Correcting Corrective Rape: *Carmichele* and Developing South Africa’s Affirmative Obligations To Prevent Violence Against Women

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Introduction

On April 28, 2008, Eudy Simelane, a thirty-one-year-old lesbian from Kwa-
Thema township outside Johannesburg, was walking near her home after a night
out with friends. Simelane had traveled the world with South Africa’s women’s
soccer team, Banyana Banyana, and was training to become the first female
referee for the 2010 World Cup, hosted by South Africa. On her way home
from the bar, however, she was attacked by a group of men. The men dragged
her across the ground, stabbed her twenty-five times in the face, chest, and legs,
and gang raped her, dumping her body in a ditch where they left her to die.

Simelane was the victim of “corrective rape,” an act of violence against
women committed by men ostensibly to “cure” lesbians of their nonconforming
sexual orientation—or “correct” it—the belief being that homosexuality is an
imported white disease. Attackers, often family members, friends, or neighbors

2. Id.
3. Id.
5. See, e.g., J.A. Nel & M. Judge, Exploring Homophobic Victimisation in Gauteng, South Africa: Issues, Impacts and Responses, 21 ACTA CRIMINOLOGICA, no. 3, 2008 at 19, 24 n.2 (“‘Corrective rape’ seeks to justify the rape of those people who are perceived to not conform—or to disrupt—expected gender roles, behaviour and/or presentation.”); Emma Mittelstaedt, Comment, Safeguarding the Rights of Sexual Minorities: The Incremental and Legal Approaches to Enforcing International Human Rights Obligations, 9 CHI. J. INT’L L. 353, 354 n.8 (2008) (“‘Corrective rape’ is the term used to describe the practice of raping African women and girls thought to be lesbians with the claimed purpose of turning them into ‘real African women’—the underlying belief being that homosexuality is a ‘disease’ imported by the white colonial empire.”); Kelly, supra note 4 (reporting the rape of Eudy Simelane as an
of the victims, say they are teaching lesbian women “‘a lesson’” by raping them and “showing them how to be ‘a real woman.’” The danger of corrective rape, though, is not limited to lesbians: because corrective rape is meant to “cure,” or simply to punish, nonconforming sexual orientations, corrective rape may affect not only gay women, but also any women with nonconforming sexual identities. In one alarming case, thirteen-year-old twin daughters were raped because their mother was a lesbian. Thus, any woman thought to be “too different” or insufficiently feminine and who fails to stay invisible is at risk.

What’s worse, what happened to Simelane is not an isolated incident: according to a recent broadcast, “at least 500 lesbian women are victims of corrective rape each year” and, according to one study, “86% of black lesbians from the Western Cape said they lived in fear of sexual assault.” Although an increasingly “‘macho culture’” and continued misunderstanding of and animus toward homosexuality are likely responsible for the rise in corrective rapes, South Africa also lacks the tools to address these atrocities: only a “fraction” of cases are prosecuted and out of the thirty-one lesbian women

example of corrective rape); see also INT’L GAY & LESBIAN HUMAN RIGHTS COMM’N, EQUAL AND INDIVISIBLE: CRAFTING INCLUSIVE SHADOW REPORTS FOR CEDAW 22 (2009), http://www.iglhrc.org/binary-data/ATTACHMENT/file/000/000/287-1.pdf (discussing corrective rape).

6. See Nel & Judge, supra note 5, at 24; see also Shereen W. Mills, Reforming the Law of Rape in South Africa, in RETHINKING RAPE LAW: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 251, 253 (Clare McGlynn & Vanessa E. Munro eds., 2010) (“Most rape is by a perpetrator known to the victim.”)


8. See Nel & Judge, supra note 5.

9. Channel 4 News, supra note 5.

10. See Nel & Judge, supra note 5, at 24 & n.2; see also Dan Rather Reports: Excerpt from Corrective Rape (HDNet television broadcast Mar. 1, 2011), available at http://www.hd.net/blogs/2011/03/excerpt-from-corrective-rape/ [hereinafter Dan Rather Reports] (noting that “now lesbians’ more open lifestyle is making them targets” for corrective rape).


