



Commission for Gender Equality  
A society free from gender oppression and inequality

# Monitoring the Implementation of the Maputo Protocol 2019/2020





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***THE PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND  
PEOPLE'S RIGHTS ON THE RIGHTS OF WOMEN IN AFRICA***

Monitoring the Implementation of the Maputo  
Protocol

2019/2020

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## Acronyms & Abbreviations

ACHPR:	African Charter on Human and People's Rights
APPER:	Africa's Priority Programmes for Economic Recovery, 1985
BCEA:	Black Conditions of Employment Act (Act 75 of 1997)
BPF:	Beijing Platform for Action
CEDAW:	Convention on the Elimination of all Forms of Discrimination Against Women
CFMC:	Clinical Forensic Medicine Centres
CGE:	Commission for Gender Equality
CSE:	Comprehensive Sexuality Education
DOH:	Department of Health
DSD:	Department of Social Development
DOWYPD:	Department of Women, Youth and People with Disabilities
DPSA:	Department of Public Service South Africa
EEA:	Employment Equity Act (Act 55 of 1998)
FCS:	Family Child and Sexual Offences
FGM:	Female Genital Mutilation
GBV:	Gender-Based Violence
GDI:	Gender Development Index
GGI:	Global Gender Index
GII:	Gender Inequality Index
HDI:	Human Development Index

HRBA:	Human Rights Based Approach
ICPD:	International Conference on Population Development
LGBTQIA+:	Lesbian, gay, bisexual, transgender, queer/questioning, intersex, asexual, and other
MRDA:	Mineral and Petroleum Resources Development Act (Act 28 of 2002)
MTSF:	Medium-Term Strategic Framework
NDP:	National Development Plan 2030
NEPAD:	New Partnership for African Development, 2001
NGM:	National Gender Machinery
NGO:	Non-Governmental Organisation
NGPF:	National Gender Policy Framework
NPA:	National Prosecuting Authority
OAU:	Organisation of African Union
PSC:	Public Service Commission
SADC:	Southern African Development Community
SAPS:	South African Police Service
SRHR:	Sexual and Reproductive Health Rights
STATS SA:	Statistics South Africa
SMS:	Senior Management Service
TCC:	Thuthuzela Care Centres
UNDP:	United Nations Development Programme

- UNSC: United Nations Security Council
- VAW: Violence Against Women
- WEF: World Economic Forum
- WPS: Women Peace and Security
- WPTPS: White Paper on the Transformation of Public Service

## 1. Background

The Organisation of African Union came about as result of the first Congress of African Jurists, held in Lagos, Nigeria in 1961. The Congress adopted a declaration otherwise referred to as the 'Law of Lagos', calling on African governments to adopt an African convention on human rights with a court and a commission.<sup>1</sup> The rationale of unionising the continent was to accelerate integration on the continent for incorporation into the global economy, while also addressing a variety of social, economic and political challenges caused by globalisation. At the time, African countries were advocating against colonialism and apartheid, striving for independence. The unique point of departure was focus on the social and cultural attitudes of Africans. Therefore, the Organisation of African Union (OAU) was established on the 25 May 1963.

The objectives of the OAU were to:

- Rid the continent of the remnants of apartheid and colonialism
- Promote unity among member states
- Intensify cooperation for development
- Safeguard the sovereignty and territorial integrity of member states
- Promote international cooperation within the framework of the United Nations

The coordinating committee for the liberation of Africa was also established. Through the OAU, the continent spoke in one voice representing the integrity of Africa. The OAU started putting in place a number of mechanisms, programmes and action plans to promote socio-economic and political integrity on the continent, largely through the preservations of minerals.

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<sup>1</sup><http://www.achpr.org/instruments/achpr/history/>

In 1980, **the Lagos Plan of Action** was developed, incorporating programmes and strategies for self-reliant development and cooperation among African countries.

The **African Charter on Human and People's Rights** (ACHPR) was one of the mechanisms adopted after deliberations that had, at times, led to hostility among member states. The ACHPR became part of the OAU agenda after the realisation that the OAU had been neglecting the human rights perspective for people within respective member states because it had mainly focused on ridding the remnants of colonialism. The main instrument used to safeguard human rights in international relations was the Universal Declaration of Human Rights. In 1981 therefore, the president of The Gambia convened two ministerial conferences in Banjul, where the draft ACHPR was adopted. It was subsequently submitted to the OAU Assembly, and today the ACHPR is also known as the Banjul Charter. Adoption of the ACHPR led to the establishment of the African Commission on Human and People's Rights which its headquarters is in Banjul, as well as the African Court which was established by virtue of Article 1 of the Protocol to the African Charter adopted in Ouagadougou, Burkina Faso, in June 1998. The Protocol came into force on 25 January 2004, to enforce the Charter. The Court is located in Arusha at Tanzania. Other mechanisms that were adopted in promoting unionisation of Africa include:

**Africa's Priority Programme for Economic Recovery (APPER), 1985**, which aims to rid Africa of debt incurred through structural adjustment programmes that were imposed on African countries as a condition of loans provided by international financial institutions such as the International Monetary Fund and the World Bank.

**The OAU Declaration, 1990**, which was adopted to address fundamental changes and the political and socio-economic situation in Africa during 1990, which also guided Africa to resolve challenges related to peace, democracy and security.

**The Abuja Treaty**, established the African Economic Community (AEC) in 1991, which envisioned for the AEC six stages, including the African Common Market.

**The African Union Constitutive Act**, adopted at the Lomé Summit in Togo and entered into force in 2001.

**The New Partnership for African Development (NEPAD), 2001**, adopted as an African Union programme at the Lusaka Summit.

The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, also known as the Maputo Protocol was established by the African Union, and went into effect in 2005.

Article 66 of the ACHPR provides for special protocols or agreements to be established that supplement its own provisions, as necessary. Adoption of the Maputo Protocol began during the 31<sup>st</sup> Ordinary Session of the Assembly of the Heads of State and Government of the OAU in Addis Ababa, Ethiopia, in June 1995. It was endorsed by resolution AHG/Res.240 (XXX1).

The Maputo Protocol was adopted on 11 July 2003, and entered into force on 25 November 2005. It was established following the realisation that while numerous international, regional and sub-regional mechanisms exist to protect women's human rights and advocate for gender equality, there were still gaps that result in the marginalisation of African women.

There was a concern that despite the ratification of those gender transformational international mechanisms, including the ACHPR, African women were still exposed to all forms of discrimination and harmful practices.<sup>2</sup> Additionally, the Maputo Protocol provides extensively for sexual and reproductive health and the rights of African women, addressing health needs

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<sup>2</sup> African Charter on Human and People's Rights on the Rights of Women Preamble. 2011. Cape Town: ABC Press

of women within the member states<sup>3</sup>. It was hoped that 54 AU member states would ratify the Maputo Protocol by 2015, and fully have domesticated and implemented it by 2020. In 2015, however, it was found that only 37 of the 54 AU member states had ratified the Maputo Protocol. South Africa signed the Maputo Protocol on 16 March 2004, ratified it on 17 December 2004, and deposited it with the Chairperson of the Commission of the African Union on 14 January 2005.

### **1.1 South African background: The Commission for Gender Equality**

The Commission for Gender Equality (CGE) is an independent statutory body established by Section 181 of the South African Constitution, along with other five other Chapter Nine institutions. The mandate of the CGE is outlined under Section 187 of the Constitution of the Republic of South Africa, 1996, and in the Commission for Gender Equality Act 39 of 1996.<sup>4</sup> The CGE is tasked with a broad mandate to promote respect for gender equality; the protection, development and attainment of gender equality; as well as to make recommendations to parliament on any legislation affecting the status of women's human rights in South Africa.

The CGE is further committed to creating a society free from gender discrimination and any other forms of oppression. The mandate is achieved through monitoring and evaluation of the implementation of gender related frameworks across all spheres of governance, as well as private sector in South Africa. The CGE also carries out its mandate through investigations and litigation of gender-related cases, research on predominant gender issues and social ills, as well as through education, advocacy and lobbying.

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<sup>3</sup> <http://www.the-isa.org/events/thematic-workshop-on-article-14-of-the-maputo-protocol-22-23-june/>

<sup>4</sup> Act 39 of 1996.

The Commission for Gender Equality Act mandates the CGE to monitor South Africa's compliance with all ratified international, continental and regional instruments that impact women's human rights and gender transformation in the country.

Section 11 (h) and (i) of the Commission for Gender Equality Act provides as follows:

- 11 (h) The CGE shall monitor the compliance with international covenants and international charters, acceded to or ratified by the Republic, relating to the object of the Commission [sic – refers to the CGE]
- 11 (i) The CGE shall prepare and submit reports to Parliament pertaining to any such conventions, covenant, charters and protocols relating to the objects of the Commission [sic – refers to the CGE].

These instruments include:

- The Elimination of all Forms of Discrimination Against Women (CEDAW);
- The Beijing Platform for Action (BPF);
- The Sustainable Development Goals (SDGs);
- The African Charter on Human and People's Rights (ACHPR);
- The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa; and,
- The South African Development Community Protocol on Gender and Development.

The purpose of this report is therefore to respond and adhere to Section 11 (i) of the Commission on Gender Equality Act by reporting on the progress of South Africa in the implementation of the Maputo Protocol, which is Part B of the ACHPR.

The AUC celebrated its 30<sup>th</sup> anniversary during the 59<sup>th</sup> Ordinary Session, hosted in Banjul from 17 October to 4 November 2016. This session also marked a milestone for the CGE, as it made took the initiative of submitting an application for Affiliate Status. As a result, the CGE is currently active in the international space, as Affiliate Status was granted by the African Commission during the 60<sup>th</sup> Ordinary Session, held in Mauritania in April 2018.

As a result, the CGE is now also obliged to report to the African Commission on the status of gender transformation in South Africa.

## **1.2 South Africa's women empowerment journey**

It is important to take stock and reflect on the journey and trajectories of South Africa in terms of advocating for women's empowerment and emancipation.

This initiative started in 1954, when the Federation of South African Women (FSAW) launched the Women's Charter at its inaugural conference on 17 April 1954. The FSAW comprised membership from African National Congress Women's League, Indian Congress, and the Congress of Democrats. The Women's Charter was crafted to unite women in action for the removal of all political, social, legal and economic inequalities of the time. The road was not easy, as from 1956, women started to be silenced by being exiled, arrested and imprisoned, as a strategy to dissolve the organisation.

Democratic dispensation resulted in a sophisticated constitution that was first enacted as an Act of Parliament, Act no. 108 of 1996. It is further important to reflect that after the first democratic elections, which were in 1994, South Africa was readmitted into the international space. As a result, South Africa participated at the United Nation's Fourth World Conference in Beijing in 1995, where the concept of gender mainstreaming was coined. The international community was tasked with the mandate to ensure the implementation of gender mainstreaming within their respective countries. In response to that call South Africa developed a National Gender Policy Framework which was

adopted as the key framework to implement gender mainstreaming in the country across all spheres in 2000,

At the dawn of democratic dispensation, South Africa put in place a constitution that provided for the Bill of Rights, which Section 9 of the Constitution under the Bill of Rights which among other things provide for Equality. Chapter 9 of the Constitution provides for the establishment of Institutions Supporting Constitutional democracy under Section 181, herein called Chapter Nine Institutions, which are independent bodies geared towards promotion of democracy in the country and holding the State and other entities accountable.

Since the democratic dispensation, gender discourse in South Africa has been guided by the international legislative and policy frameworks through ratifications of international conventions, and by acceding to regional charters, protocols and declarations that promote the status of women. In 2000, South Africa put in place the National Gender Policy Framework (NGPF) as indicated. NGPF was a document that was set to guide government and other entities on mainstreaming gender within policies and programmes. South Africa ensured compliance to all treaty bodies that it is a state party to, through domesticating such instruments and enshrining their provisions within the domestic frameworks to protect women's human rights in South Africa.

### **1.3 Introduction to this study**

South Africa in compliance with obligations to the ACHPR, has thus far submitted a periodic country report to the AUC, examining ten years of South African's implementation of ACHPR and the Maputo Protocol and its impact on gender transformation for its intend. The report was presented to the African Commission on Human and People's Rights in October 2016. Notably, the report did not reflect developments that occurred within the two years prior to its submission. It consisted of two sections:

- Part A, which reported on compliance with to the implementation of ACHPR
- Part B, which reported on progress in the implementation of the Maputo Protocol, as per reporting guidelines from the ACHPR.

The concluding observations contained recommendations to South Africa after the deliberations by the African Commission on the report. These concerns are expected to be addressed during the next reporting period.

The aim of this study in line with the CGE constitutional mandate also as a National Human Rights Institution playing oversight on the work of government and other entities, is to evaluate progress made by South Africa on the implementation of selected articles of the Maputo Protocol, on which the CGE focused during this financial year (as per the Annual Performance Plan 2019/2020, in compliance with Section 11 (h) and (i) of the Commission on Gender Equality Act.

The study will focus on assessing South Africa's compliance in terms of the implementation of the Maputo Protocol, and identify achievements as well as challenges hindering compliance.

#### **1.4 Objective of this study**

The objective of this study is to implement the Commission on Gender Equality Act, Sections 11 (h) and (i), which mandate the CGE to monitor and evaluate the implementation of the international and regional instruments that South Africa has acceded to or ratified. This study is therefore intended to evaluate the implementation and the impact thus far on the implementation of the Maputo Protocol.

This process also responds to Strategic Objective 3 as outlined in the CGE's Annual Performance Plan for the financial year 2019/2020.

## 2. Methodology

This study is classified as applied research, seeking to establish the impact of the implementation of ACHPR and the Maputo Protocol, and to identify potential challenges hindering the effective implementation of the mechanism thereof. According to Rossi (2004:8), applied social research grew at an accelerating pace and was commended for providing positive contributions during World War II. This approach is considered to be more applicable for this process since South Africa's democracy is very young when compared to other African countries, most of which attained independence from colonialism in the 1960s.

South Africa only ratified numerous international and regional human rights instruments, including the ACHPR and Maputo Protocol, after introduction of democratic dispensation in the country. It is imperative to evaluate the impact of the implementation of these mechanisms periodically to ensure that the country is compliant to international standards, especially in protection and promotion of people's human rights for attainment of equality in all spheres of life.

