of their increased responsibility at home. While this disproportionate impact may not be the result of direct discrimination, it is also still the case that the laws and policies in place during the pandemic had the effect of impeding on women's right to work more severely than that of men's. It can be argued that while this outcome was not intended, it was nevertheless a predictable outcome given previous evidence of the disparate impact of crises on women.

Thus, the previous chapter sets out States obligations to mitigate this adverse economic impact, inter alia, by addressing and incorporating the informal sector in economic response plans and recovery policies and through the provision of social assistance to women who have been affected by job and income losses so as to ameliorate women's economic hardship.

On the face of it, the existing South African legislative framework demonstrates an unequivocal commitment to the equality of women and men in employment. For example, the Employment Equity Act,<sup>250</sup> premised on the rights to dignity and equality as enshrined in the Constitution, aims to ensure parity in the enjoyment of workers' rights between men and women and between other vulnerable groups. Additional legislation, such as the Basic Conditions of Employment Act<sup>251</sup> and the Labour Relations Act<sup>252</sup> are also considered to be gender-responsive.<sup>253</sup>

The South African government was heralded for its initial commitment to the establishment and implementation of a sizeable number of social and fiscal policies that were aimed at mitigating the devastating effects of the pandemic on the economy, specific vulnerable economic sectors and vulnerable members of society generally.<sup>254</sup> Approximately R500 billion was allocated towards providing such relief.<sup>255</sup> However, certain commentators have pointed

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<sup>250</sup> 55 of 1998.

<sup>251</sup> 75 of 1997.

<sup>252</sup> 66 of 1995.

<sup>253</sup> Department of Women, Youth and Persons with Disabilities (WYPD) 'South Africa's Report on the Implementation of Agreed Conclusions on 'Women's Empowerment and the Link to Sustainable Development'' (2020) available at <https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/CSW/65/MS%20Inputs%20Review%20Theme/South%20Africa.pdf>, accessed on 15 May 2023 at 8.

<sup>254</sup> Nqobile Sikhosana and Ogochukwu Iruoma Nzewi 'A Compendium on the Application of Gender Equity Financing & Budgeting in Covid-19 Mitigation and Recovery Processes: Key Lessons for South Africa' (2021) 10 *African Journal of Gender, Society and Development* 13 at 24.

<sup>255</sup> Ibid.

out that the commitment to vulnerable sectors as a homogenous group has meant that the government has not taken into account *specific* vulnerable sectors in which women are overrepresented and has thus ‘failed to ascertain where the economic priorities of women and men differ,’ thereby failing to diligently safeguard women’s economic equality.<sup>256</sup>

One example in which this manifests is in the government’s establishment of a Temporary Employee/Employer Relief Scheme (TERS) in March of 2020.<sup>257</sup> The aims of the TERS scheme were ‘to make provision for the payment of benefits’ to workers whose income had been reduced as a result of the pandemic and to mitigate the economic effects of pandemic-related job losses and unemployment.<sup>258</sup> However, this financial relief was only available to those who worked in the formal sector, thereby excluding a large number of disadvantaged women from the purview of this protection.<sup>259</sup>

The government similarly established a COVID-19 Social Relief Distress Grant (SRDG) which provided direct financial assistance to individuals who were unemployed and who, like informal workers, were exempt from accessing benefits under other relief schemes.<sup>260</sup> On the face of it, this grant would provide much-needed financial protection to disadvantaged women and women in the informal sector. However, the grant was initially not available to persons (caregivers) who had already been receiving Child Support Grants (CSG).<sup>261</sup> This once again exempted a number of women from this relief as many recipients of CSGs were women in the informal sector who could barely survive on the CSGs and could now not find safety in other social schemes.

According to The National Income Dynamics Study–Coronavirus Rapid Mobile Survey (NIDS–CRAM), a striking majority of the beneficiaries of the TERS and SRDG between May and December 2020 were male, having accounted for approximately sixty-eight percent of the recipients.<sup>262</sup> This was so even despite the disparity in the rate and degree of employment loss between men and women.<sup>263</sup> This is a direct demonstration of women’s structural equality barriers as the low number of female recipients, despite their

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<sup>256</sup> Ibid at 25.

<sup>257</sup> Saloshni Naidoo and Rajen Nithiseelan Naidoo ‘Vulnerability of South African Women Workers in the COVID-19 Pandemic’ (2022) 10 *Frontiers in Public Health* 1-7 at 3.

<sup>258</sup> Op cit note 253 at 9.

<sup>259</sup> Naidoo op cit note 257 at 3.

<sup>260</sup> Ibid at 3.

<sup>261</sup> Ibid.

<sup>262</sup> Busi Sibeko ‘South Africa: Social Protection through Fiscal Policy during the COVID-19 Pandemic’ in Dawn Discussion Paper No. 45 on Policy Transformations (2022) at 19.