12. Kelly, supra note 4; see also Geen, supra note 7 (“We get insults every day, beatings if we walk alone, you are constantly reminded that you deserve to be raped.”).

13. Kelly, supra note 4; see Mills, supra note 6, at 252; see also Dan Rather Reports, supra note 10 (describing South African society as “male-dominated”).


15. Al Jazeera, supra note 11.
who were reported murdered in homophobic attacks in a decade, there has been just one conviction. Moreover, the number of corrective rapes is likely higher than reported because crimes based on sexual orientation are not expressly recognized in South Africa and because underreporting is highly likely for crimes of sexual violence due to the lack of faith in and the prejudice of the police, the low conviction rate, trauma endured by rape victims at trial, and, for gay women, the fear of persecution for reporting.

Corrective rape both implicates a number of fundamental rights under South Africa’s 1996 Constitution and denies women the promise of a post-apartheid South Africa free from all forms of fear, hatred, and bigotry. In this sense, corrective rape is unique: not only is corrective rape more likely to affect poor, black women who live in townships, but gay women targeted for corrective rape are also more likely to find themselves isolated, with little support, and generally vulnerable. These women are even less likely to report an instance of corrective rape when faced with society’s general opprobrium that continues to attach to homosexuality: the attitude of those who strongly disapproved of the inclusion of sexual orientation in the Equality Clause has not dissipated and many gay people, especially those from black and coloured communities, are not accepted by society generally. Moreover, because documented instances of corrective rape often involve serious physical abuse and even death and are performed by individuals or groups of men motivated by a fundamental misunderstanding of homosexuality and general animus toward gay people, there is a case to be made to compel the government to step in. Because South Africa was the first country in the world to constitutionalize equality on the

16. Geen, supra note 7; Kelly, supra note 4 (noting that Eudy Simelane’s case produced the first conviction).
17. Geen, supra note 7.
19. See S. Afr. Const., 1996 ch. 2 (Bill of Rights); infra section II.A.
20. See infra notes 80–83 and accompanying text.
21. See Nel & Judge, supra note 5, at 20 (noting that constitutionally guaranteed services are not being provided to gay South Africans because of service-provider discrimination); see also Yolanda Mufweba, “Corrective Rape Makes You an African Woman,” IOL NEWS, Nov. 7, 2003, http://www.iol.co.za/news/south-africa/corrective-rape-makes-you-an-african-woman-1.116543 (describing the rape of a thirteen-year-old girl for being too “butch” and her mother’s response: “‘this is what happens to girls like you’”).
22. See infra note 136 and accompanying text.
basis of sexual orientation,²⁴ because the women targeted for corrective rape are often among the most vulnerable and isolated in society, because the men who commit corrective rape are frequently motivated by a deep-seated animus toward gay people, and because the post-apartheid government has championed respect for human rights, South Africa, under the 1996 Constitution, is uniquely positioned to do more to protect women from the gross deprivation of human rights that is corrective rape.

That being said, my Note focuses on corrective rape. This is not to trivialize other forms of violence against women or imply that there is a hierarchy of violence, with some forms more worthy of protection than others. Furthermore, I acknowledge that most, if not all, of my analysis pertaining to the government’s affirmative duty to protect women from corrective rape may be used to argue that the government has a positive, general duty to protect women from all forms of violence against women. My Note is intended to jump-start a conversation about corrective rape in particular and violence against women in general and to point out ways in which, because of the unique circumstances of corrective rape and South Africa’s distinct constitutional structure, the country is well placed to demonstrate real leadership and tackle corrective rape. As Constitutional Affairs Minister Mohammed Vale Moos noted, the 1996 Constitution “‘is a document that will no doubt serve as a beacon in constitutionalism not only here, but internationally . . . .’”²⁵