A single system design is considered the most appropriate technique for evaluating the impact of implementing the indicated instruments. Qualitative approach was used to conduct this study. Desktop research was employed, reviewing strategic documents and analysing annual and research reports from both government and independent research institutions on different thematic areas. Unstructured in-depth interviews were conducted where information was not available and/or not comprehensive enough to prove the level of achievement or failure in terms of implementing different articles of the two instruments.

The unstructured interview is considered one of the most applicable techniques, as it ensures that information supplied by participants clearly relates to specific questions. The technique also provides the researcher with

the opportunity to probe for more information and clarity where necessary.<sup>5</sup> Rubin and Rubin (1995:145)<sup>6</sup> indicate that an interview is comprised of three question types:

- *Main questions* – the researcher prepares a handful of main questions with which to begin and guide the conversation;
- *Probe* – when responses lack sufficient detail, depth or clarity, the interviewer puts out a probe to complete or clarify the answer provided, or request evidence to support the response provided; and,
- *Follow-up questions* – these pursue the implications of answers to the main questions<sup>7</sup>.

This technique is further considered applicable as it allows the researcher to explore the duty bearers' experiences, perceptions, opinions and their understanding with regard to these regional instruments, as well as what is expected of them in terms of implementing these mechanisms. The researchers will adhere to all the principles of research for compliance purposes, as required in the field of human science research.

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<sup>5</sup> Strydom, H. and Delpont, C. S. L. 2007. Sampling and Pilot Study in Qualitative Research. In AS de Vos et. al (Eds). Research at Grass Roots: For the Social Sciences and Human Service Professions. Pretoria: Van Schaik.

<sup>6</sup> Rubin, H. J and Rubin I. S. 1995. Qualitative Interviewing: the art of hearing data. Thousand Oaks, CA: SAGE.

<sup>7</sup> Ibid.

### 3. Progress on responding to previous concerns raised

#### 3.1. Criminalising corrective rape

**Concern as raised by the African Commission on Human and People's rights:**

*"Speed up the enactment of the Hate Crimes Bill to criminalise corrective rape"*

Corrective or curative rape as a term is used to describe the sexual violence perpetrated for the purpose of supposedly 'curing' a person of their real or perceived sexual orientation and/or gender identity"<sup>8</sup>. Hate crimes are crimes that impact not only on the individual victim, but on the whole 'hated group'. They are different from other crimes in that the offender is sending a message to members of a certain group that perpetrators consider a-normal within their respective neighbourhood, community, school or workplace including other social and formal spaces.<sup>9</sup>

Hate crime is an attack on identity, which is committed and motivated by inherent characteristics of the victim.<sup>10</sup> Unfortunately, there is no recognition of corrective rape as a hate crime by the South African Government.<sup>11</sup> The Sexual Offences Act<sup>12</sup>, as a piece of legislation, does not recognise the rights of lesbians as it pertains to their vulnerability to rape for curative motivations nor as a category of rape with aggravated circumstances, which ultimately results in blanket sentencing. This absence of any law that outrightly criminalises corrective rape, which is rape committed out of malice against the

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<sup>8</sup> Isaack, Wendy. "South Africa: Hate crimes and state accountability". Pambazuka, Women and Gender, 2007.

<sup>9</sup> Harris, Bronwyn. "Arranging prejudice: Exploring hate crime in post-apartheid South Africa". CSV, Race and Citizenship in Transition Series, 2004.

<sup>10</sup> KORAAN, R and GEDULD, A. "Corrective rape" of lesbians in the era of transformative constitutionalism in South Africa. *PER* [online]. 2015, vol.18, n.5, pp.1931-1952. ISSN 1727-3781. <http://dx.doi.org/10.4314/pej.v18i5.23>

<sup>11</sup> Luis Abolafia Anguita (2012) Tackling corrective rape in South Africa: the engagement between the LGBT CSOs and the NHRIs (CGE and SAHRC) and its role, *The International Journal of Human Rights*, 16:3, 489-516, DOI: [10.1080/13642987.2011.575054](https://doi.org/10.1080/13642987.2011.575054)

<sup>12</sup> Act 23 of 1957.

victim's identification shows a lack of understanding around LGBTQIA+ human rights violations. It is, however, noted that there is a collective process underway of developing the Hate Crimes Legislation. There is currently a Hate Crimes Bill awaiting promulgation by Cabinet. It is also noted that the Constitutional Court, which is the Supreme Law of the Land, set new course for dealing with rape in South Africa. This course holds liability of rape not only to the perpetrator alone, but to any spectator/s, which is a common feature of the modus operandi used during the perpetration of gang rape and corrective rape.

It is important that the crafting and enacting of the Hate Crimes Bill is expedited, as it is a key mechanism for combatting the heinous scourge of hate crimes in the country. The legislation will create crime category that will record the occurrences of hate crimes as stand-alone types. Disaggregated data should be taken into consideration on the data collecting tools when such crimes are reported. Hate crimes are human rights violations that defy constitutional principles, hence it is critical that the scourge of such violations is curbed.

The impact of Violent hate crimes have demonstrated to be more brutal.. Moreover, hate crimes often cause the direct victims as well as affected victims to suffer from psychological stress, more so than a non-hate crime victim. Thirdly, hate crimes are likely to have a serious negative impact on the targeted community as well as the society in its entirety.

Government institutions and the police should provide specific responses, such as gender sensitivity training for staff dealing with these crimes, and enhanced minimum sentencing for perpetrators. A law will also enable authorities to develop a standardised response to incident reports with an emphasis on better data collection and monitoring and evaluation of hate crimes. This will allow authorities to measure the extent of the problem, and the subsequent allocation of appropriate resources to address it. The CGE is notable of the initiatives that government has put in place as state responses to mitigate and

remedy the scourge of hate crimes and violations perpetrated against LGBTIQ+ community. Such measures include the establishment of the National Task Team (NTT) on Gender and Sexual Orientation-Based Violence Against LGBTI-Persons. The NTT was established in September 2011 by the Minister of the DOJ&CD and was initially mandated to address homophobic rape. However, in light of other violent crimes committed against LGBTI persons, its scope was later extended to incorporate all forms of gender-based violence crimes and sexual orientation-based crimes that are perpetrated against LGBTI persons, such as murder<sup>13</sup>. The NTT is a multi-stakeholder entity that comprises government departments and institutions that participate in crime intervention, particularly government departments that constitute the Justice, Crime Prevention and Security Cluster (JCPSC), as well as civil society organisations that focus on LGBTI persons and communities, and National Human Rights Institutions, including the CGE<sup>14</sup>.

The NTT developed a National Intervention Strategy (NIS) for the Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Sector (years 2014-2017) to address the so called "corrective rape" and other forms of violence directed to the LGBTI<sup>15</sup>. The NIS implementation period lapsed in 2017, and at the time of compiling this report, the development of another NIS was underway.

As part of the work of the NTT, a Rapid Response Team (RRT) was established to ensure speedy investigations and finalisation of cases of crimes committed against the LGBTI persons. The RRT meets on a monthly basis and one of its key priorities is to discuss updates on the status of cases. The effectiveness of the operations of this response team is yet to be examined and documented which calls for a separate research study to be commissioned to assess the effectiveness and impact of the NTT and its related structures such as the RRT. The study could capture and evaluate the opinions of all stakeholders involved, including the LGBTQIA+ persons and communities themselves. A critique of the NTT as it stands is that it excludes and overlooks the plight of Queer and Asexual persons whose rights are equally violated as they also face corrective rape and other forms of hate violence.

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<sup>13</sup> DOJ & CD (n.d.). National Intervention Strategy for Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) Sector.

<sup>14</sup> Ibid

<sup>15</sup> Ibid

In terms of the training and capacity building of law enforcement officials and other key role players, data obtained from the NTT indicates that a multisectoral guide to sensitise service providers about the rights of the LGBTI was developed and piloted<sup>16</sup>. Law enforcement officials from the South African Police Service (SAPS), National Prosecuting Authority (NPA), and DO&JCD were also targeted for this pilot training. Additionally, the legal unit of the CGE was under an agreement made with the office of the Deputy Chief Justice in the process of developing a manual to sensitise judicial officers on the rights of survivors of GBV, including survivors of "corrective rape". The development of the manual was still in its infancy stage at the time of compiling this report<sup>17</sup>.

As already indicated, in April 2019, SAPS approved the Standard Operating Procedure (SOP) to promote respect, protection and promotion of the rights of the LGBTI+ persons who are either victims or alleged perpetrators of crime<sup>18</sup>. The document was developed in response to reports and allegations levelled against the members of SAPS for their failure to uphold the rights of the LGBTI+ in the provision of their services. The guidelines contained in the SOP seek to ensure that the LGBTI+ persons, as well as their families, friends and support networks are not discriminated against in any shape or form, and that victims of crime do not experience secondary victimisation at the hands of SAPS members. The implementation of the SOP was set to commence on the 1<sup>st</sup> of October 2019 and would continue for a period three years before it is reviewed.

In terms of public awareness initiatives, the NTT had developed an multisectoral Communication Strategy to educate the South African public about the Constitutional Rights and encourage acceptance towards the LGBTI persons<sup>19</sup>. The Communication Strategy identifies a number of interventions that target various sectors of society. In spite of all these efforts however, discrimination and violence against the LGBTI community remain persistent challenges in the Country. In a study that was conducted by the Human Science Research Council (HSRC) in the KwaZulu

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<sup>16</sup> DOJ & CD (n.d.). Working with diverse communities. Understanding sexual orientation, gender identity and expression: A guide for service providers.

<sup>17</sup> Information obtained from a CGE Official, February 2020.

<sup>18</sup> SAPS (2019). Standard Operating Procedure to respect, promote, and promote the rights of the Lesbian, Gay, Bisexual, Transgender, Intersex, Plus (LGBTI+) Persons.

<sup>19</sup> DOJ & CD (n.d.) Communication Strategy: National Task Team on Gender and Sexual Orientation-Based Violence Perpetrated on LGBTI Persons.

Natal province in 2014, young lesbian women and gay men reported experiences of homophobic language and violence<sup>20</sup>. An attitudinal survey conducted by the same institution in 2017 revealed that 44.6% of South Africans chose "strongly agree" on the question about sex between women being "plain wrong", while 35% selected "strongly agree" about finding lesbians "disgusting". This underscores a need for more initiatives to address the negative attitudes and discriminatory behaviour of South Africans against the LGBTI.

### 3.2 Rights related to marriage

**Concerns as raised by the African Commission on Human and People's rights:**

*"Enforce laws that outlaw the practice of ukuthwala"*

Traditionalism is one of the identity elements of the South African Society in its heterogeneity. That is why different ethnic groups still maintain their cultures and traditional believes. *Ukuthwala* was traditionally a strategy that was used by two consenting adults who want to get married, but having obstacles that are posing as hindrance for them to achieve their goal. One of such hindrances being lack of bride price for the groom as bride price is one of the key incentives that is attached to marriage by the family of the bride. In other cases, it was used where there were disagreements between the two families in terms of negotiations hence obstructing the couple to proceed with the plan to get marriage.

In the evolution of the society, *ukuthwala* has now been used in a way that presents different forms of criminality which have tended to pollute this customary practice that was intended for a good cause at its initial inception.

*Ukuthwala* is currently practiced in a form of abduction that involves the kidnapping of a girl or a young woman by a man and his friends or peers with

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<sup>20</sup> HSRC (2014). Heteronormativity, homophobia and 'culture' arguments in KwaZulu-Natal, South Africa.

the intention of compelling the girl or young woman's family to endorse marriage negotiations. Section 31 of the Constitution recognises cultural rights of communities and groups provided that such rights are not exercised in a manner inconsistent with any of the provisions of the Bill of Rights.

The CGE notes that it is difficult to grasp the full scope and extent of child marriage in South Africa, as the prevalence of these incidences in the name of *ukuthwala* and other forms of forced marriages are not well documented hence not adequately reported. The Jezile case of 2014 cited as *Jezile v State and Others*<sup>21</sup> was the first *ukuthwala*-based conviction in the Western Cape. It centred on the abduction of a 14-year-old girl from her home in the Eastern Cape, following the negotiation and payment of lobola of R8,000 to her family.

The ACHRP acknowledges the existence of laws that criminalise *ukuthwala* such as:

Customary Marriage Act, wherein the age of consent for marriage is 18yrs

Prevention and Combating of Trafficking in Persons, through which concluding a forced marriage with another person is a punishable offence

- Criminal Law (Sexual Offences and Related Matters) Amendment Act<sup>22</sup>

The ACHRP however notes the following shortcomings that are negatively impacting the efforts to end this practice:

Prohibition of Forced Marriages and Child Marriages Bill is yet to be enacted

- Lack of enforcement by the South African Police Service (SAPS). Figures released by the SAPS to Parliament's Select Committee on Women,

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<sup>21</sup> *Jezile v S and Others* (A 127/2014) [2015] ZAWCHC 31; 2015 (2) SACR 452 (WCC); 2016 (2) SA 62 (WCC); [2015] 3 All SA 201 (WCC) (23 March 2015).

<sup>22</sup> Act 32 of 2007.

- Children and People with Disabilities show that only a handful of arrests have been made for *ukuthwala* abductions in 2015 despite the high recorder numbers of *ukuthwala*.<sup>23</sup> The Legal Resource Centre also
- o submitted that the statistics on *ukuthwala* are much higher than the data collected on registered child marriages.

The legal regime governing marriage and the age of marriage are yet to be harmonised. Generally, the legal age of consent is considered to be above the age of 16, provided it is consensual between both parties. Sex with a child that is 12 years old or younger is defined as statutory rape, as a child of that age is legally incapable of consent. Consensual sex is also allowed between children where one is below 16 and the other one above 16, provided that the age difference between them is not more than two years. Sexual activity between adults and adolescents younger than 16 is still a crime in virtue of a 16-year-old not being legally able/allowed to grant consent.