<sup>263</sup> Ibid.

disproportionate unemployment, ignores the fact that most women are the primary caretakers of their children and thus would be disproportionately left out of financial aid schemes. The government's decision to initially exclude recipients of CSGs in the SRDG runs contrary to its human rights law obligations to ensure that potential adverse effects of pandemics and crises on women and girls are mitigated by the provision of social and fiscal policies that are created with the knowledge of women's structural inequality in mind. The government should have acknowledged that the position of women in the economy would render them disproportionately susceptible to job losses and financial hardship as well as the fact that women historically bear the brunt of the unpaid care burden, thus the exclusion of care-giving women from the SRDG would never be reasonable in efforts geared toward the protection of vulnerable persons during the pandemic.<sup>264</sup>

It must be noted that the government later remedied this disparity when it reinstated the grant in August of 2021 and has since included recipients of CSGs in the purview of its assistance. However, this came about after increased pressure and advocacy from civil society and women's rights organisations.<sup>265</sup>

As demonstrated in the previous chapter, the Maputo Protocol and CEDAW (and their respective institutional bodies), employed in this thesis as markers of feminist legal theory in action, oblige State parties to ensure women's economic equality in times of crisis by adopting legislation and policy that (inter alia) targets women of all backgrounds, incorporates the informal sector in response planning, and that makes provision for social policies that will ameliorate the adverse economic impact on women. South Africa, as a party to both instruments, was therefore under a positive duty to facilitate the implementation of such measures from the beginning. From the above examples, however, it can be gleaned that the South African government did not adequately adopt a gendered-lens in its economic response planning.

#### **4.4 Government's educational response measures**

In order to deal with the impact of the pandemic, the Department of Basic Education (DBE), in partnership with the National Education Collaboration Trust, initially developed an emergency COVID-19 response plan which included the following key elements: an educational support programme which made provision for the broadcasting of lessons via

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<sup>264</sup> Ibid at 21.

<sup>265</sup> Ibid at 23.

television and radio; online curriculum support lessons for various (but not all) grades aided by a decrease in data costs; an overhaul of the pre-existing DBE website so as to prioritise the dissemination of study and learning materials as well as other social support resources; and the establishment of a monitoring and evaluation mechanism to assess the capacity of school's to re-open.<sup>266</sup>

The response measures adopted by the South African government in respect of education, it has been argued, were blind to the existing inequalities plaguing vulnerable learner's home and school environments.<sup>267</sup> The seemingly hasty decision to effect school closures, despite expert and public opinion to the contrary, were arguably not informed by the government's human rights obligations, especially those in respect of women and girls.<sup>268</sup> In fact, no targeted measures were aimed specifically at mitigating girls' educational inequality, let alone that of disadvantaged women and girls.

Periods of crisis necessitate the need for technological access to educational facilities. Indeed, many of the key elements of the DBE's initial recovery plan (as aforementioned) were premised on the provision of online and electronically-based learning. In terms of international human rights law pertaining to women and girls in crisis, government response measures need to ensure that women and girls who come from disadvantaged backgrounds are not excluded from this method of learning due to their lack of technological access.<sup>269</sup> Additionally, in order to facilitate girl's access to technological methods of education, the CEDAW Committee has stated that teachers need to be sufficiently trained in the medium of Information Communication Technologies (ICTs) so as to deliver quality distance and remote education.<sup>270</sup> The DBE issued a teacher's guide that outlined directions for ensuring learner's health and safety in the classroom and provided some guidance on remote teaching, however there was no provision of resources necessary to facilitate this.<sup>271</sup> As such, many educators did not receive adequate technological training and children and schools lacking access to technological devices or the internet faced disproportionate educational disruptions – a setback especially pronounced for disadvantaged learners. Further efforts to decrease data expenses are and were

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<sup>266</sup> Crain Soudien, Vijay Reddy and Jaqueline Harvey 'The Impact of COVID-19 on a Fragile Education System: The Case of South Africa' in Fernando M Reimers (ed) *Primary and Secondary Education During COVID-19: Disruptions to Education Opportunity During a Pandemic* (2022) 309.

<sup>267</sup> Ronicka Mudaly and Vimolan Mudaly 'Exploring How the National COVID-19 Pandemic Policy and its Application Exposed the Fault Lines of Educational Inequality' (2021) 84 *Journal of Education* 106 at 109.

<sup>268</sup> Op cit note 198 at 22.

<sup>269</sup> Op cit note 200 para 35(c).

<sup>270</sup> Ibid para 35(b).

<sup>271</sup> Op cit note 198 at 25.

insufficient as a large number of poorer learners do not possess any digital device.<sup>272</sup> The differences in socioeconomic background thus meant that disadvantaged learners did not experience the policy and response measures on an equitable basis with their wealthier counterparts. Such discrimination of result is exactly what the government should have adequately prepared for, yet no such targeted measure was implemented.

Along with material barriers to access to remote learning, government failed to consider the increased risk that school closures and the attendant relegation of girls to their homes would pose for women and girls who are susceptible to abuse and increased responsibilities within the home.

The DBE then developed a second plan, called the School Recovery Plan in Response to COVID-19 (SRPRC) in June 2020, which made provision for the gradual return of learners back to in-person learning.<sup>273</sup> This return was complicated by a rise in infections, marking the start of a month's long pattern of alternating between remote and in-person learning as the pandemic waves passed through.<sup>274</sup> The plan made provision for the 'phasing in' of learners on a rotational basis and was primarily concerned with 'making up for lost time' in a manner that preserved the health and safety of the students.<sup>275</sup> However, nowhere in the plan had mention been made of aims to ensure that vulnerable women and girls, who are more at risk of dropping out due to teenage pregnancies or economic concerns, would still be able to return to school and continue their education post-school re-opening. Additionally, as a party to CEDAW, South Africa is under an obligation to continually collect data disaggregated by sex, ethnicity and socioeconomic background reflecting, inter alia, the proportion of female students who remain in attendance at school and the proportion who have dropped-out.<sup>276</sup> Yet, despite evidence of the increased dropout rate amongst girls, further disaggregated data to this effect was not made available during the pandemic.<sup>277</sup>

It is evident that the right to and quality of education of disadvantaged women and girls in South Africa has been disproportionately impacted by the COVID-19 pandemic, as many of

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<sup>272</sup> Dr Avashni Reddy Moonasamy and Gedala Mulliah Naidoo 'Digital Learning: Challenges Experienced by South African University Students during the COVID-19 Pandemic' (2022) 17 *The Independent Journal of Teaching and Learning* 76 at 77; Grasia Chisango and Newlin Marongwe 'The Digital Divide at Three Disadvantaged Secondary Schools in Gauteng, South Africa' 2021 *Journal of Education* 149 at 158.