The real violence of corrective rape, then, is that despite South Africa’s legal success in protecting gay rights and despite the promise of a post-apartheid South Africa that values human rights, the government has not done enough to stop corrective rape. But to American students of constitutional law, South Africa has done nothing to violate the rights of women like Simelane—neither the state nor any of its agents attacked her, directly causing any deprivation of her constitutional rights. Nonetheless, what if constitutional doctrine could be utilized such that, even though the state has not directly caused harm, it may nonetheless be held responsible for failing to exercise its power in a way that gives effect to the rights of its citizens and protects them from some of the grossest forms of violence? My thesis is that, under the 1996 Constitution, the government is under such an affirmative duty and must prevent, investigate, and punish corrective rape based on a synthesis of the Constitutional Court’s seminal decision in Carmichele v. Minister of Safety and Security²⁶ and South Africa’s international legal obligations. Only by imposing this affirmative obligation will women and girls like Simelane be able to fully and freely exercise their rights and enjoy the promise of a post-apartheid South Africa.

In Part I, I discuss the history of violence against women in South Africa and

²⁴. See Christiansen, supra note 14, at 997.
²⁶. 2001 (4) SA 938 (CC) (S. Afr.).
the extent of such violence today, as background to corrective rape. I then summarize *Carmichele*, an answer to the violent legacy left over from apartheid. *Carmichele* revolutionized the common law and today requires lower courts to develop the common law when it fails “to reflect the spirit, purport and objects” of the 1996 Constitution.27 Because the 1996 Constitution enshrines certain fundamental rights—such as the rights to life, equality, and freedom from violence28—*Carmichele* requires courts to update the common law—including the duties government owes its citizens—to reflect these fundamental values.29 *Carmichele*, then, provides a roadmap for legal action compelling the government to do more to protect women from violence, the only way to truly prevent corrective rape.

In Part II, I first address the constitutional implications of corrective rape, which, because of the breadth and number of rights the 1996 Constitution deems fundamental, trigger the need for courts to analyze the common law to ensure that the government’s common law duties reflect Bill of Rights protections under *Carmichele*. Second, I proceed to a general discussion of the contemporary debate over the horizontal application of fundamental rights: do constitutional rights merely limit abuses by the state or do they also touch on private conduct, equally capable of infringing fundamental liberties? A brief survey of this debate highlights two possible means of applying the 1996 Constitution to corrective rape to prevent it most effectively—either by charging those who commit corrective rape with violating the constitutional rights of their victims or, as in *Carmichele*, by developing the common law vis-à-vis the government and placing the burden on the state to give effect to South Africa’s constitutional protections. I then argue why the latter is the ideal way to bring an end to corrective rape. Finally, I conclude by discussing the practical logistics of bringing a *Carmichele* suit.

In Part III, I discuss South Africa’s international legal obligations and the doctrine of due diligence, which requires affirmative steps by government actors to prevent, investigate, and punish private human rights violations and may hold the state responsible for failure to satisfy these requirements.30 I contend that lower courts, having determined that the government’s common law duties must be developed under *Carmichele*, must look to South Africa’s international legal obligations. These courts should find that the doctrine of due diligence fits neatly into the newly developed wrongfulness (or duty) prong of the test for delict—the South African equivalent of negligence in U.S. tort law31—and affirmatively obligates the government to better protect against corrective rape.

Finally, in Part IV, I outline the possible contours of the due-diligence-turned-wrongfulness-prong to suggest what South Africa’s affirmative obligations to

27. *Id.* at 954–55 para. 36.
30. *See infra* notes 273–320 and accompanying text.
prevent corrective rape might look like, with an eye to addressing institutional and cultural barriers, which, if overcome, will help correct corrective rape.

I. VIOLENCE AGAINST WOMEN AND THE CARMICHELE REVOLUTION

A. VIOLENCE AGAINST WOMEN: FROM APARTHEID TO TODAY

Despite South Africa’s success in undoing apartheid and the country’s commitment to and progress in human rights, the legacy of apartheid remains, particularly when it comes to violence against women and corrective rape. Given the levels of violence against women, it is perhaps unsurprising that the deep misunderstanding of and gross animus toward homosexuality in modern South Africa add a new dimension to the violence and give rise to corrective rape.