The CGE notes that the Department of Home Affairs is in the process of reviewing the existing laws governing marriage in South Africa to ensure that they comply with the principles of equality, non-discrimination and human dignity. Moreover, the process, amongst other things, is meant to look into marriages that involve minors (persons under 18 years). The current legislation allows for the marriage of minors which is contrary to the Constitution, and the Children's Act.<sup>24,25</sup>

The CGE has been advocating that there is an urgent need to harmonise the marriage related laws to provide for the age of marriage to be above 18 the age of 18 without any exception, in line with the provisions of Children's Act which defines the child in line with the international standards including the

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<sup>23</sup> SAPS 'Presentation to the Parliamentary Select Committee on Women, Children and Persons with Disabilities' (22 June 2011), <http://www.tlac.org.za/wp-content/uploads/2012/01/Implementation-of-the-Domestic-ViolenceAct.pdf> (Accessed 21 May 2016) at p22

<sup>24</sup> THE CONSULTATIVE STAKEHOLDER ENGAGEMENTS FOR THE DEVELOPMENT OF THE MARRIAGES POLICY <http://www.dha.gov.za/index.php/identity-documents2/53-notices/this.href>

<sup>25</sup> The Children's Act (Act 38 of 2005).

Maputo Protocol, and recommends for the review of laws criminalizing child marriage for adequate protection of girl children in the country from the criminality associated with *ukuthwala* in its manifest.

### 3.3 Rights pertaining to the Mining Charter

**The African Commission recommended that South Africa take measures to address the following limitations as articulated in the Mining Charter:**

*“Failure to address gender inequality in the sector whether in relation to ownership, management positions or other core mining roles”*

The CGE acknowledges and commends the South African government for the development and enactment of the new Mining Charter, which aims to transform the mining industry by promoting equity in the ownership, management and operations of the industry. The new Mining Charter provides that top executive management and mining boards be both be 50% black and 20% female, while senior and middle management are expected to be 60% black and 25% female. Junior management should be 30% women and 70% black.<sup>26</sup>

The CGE further acknowledges the report by the Chamber of Mines, which shows that the number of women working in the industry has increased from 11 400 in 2002 to 57 800 in 2015. Women now constitute 13.2% of the overall workforce, with black women comprising 10.2%. When broken down by category of work, women constitute 29.6% of top/senior management, 21.5% of middle management and 17.4% of skilled/ technical workers.<sup>27</sup>

That notwithstanding, the CGE notes that in as much as the Mining Charter 3 aims to promote gender equality within the industry, those that are set to

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<sup>26</sup> Mining charter

<sup>27</sup>Chamber of Mines, 2017. 'Women in Mining: Fact Sheet 2017 - <http://www.chamberofmines.org.za/industrynews/publications/fact-sheets/send/3-fact-sheets/424-women-in-mining>

benefit are upper/middle class and professional women who have formal education. Poor women who live and work in/around the communities where mining takes place remain unseen and thus left out of the production.

Furthermore, the CGE wishes to raise concerns over the fact that the identify of women and youth have been used interchangeably within the entire Mining Charter, hence there needs to be a clear disaggregation of data by demographics of South African society participating in mining, for ease of reference. Failure to collect disaggregated data will continue to marginalise women, as the mining industries may easily opt to simply procure from youth-owned companies instead of women-owned companies, hence continuing to subjugate women. This interchangeability occurs throughout the Mining Charter, leaving specific targets for women and girls unquantifiable and unenforceable.

*"Lack of reference to measures addressing gendered impacts of mining, which include the loss of livelihoods experienced by women who are dispossessed, due to mining activities"*

The CGE notes that there are currently no policies or guidelines within the mining industry that specifically and comprehensively address the gendered impact of mining. Social labour plans which are meant to drive corporate social responsibility programmes as mandated by the South African Constitution and the Mineral and Petroleum Resources Development Act<sup>28</sup> (MRDA) are not properly implemented. Women continue to be disproportionately negatively affected by mining, not only because of their proximity to the mines, but also because of the political, economic and social impediments they face in holding corporations and state parties to account.<sup>29</sup>

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<sup>28</sup> Act 28 of 2002.

<sup>29</sup> Action aid

### 3.3 The right to education and training

**Concern as raised by the African Commission on Human and People's rights:**

*"Develop programmes aimed at curbing pregnancy amongst girls of school going age"*

The African Commission commends the Department of Basic Education for developing the National Policy for the Prevention and Management of Learner Pregnancy. This policy seeks to ensure the accessible provision of information on prevention; choice of termination of pregnancy; care, counselling and support; frameworks for impact mitigation; and guidelines for systemic management and implementation.

The policy commits the basic education system and other role players to providing the Comprehensive Sexuality Education (CSE), a crucial tool to achieve optimal sexual and reproductive health among the youth. The aim of CSE is to ensure that young people gain the knowledge and skills to make conscious, healthy and respectful choices about relationships and sexuality. It provides an age-appropriate, culturally relevant and rights-based approach to sexuality and relationships, which explicitly addresses issues of gender and power, and provides scientifically accurate, practical information in a non-judgemental way.<sup>30</sup>

However, the African Commission notes that approval of the bill has not yet been finalised, and urges the Department of Basic Education to do so as soon as possible. The closing date for comments was 30 July 2018, after which the policy has not been finalised.

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<sup>30</sup> Basic Education extends deadline for comments on draft learner pregnancy policy <https://www.gov.za/speeches/departement-basic-education-extends-dealdine-public-comments-draft-learner-pregnancy-policy>

### 3.4 On economic and social welfare rights

**Concern as raised by the African Commission on Human and People's rights:**

*"Government should build operational and institutional mechanisms to combat the high rate of unemployment amongst women aged 15 to 24 years"*

The CGE acknowledges that unemployment as a whole is currently a global phenomenon and not a problem unique to South Africa. That notwithstanding, the CGE would like to point out that as things currently stand, this problem disproportionately affects women, specifically black women within 15–24 years old age category.

According to Statistics South Africa (Stats SA), who reported a decrease in labour participation within this demographic.<sup>31</sup> The South African labour market is more favourable to men than it is to women, and men are more likely to be in paid employment than women, regardless of race. Stats SA did, however, point out that the burden of unemployment is concentrated amongst the youth in general (aged 15–34 years), as they account for 63,4% of the total number of unemployed persons. Almost 4 in every 10 young people in the labour force did not have a job, with the unemployment rate within this group at 26% in the 1<sup>st</sup> quarter of 2019. Just under 30% of youth have jobs, and about half (48,8%) participate in the labour market.<sup>32</sup>

## 4. Article 2: Elimination of Discrimination Against Women

South African women have been oppressed in many ways over the years. Until very recently, women were not even fully recognised as legal persons<sup>33</sup>. Women's subordination generally cuts across race, class and other social categories. Women tend to be poorer than their male counterparts. The

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<sup>31</sup> STATS SA Quarterly Labour Force Survey Quarter 1: 2019  
<http://www.statssa.gov.za/publications/P0211/P02111stQuarter2019.pdf>

<sup>32</sup> Ibid

Gender Policy Statement, Department of Justice and Constitutional Development, 2<sup>nd</sup> edition, 2012

phenomenon of violence against women haunts women from all spheres of life including children, women with disabilities and the elderly. This happens both in the public sphere and in the privacy of their homes.

Cultural practices across South Africa generally expect women to defer to men in decision-making in both public and private spheres. As a result, women experience obstacles in entering corporate management and other decision-making positions, including public office. Those women who have penetrated decision-making structures tend to find the environment sexist, and are often forced to leave.

South African women's legal status meant that, in many instances, they could not represent themselves in court, enter the legal profession or conclude contracts without the assistance of men. Black women were obviously doubly disadvantaged as a result of their race and their gender. The law, in various forms, has had a significant role in this prejudice. Customary law, for instance, gives black women the status of minors and excludes them from rights regarding children and property ownership. South Africa's common law deprived white women of guardianship and various economic rights.

To date, women – black women in particular – are still economically disadvantaged. They make up a disproportionate section of the unemployed, and tend to occupy more of the lower-paid informal jobs, as domestic workers and farm labourers. Women also often earn less than men for the same tasks.

South African women also have to contend with extremely high rates of rape and domestic violence. While women are protected by the full range of rights guaranteed in the South African Constitution - the rights to life, dignity, privacy and others – they also receive specific protection in Section 9, entitled "Equality". It states:

*"(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 prohibition of discrimination on the grounds of gender, sex, pregnancy and marital status is clearly intended to protect women. The grounds "sex", which is a biological feature, and "gender", a social artefact, are both included - perhaps unnecessarily. But the result is that this section leaves no doubt that no unfair discrimination based on any feature of being a woman will be tolerated.

Since 1994, South Africa has made significant progress in putting in place legislations and policy framework for advancing gender equality and empowerment for women, children and people with disabilities<sup>34</sup>.

On 15 December 1995, South African Parliament adopted without reservation the CEDAW and its Optional Protocol, thus committing itself to a wide range of obligations under international law. On 10 December 1996, International Human Rights day, the late former State President, Nelson Mandela signed into law a final constitution for South Africa which also provided for the establishment of the Commission for Gender Equality (CGE) in April 1997.

South Africa also signed other key international and regional instruments, such as the aforementioned Beijing Platform for Action; the Millennium Declaration; the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa; the Solemn Declaration on Gender Equality in Africa; and the SADC Protocol on Gender and Development. It also passed domestic laws that promote gender equality and protect against discrimination and victimisation based on gender. Legislation in place includes the Employment Equity Act<sup>35</sup> (EEA); the Promotion of Equality and Prevention of Unfair Discrimination Act<sup>36</sup>, as amended by the Criminal Law (Sexual Offences and

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<sup>34</sup> <https://www.sahistory.org.za/article/women-protection-and-representation-in-south-africa-after-20-years-of-democracy>

<sup>35</sup> Act 55 of 1998.

<sup>36</sup> Act 4 of 2000.

Related Matters) Amendment Act; the Protection from Harassment Act<sup>37</sup>; the Domestic Violence Act<sup>38</sup>; the Prevention and Combating of Trafficking in Persons Act<sup>39</sup>; the Recognition of Customary Marriages Act<sup>40</sup>; the Maintenance Act<sup>41</sup>; the Choice on Termination of Pregnancy Act<sup>42</sup>, as well as the 2013 Women's Empowerment and Gender Equality Bill, which expired before it could be enacted. The latter process now needs to start from the beginning to craft the legislation that will enforce equality in the country.

The South African Framework for Women's Empowerment and Gender Equality defines empowerment as a process of 'conscientisation', which builds critical analytical skills for an individual to gain self-confidence in order to take control of her or his life<sup>43</sup>. Empowerment of women is an essential process in the transformation of gender relations because it addresses the structural and underlying causes of subordination and discrimination.

Promoting gender equality and women's economic empowerment requires regular and careful planning and monitoring, as well as gender budgeting to ensure inclusive and participative economic development. As a result, this enhances the process of gender mainstreaming, and ensures decentralisation of women-specific programmes as required across the country. South Africa has therefore put in place measures to enable women's economic development across the three spheres of governance in the country.

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<sup>37</sup> Act 52 of 2002.

<sup>38</sup> Act 116 of 1998.

<sup>39</sup> Act 7 of 2013

<sup>40</sup> Act 120 of 1998.

<sup>41</sup> Act 99 of 1998.

<sup>42</sup> Act 92 of 1996.

<sup>43</sup> The South African government and the empowerment of women, P Moleke and S Mpothane,

## ***4.1 Policies, programmes, strategies and initiatives geared towards the promotion of gender equality and the elimination of discrimination against women***

### ***4.1.1 South Africa's National Gender Policy Framework for Women's Empowerment and Gender Equality***

The National Gender Policy Framework (NGPF) for Women's Empowerment and Gender Equality was developed as an initiative responding to the resolutions that came out of the Beijing Platform for Action (BPF). South Africa therefore developed the framework in compliance with the BPF as a state party to the treaty, adopted in 2000 as the main gender transformational national policy guideline to map for gender mainstreaming across all sectors in the country in compliance with the international standards. The NGPF establishes guidelines for South Africa as a nation to take action to remedy the historical legacy of apartheid, which left immense gender inequality in the country.<sup>44</sup>

The Gender Policy Framework proposed measures, processes and mechanisms to indicate progress towards gender equality<sup>45</sup> These included legislation and policies; establishment of a focal point for women parliamentarians; gender mainstreaming across all levels of government; the development of provincial gender action plans and the monitoring of policy implementation.

This Gender Policy Framework establishes guidelines for South Africa as a nation to take action to remedy the historical legacy by defining new terms of reference for interacting with each other in both the private and public spheres, and by proposing and recommending an institutional framework that

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<sup>44</sup>The National Gender Policy Framework. 2000.

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File:///C:/Users/Admin/Documents/Articles%20%20Documents%20Elimination%20of%20Discriminati on%20Against%20Women/national-gender-machinery

facilitates equal access to goods and services for both women and men. The Gender Policy Framework proposes a process that moves away from treating gender issues as “something at the end-of-the-day” business. Often, while discussing development issues, it is presumed that gender issues can be addressed after the “hard-core.

#### **4.1.2 National Development Plan 2030**

The National Development Plan (NDP) is a broad strategic framework. It sets out a coherent and holistic approach to confronting poverty and inequality based on the six focused, interlinked priorities.

The National Development Plan was accepted by the South African Cabinet and at the Mangaung Conference of December 2012 as the basis document for government's future policy making, putting the South African society on a healthier development path towards 2030.<sup>46</sup> As such, this document has to be taken very seriously as a policy driver. The policies that will flow from this document should, however, take into consideration all the people in South Africa, in their demographic diversity. In this regard women constitute a very important policy constituency, making up 52% of the nation, and moreover are the reproducers of the nation (they bear children that will form new generations of citizens). Any policy that is gender blind (that does not take into consideration the effects of the policy on women and men in a differential way) is bound to run into serious problems.

The NDP envisages a South African society that is democratic and prosperous by 2030.<sup>47</sup> To achieve this society, an imperative of the NDP is to overcome social and economic exclusions, as they are causes as well as outcomes of poverty and inequality.

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<sup>46</sup> CGE Gender Analysis of The National Development Plan Vision 2030

<sup>47</sup> Department of Women Strategic Plan 2015-2020

However, concerns on engendering the NDPs have been raised. The view of the NDP is that South Africa has the potential and capacity to eliminate poverty and reduce inequality over the next two decades.<sup>48</sup> Women are far more vulnerable to and deeply affected by poverty than men; face overwhelming institutionalised challenges in gaining access to land and land ownership, political representation and employment; and remain largely unrecognised by and excluded from the formal economy. If the NDP as a national strategy to reduce poverty, exclusion and inequality does not specifically recognise and address these engendered imbalances and vulnerabilities, it will unwittingly perpetuate these, and have very little prospect of success.