<sup>273</sup> Soudien op cit note 266 at 310.

<sup>274</sup> Ibid.

<sup>275</sup> Ibid.

<sup>276</sup> Op cit note 200 para 31(d).

<sup>277</sup> Committee on the Elimination of Discrimination against Women *Concluding observations on the fifth periodic report of South Africa* 23 November 2021 CEDAW/C/ZAF/CO/5 para 43.

them did not have access to online educational resources, were forced to shoulder the additional burden of unpaid domestic and care work in the home or had their education suffer as a result of GBV.<sup>278</sup>

The South African government did not adhere to its human rights obligations to ensure that its educational response measures were gender-sensitive and responsive. As such, the measures employed by the government during the pandemic only served to deepen inequalities along gendered and socioeconomic lines within education. It thus failed to meet the core obligation of this right – to ensure that education is accessible to all without discrimination. The government failed to integrate any meaningful mitigation policies that addressed the historically inferior position of the disadvantaged girl-child, and as such this subgroup will be emerging from the pandemic in a compounded condition significantly worse-off than before.

#### **4.5 Response measures related to GBV**

Gender-based violence is a form of discrimination that remains prohibited during periods of crisis. The preceding chapter of this thesis demonstrated that there is a heightened international law obligation on States to prevent increased incidences of GBV and to protect citizens therefrom during states of national emergency.<sup>279</sup> The stringency and scope of this obligation, it has been held, is in direct proportion to the individual circumstances and context characterised by the country.<sup>280</sup> Thus, in order for any GBV mitigation policy to be effective in South Africa, it must address and take cognisance of the already dismal state of GBV prevention and enforcement in the Republic.<sup>281</sup> The situation in the country prior to the pandemic in respect to GBV was one characterised by low levels of reporting, poor enforcement of the national legislative framework aimed at combatting GBV, and a lack of any substantial justice being delivered to victims.<sup>282</sup> This situation, as previously demonstrated, was only made worse by the scourge of the pandemic.

At the moment of implementing containment measures (and, arguably, well before that), the government of South Africa ought to have considered the ways in which lockdown policies forcing women and girls to stay at home would put them at an increased risk of GBV

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<sup>278</sup> Chitiga op cit note 38 at 1630; Van Der Berg et al op cit note 115 at 10.

<sup>279</sup> Op cit note 2 at 19.

<sup>280</sup> Ibid at 17.

<sup>281</sup> Ibid.

<sup>282</sup> Human Rights Watch ‘South Africa: Broken Promises to Aid Gender-Based Violence Survivor - Improve Shelter Funding; Increase Access for Sex Workers, LGBT, Undocumented Survivors’ (2021) available at <https://www.hrw.org/news/2021/11/24/south-africa-broken-promises-aid-gender-based-violence-survivors>, accessed on 27 April 2023.



and should thereby have adequately prepared a plan to circumvent a manifestation of this risk, as mandated by the CEDAW Committee and other international human rights institutions.<sup>283</sup> However, the response of the South African government has been criticised for its failure to timeously appreciate the devastating effect that its strict lockdown measures would have on the rights of women and girls.<sup>284</sup> Dr Tlaleng Mofokeng, the Special Rapporteur to the United Nations on the Right to Health, denounced South Africa's COVID-19 response, stating that the government's failure to, inter alia, include a process for the screening and identification of violence in its response plan meant that many of the attending laws, policies, resources, budget and infrastructure dealing with GBV were inadequate.<sup>285</sup>

The maintenance and availability of shelters for victims of GBV is central to a State's obligation towards women and girls in times of crisis and disaster, as emphasised by the CEDAW Committee above.<sup>286</sup> In the context of the COVID-19 pandemic, this necessitates the characterisation of these shelters as an essential service, barring which it would be unable to operate.<sup>287</sup> On the 26 March 2020, the government implemented what was known as a 'hard lockdown' which prohibited the movement of people out of and within the Republic with exceptions only explicitly being made where a person had to travel for essential goods, obtain medical attention or supplies, or (in the case of an essential worker) where said person had to attend work in certain designated times.<sup>288</sup> The status of domestic violence shelters was not immediately clear from this announcement, with many individuals unsure whether they would fall into the category of exempted essential services. It was only after more than two weeks later, on 13 April 2020, that the President would clarify that services for victims of GBV are to remain open.<sup>289</sup> The lack of foresight in the specificity of the application and interpretation of the lockdown measures insofar as GBV services is concerned, at least in the initial stage of the pandemic, runs counter to a State's obligation to ensure that women and girls are made sufficiently aware of these services – as mandated by the African Commission.<sup>290</sup> The

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<sup>283</sup> Op cit note 2 at 19.

<sup>284</sup> Op cit note 282.

<sup>285</sup> COVID-19 and Gender-Based Violence Policy Tracker Policy Briefing Paper: South Africa available at [https://pure.giga-hamburg.de/ws/files/28564421/South\\_Africa\\_Working\\_paper\\_3.pdf](https://pure.giga-hamburg.de/ws/files/28564421/South_Africa_Working_paper_3.pdf), accessed on 15 April 2023 at 5; Dr Tlaleng Mofokeng, Special Rapporteur to the UN on the Right to Health (SA), Interview, New York/South Africa, 14 June 2021.