During apartheid, state-approved violence rendered violence in general an appropriate and normal political tool such that anti-apartheid forces began to valorize it as a means to a justified end. The threat of violence against women held in apartheid detention centers was effectively used “as a tool of political control”: detention was a central tool of the apartheid regime and threats of sexual violence—designed to subdue and control—aimed at women prisoners were used to great effect. Moreover, violence and the threat of violence against women in detention were rarely reported because of the impossibility of corroboration. Sexual abuse of women by security forces, however, was not limited to dissidents in prison; rather, members of the police force also raped women who were not detained.

32. See Andrews, supra note 18, at 339 (noting that, less than a decade after apartheid, South Africa ranked seventh in the world in the number of women represented in Parliament).

33. See Helène Combrinck, The Dark Side of the Rainbow: Violence Against Women in South Africa After Ten Years of Democracy, in ADVANCING WOMEN’S RIGHTS: THE FIRST DECADE OF DEMOCRACY 171, 171–72 (Christina Murray & Michelle O’Sullivan eds., 2005); Nel & Judge, supra note 5, at 19; see also Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 19: Violence Against Women, ¶ 6, U.N. Doc. A/47/38 (Jan. 29, 1992) [hereinafter CEDAW General Recommendation 19] (defining violence against women as “violence that is directed against a woman because she is a woman or that affects women disproportionately[, including] acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty”). The CEDAW Committee’s definition of violence against women encompasses corrective rape because of the latter’s disproportionate impact on women. However, because it fails to fully address ways in which corrective rape is violence against gay women, I provide it merely as a reference.

34. Anderson, supra note 18, at 790–91; Michelle Govender, Domestic Violence: Is South Africa Meeting Its Obligations in Terms of the Women’s Convention?, 19 SAJHR 663, 676 (2003); see also Joe Thloloe, Human Rights and the South African Context, in HUMAN RIGHTS IN THE TWENTY-FIRST CENTURY: A GLOBAL CHALLENGE 41, 41 (Kathleen E. Mahoney & Paul Mahoney eds., 1993) (arguing that South Africans are the victims of apartheid in two ways: because of segregation and because of the lawlessness apartheid induced).

35. Anderson, supra note 18, at 791; see also id. at 801 (discussing the apartheid state’s use of rape as a political tool).

36. Id. at 795–96.

37. See id. at 796.

38. Id. at 797–98.
The apartheid regime also facilitated the social structures that today enable all forms of rape. First, the police force in apartheid South Africa was designed to protect whites from blacks, not to protect black communities from crime. This legacy remains today, with the continued need to train and “transform the police from a political tool . . . into a nonpolitical security force” meant to ensure community safety. Second, townships, required by the Group Areas Act, which effectively excluded non-white South Africans from living in most developed areas, were lawless, isolated, and impoverished; provided no protection from police; and were designed like prisons and internment camps. Third, townships were crowded and cramped, meaning women lacked privacy and safety. Under these circumstances, women in townships were “subject to male sexual oppression” and were without any effective police structure to protect them. Furthermore, these women, too poor to afford to live or work outside the townships, were trapped there while the police permitted violence in townships to continue unchecked and without investigation because reports of violence fueled pro-segregation sentiments, an important underpinning of apartheid.

During the transition to democracy, South Africa held the promise of a new democratic order premised on the values of democracy, equality, and freedom. However, violence against women—described as “epidemic”—has prevented women from truly being able to celebrate this new enterprise. First, when apartheid ended, military troops were withdrawn from the townships, leaving a security vacuum. Second, the government recruited vigilante groups, which had formerly taken part in the violence plaguing townships, to fill this gap. Because these groups were poorly trained and known for their use of force, their...
introduction as security forces led many township residents to feel even less
safe. Moreover, many members of these groups sexually abused women, even
as some women reported sexual abuse to these same members of the “police.”