The CGE has been mandated to ensure gender-aware and responsive policy making, and finds that the NDP has been constructed in an entirely gender-blind fashion, with women considered separately in an add-on feather entitled "Women and the Plan". CGE further indicated that it is clear that women, their potential, needs and vulnerabilities do not form an integral part of the NDP in a way that would have been visible if gender disaggregated data would have been used and questions about women's realities asked.

The CGE presented its report on the gender-blindness of the NDP before the Planning Commission in the Presidency. It has also been echoed in different forums advocating for gender budgeting that it is important that the NDP gets reviewed and written in a manner that will enable planners to accommodate the gendered aspects of life that need to be incorporated in the NDP as a critical national agenda. The CGE is aware of the parallel initiatives made by the Department of Planning, Monitoring and Evaluation (DPME), which is in the process of revamping the monitoring and evaluation system in the country

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<sup>48</sup> CGE Gender Analysis of The National Development Plan Vision 2030

across all facets of governance in the country. The Department of Women, on the other hand, is facilitating the process of gender budgeting.

#### **4.1.3. Medium-Term Strategic Framework: 2014-2019**

The Medium-Term Strategic Framework (MTSF) is Government's strategic plan for the 2014-2019 electoral term.<sup>49</sup> It reflects the commitments made in the election manifesto of the governing party, including the commitment to implement the NDP. The MTSF sets out the actions Government will take, and targets to be achieved. It also provides a framework for other national, provincial and local government plans.

At the end of the last administration (2009-2014), the Presidency published a twenty-year review, outlining progress made since 1994 and identifying challenges that still need to be overcome. Today, South Africa is a better place in which to live than it was in 1994. Political and social rights are protected, and the lives of millions of South Africans have improved through new laws, better public services, expansion of economic opportunities and improved living conditions with the basic needs as outlined under Section 27 of the South African Constitution. This, acknowledging there are still challenges. It is, however, important to recognise the strides that the country has made in this regard.

As indicated, the country still faces immense challenges. As the twenty-year review and the National Planning Commission's 2011 Diagnostic Report highlight, poverty, inequality and unemployment continue to negatively affect the lives of many people. Too few people have work, investment is too slow, and education lags behind requirements. The weak state of the economy impedes our efforts to reach our development goals, hence the urgent need to go back to the drawing table and devise new strategies to address

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<sup>49</sup> <https://www.dpme.gov.za/keyfocusareas/outcomesSite/Pages/default.aspx>

inequality, as well as the gender pay gap that is eroding the economy in the country.

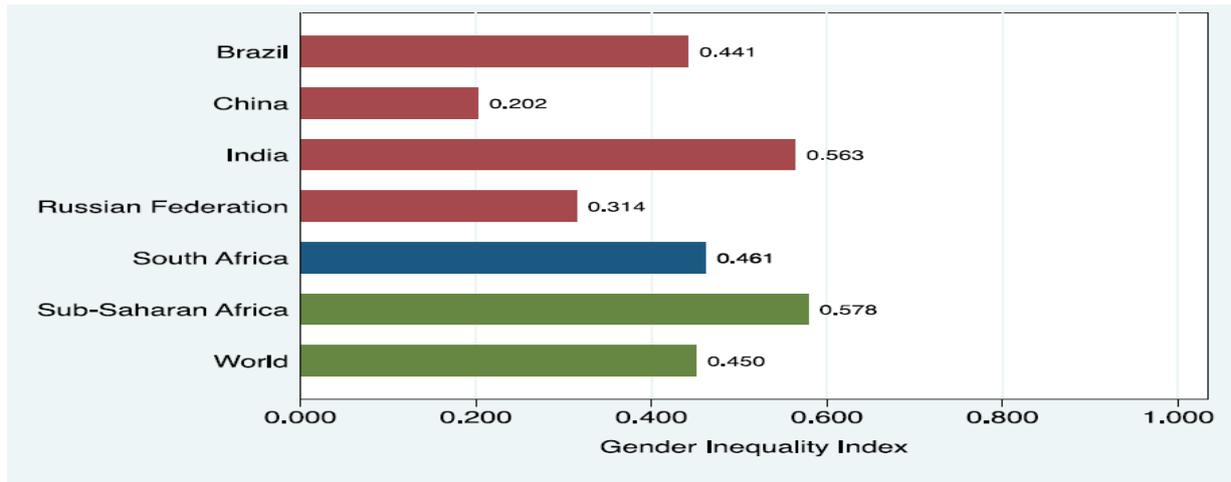
The UNDP publishes a Gender Inequality Index and a Gender-Related Development Index in line with its perhaps more well-known Human Development Index (HDI)<sup>50</sup>. The Gender Inequality Index (GII) was introduced in the 2010 Human Development Report, while the Gender-Related Development Index (GDI) was introduced in the 1995 Human Development Report. Similarly, the World Economic Forum (WEF) has published the Global Gender Gap Index (GGI) annually since 2006.

Relative to its fellow BRICS<sup>51</sup> countries, South Africa, ranked 113<sup>th</sup>, performs relatively poorly in terms of the HDI. Russia is ranked 57<sup>th</sup>, Brazil 79<sup>th</sup>, China 91<sup>st</sup> and India 135<sup>th</sup>. While South Africa's GII value is very close to the global average and is considerably better than the average for sub-Saharan Africa (Figure 2), the picture is not much different. Gender inequality, according to this measure, is lowest amongst the BRICS countries, with China ranked 37<sup>th</sup>, Russia 52<sup>nd</sup> and India 127<sup>th</sup>. Brazil and South Africa have relatively similar index values and are ranked 85<sup>th</sup> and 92<sup>nd</sup> respectively.

*Figure 1: South Africa Gender Inequality Index Compared: 2013*

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<sup>50</sup> South Africa Report on Status of Women in South African Economy, 2015. Department of Women,  
<sup>51</sup> Ibid



Source: UNDP:2014<sup>52</sup>

#### 4.1.4. National Gender Machinery

The National Gender Machinery is based on the need to balance mainstreaming of gender equality processes, ensuring that society broadly takes on the responsibility of redressing women's oppression and patriarchal domination as well as building gender equality.<sup>53</sup> It is against this background that today in South Africa, we have the CGE, structures located in government, headed by the Department of Women, supplemented by remaining provincial structures from the previous Office on the Status of Women, with Gender Focal Points at departmental and some municipal levels.

#### 4.1.5. Strategic Framework for Gender Equality within the Public Service

The Strategic Framework for Gender Equality within the Public Service (2006-2015) is aimed at achieving women's empowerment and gender equality in the workplace. Additionally, it is aimed at ensuring a better quality of life for all women through improved and accelerated service delivery by the public

<sup>52</sup> United Nations Development Programme.2014. Human Development Report. Sustaining Human Progress: Reducing Vulnerabilities and Building Resilience

<sup>53</sup>file:///C:/Users/Admin/Documents/Article%20Documents%20Elimination%20of%20Discrimination%20Against%20Women/national-gender-machinery.pdf

service. It is premised on the promotion and protection of human dignity and human rights of women, including the rights of women with disabilities. It takes cognisance of the role of institutions in promoting non-sexism and non-racialism, particularly issues pertaining to organisational transformation and change, and how these changes are managed within the context of a transforming and developing state. It is within this context of transformation and development that the Strategic Framework projects with renewed vigour have the goal of achieving women's empowerment and gender equality, including that of a new profile for the public service.

The priority focus on increasing women's participation in decision-making, and the concomitant adoption of the public service employment equity target of 50% representation for women at all levels of the Senior Management Service (SMS), are built into the current strategy. This translates to a concerted effort needed across all government departments, at national, provincial and local levels, in addressing women's empowerment and leadership development.

This Strategic Framework also highlights key challenges facing women:

- **Gender relations** is a key focal area in the process of transformation.
- **Poverty**. The systematic and socially engineered location of women in rural areas, and the underdevelopment of infrastructure in these areas, has been directly responsible for the poor conditions in which the majority of women live.
- **HIV and AIDS** affects women disproportionately to men. The power imbalances between women and men in interpersonal relations contribute to this growing pandemic.
- **Violence against women** remains a serious problem in South African society. The high incidence of rape, as well as other forms of physical and psychological abuse of women and girls, is evidence of this. While criminal justice systems are now beginning to deal with this crisis in a gender-sensitive manner, it continues to be a major challenge,

especially as it is compounded by its interrelation with poverty and HIV and AIDS.

- **Access to basic needs** such as education, housing, welfare, fuel and water has also been influenced by unequal gender, race and class relations. The inequality of power between women and men has inevitably led to the unequal sharing of resources such as information, time and income as well. Access to basic resources has improved since 1994, but women's control over these resources is still not satisfactory.
- **Access to employment and economic empowerment.** Differential access to employment opportunities exists. While women theoretically have access to a broader scope of position in the labour market, these new opportunities are accessible to a narrow pool of women, namely those who have had access to skills development, education and training.
- **Access to science and technology.** Science and technology, as fundamental components of development, are transforming patterns of production, contributing to the creation of jobs and new ways of working, and promoting the establishment of a knowledge-based society. Given the large number of women in the workforce, South Africa must devise mechanisms for engaging women with science and technology in order to enhance their productivity and thus increase the quality of national production. Women should be actively involved in the definition, design, development, implementation and gender-impact evaluation of policies related to economic and social changes.

#### **4.1.6. Gender transformation in a workplace**

Legislation require both public and private sector to promote equality and to eliminate discrimination in a workplace by complying with gender equity principles.<sup>54</sup> Other legislations which impact on gender transformation in the

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<sup>54</sup> CGE Investigative Report on Employment Equity Hearings, 2016/17

workplace include the Labour Relations Act<sup>55</sup>, the Basic Conditions of Employment Act<sup>56</sup>, the Skills Development Act<sup>57</sup>, and Promotion of Equality and Prevention of Unfair Discrimination Act.

#### **4.1.7. The law on breastfeeding**

Breastfeeding at work is already protected under South African law. The Basic Conditions of Employment Act (BCEA) stipulates that employees with infants must be allowed two breaks of 30 minutes each, every working day, to allow for breastfeeding or expressing milk. These breaks are mandatory for the first six months of the child's life.

In South Africa, in terms of the Code of Good Practice on the Protection of Employees during Pregnancy and after the Birth of a Child (which forms part of the Codes of the BCEA), arrangements should be made for employees who are breast-feeding to have breaks of 30 minutes twice per day for breast-feeding or expressing milk each working day for the first six months of the child's life.

Working women in particular need protection against discrimination and harassment because they often face difficulties when breastfeeding at their jobs.

#### *4.1.8. Guidelines for childcare facilities in the public service*

These guidelines were developed to provide technical assistance to national and provincial departments on how to establish childcare facilities for the benefit of public servants and their children. These facilities are intended to improve productivity and for promotion of gender equality within the context of Employee Health and Wellness Strategic Framework and policies in the public service.

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<sup>55</sup> Act 66 of 1995.

<sup>56</sup> Act 75 of 1997.

<sup>57</sup> Act 97 of 1998.

Based on the findings of the 2007 Public Service Commission Report on Gender Mainstreaming Initiatives in the Public Service, recommendations were made for the Department of Public Services and Administration to put a national framework in place, aimed at creating a more enabling environment, and recognising the importance of providing social benefits to families. This framework should compel departments to provide for breastfeeding facilities, flexitime to accommodate child caring considerations, and consideration given for child care facilities.

These guidelines seek to address challenges on the implementation of gender mainstreaming as identified by the study. It also serves as an efficiency tool for supporting women to reach Employment Equity targets and to expand on the current state in terms of implementation of family friendly policies in the public service.

#### **4.1.9. Gender mainstreaming**

Despite South Africa's favourable legislative context for the realisation of gender equality, equity and women's empowerment, multiple challenges continue to exist at implementation level. The majority of women still bear the brunt of the triple challenge of poverty, unemployment and inequality.<sup>58</sup> The Department of Women, Youth and People with Disabilities was mandated to work with line function departments to analyse policy and policy implementation through a gender lens to ensure the progressive realisation of gender equality and the socio-economic empowerment of women. This will be achieved through gender mainstreaming within government programmes, as well as within the private sector and other social structures.

Gender Mainstreaming Policy seeks to create a value system in which equality is a core value for both men and women. A clear conceptual understanding

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<sup>58</sup> Department of Women Strategic Plan 2015-2020

of gender concepts including the meaning of gender mainstreaming is essential for departmental officials at all levels, and for decision-makers to understand the intent of gender mainstreaming as a strategy. With lack of understanding of these concepts by the duty bearers, they are much more likely to abandon the critical notion of implementing gender mainstreaming to promote gender equality for maximisation of economic development in the country.

The CGE recommends that government departments ought to develop clear, practical and implementable gender-equity policies and implementation plans with equally clear and achievable targets as part of their annual strategic planning sessions.<sup>59</sup>

It also recommends that to hold discussions with the Department of Public Service Administration (DPSA) and the Public Service Commission (PSC) to develop a common approach that ensures that government departments and other public entities are compelled to put in place effective systems, including employment contracts and performance agreements for senior managers to incorporate KPAs relating to gender mainstreaming.

It was also noted that the NGPF should be reviewed, with particular emphasis on the position of Gender Focal Persons in the public service to be reconceptualized to ensure that their functions and responsibilities for gender mainstreaming are clearly defined and aligned to a senior manager within the Senior Management Service (SMS) level of every government department. Additionally, government departments should be required to incorporate gender mainstreaming into their annual programmes of action with clear, specific and dedicated budgetary allocations.

#### **4.1.10. CGE Employment Equity Hearings 2016/17**

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<sup>59</sup> Assessing Gender Mainstreaming in The Public Service, CGE (2015 Research Report)

The CGE conducted such hearings and continue to do so as part of their constitutional mandate. The Commission on Gender Equality Act , as amended, in terms of Section 11.1 (a)-(iv), “shall monitor and evaluate policies and practices of organs of state at any level; statutory bodies or functionaries; public bodies and authorities; and private business, enterprises and institutions; and make recommendations that the Commission may deem necessary”.