<sup>286</sup> Op cit note 171 para 57(c).

<sup>287</sup> Charlotte M Roy, Paul Bukuluki and Sara E Casey et al 'Impact of COVID-19 on Gender-Based Violence Prevention and Response Services in Kenya, Uganda, Nigeria and South Africa: A Cross-Sectional Survey' (2022) 2 *Front. Glob. Womens Health* 1-9 at 2.

<sup>288</sup> Staunton op cit note 238 at 5.

<sup>289</sup> Roy et al op cit note 287 at 2.

<sup>290</sup> Op cit note 226 at 3.

government of South Africa should have ensured that victims of GBV would be adequately informed about the options available to them well before the lockdown actually came into effect. The benefit such an obligation has on safeguarding the rights of women and girls becomes evident when one is made cognisant of the fact that at least 21 women had been killed by their domestic partners within the first two months of the lockdown.<sup>291</sup> Many GBV organisations in South Africa had to shut down or decrease in operation. For example, one study showed that of the 28 GBV organisations in the country, almost 60 percent had to cease or reduce their operation either because they had been deemed non-essential or because the lockdown restrictions complicated their work.<sup>292</sup> There were also discrepancies in the amount of personal protective equipment and funding provided to the various shelters, with claims that shelters in the Western Cape were timeously and adequately assisted and funded while those in other provinces were not.<sup>293</sup> About 60 percent of GBV organisations in South Africa reported that their work could not continue because they were under-funded.<sup>294</sup> As it is part of a State's human rights obligation to provide funding to shelters in facilitation of their duties in respect of GBV, the inconsistencies in the government's provision of financial assistance to shelters put it in breach thereof.

In times of crisis and disaster, the State must ensure that women are able to safely and accessibly report all acts of GBV.<sup>295</sup> The South African government responded to this obligation and the COVID-19 crisis by strengthening hotline services during the pandemic and even created a new legal justice hotline.<sup>296</sup> However, this hotline was criticised because the information provided was outdated and sometimes inappropriate.<sup>297</sup> Furthermore, during lockdown, victims who were locked in a home with their abusers could not use the hotline out of fear that they would be heard.<sup>298</sup> Thus, the government should have foreseen this possibility

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<sup>291</sup> Op cit note 285 at 5.

<sup>292</sup> Op cit note 287 at 4.

<sup>293</sup> Op cit note 282.

<sup>294</sup> Priscilla Gutura and Reema Nunlall 'Gender-Based Violence Amid the COVID-19 Pandemic : A Critical Reflection on the Global Response' (2020) 23 *Acta Criminologica : African Journal of Criminology & Victimology* 108 at 116; Roy et al op cit note 287 at 4.

<sup>295</sup> Op cit note 171 para 57(c).

<sup>296</sup> Merike Blofield, Asma Khalifa, Nancy Madera et al 'The Shadow Pandemic: Policy Efforts on Gender-Based Violence During COVID-19 In the Global South' (2021) GIGA Focus Global 1-14 at 7 available at [https://www.ssoar.info/ssoar/bitstream/handle/document/75502/ssoar-2021-blofield\\_et\\_al-The\\_Shadow\\_Pandemic\\_Policy\\_Efforts.pdf?sequence=1&isAllowed=y&lnkname=ssoar-2021-blofield\\_et\\_al-The\\_Shadow\\_Pandemic\\_Policy\\_Efforts.pdf](https://www.ssoar.info/ssoar/bitstream/handle/document/75502/ssoar-2021-blofield_et_al-The_Shadow_Pandemic_Policy_Efforts.pdf?sequence=1&isAllowed=y&lnkname=ssoar-2021-blofield_et_al-The_Shadow_Pandemic_Policy_Efforts.pdf), accessed on 29 April 2023 at 7.

<sup>297</sup> Op cit note 282.

<sup>298</sup> Sithembiso Ndlovu, Mutshidzi Mulondo, Joyce Tsoka-Gwegweni et al 'COVID-19 Impact on Gender-Based Violence among Women in South Africa during Lockdown: A Narrative Review' (2022) 26 *African Journal of Reproductive Health* 59 at 63.

and adequately prepared for it by making it known to the women and girls that they would be allowed to leave their residences in order to find a safe place in which they could report their grievances.

#### 4.5.1 Existing legal framework and amendments

South Africa has an extensive legislative framework indicating a commitment to penalise all acts of violence against women. The Protection from Harassment Act,<sup>299</sup> for example, makes provision for the obtainment of a protection order which, if breached, subjects the perpetrator to a fine or imprisonment.<sup>300</sup> However, application of this Act is restricted during the pandemic as the process through which one would obtain a protection order is complicated by the imposition of lockdowns and other containment measures.<sup>301</sup>

Thus, in facilitation of its international human rights obligations toward women and girls in light of GBV, South Africa should have strengthened the efficacy of its existing GBV legal framework and adapted the framework to cater to the unique exigencies of the COVID-19 context.<sup>302</sup>

One regard in which the government upheld this obligation is in its amendment of its existing Domestic Violence Act.<sup>303</sup> The Domestic Violence Amendment Act (hereafter the Amendment Act)<sup>304</sup> extended the definition of domestic violence to include spiritual abuse, elder abuse, exposing a child to domestic violence and controlling and coercive behaviour.<sup>305</sup> Additionally, and most important to the subject at hand, the Amendment Act allows complainants to apply for protection orders electronically.<sup>306</sup> This represents a significant positive reformation of the law that demonstrates an awareness on the part of the legislature that the risks posed to women during states of disaster call for legitimate and legislative action in accordance with their international law obligations. As praiseworthy as this step was, however, it is nevertheless predicated on the privileged and incorrect assumption that most South Africans (and South African women) would be able to access this online service. It is therefore unintentionally exclusionary toward those who might not have access to a technological device, or who might not be able to afford data, the internet or even electricity –

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<sup>299</sup> 17 of 2011.

<sup>300</sup> Ibid s 2 and s 18(1).

<sup>301</sup> Op cit note 285 at 7.

<sup>302</sup> Op cit note 2 at 20.

<sup>303</sup> 116 of 1998.

<sup>304</sup> 14 of 2021.

<sup>305</sup> Ibid s 1.

<sup>306</sup> Ibid s 4(1).

in other words it is not very useful to disadvantaged women and girls.<sup>307</sup> In this way, although one could make the argument that the legislative provision might safeguard the rights of women as a homogenous group, it does not adequately safeguard the rights of vulnerable and marginalised groups of women and girls.

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<sup>307</sup> Op cit note 296 at 7.

## CHAPTER 5

### LESSONS GOING FORWARD

#### 5.1 Findings of this dissertation

Disadvantaged women and girls suffered disproportionately in the areas of educational and economic disparity and in their experience of GBV during the COVID-19 pandemic. This occurred despite the existence of obligatory safeguards to women's rights during crises, enumerated in CEDAW and the Maputo Protocol and by their respective monitoring bodies (employed as representations of FLT in action). In South Africa, the case-study in this dissertation, these unfavourable outcomes were not circumvented owing to the government's failure to implement a sufficiently gender-responsive COVID-19 plan, one that should have been informed by the ideals of both instruments and the general recommendations accompanying each. With regard to economic safeguards, this dissertation found that States aiming to mitigate the adverse economic impact of crises on women need to take into account the unique structural impediments to women's economic security, particularly as it pertains to disadvantaged women, and should do so by means of, inter alia, the acknowledgement of the informal sector (in which women are overrepresented) in their response strategies and through the creation of sufficient social and economic assistance policies for women affected by pandemic-related job and income losses.<sup>308</sup> Yet, the previous Chapter of this dissertation found that the South African government's main economic relief scheme (TERS) failed to incorporate the informal sector within its ambit, the subsequent SRD Grant, a potential remedy to TERS' inadequacy, failed to protect poor, unemployed caregiving women, and both schemes primarily benefitted men.<sup>309</sup> In the area of education, the South African government failed to devise a crisis-response plan that was gender-sensitive, that specifically targeted disadvantaged women and girls or that acknowledged their susceptibility to GBV, teenage pregnancy and to post-school return dropouts.<sup>310</sup> The generic COVID-19 emergency response plan, devised primarily by the Department of Education, failed to consider disadvantaged learners', including girls', impeded technological access during school closures or to arrange for alternative means of education in this regard.<sup>311</sup> The safeguards relating to the mitigation of GBV during crises,

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<sup>308</sup> See section 3.4.3 of this dissertation.

<sup>309</sup> See section 4.3 of this dissertation.

<sup>310</sup> See section 4.4 of this dissertation.

<sup>311</sup> Ibid.

well-established within CEDAW and the Protocol and in the work of their monitoring bodies, were poorly implemented in South Africa during the pandemic, which was categorised by inadequate GBV laws, policies, budgeting and infrastructure. Contrary to these safeguards, women and girls were not made timeously aware of the existence of GBV support services, shelters were inoperable or under-funded, and useful amendments to existing legislation still exempted a large number of disadvantaged women and girls from its protection.<sup>312</sup> The response of the South African government thus only served to further impede rights-access along gendered and socioeconomic lines.

The current Chapter will seek to conclude this dissertation by utilising ideals of FLT to make recommendations for future crisis response measures. Broadly speaking, FLT seeks to address and remove legal and sociocultural impediments to women's equality and emphasises the role of law and policy as instrumental in this regard.<sup>313</sup> When using feminist legal theory and its expressions in CEDAW and the Maputo Protocol as tools against which to assess and analyse the disproportionate impact of crises on women and girls, and to analyse policy so as to reform this disparity, one arrives at the recommendations below.

## **5.2 Recommendations**

### **5.2.1 Gender needs to be a main marker against which States interpret, create, inform and apply crisis law and policies.**<sup>314</sup>

Gender analysis in this sense must incorporate the social, cultural and even legal practices and attitudes that continually subjugate women and girls.<sup>315</sup> This dissertation posits that there are two ways in which gender may be mainstreamed, namely through increasing the representation of women and girls in decision-making positions and through the implementation of gender-responsive budgeting.

#### **5.2.1.1 Women and girls need to be well-represented within the composition of emergency and crisis task-forces**

One way to ensure that gender is at the centre of crisis response and preparedness is by including women and girls in leadership and decision-making processes. The adequate

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<sup>312</sup> See section 4.5 of this dissertation.

<sup>313</sup> Op cit note 48 at 254.

<sup>314</sup> Yvonne Georgina Tovar Silva 'Contributions of the Critical Legal Feminist Theory in the Analysis of the Situation of Women in Labour Market Policies during the Covid-19 Pandemic in Latin America' (2022) 5 *Annals of Bioethics and Clinical Applications* 1-6 at 5.