The primary objectives of these hearings are to assess the impact of the EEA and to hold private and public sector accountable for non-compliance with legislation.<sup>60</sup> The hearings also intend to raise awareness of national legislation and relevant international commitments. Furthermore, they ascertain the vulnerabilities and risks experienced by women and people with disabilities across various sectors and levels in the workplace. The hearings identify challenges encountered, as well as successes and progress made in achieving equity targets for women and persons with disabilities.

#### ***4.1.11. Department of Justice and Constitutional Development Gender Policy Statement- Balancing the Scales of Justice Through Gender Equality<sup>61</sup>***

The purpose of Department of Justice and Constitutional Development's Gender Policy Statement is to bring a gendered perspective into all aspects of planning, policy, legislation development, and the transformation of the justice system. This means that internally, when the department acts as an employer, and externally, when it acts as a service agency of the government. Ultimately, this should result in the achievement of gender equity and the substantive equality between women and men, principally through the empowerment of women.

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<sup>60</sup> CGE Investigative Report on Employment Equity Hearings, 2016/17

<sup>61</sup> Doj Gender Policy Statement 2<sup>nd</sup> Edition

Generally, gender policies seek to address the inequalities between men and women in society. The Department of Justice and Constitutional Development has come to realise that policies and practices that treat men and women identically, regardless of their inherent differences that disadvantage them,, hence resulting in injustice and inequity, or exacerbating existing inequality. The policy is also aware that a number of blatantly discriminatory laws are still to be found on South Africa's statutes and in common law principles. These treat women as inferior to men, or impose them to undue burdens on the basis of sex and not the other demographic characteristics. Such discriminatory laws and common law principles are in violation of our Constitution, as well as our international human rights obligations, particularly our obligations under the CEDAW.

The Gender Policy Statement prioritises the specific empowerment of women as a way of achieving gender equality. However, some of the interventions will benefit both men and women equally as a way of achieving gender equality. The Gender Policy Statement takes into account the diversity of women's experiences in South Africa, and particularly the compound oppression suffered by African, rural, working class and poor women, as a direct legacy of apartheid. In this regard, the department gives priority to those interventions that will uplift the most disadvantaged of women. This is in line with the commitments made by the Department for the implementation of the Beijing Platform for Action of 1996.

“The Gender Policy Statement is based on the premise that gender inequality is about power relations between men and women, and that any policy, plan or practice that seeks to achieve gender equality must equalise those. As such, the Gender Policy Statement is informed by gender analysis and requires all future policies, plans and administrative action also be informed by gender analysis. Simply put, a gender analysis seeks to identify and understand the manner in which any proposed policy, plan or action is likely to impact on

women and men, taking into account the diversity of their needs and experiences."<sup>62</sup>

#### **4.1.12. National Policy Framework Management of Sexual Offence Matters**

Sexual violence is universally recognised as a serious violation of human rights and discrimination against women, therefore the objectives of the NPF are mainly to ensure a uniform and co-ordinated approach by all government departments and institutions in dealing with matters relating to sexual offences, and to guide the implementation, enforcement and administration of the Sexual Offences Act, and to enhance the delivery of services, as envisaged in the Act, through the development of a plan for the progressive realisation of services for victims of sexual offences, within available resources.

The NPF intends to achieve the broad objects of the Act, which primarily seek to establish a criminal justice system that is quick, more protective, least traumatising, more sensitive to the plight of victims, and promotes cooperative responses between all government departments and institutions.

This NPF is based on four principles, which are informed by the objectives of the Act.<sup>63</sup>

*Principle 1: Adoption of a Victim-Centred Approach to Sexual Offences.* This principle underlines the importance of providing services to victims of sexual offences based on a victim-centred model. This approach recognises the centrality of the victim's role in the management of sexual offence cases and promotes the provision of services, processes and institutional mechanisms that improve victims' emotional and psychological well-being. This approach

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<sup>62</sup> <https://www.justice.gov.za/policy/1999-GenderPolicyStatement.pdf>

<sup>63</sup> Department of Justice and Constitutional Development's National Policy Framework Management of Sexual Offence Matters, 2012

recognises, at its core, that addressing the vulnerability of victims' due gender power imbalances, age, disability, sexuality and cultural dynamics and other factors often has a great impact on the outcome of the sexual offence cases. An efficient and effective victim-centred response therefore requires all service delivery points within the value chain of sexual offences to provide victim-friendly services that exhibit speed, sensitivity and responsive attitudes to reduce, and ultimately, eradicate secondary victimisation.

*Principle 2: Adoption of a Multi-disciplinary and Intersectoral Response to Sexual Offences* This principle rests on the premise that an efficient and holistic response to the management of sexual offences requires a multi-disciplinary and intersectoral approach. It requires collective participation of service providers such as the police officials, health care professionals, social workers, prosecutors, judicial officers, correctional officials, educators and traditional leaders. At community level, the integrated response of organisations such as NGO's, Community-based Organisations and Religious-based Organisations, which enhance interventions against sexual violence, also become imperative.

This principle therefore promotes a coordinated response to sexual crimes so as to allow room for joint development and execution of intervention actions and programmes, shared services and resources, integrated skills development, and collective monitoring and evaluation mechanisms, with the aim to improve the quality and quantity of services. Intersectoral collaboration not only provides a continuity of care and co-ordinated response to victims' needs, but also provides the opportunity for on-going oversight, feedback and evaluation, which leads to the improved provision of services.

*Principle 3: Provision of Specialised Services to the Victims of Sexual Offences* International and national research studies continue to highlight the severe consequences of sexual violence on both the direct and indirect victims of this crime. The international trend in addressing these consequences puts emphasis on the adoption of specialised services when dealing with victims of

sexual offences. It requires the provision of specialised services by people who acquired specialised knowledge and skills to specifically deal with sexual offences matters.

The notion of specialisation is widely recognised for its success in improving the quality and quantity of services. It eliminates mediocre and poor outcomes of services, whilst establishing greater sensitivity to victim's needs and deeper expertise in managing these cases. As against the often-crowded generalisation model, specialisation is also known for increasing speed, quality and quantity in service delivery. It is largely considered as a great motivator that can create great passion for one's work.

By making reference to the vulnerability of victims and the eradication of secondary victimisation, the Act may be further construed as recognising the peculiar circumstances of victims of sexual violence, which often gives rise to special needs that require a specialised response.

The existing government approach to service delivery recognises the notion of the provision of specialised services as imperative for victims of certain crimes, such as rape, domestic violence and other crimes associated with gender-based violence. Moreover, the Act itself requires the introduction of "certain services to certain victims of sexual offences" which is read to mean "specialised services". Government departments have established specialised units, divisions or structures that are capacitated by specialist personnel and special resources to deal with sexual offences matters. Examples of these include specialised services offered by Clinical Forensic Medicine Centres (CFMC) in the DOH; Family, Child and Sexual Offences (FCS) Units within SAPS; Thuthuzela Care Centres (TCCs) established by the NPA; Court Preparation Officers provided by NPA; as well as the Sexual Offences Courts that are capacitated with Witness Testifying Rooms, One-Way Mirrors, Anatomical Dolls and Intermediaries provided in courts, as well as One-Stop Centres managed by the DSD.

*Principle 4: Equal and Equitable Access to Quality Services for Victims of Sexual Offences* Equal access refers to non-discriminatory accessibility to the services provided to both victims and perpetrators irrespective of race, class, gender, sexuality, disability or creed etc. The equal treatment must be afforded in provision of services to all. The Act demonstrates this through the infusion of gender-neutral sexual offences.

The Act introduces the concept of progressive realisation of services for victims of sexual offences in recognition of development imperatives that often compete for limited government resources. However, while services introduced by the Act will be progressively realised, equitable access to such services across the CJS as well as across different locations is equally important. Equitable access to quality services is not only determined by geographical proximity and/or the availability of transport, but also by times (i.e. hour of the day) at which people access such services. Services and facilities must be made accessible to all people, especially persons with disabilities, e.g. by providing appropriately designed ramps, doorways, elevators for the physically disabled victims, sign-language interpreters for victims with impaired hearing, and Braille education material, audio tapes and communication aids for the visually impaired.

Equitable access is also founded on service providers' sensitivity to the diversity of victims' needs, including marginalised groups such as the disabled and LGBTQI+ victims.

### ***Available physical resources at courts dealing with sexual offenses cases***

As at December 2012, there were 322 CCTV systems, 98 one-way mirrors and 220 witness testimony rooms. The re-establishment of the Sexual Offences

Courts has therefore increased the physical resources by adding the following:<sup>64</sup>

Table 1: Physical Resources for 21 Sexual Offences Courtrooms – 2013/ 2014

<b>Region</b>	<b>Dual view CCTV</b>	<b>Testimony rooms</b>	<b>Private child- friendly waiting rooms</b>	<b>Adult- friendly waiting room</b>	<b>Bar fridge</b>	<b>Microwave oven</b>
Eastern Cape	2	2	3	3	3	3
Free State	4	4	2	2	2	2
Gauteng	2	2	2	2	1	1
Limpopo	1	1	1	1	1	1
Mpumalanga	2	2	2	2	2	2
Northern Cape	1	1	1	1	1	1
North West	2	2	2	2	2	2

<sup>64</sup>DOJ&CD: REPORT ON THE IMPLEMENTATION OF CRIMINAL LAW (SEXUAL OFFENCES AND RELATED MATTERS) AMENDMENT ACT 32 OF 2007: 01 April 2013 to 31 March 2014

Western Cape	5	5	5	5	5	5
<b>Total</b>	<b>21</b>	<b>21</b>	<b>17</b>	<b>17</b>	<b>18</b>	<b>18</b>

Source: DoJ & CD Report, 2013/14

#### 4.1.13. Equality Courts

The Equality Courts are informal civil courts situated within designated Magistrate Courts and all High Courts. The Equality Courts were created by the Promotion of Equality and Prevention of Unfair Discrimination (PEPUDA). PEPUDA is legislation created in terms of the Constitution in order to expand and give effect to Section 9 of the Constitution, the equality clause. 9 Item 23(1) of Schedule 6 of the Constitution required the passing of PEPUDA within three years of commencement of the Constitution.

### 5. Key challenges still facing women in South Africa

An analysis of the 20 years of democratic governance indicates that while considerable progress has been made regarding institutionalising women's rights and gender equality, South Africa still faces many challenges.<sup>65</sup> To achieve a society free of racism and sexism, the country must undergo a paradigm shift with regard to the way in which resources are allocated and how people relate to each other. These challenges which face the country have been translated into national priorities. All of these priorities have compelling gender dimensions which need to be addressed if the country is to advance towards women's empowerment and gender equality. The key challenges are:

**Gender relations:** One of the key objectives in the process of transformation remains that of the transformation in gender relations. The challenge is to

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<sup>65</sup> A STRATEGIC FRAMEWORK FOR GENDER EQUALITY WITHIN THE PUBLIC SERVICE (2006-2015)

shape the broad transformation project in a way which acknowledges the centrality and compatibility of the transformation of gender relations to the broader institutional change process. This requires a fundamental review of what has come to be accepted as 'business as usual.'

**Poverty** is a major problem for women in South Africa. The systematic and socially engineered location of women in rural areas, and the underdevelopment of infrastructure in these areas, has been directly responsible for the poor conditions under which the majority of South Africa's rural communities live. Apartheid laws coupled with repressive customs and traditions, disempowered women in ways that will take generations to reverse. While the democratic government has established enabling legislation, it must move towards delivery to alleviate and, eventually, eradicate poverty.

**HIV and AIDS** is a serious problem in South Africa. It affects women disproportionately to men. The power imbalances between women and men in interpersonal relations contribute to this growing pandemic

**Violence against women** remains a serious problem in South African society. The high incidence of rape cases, as well as other forms of physical and psychological abuse of women and girls, is evidence of this. While the criminal justice system is now beginning to deal with this crisis in a gender-sensitive manner, it continues to be a major challenge, especially as it is compounded by its interrelation with poverty and HIV and AIDS.

**Access to basic needs** such as education, housing, welfare, fuel and water has also been influenced by unequal gender, race and class relations. The inequality of power between women and men has inevitably led to the unequal sharing of resources such as information, time and income as well. Access to basic resources has improved since 1994 but women's control over these resources is still not satisfactory. The lack of infrastructure in the rural areas still acts as a barrier for women to gain easy access to basic resources.

**Access to employment and Economic Empowerment:** Differential access to employment opportunities exists. Whilst theoretically women currently have access to a broader scope of position in the labour market, these new opportunities are accessible to a narrow pool of women who have had access to skills development, education and training. In large measure, women's employment remains either within the traditional female occupations or within the domestic and farming sectors all too often as casual workers. They are concentrated within positions which are low-paying, and which have high rates of turnover. Women all too often are likely also to be unemployed or underemployed and thus constitute the poorest group. The challenge is to ensure that South Africa's macro-economic strategy promotes economic growth and sufficiently addresses the differential impact of macroeconomic policy on various groups of people depending on class, race, age, gender, location and disability.

**Access to science and technology:** Science and technology, as fundamental components of development, are transforming patterns of production, contributing to the creation of jobs and new ways of working, and promoting the establishment of a knowledge-based society. Given the large number of women in the workforce, South Africa must devise mechanisms for engaging women with science and technology in order to enhance their productivity and thus increase the quality of national production. Women should be actively involved in the definition, design, development, implementation and gender-impact evaluation of policies related to economic and social changes.

**Implementation of laws:** South Africa has adopted sophisticated rights-based legislation with explicit reference to gender equality. An important challenge remains in making these rights accessible to all women by the provision of information and the development of the knowledge and skills that women require to avail themselves of the mechanisms inherent in the legal remedies.

**Women's mobility in the workplace:** Women face many barriers with regard to their mobility in the workplace, particularly barriers of access to entry into management. Furthermore, women find themselves stuck at some positions, especially in the SMS. These challenges need to be debated and addressed.

Women's access to political power and decision-making has improved since the 1994 elections. There is a strong representation of women in the national, provincial and local legislative branches of government and in government departments. The challenge to political institutions is to change their culture in order to be more responsive to the needs of women politicians and civil servants.