<sup>315</sup> African Union *African Union Guidelines on Gender-Responsive Responses to COVID-19* (2020) available at [https://au.int/sites/default/files/documents/38617-doc-gewe\\_and\\_covid\\_19\\_eng.pdf](https://au.int/sites/default/files/documents/38617-doc-gewe_and_covid_19_eng.pdf), accessed on 23 September 2023 at 5.

representation and leadership of women at all levels is, under normal circumstances, a necessary feature of any society that wishes to safeguard the human rights of all its citizens and guarantee the equal progression of women. The duty to ensure this representation becomes more stringent during times of crisis, as a component of States' obligations to ramp up their efforts to protect women's rights in periods of turmoil. According to the CEDAW Committee, women's representation in leadership and decision-making is an aspect of women's right to equal enjoyment of political and public life as enshrined in articles 7 and 8 of CEDAW.<sup>316</sup> The Committee has also explicitly cited women's participation as one of the guiding principles of CEDAW insofar as disaster-risk mitigation is concerned.<sup>317</sup> Moreover, it is not enough that there are women within leadership and community roles – such participation must be representative of a 'diverse' group of women and girls, and must thus include marginalised, disadvantaged and rural women and girls, too.<sup>318</sup> The reason for this, as stated by the Committee, is that such leadership will ensure that disaster and crisis-response strategies are sufficiently sensitive to the needs and risk factors associated with these vulnerable groups. Indeed, proponents of anti-essentialist feminist legal theories routinely stress the importance of 'multivocal storytelling,' stating that a movement that fails to take into account the voices of those at the edge of society can never truly give rise to gender equality.<sup>319</sup> The voices of marginalised and underprivileged women are similarly necessary in the aftermath of crises such as the pandemic as they are key to recognising reasons for policy failure and provide a starting point for future reformulation.<sup>320</sup>

The need for the participation of women at all levels of crisis response management is an ideal that has thus widely been reinforced throughout the proliferation of crisis periods, yet the COVID-19 pandemic was globally characterised by an underrepresentation of women in pandemic decision-making.<sup>321</sup> In an analysis of countries in which a COVID-19 task-force was established, 24 per cent of the overall task-force composition was comprised of women and 18

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<sup>316</sup> Op cit note 171 para 35.

<sup>317</sup> Ibid at 9.

<sup>318</sup> Ibid para 32.

<sup>319</sup> Taylor Feltham 'Working Paper No. 46: Foundations for Feminist Legal Theory' (2020) Portland State University Economics Working Papers 1-19 at 14.

<sup>320</sup> Ibid at 14.

<sup>321</sup> UN Women & UNDP COVID-19 Global Gender Response Tracker 'Women Remain Absent: COVID-19 Task-Force Participation Version 2' (2021) available at <https://data.unwomen.org/sites/default/files/documents/Publications/COVID-19%20Task%20Force%20Fact%20Sheet%20November%202021%20v1.pdf>, accessed 15 May 2023.

per cent were women-led.<sup>322</sup> In terms of South Africa the average proportion of women's task-force membership was 38 per cent.<sup>323</sup> This figure is by no means a trivial one, as many other countries in the region fared significantly worse with the average proportion of women's membership in task-forces in Sub-Saharan Africa amounting to 24 per cent.<sup>324</sup> Yet, when compared to its European and North American counterparts it is evident that there is room for improvement. For example, the average proportion of women's membership in COVID-19 task forces in Iceland was 100 per cent.<sup>325</sup> Other countries with high average levels of female representation included Ireland (57 per cent) and Lucia (50 per cent).<sup>326</sup> There had additionally been further division within task forces, as some task forces were strictly decision-making while others consisted of a group of advisory experts.<sup>327</sup> The distinction between the two is significant as only the former has a greater direct influence on government decisions.<sup>328</sup> It is unsurprising that women were on average overrepresented in expert task forces as opposed to decision-making task-forces.<sup>329</sup> The situation was no different in South Africa, where women made up 45 per cent of the membership of expert task forces but only 17 per cent of the membership of advisory task forces.<sup>330</sup> Thus, even where women are represented in the composition of task forces, such representation may, on its face, be falsely inclusive when regard is had to the actual decision-making capacity of women in these structures.

In June 2022, the UN Women and United Nations Development Programme (UNDP) released a report in which it found that, although as a whole the representation of women in parliamentary and response leadership, countries possessing a larger degree of women in formal leadership performed better at crisis-response as observed over the course of the COVID-19 pandemic than those in which the representation of women was less.<sup>331</sup> Such countries also showed a greater adoption of gender-sensitive policies in their response plans.<sup>332</sup>

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<sup>322</sup> Ibid. A task-force, in this study, referred to 'any executive branch institution (temporary or permanent) created by a national government in response to COVID-19.'

<sup>323</sup> Ibid.

<sup>324</sup> Ibid.

<sup>325</sup> Ibid.

<sup>326</sup> Ibid.

<sup>327</sup> UN Women and UNDP 'Government Responses to COVID-19: Lessons on Gender Equality for a World in Turmoil' (2022) available at [https://reliefweb.int/report/world/government-responses-covid-19-lessons-gender-equality-world-turmoil?gclid=Cj0KCQjwvL-oBhCxARIsAHkOiu1Y8-a3x6kiRD8LXhZyCorT7eKqcqNmzFpI9OKwJem8dlyBEIVcUyYaAjxWEALw\\_wcB](https://reliefweb.int/report/world/government-responses-covid-19-lessons-gender-equality-world-turmoil?gclid=Cj0KCQjwvL-oBhCxARIsAHkOiu1Y8-a3x6kiRD8LXhZyCorT7eKqcqNmzFpI9OKwJem8dlyBEIVcUyYaAjxWEALw_wcB), accessed on 21 September 2023 at 112.

<sup>328</sup> Ibid.

<sup>329</sup> Ibid.

<sup>330</sup> Ibid.

<sup>331</sup> Op cit note 327 at 107.

<sup>332</sup> Ibid.



Women's participation is also crucial outside of governance, such as women's participation in mobilisations organised by civil society and participation by women's rights organisations. Clear evidence of this in South Africa, previously iterated in this dissertation, is shown by the government's decision to expand the SRDG grant after civil society organisations condemned its exclusion of certain vulnerable women from eligibility.

### **5.2.1.2 Social and economic policies and laws must have an intrinsic gender-focus and must be continually strengthened: an advocacy for gender-responsive budgeting**

This recommendation is also one that has been enumerated in guidelines for feminist crisis response but the importance thereof has recently been fortified and confirmed by analyses of the COVID-19 pandemic and its effects. According to the UN Women and UNDP report, countries in which women's equality in several aspects of life was less affected were able to circumvent significant gender disparity and ameliorate adverse results largely due to their solid social and economic protection mechanisms and their existing legal framework pertaining to gender-based violence.<sup>333</sup> The kind of protection that is envisaged arguably requires that a country dedicate a significant portion of its budgetary resources to gender-specific social and economic security policies and, where this is needed, to legislative reform.<sup>334</sup> Feminist scholars group these commitments into a cohesive strategy known as gender-responsive budgeting. 'Gender-responsive budgeting' involves 'government planning, programming and budgeting that contributes to the advancement of gender equality and the fulfilment of women's rights.'<sup>335</sup> It seeks to promote policy design and creation through a gendered lens.<sup>336</sup> As gender-responsive budgeting is a means through which States can allocate resources to facilitate the promotion of women's rights, Doubell argues that it serves as a demonstration of feminist legal theory in action.<sup>337</sup>

However, austerity poses a dangerous threat to States' implementation of gender-responsive budgetary measures.<sup>338</sup> Austerity is defined as a policy whereby governments restrict their public expenditure in an effort to remedy State debt and economic stagnation.<sup>339</sup>

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<sup>333</sup> Ibid at 126.

<sup>334</sup> Ibid.

<sup>335</sup> Rihab Khalifa and Simona Scarparo 'Gender-Responsive Budgeting: A Tool for Gender Equality' (2021) 79 *Critical Perspectives on Accounting* 1-13 at 1.

<sup>336</sup> Op cit note 254 at 17.

<sup>337</sup> Lize-Marie Doubell *The Allocation of Resources for the Realisation of Women's Rights: An Analysis of Article 26(2) of the Maputo Protocol* (LLM thesis, Stellenbosch University, 2020) 50; Budoo op cit note 177 at 121.

<sup>338</sup> Op cit note 327 at 126.

<sup>339</sup> Op cit note 262 at 7.

In South Africa, the National Treasury has embarked on a programme of austerity that has been in place for several years and which has had a direct impact on the country's ability to create and reform its social and economic protection policies.<sup>340</sup> People living in poverty, especially women and girls, are once again disproportionately affected by a government's austerity measures as they are often the main beneficiaries of governments' social and economic aid services.<sup>341</sup> However, South Africa has a human rights obligation to ensure that it is taking all appropriate measures to promote women's equality and that it is allocating sufficient resources towards this (gender-responsive budgeting). At the national level, section 27(1)(c) of the South African constitution provides the rationale and legal authority for social security and thereby elevates it to the status of an enforceable right.<sup>342</sup> In terms of the Constitution, the State must respect (negative obligation) and promote (positive obligation) this right.<sup>343</sup> As the accessibility of this right is subject to available resources, better authority for this is articulated in feminist international law instruments where rights therein contained are immediately realisable.

The obligation to ensure gender-responsive budgeting can be seen in article 26(2) of the Maputo Protocol which states that 'State parties undertake to adopt all necessary measures and in particular shall provide budgetary and other resources for the full and effective implementation of the rights herein recognised.'<sup>344</sup>

Reference to the explicit need for budgetary measures is not similarly outlined in CEDAW as explicitly as it is in the Maputo Protocol, however Doubell posits that a holistic reading and interpretation of its various provisions renders such an inference inherent in a State's obligations under the convention.<sup>345</sup>

Ensuring that social and economic protection through gender-responsive budgeting is prioritised and accounted for within future crisis-response policies is crucial, not only to cushion the negative impact on women and girls, but additionally as it forms a fundamental

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<sup>340</sup> Ibid.

<sup>341</sup> Dana Abed (OXFAM) and Fatimah Kelleher 'The Assault of Austerity: How Prevailing Economic Policy Choices are a Form of Gender-Based Violence' (2022) available at <https://policy-practice.oxfam.org/resources/the-assault-of-austerity-how-prevailing-economic-policy-choices-are-a-form-of-g-621448/>, accessed on 25 May 2023.

<sup>342</sup> Supra note 74 s 27(1)(c) states: 'Everyone has the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.'

<sup>343</sup> Letlhokwa George Mpedi 'Social Protection Law in the Republic of South Africa' (2017) 20 *Law in Africa* 33 at 37.

<sup>344</sup> Supra note 52 Art 26(2).

<sup>345</sup> Op cit note 337 at 72.

aspect of a country's duty to promote gender equality at the levels of national, international and regional human rights law.