World Economic Forums (WEF) Global Gap Index revealed South Africa's performance in terms of the most recent Global Gender Gap Index (GGI), disaggregated across the four sub-indices of Economic Participation and Opportunities, Educational Attainment, Health and Survival, and Political Empowerment.<sup>66</sup>

South Africa's Performance in Terms of WEF Global Gender Gap Index: 2014

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<sup>66</sup> Report on Status of Women in South African Economy, 2015

	Rank	Score	Sample Average	Female-to-Male ratio
<b>Global Gender Gap Index</b>	<b>18</b>	<b>0.753</b>		
Economic Participation & Opportunity	83	0.647	0.596	
Labour force participation	79	0.77	0.67	0.77
Wage equality for similar work (survey)	83	0.62	0.61	0.62
Estimated earned income (PPP US\$)	100	0.52	0.53	0.52
Legislators, senior officials & managers	65	0.43	0.27	0.43
Professional and technical workers	1	1.00	0.65	1.05
Educational Attainment	85	0.987	0.935	
Literacy rate	85	0.97	0.87	0.97
Enrolment in primary education	101	0.99	0.94	0.99
Enrolment in secondary education	1	1.00	0.62	1.11
Enrolment in tertiary education	--	--	0.88	--
<b>Health and Survival</b>	<b>1</b>	<b>0.980</b>	<b>0.960</b>	
Sex ratio at birth (female/male)	1	0.94	0.92	0.98
Healthy life expectancy	1	1.06	1.04	1.08
<b>Political Empowerment</b>	<b>12</b>	<b>0.397</b>	<b>0.214</b>	
Women in parliament	4	0.81	0.25	0.81
Women in ministerial positions	16	0.59	0.20	0.59
Years with female head of state (last 50)	64	0.00	0.20	0.00

Source: World Economic Forum: 2014

Notes: Index scores are on a scale of 0.00(unequal) to 1.00(equal)

## 6. Article 5: Elimination of harmful practices

Traditional cultural practices reflect the values and beliefs held by members of a community for periods often spanning generations. Every social grouping in the world has specific traditional cultural practices and beliefs, some of which are beneficial to all members, while others have become harmful to a specific group, such as women. These harmful traditional practices include early and forced marriages (*ukuthwala* as practised currently), virginity testing, widow's rituals, 'ukungena' (levirate and sororate unions<sup>1</sup>), female genital mutilation<sup>67</sup> (FGM), breast sweeping/ironing, the primogeniture rule, practices such as 'cleansing' after male circumcision, and witch-hunting.

Despite their harmful nature and their violation of national and international human rights laws, such practices persist because they are not questioned or challenged and therefore take on an aura of morality in the eyes of those practising them.

The human rights of women and those of girl-children are inalienable, integral and invisible part of universal human rights. But very often we find that these rights are violated by traditional and traditional practices that exist in different societies. In South Africa, these harmful practices manifest in different ways and vary from one province to another, and from one culture to another.

### 5.1 Virginity testing

Virginity testing is practised mostly in KwaZulu-Natal and the Eastern Cape. Virginity testing is the practice and process of inspecting the genitalia of girls and women to determine if they are sexually chaste. It is based on the false assumption that a woman's hymen can be torn only as a result of sexual

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<sup>67</sup> Ibid

intercourse.<sup>68</sup> It is a very controversial practice, both because of its implications for the girls tested and because it is not necessarily accurate.

Virginity testing compromises and potentially violates the girl-child's right to equality, dignity, privacy and freedom and security.<sup>69</sup> Limiting the right to practice one's culture is reasonable and justifiable in the context of our Constitutional values and provisions and South Africa's international human rights law obligations. The physical examination of girl-children that constitutes virginity testing cannot hold up to constitutional scrutiny.

## **5.2 Ukuthwala**

*Ukuthwala* like virginity testing, is mostly practiced in KZN and Eastern Cape. It is a form of abduction that involves the kidnapping of a girl or a young woman by a man and his friends or peers with the intention of compelling the girl or young woman's family to endorse marriage negotiations.

Today *ukuthwala* involves the kidnapping, rape and forced marriage of minor girls by grown men old enough to be their grandfathers. It contradicts the reasons advanced for practicing virginity testing.

## **5.3 Ukungena**

In terms of the Recognition of Customary Marriages Act (RCMA), a customary marriage must be negotiated and entered into in accordance with customary law. Customary marriages include polygamous practices; polygamy includes levirate and sororate unions, although the RCMA is silent on this. As it has been a cultural practice, it is still practised by some communities. If the inheriting of the deceased's spouse is conducted according to the custom of that

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<sup>68</sup> *Ibid.*

<sup>69</sup> Harmful Social and Cultural Practices – Virginity Testing? South African Human Rights Commission.

community, and the widower or widow and the deceased spouse's relatives' consent, then that marriage is a valid marriage under the RCMA.

#### **5.4 Male circumcision rituals or practices that affect women**

Civil society organisations in the Eastern Cape, KwaZulu-Natal and Limpopo have been complaining about the ritual of the 'cleansing' of young men who have just completed their circumcision process. The 'cleansing' involves the young men finding a female, perhaps even a widow, and gang raping her to 'cleanse' themselves after this ritual. This is definitely not rooted in *Ubuntu*. It is a criminal act.

#### **5.5 Widows' rituals**

Widowhood is a clearly defined social role for women, that is associated with prescribed institutionalised cultural and religious norms and the concomitant social sanctions if a deviation from the defined social role occurs. However, an altogether different set of norms applies to men upon the death of their wives.<sup>70</sup> The Commission on Gender Equality (CGE) conducted an in-depth country-wide study on the experiences of widowhood in different cultures and in different geographic areas in South Africa. The study revealed the following:

- There is large-scale discrimination against widows and widowers, including the imposition of burdens, obligations or disadvantages, and the with-holding of benefits, opportunities or advantages, as well as the regular harassment of widows and widowers in the context of the household, community, state and marketplace.
- A woman's status shifts drastically (downward) after the death of her husband in contrast to the widower's status which remains unchanged (including in terms of the administration of the estate).
- A decrease in social status not only has implications for women's livelihood, economic status and quality of life, but also increases their

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<sup>70</sup> Ibid

vulnerability to discrimination, abuse, harassment and gender-based violence, as well as their ability to assert their rights.

- Both women and men experience increased social pressure during widow(er)hood, but in opposite directions: widows are pressured to remain 'loyal' and 'faithful' to their late husbands, and honour their memory, whereas men are often pressured into a quick remarriage, regardless of their readiness or wish to remarry.
- If widows remarry, they rarely do so of their own free will. In some communities' widows may be forced into new conjugal relations with a male relative or be forbidden to remarry, even if they wish to do so.

### **5.6. Witch-hunting violence against women**

This practice is rife in Limpopo, and now lately in Eastern Cape and KwaZulu-Natal.

Witchcraft violence against women has been a global problem since time immemorial. It was practised in Europe, as described by William Shakespeare in *Macbeth*. Recently, in 2001 I was in Aarhus, Denmark, and I was invited to the annual celebration of their witches' day. They make a bonfire and burn the dummy figure of a woman on the fire.

The patriarchal nature of our societies, as influenced by colonialism and imperialism, explains why elderly women are targeted during witch-hunting. They are weak, defenceless and therefore easy targets. It is criminal, and the perpetrators must face the full wrath of the law.

The South African Constitution proclaims South Africa as a state founded on the values of human dignity, equality and the advancement of human rights and freedoms; as well as non-racialism and non-sexism. Women are obviously protected by the full range of rights guaranteed in the Constitution - the rights to life, dignity, privacy, and others. But they receive specific protection in Section 9, entitled "Equality". It says: Section 9(1): "Everyone is equal before the law and has the right to equal protection and benefit of the law". Section 9(3)

further state that '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 prohibition of discrimination on the grounds of gender, sex, pregnancy and marital status is clearly intended to protect women. The grounds "sex", which is a biological feature, and "gender", a social artefact, are both included - perhaps unnecessarily. But the result is that this section leaves no doubt that no unfair discrimination based on any feature of being a woman will be tolerated.

### **5.1 The Children's Act<sup>71</sup>**

Section 12 of the Children's Act, titled "Social, Cultural and Religious Practices", specifically prohibits FGM and the circumcision of female children. Contravention of this prohibition is an offence, which may result in a sentence of a fine or imprisonment of up to ten years if found guilty. The Children's Act also protects the privacy, bodily integrity and dignity of children, especially female children, by prohibiting virginity testing with regard to children younger than 16 years of age. Virginity testing may be practiced in relation to children older than 16, on condition that the testing is performed in the prescribed manner and that written consent is given.

### **5.2 The Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA)**

The Act, more commonly referred to as the Equality Act, was passed in 2000, and defines discrimination widely to include gender, sex, pregnancy, marital status and sexual orientation Chapter 2 of the Act deals with the prevention, prohibition and elimination of unfair discrimination, hate speech and

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<sup>71</sup> Culture, tradition, custom, law and gender equality, MJ Maluleke. Advocate of the High Court; Director in the Gender Directorate; Department of Justice and Constitutional Development:

harassment on any of the prohibited grounds, as set out in the definition of 'prohibited grounds' (which is not a closed list, but all of the 17 prohibited grounds are contained in the Constitution).

Section 8 of *PEPUDA* provides that the following constitute unfair discrimination:

- Section 8 (a) gender-based violence;
- Section 8(b) female genital mutilation; and,
- Section 8(d) any practice including traditional, customary, or religious practice which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and wellbeing of the girl-child.

This means that all practices such as virginity testing, *Ukuthwala*, and others that are dehumanising young girls, are regarded as unfair discrimination by *PEPUDA*.<sup>72</sup> The rights in *PEPUDA* can be enforced in the courts; there are specialised courts called Equality Courts where the violation of all these rights can be reported.

### **5.3 The Criminal Law (Sexual Offences and Related Matters) Amendment Act (Sexual Offences Act)**

Having sex with a girl-child without her consent following her kidnapping and abduction (*ukuthwala*) constitutes rape in violation of the Sexual Offences Act. Regarding a child, the age of consent is 16; meaning that sex with a child under the age of 16 constitutes a sexual offence. Sex with a child that is 12 or below is rape, as a child of that age is legally incapable of consent. The Act also prohibits other sexual activities with children, including sexual grooming.

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<sup>72</sup> Culture, tradition, custom, law and gender equality, MJ Maluleke. Advocate of the High Court; Director in the Gender Directorate; Department of Justice and Constitutional Development:

Section 17 of the Sexual Offences Act prohibits the sexual exploitation of children by their parents and others. Parents, relatives or others who collude in, or aid and abet, the *Ukuthwala* of a girl-child commit the crime of sexual exploitation of children. These parents and relatives also face being charged with trafficking in persons, under Section 71 of the Sexual Offences Act.

#### **5.4 The Recognition of Customary Marriages Act (RCMA)**

According to the RCMA, both the bride and the bridegroom must consent to a marriage. The age of consent is 18 years of age.

#### **5.5 The Prevention and Combating of Trafficking in Persons Bill [B7-2010] (the Bill)**

The Bill prohibits the recruitment, sale, supply, procurement, transportation, transfer, harbouring, disposal or receipt of persons by means of the use of threat, force, intimidation or other forms of coercion; or by abusing vulnerability, for the purpose of exploitation. Parents, relatives and others who hand over a child into a forced marriage for financial or any other type of gain can be prosecuted under Section 4 read with Section 1 of the Bill.

#### **5.7 The Domestic Violence Act**

A victim of *Ukuthwala* may apply for a protection order under the Domestic Violence Act against family members involved in her abduction.

#### **5.8 The Traditional Courts Bill**

The Traditional Courts Bill was crafted to harmonize the principles of the Bill of Rights with the Customary Law of the land. The principles of the traditional courts bill are based on reconciliation and restorative justice which promote the values that underlie an open democratic society as per the constitutional provisions under the Bill of Rights. The transformation of traditional courts is therefore a constitutional prerogative and it is part of the process of harmonizing the justice system with the new values of the Constitution, with the

Customary law which is a prominent law and part of the South African legal system, especially within the rural and indigenous communities that comprise the majority population of the country.<sup>73</sup> The importance of customary law is recognized as well as the need for it to be refined and aligned with the discourse of promotion of human rights, including women's human rights.

Among the reasons that led to the stalling of the TCB was the fact that it was discriminatory and not compliant with the provisions of the constitution on equality and universal access to justice. The Bill denied women the right to talk in those courts while in some instances they were not allowed to participate at all in the proceedings on the basis of them being women. That as a result led to many submissions to parliament from activists within the gender sector contesting the provisions of the Bill that seemed inconsistent with the provisions of the constitution.

Thus far, consensus had been reached on equal participation of women, levels of dispute resolution, jurisdiction boundaries, the scope of authority of traditional courts, legal representation, sanctions, appeal mechanism and accountability, among other matters.

The issues where the parties still have no clear agreement on include the nature of traditional courts getting rid of the discriminatory provisions and court system, the powers of traditional leaders, enforcement mechanisms and tradition/custom versus human rights. The Department (Corporate Governance and Traditional Affairs) indicated that the Bill should be ready to be sent to Cabinet before it is taken to Parliament.

### **5.9 KwaZulu-Natal Provincial Task Team**

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<sup>73</sup> For more information, see <https://www.parliament.gov.za/news/traditional-courts-bill-set-return-parliament>

## ***7. A task team has been set up in KwaZulu-Natal to investigate the extent and harmful effects of ukuthwala. Participation in political and decision-making processes***

During South Africa's national and local elections, different organisations, including the CGE, undertake monitoring on the representation of women throughout the election.

South Africa has been considered as one of the most transformed countries in Africa, after Rwanda, in terms of implementing the 50:50 quota, as provided for by the SADC Protocol on Gender and Development. The 50:50 quota was introduced in 2008, and during the 2011 local government elections, the African National Congress, in their manifesto, committed to using the zebra stripes policy in their party list to ensure that they implement the quota as provided. The African National Congress (ANC) was the only party that had 50% representation of women on their party list. The gender specific provisions of the ANC manifesto entailed the following:

- Upscaling the prevention of mother to child transmission of HIV/AIDS to 95% in all districts;
- Combat violence and crimes against women and children by increasing the capacity of the criminal justice system to deal with such violence; and,
- Vigorously implement broad-based economic empowerment and affirmative action policies, and adjust them to ensure that they benefit more broad sections of the South Africa people, especially the workers, youth, women and people with disabilities.

Other parties such as COPE, DA, IFP, UDM and ACDP did not have a quota on their party lists, as required. Gender was not mainstreamed in their manifestos, and the ACDP only took into cognisance the reproductive rights of women,

neglecting to recognise the economic and political contribution of women in the development of the country. This illustrates the general perceptions that some of the political parties have regarding the role of women in politics and the economy of the country. The rest of the manifestos of the parties that were targeted by the CGE were liberalistic, and were not taking into consideration the probable exclusion of women by them not having specific provisions in their manifestos of encouraging and promoting women's representation in the political and decision-making processes.

It has been taken into consideration over the years within the political landscape that political parties are the gatekeepers for women's entry into politics, because they control the nomination processes. They therefore play an integral role in ensuring women's representation in all their structures and at all levels. Members of the South African 50/50 Campaign have been proposing a legislated quota, which would compel all political parties to have equal numbers of women and men on their party lists, and which would carry sanctions for non-compliance.<sup>74</sup>

However, there is the danger of legitimising patriarchy by focussing only on the numbers. It is important that any discourse around quotas should also take into account qualitative factors, which entail women's quality representation within governance - not just to comply with the numbers - but also in providing the necessary expertise in the space. If any real, legitimate change is to take place, the institutions in which women have to function – which still remain largely patriarchal - need to change to become more enabling structures for women. It is also crucial that the electorate know how and what they should be holding their elected representatives accountable for.<sup>75</sup>

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<sup>74</sup> <http://www.genderlinks.org.za/article/political-change-threatening-gender-commitments-2008-11-26>

<sup>75</sup> *Ibid.*

## 7.1 Local government

The local government sector is governed by the Municipal Structures Act<sup>76</sup>, which specifies that a party's candidate list must contain gender parity as per Section 11(3):

*“Every party must seek to ensure that fifty per cent of the candidates on the party list are women and that woman and men candidates are evenly distributed through the list”.*

Despite the inclusion of the above provision, the Act is critiqued for having no associated sanction or penalty should parties fail to. Local government is lagging in terms of South Africa's commitments to gender equality and international instruments. The aforementioned is aptly captured in Gender Link's report titled “Gender in the 2011 South African Local Government Elections”, wherein it is cited that there is a decline in women's representation in local government elections.

Table 2: Women's representation in local government 2016 <sup>77</sup>

<b>Year</b>	<b>% Women Ward</b>	<b>% Women PR</b>	<b>% Women Overall</b>
1995	11%	28%	19%
2000	17%	38%	29%
2006	37%	42%	40%
2011	33%	43%	38%
2016	33%	48%	41%

<sup>76</sup> Act 117 of 1998.

<sup>77</sup> Gender Links. 2016

The table above presents the findings that came out of the 2016 local government elections, which also reflects on the cohort since the first local government elections in 1995. The table demonstrates that women's representation in wards increased significantly within the first three administrations, from 11% in 1995, to 37% in 2006. The numbers dropped by 4% during the 2011, elections and remained stagnant after the 2016 local government elections. The CGE is concerned with what could be leading to the regression when there are legislative and policy frameworks that promote the mainstreaming of gender in governance and leadership.

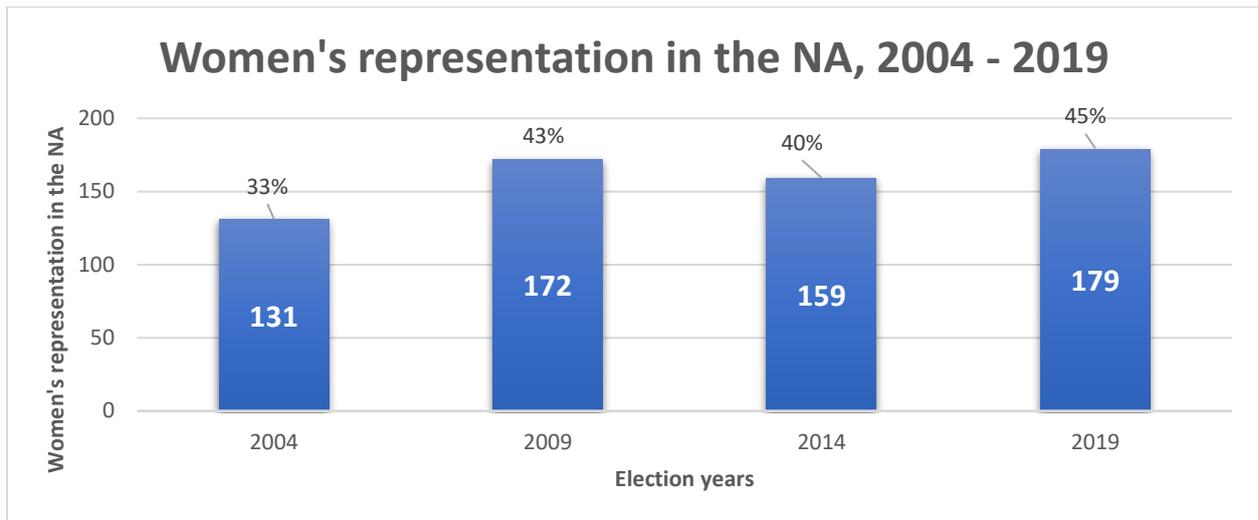
It has been a different case with women, where there was consistent improvement from 28% women's representation in 1995, to 48% in 2016, which reflects a significant shift and transformation. The findings also demonstrate a significant overall improvement from 19% in 1995 to 41% in 2016. These statistics are indicative that there is a need to enforce the issue of representation of women within governance and decision-making positions. This can only be through legislating for 50:50 representation of women, and imposing sanctions to the non-compliant entities.

*Table 3: Women's Representation in the National Assembly from 1994 - 2019<sup>78</sup>*

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<sup>78</sup> IEC. 2014. Final candidate lists published, and certificates issued. <http://www.elections.org.za/content/About-Us/News/Final-candidate-lists-published-and-certificates-issued/> Accessed: 14.10.2019.

<sup>78</sup> IEC. 2019. Voters' Roll Certified for National and Provincial Elections 2019. <https://www.elections.org.za/content/About-Us/News/Voters--Roll-Certified-for-National-and-Provincial-Elections-2019/> Accessed: 14.10.2019.



Source: National Assembly, IEC & CGE

The CGE's observation of South Africa's election processes and outcomes is in line with the Commission's legal and constitutional mandate. This is also in compliance with regional and global commitments and policy frameworks to monitor South Africa's compliance with the international standards in their processes of elections. In terms of domestic frameworks, South Africa's Constitution provides for promotion of gender equality as provided for in Chapter 2 Section 9 (1), which states that "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." South Africa is also a state party to several international and regional instruments, which obliges the country to commitment to promoting gender equality in all spheres including in the area of political participation and representation. Article 7 of the United Nations Convention on the Elimination of All forms of Discrimination against Women (CEDAW) also provides for state parties to take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, to ensure substantive equality between women and men with

regard to, inter alia, the right to vote and the right to participate and be adequately represented in processes of governance and decision making.<sup>79</sup>

The table above indicates that the representation of women in the National Assembly has been improving since 1994. During South Africa's first democratic elections, when women's representation was 27.7%; this significantly improved until 2009, where it reached 43%, which was commended even outside the borders of South Africa. The 2014 national elections resulted in a 3% regression to 40% women's representation in the National Assembly. South Africa for the first time in history realised the attainment of 50:50 representation in the National Assembly after the 2019 provincial and national elections. There were critiques and concerns that unsettled the gender sector in the country at the time. This came with the then new administration of former President Jacob Zuma and the debates were centred around whether the decline was a reflection of his conservatism and staunch belief system in patriarchy, hence the positioning of women within the broader society.

The improvement was noticed after the removal of President Zuma's administration, which placed women's representation back to 43%, which constituted a significant shift. The CGE also monitored the process of the 2019 general elections throughout all phases.(pre-elections, elections & post-elections).

## 7.2 Legislative framework

- The Employment Equity Act<sup>80</sup>;
- The Promotion of Equality and Prevention of Unfair Discrimination Act;
- National Framework for Women's Empowerment and Gender Equality (2002);
- Traditional Leadership and Governance Framework Act<sup>81</sup>; and,

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<sup>79</sup> Ibid.

<sup>80</sup> Act 55 of 1998.

<sup>81</sup> Act 23 of 2009.

- Communal Land Rights Act<sup>82</sup>.

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<sup>82</sup> Act 11 of 2004.

## 8. The Right to Peace

Notably, the post-1994 period is the first time South Africa has critically engaged with transitional justice; the oppressive eras of slavery, colonialism and apartheid did not afford such an opportunity. After the Anglo-Boer War, in 1913, the British and the Afrikaners made their peace (Plaatje, 2007). Post-1994, various internal conflicts that are threats to peace and security, ranging from xenophobia, #FeesMustFall, labour strikes and service delivery protests (Gqola, 2016; Molobye, 2017) continue to be recorded in South Africa. There has been no peace in South Africa over the past two decades, and the assurances of both President Thabo Mbeki and President Jacob Zuma that they would prevent the resurgence of Afrophobic violence, were not realised (Gqola, 2016); the events of 2008, 2015, 2018 and 2019 bear testimony to this. With no Peace Plan in place, promises of peace remain that: promises.

Whilst South Africa engaged a number of mechanisms to find peace and resolve conflict, notably the Truth and Reconciliation Commission, women have largely been left behind. The issue of compensation for the gross losses that women have suffered remains unaddressed. The project for national healing is undermined by gender inequality and crimes against women (Gobodo-Madikizela et al., 2014). Family disruptions, with absent and uninvolved fathers, remains a concern for some women (Nduna & Khunou, 2014). Violent regimes may have ended, but violence against woman is not a problem of the past, as women continue to feel unsafe in South Africa (Gobodo-Madikizela et al., 2014, p. 85). Further to national security concerns and the need to address transitional justice, at household and individual levels, whilst men are more likely to be murdered, female-headed households are also at a higher risk for murder (STATS SA, 2018), even though the actual individual victims may not be females. Such statistics underscore the vulnerability and bias of violence against women in comparison with their male counterparts. These findings further substantiate why women should have a

stake in interventions that are aimed at bringing peace and security to their communities.

Women's participation in peace and security dates back to the 20<sup>th</sup> Century, and includes the recent struggle against apartheid (South African History Online, 2011). There is compelling evidence for the continued, varied and meaningful involvement of women in peace and security (Gobodo-Madikizela et al., 2014), hence the importance of the involvement of civil society in the development, implementation, and monitoring of the National Action Plan. The multi-sectoral South African security sector is crucial in facilitating this consultative process. The South African security sector advocates, promotes and drives law enforcement, including compliance within the borders of the country.

The South African security sector is comprised of different public and private entities that include, among others:

- The Justice department, that deals with Justice and Constitutional Development; and,
- The SAPS, which is the country's principal law enforcement agency, mandated to protect and secure all the people of South Africa by preventing, combating and investigating crime, upholding and enforcing the law and maintaining public order.

Other departments concerned with cross border security include, among others:

- The State Security Department;
- The South African Revenue Service;
- The Department of Defence; and,
- The Department of Home Affairs.

Whilst South Africa has no active war, the country is viewed by the global community as one of the most violent in the global ranking; compared with

countries that are in a state of active war, such as Democratic Republic of Congo, there are more women who die, mostly at the hands of their loved ones working in the private sphere, than in the war struck countries. This justifies the applicability of the implementation of strategies and the need to maintain peace where conflict prevails, internally and externally. The late President Nelson Mandela's caution that, "what is important is not only to attain victory for democracy, it is to retain democracy" (Mandela & Crwys-Williams, 2011, p. 30) supports this. In order to strengthen and retain democracy, women's participation in peace and security plans is crucial. Women, Peace and Security (WPS) is a programme directed to facilitate the women, peace and security agenda by exchanging best practices to advance women's participation in national level peace and security policies and programmes. As citizens, it is important for women to be part of the solution on issues affecting them, and engage in conflict resolution and mediation, as they are the societal social fabric that mends the remnants of conflict and is burdened with the responsibility of reintegrating and rehabilitating the society beyond war. This is indicative of the importance of women during conflict resolution to respond to gender and transitional justice. In South Africa, WPS was introduced in compliance with UN Resolution 1325 to respond to the impact of conflict on women and children, and to include women in national, regional and global peace and security processes. The following are the objectives of participation of women in war situations.

1. To protect women's rights during armed conflicts;
2. To prevent impunity for gender-based crimes;
3. To mainstream gender aspects in peacekeeping operations; and,
4. To increase women's participation in the various phases before, during and after armed conflicts

WPS programmes serve as a guide to identify women's peace and security priorities; to capacitate women's voices and influence by allowing women to

play a participative role; to come up with plans to address peace and security threats affecting women and children; and ultimately, to eradicate them. WPS was introduced as part of the United Nation's Sustainable Development Goals (SDGs), that aims to, among other things:

- Eliminate all forms of violence against women and girls in the public and private spheres;
- Eliminate all harmful practices, such as child, early and forced marriage, and FGM, and
- End the abuse, exploitation, trafficking and all forms of violence against and torture of children.

Chapter 11 of South Africa's National Development Plan (NDP) outlines prescripts for social protection which are closely linked to peace and security. Social security is regarded as a basic right in South Africa. The NDP lists six functions of social protection: it must be protective; preventative; promotive; transformative; developmental and generative.

South Africa is classified as one of the most violent societies in the world, especially with regards to Gender-Based Violence/ Violence against Women and Children (GBV/VAWC). South Africa's major civil war, unlike with other countries, is within the home, and manifests itself as domestic violence, hence the relevance of UN Resolution 1325, and the Arms Trade Treaty, 2014. This is due to the fact that research has revealed that a number of women who are killed in South Africa due to GBV within the private sphere, have been proven to be higher than the number of women who are killed in active conflict zones.

South Africa, after attaining democracy, ratified and domesticated several international and regional instruments to inform the country's regulatory framework, as well as to ensure compliance with international standards. As per the CGE mandate, the CGE has been monitoring and evaluating a number of these instruments, and have produced reports that have been presented in Parliament. The findings in all those processes that the CGE has

undertaken, have demonstrated that there is a challenge in terms of implementation, despite the good legislative and policy framework that is in place to domesticate these international policies.