### **5.2.2 Crisis response measures must acknowledge the intersectionality of the female experience**

Where a state introduces new policy or amends a law or legislative provision in order to better safeguard rights during times of crisis, such provision or policy must not be premised on a homogenous conception of women's experience such that it has the adverse effect of prioritising protection for a certain subset of women and girls. As demonstrated in Chapter 3 of this dissertation, CEDAW, the Protocol and anti-essentialist theory dictate that crisis-response strategies across all spheres must take special note of the effects such strategies might have on the most vulnerable members of society, including those women and girls who are further victimised by the unequal power-dynamics of race and class.<sup>346</sup> Measures taken need to recognise that, in order to meet the needs of poorer women and girls, different interventions may need to be prioritised over those that are merely gender-specific.<sup>347</sup> Policies and legislative amendments not only need to consider the utility of the content of a policy or provision, but must also consider the accessibility of such measures to those for whom this might be an obstacle. Thus, in terms of women's and girls' economic interests, this necessarily entails that, during crises, disadvantaged women and girls are able to sustain themselves in order to live day-to-day without having to lose their livelihoods in the process. This could be done through the provision of paid leave for women who have compounding responsibilities at home or who do not have the means to work from home.<sup>348</sup> For women who work in informal sectors or who are unemployed the availability of adequate social protection policies, as iterated in Chapter 4, is invaluable (this should be considered in conjunction with gender-budgeting as above).<sup>349</sup> In terms of education, there is a need to bridge the digital divide, both as it manifests between men and women and as it manifests between the privileged and underprivileged. Where possible, policy-makers need to prioritise alternative methods of education and the provision of infrastructure that would deliver free internet access to those in disadvantaged areas to

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<sup>346</sup> Op cit note 163 para 52(b); Op cit note 171 para 57(c); Op cit note 200 para 20.

<sup>347</sup> Op cit note 48 at 255.

<sup>348</sup> International Monetary Fund 'Gender Equality and COVID-19: Policies and Institutions for Mitigating the Crisis' (2021) available at <https://www.imf.org/-/media/Files/Publications/covid19-special-notes/en-special-series-on-covid-19-gender-equality-and-covid-19.ashx>, accessed on 22 September 2023 at 3.

<sup>349</sup> Ibid.

facilitate online learning in future crises.<sup>350</sup> Moreover, efforts in this regard must address the social and cultural norms that inform and perpetuate the educational divide between boys and girls with regard to both the physical and digital components.

### 5.2.3 Recommendations with regard to GBV

It must here be emphasised that governments, as a matter of continued policy, need to show a steadfast commitment to GBV prevention – such an undertaking should not only be prioritised in the wake of global crises.<sup>351</sup> Thus, as a point of departure, the legislative and enforcement measures already in existence should be continuously strengthened and improved and should allow ease of access to even the most marginalised or disadvantaged.<sup>352</sup> Furthermore, governments should extend efforts to understand and eliminate the underlying causes of GBV and mobilise efforts to transform the sociocultural attitudes that drive acts of violence against women and girls.<sup>353</sup> The COVID-19 pandemic has also laid bare the need for the categorisation of protective services for women and girls as essential services during periods of crisis or emergency.<sup>354</sup> These services would include shelters and hotlines and other modes of psychosocial support and should be made accessible in both urban and rural zones.<sup>355</sup> Last, GBV response plans, both under ‘normal’ circumstances and during crises, should adopt a multisectoral approach that involves the government, legal and medical professionals, civil society organisations as well as the broader community so as to maximise the effectiveness of the interventions.<sup>356</sup>

### 5.3 Conclusion

The discussions enumerated within the preceding chapters demonstrate how the COVID-19 pandemic has had an adversely disproportionate impact on the ability of women and girls to enjoy and exercise their human rights in an equal manner with men, particularly in the realm of women’s rights to economic equality (including employment), the right to an equal education and as well as the right to be free from gender-based violence. Furthermore, it has demonstrated that pre-existing structures of inequality between men and women and within

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<sup>350</sup> Op cit note 315 at 13; Anuradha Mathrani, Tarushikha Sarvesh and Rahila Umer ‘Digital Divide Framework: Online Learning in Developing Countries during the COVID-19 Lockdown’ (2021) 20 *Globalisation, Societies and Education* 625 at 637.

<sup>351</sup> Op cit note 294 at 119.

<sup>352</sup> Ibid.

<sup>353</sup> Ibid.

<sup>354</sup> Kotie Geldenhuys ‘Gender-Based Violence: The Shadow Pandemic that Runs alongside Disasters and Pandemics’ (2021) 114 *Servamus Community-based Safety and Security Magazine* 40 at 44.

<sup>355</sup> Ibid.

<sup>356</sup> Shalini Mittal and Tushar Singh ‘Gender-Based Violence During COVID-19 Pandemic: A Mini-Review’ (2020) 1 *Frontiers in Global Women’s Health* 1-7 at 5.

women as a homogenous group are amplified in crises of this nature. Thus, where there is a lack of social and economic protection, or where such protection is functionally inadequate or counter-intuitive, there is a real risk that States will be in breach of their international law obligations in respect of women's rights, and a serious risk of women's continued and aggravated social and economic subjugation. It is imperative that States such as South Africa are able to learn from their experience of the pandemic, as a novel crisis-response case study, in order to safeguard the rights of women and girls, particularly those who are disadvantaged. In order to mitigate the adverse effect of future crises on disadvantaged women and girls, ideals of FLT require that crisis-response strategies and policies are informed by gender, thereby necessitating the need for the participation and representation of women and girls in policy-making, as well as the need for gender-responsive budgeting. In keeping with anti-essentialist aims, government plans need to acknowledge and account for the heterogenous reality of the female experience as a failure to do so will mean that any effort to safeguard the rights of women and girls will not reach those who are most in need of it.

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