UN Resolution 1325 was adopted on 31 October 2000, (S/RES/1325/2000), "Women, Peace and Security,". This was the first Resolution since the first Security Council meeting of 1946. This was also the first platform where the impact of armed conflict on women was explicitly mentioned, and where women's contribution to conflict resolution and lasting peace was thoroughly deduced and deliberated.

This Resolution was echoing the provisions of other related United Nations treaties, such as Beijing Platform for Action, the CEDAW and its Protocol, among other instruments. UN member states, after that initial meeting on women's participation, have been invited periodically by the Security Council to strengthen their commitment to the implementation of this Resolution, by the development of costed national action plans or strategies for ease of implementation.

The adoption of Resolution 1325, also led to the reviews and adoption of other subsequent Resolutions such as 1820, 1888, 1889, 1960, 2122 and 2242. This was due to the realisation that women and children were not only overwhelmed by combatants and other elements of armed conflict, such as sexual violence, but were also overwhelmed by new conflict environment that emerged during the post-conflict period, during rehabilitation and reintegration. South Africa as a state party, was fortunate to be one of the founding countries of United Nations Security Council (UNSC), even though it was suspended in 1974 due to the apartheid regime. It was reinstated to the UN after the 1994 elections, and it was elected for the first time to serve as a non-permanent member on the UNSC in the 2007 – 2008 period, with second and third terms, 2011 – 2012 and 2019 – 2020 respectively.

## 8.1 Successes

During the first two terms that South Africa served as a non-permanent member on the UNSC, it successfully managed to advocate for closer cooperation between the UNSC and the AU Peace and Security Council. This was to achieve greater strategic coordination between the two councils for the enhancement of effectiveness in addressing the challenges related to peace and security on the African continent. This led to the adoption of the landmark Resolution S/2033/2012 in 2012, which made recommendations on the strengthening of the cooperation between the two councils. That led to the two councils developing collaborative efforts in addressing the issues of peace and security within the global context.

South Africa, during its third term, is at the final stage of developing the National Strategy that will enable the country to effectively implement the Resolutions in adherence with international standards. The process started in 2009, but has now received the requisite political will, and both government and civil society organisations are now working together to make this process a success.

## 9. Sexual and reproductive health rights

*'Reproductive rights are a set of rights of individual to decide whether to reproduce and have a reproductive health. This includes and not limited to an individual's rights to plan a family, terminate a pregnancy, use contraceptives, learn about sex education and gain access to reproductive health services.'*

African women have historically been centre stage on issues related to development within their respective communities and individual families. In addition to that role, women have also been responsible for exercising a reproductive role within the family units of their communities. However, their meaningful contribution was regularly denied until recently, with the introduction of radical advocacy on the implementation of regulatory frameworks which promote gender equality, and which also include women's right to sexual and reproductive health. There is a growing acceptance and recognition of the important role that women play in the development process. Women are crucial to the success of family planning programmes, bear much of the responsibility for food production and account for an increasing share of wage labour in Africa.<sup>83</sup> Despite their significant contributions, women continue to face formidable social, economic and political barriers.<sup>84</sup> Women are continuously denied access to certain structures in society by their male counterparts, who cite cultural practices which initially also included women's sexual and reproductive rights. As Anunobi correctly notes, women are unrecognised as full partners either in the family or in society, women have been denied equal access to education, job training, employment, healthcare, ownership, and political power.<sup>85</sup>

The realisation of women and girls' reproductive health and rights was one of the key agenda items of the International Conference on Population and

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<sup>83</sup> Anunobi, F, Women and Development in Africa: From Marginalization to Gender Inequality.

<sup>84</sup> Ibid

<sup>85</sup> Ibid

Development (ICPD), held in 1994. This was with the realisation that fulfilling the rights of women and girls was central to the development agenda. The rationale was to promote every individual's human rights and dignity, which also includes the right to plan one's family. That was acknowledged to be one of the foremost foundations of sustainable development.

The ICPD was therefore adopted by 179 member states as a road map and strategy towards improving the life for every individual. Sexual and Reproductive Health Rights (SRHR) is an important key precondition for women's empowerment. Central to SRHR, is the ending of GBV, and harmful practices including FGM. Addressing these social ills is a way of investing in the youth and women, which will subsequently lead to the promotion of environmental sustainability and population control. The ICPD was a 20-year programme of action, the key objective of which was to ensure universal access to SRHR services. It was aimed at protecting and fulfilling the rights of adolescents and the youth, and provide them with accurate information on comprehensive sexuality education and reproductive rights for life long health.

The member states were also obliged to remove legal barriers towards SRHR, including inconsistencies in the legal protections that can create age related barriers. The African Charter on Human and People's Rights on the Rights of Women, herein called Maputo Protocol as it was adopted in Maputo in 2003, realising the gap in the protection of African women on the issues that affect them directly. It also echoes the sentiments of the ICPD as stipulated under Article 14, addressing the issues that African women are faced with.

South Africa is a member state to these two important frameworks, and is therefore obliged to legislate for their implementation; much work has been done in this regard. The CGE, as per its mandate as provided under Section 11(l) and (h) of the CGE Act, has been monitoring the implementation of the Maputo Protocol and other related instruments for the advancement of gender equality in the country. The issue of sexual and reproductive rights has been a subject for many boardroom debates universally, due to the realisation

that there is a need to promote human rights-based approaches in the provision of health services. There is growing recognition of the importance of linking reproductive rights and gender equality for the effective response to persistent gender inequalities and gender-based violence epidemics currently ravaging South Africa. The new health and human rights- based programme will build on lessons learnt from the previous programmes, reviews and lessons learnt of innovative approaches, evidence-based research and legal support initiatives, where CGE can add real value.

The CGE wishes to see effective and meaningful implementation of the human rights-based approach (HRBA) to sexual and reproductive health, maternal health, and child health. This is an international obligation placed on South Africa, as it is linked to the technical guidance document of the Office of United Nations High Commissioner for Human Rights. This obliges South Africa to address, via a HRBA, the reduction of preventable maternal mortality and morbidity.

Reproductive rights rest squarely on the recognition of the basic rights of all couples, and individuals, to decide freely and responsibly, one the number, spacing and timing of their children - including having the information to do so - as the right to attain the highest standards of sexual and reproductive health. This is provided for under the Section 27 of the Constitution. South Africa, as a member state to the Maputo Protocol, is also mandated to implement the provisions of the protocol on sexual and reproductive health and rights as follows:

States Parties shall ensure that the right to health of women, including sexual and reproductive health is respected and promoted. This includes:

- a) The right to control their fertility;
- b) The right to decide whether to have children, the number of children and the spacing of children;

- c) The right to choose any method of contraception;
- d) The right to self-protection and to be protected against sexually transmitted infections, including HIV/AIDS;
- e) The right to be informed on one's health status and on the health status of one's partner, particularly if affected with sexually transmitted infections, including HIV/AIDS, in accordance with internationally recognised standards and best practices; and,
- f) The right to have family planning education.

In most societies, irrespective of economic, social or political status, women and girls, as compared to men and boys, face more restrictions on their sexuality and freedom of movement. Restrictions range from women and girls' inability to make sexual and reproductive choices free from discrimination, coercion or violence. Such restrictions may occur at home, where women may not be able to negotiate safer sex due to the asymmetrical nature of the relationship between men and women and boys and girls within the private sphere. They also occur in communities and public spaces, where there may be lack of access to comprehensive sexual and reproductive healthcare; sometimes coercive sterilisation, stigmatisation of persons with disabilities and people living with HIV; as well as delayed or denied justice, where sought. The CGE has taken a stand to audit the sexual and reproductive health rights to ensure that the South African government adheres to international standards by ensuring that the health policies in the country are crafted in a manner that promotes HRBA. The effective implementation of HRBA ensures accountability by duty bearers, and ease of access to health services by the rights holders, who in this case are women and children, as well as adolescents.

It is critical that the CGE focus on this area, as it is evident that HIV, sexual and gender-based violence, and unwanted pregnancy emanating from different social ills that the South African society is faced with, undermine the health and wellbeing of large number of the population, with young people being the

most vulnerable. Sexual relationships and sexual decision making are the source of sexual and gender-based violence and teenage pregnancy, as well as unwanted pregnancy, respectively.<sup>86</sup>

### **9.1 Theoretical orientation**

Rights to comprehensive reproductive health services, including access to health services, are key for men, women and children for accessing healthcare, maternal and neonatal care, contraceptives and other products or services. These fundamental rights are rooted in international human rights standards which guarantee the rights to life, health, privacy and non-discrimination. These rights are sometimes violated when the state makes these services inaccessible to women, men, vulnerable populations including newborn babies and children.

Equal reproductive rights, along with SRHR, are guaranteed in international and regional human rights treaties, and many domestic laws. It is argued that if these are not reinforced by national legislation and the courts, they become empty promises. However, just three decades ago, it was encouraging to realise the inclusion of SRHR among the first set of rights that have been recognised under international law; according to the Universal Declaration of Human Rights, the CEDAW and the International Convention Government and Political Rights of Women and Men. However, universal access to reproductive rights is still not fully realised in many parts of the world, including South Africa, despite the potential benefits to the economy.

SRHR encompass the right of all individuals to make decisions about their sexual activity and reproductive systems, free from discrimination, coercion and violence, and to achieve the highest attainable standard of sexual health. For example, access to sexual and reproductive health services allows individuals to choose whether, when and with whom to engage in sexual activity; to

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<sup>86</sup> Sexual and Reproductive Health and Rights: Fulfilling our commitments. 2011-2021 and Beyond. Department of Health

choose whether and when to have children; and to have access to the information and means to make those choices. Protecting and promoting the sexual and reproductive health rights of all individuals will not only save lives and empower people, but can lead to significant economic gains for individuals, families, and nations. It has been shown to reduce healthcare costs, improve productivity, and increase rates of education, which leads to greater economic growth. The HRBA is key, as it empowers rights holders to claim and enjoy their rights and support duty bearers to meet their obligations. The HRBA ensures that policies and programmes put in place are responsive to the needs of rights holders, and promote the human rights principles of equality and non-discrimination, participation and the indivisibility of the rule of law. This further promotes the principles of accessibility, availability and acceptability when it comes to provision of health services.<sup>87</sup>

## **Legislative Framework**

### 8.1. The laws that guide sexual and reproductive health rights

#### 8.1.1. National Health Act<sup>88</sup>

This Act provides for a uniform, structured healthcare system in South Africa, taking into consideration the obligations imposed by the Constitution, as well as other national, provincial and local government laws with regards to health services.

#### 8.1.2. Choice of Termination of Pregnancy Act<sup>89</sup>

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<sup>87</sup> Human Rights Based Approach to Health: Health Policy Makers.ND.

<sup>88</sup> Act 61 of 2003.

<sup>89</sup> Act 92 of 1996.

The Act provides for the determination of the circumstances and conditions under which the pregnancy of a woman may be terminated, and for the matters connected with the pregnancy. This allows for women to make the choice in relation to terminating their pregnancy.

#### 8.1.2 Sterilisation Act<sup>90</sup>

This Act provides for the right to sterilisation, the circumstances under which sterilisation may be performed, and the circumstances under which sterilisation may be performed on persons incapable of consenting, or incompetent to consent, due to their mental capacity.

#### 8.1.3 Mental Health Care Act<sup>91</sup>

This Act provides for mental health in the country, and in particular the admission and the discharge of mental health patients in mental health institutions, with emphasis on human rights for mentally ill patients, as provided under the Bill of Rights as well as Section 27 of the Constitution.

#### 8.1.4. Criminal Law (Sexual Offences and Related Matters) Amendment Act

Include all sexual crimes in one law;

- o Define all sexual crimes;
- o Make all forms of sexual abuse or exploitation a crime;
- o Make sure that both men and women can use the law with regard to sexual crimes;
- o Make sure that government departments work together to protect complainants from unfair treatment or trauma;
- o Improve the way the criminal justice system (the courts and police) works;

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<sup>90</sup> Act 44 of 1998.

<sup>91</sup> Act 17 of 2002.

- o Make the age when both men and women can give permission (consent) to have sex, 16 years;
- o Make sure that rape survivors get post-exposure prophylaxis (PEP), which is medical treatment that can reduce their chances of getting HIV from the rape;
- o Allow rape survivors to find out if the person who raped them has HIV; and
- o To establish a National Register (a list of names) for Sex Offenders

The Act also addresses the archaic law on sexual offences that existed prior to this law coming into effect. Amongst other things, the Act repeals the common law offence of rape and replaces it with an expanded statutory offence of rape, applicable to all forms of sexual penetration without consent, irrespective of gender. This means that a woman, a man (or a child) can now be raped by another woman or man. Another development in this Act is the enactment of expanded or amended sexual offences against children and persons who are mentally disabled, including offences relating to sexual exploitation or grooming, exposure to or display of child pornography or pornography to children and the creation of child pornography.

The Act also makes provision for the establishment of the National Inter-Sectoral Committee on the Sexual Offences Amendment Act. The Committee must, among others, advise the Minister for Justice and Constitutional Development on various matters including the implementation of the Act.

#### 8.1.5. Domestic Violence Act

The Act provides for victims of domestic violence the maximum protection from domestic abuse. The Act also provides remedies for victims, and how they can access such remedies.

#### 8.1.6. Promotion of Equality and Prevention of Unfair Discrimination Act

This Act prohibits unfair discrimination by the government and by private organisations and individuals and forbids hate speech and harassment.

## **Conclusion**

South Africa has been identified as a poster child in terms of the progressive constitution and legislative framework for protection of people's rights. Despite the visible gender inequality in all areas of life there has been visible initiatives by government in the promotion of gender equality. Achievement of 50/50 representation of women in parliament after 2019 has proven to be a move in the right direction to achieving gender transformation in South Africa. Even though Maputo protocol is not legislated in the country, there are several pieces of legislation that address the provisions of the Protocol. The CGE will continue to monitor the level of compliance in terms of the implementation of the Maputo protocol as per the constitutional mandate.







Commission for Gender Equality  
A society free from gender oppression and inequality

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