This violence undermined the legitimacy of South Africa’s new democratic
order. As Nelson Mandela noted: “‘It is vitally important that all structures of
government, including the president himself, should understand . . . fully, that
freedom cannot be achieved unless the women have been emancipated from all
forms of oppression.’” However, violence against women limited women’s
ability to freely exercise their rights, negatively affected women’s health,
caused many women to fear for their safety and distrust men, and decreased
economic productivity, causing inevitable re-victimization (in the case of domes-
tic violence) when the government could not afford to address the violence.

Despite announcing a break from its racist and violent past, South Africa has
prevented many women from enjoying the promise of a post-apartheid world by
failing to properly address violence against women.

Following the transition to democracy, women still face the risk of violence
on a daily basis. For instance, one commentator reported that “[f]igures suggest
there are an estimated 500,000 rapes in South Africa every year and [that] for
every 25 men accused of rape in the country, 24 walk free.” Another noted
that there are 140 reported rapes every day, although many believe the actual
number to be in the hundreds, and a third reported that half of all South
African women will be raped in their lifetimes. In fact, South Africa has the
highest rate of reported rapes in the world, which is more than twice that of
the United States. According to a Human Rights Watch report, twenty-eight

53. See id. at 806–07.
54. Id. at 807–08.
55. Adrien Katherine Wing & Eunice P. de Carvalho, Black South African Women: Toward Equal
Rights, 8 HARV. HUM. RTS. J. 57, 57 (1995) (quoting The Wit and Wisdom of Nelson Mandela, EBONY,
56. Kim, supra note 18, at 12 (describing how “violence bars women from effective participation in
political life”).
57. See Govender, supra note 34, at 665–66 (reasoning that women were revictimized in cases of
domestic violence “because women [were] unable to leave abusive homes and relationships as a result
of being financially dependent on the abuser”); see also CEDAW General Recommendation 19, supra
note 33, ¶¶ 7, 11 (arguing that violence against women threatens women’s human rights and maintains
women in subordinate roles, deprives them of their ability to participate politically, and results in lower
levels of education and skills and fewer work opportunities); Anderson, supra note 18, at 809 & n.132,
820 (discussing how violence in South Africa threatens democratic progress and also denies women the
opportunity to fully participate in the new democratic order); Kelly, supra note 4 (“‘You don’t have
freedom of movement, you don’t have space to do as you please. You are always scared and your life
always feels restricted.’”).
58. Geen, supra note 7; see also Mills, supra note 6, at 252 (noting that only one out of nine “rapes
involving physical force” is reported to the police and that “the vast majority of rapes never come to the
attention of the criminal justice system” (citation omitted)).
59. Alexandra Fuller, Mandela’s Children, NAT’L GEOGRAPHIC, June 2010, at 80, 93.
60. Andrews, supra note 18, at 341.
61. HUMAN RIGHTS WATCH, supra note 11.
62. See Fuller, supra note 59, at 95.
percent of men surveyed had raped a woman or a girl and one in twenty men said they had done so in the past year.63 Two out of five women report that rape is their first sexual experience.64 Add to these alarming numbers the lack of consequences for raping a woman: the low arrest and conviction rate65 not only means that few will be brought to justice, but it also makes rape victims less likely to report sexual violence.66 This will be especially true where reporting risks exposing the victim to persecution for being gay, as is the case for corrective rape.67 Even when rape victims do report sexual violence, there are additional obstacles that stand in the way of justice: delay in receiving health care and assistance, the lack of counseling services, and delay in receiving legal aid.68 Equally troubling is the high rate of HIV/AIDS in South Africa,69 which puts women who are sexually violated at a greater risk of contracting the virus,70 especially because many health providers do not provide post-exposure prophylaxis (PEP)71 and because women’s inability to report rapes72—to either the police or health clinics—prevents them from gaining access to any preventative treatment.

The high rate of violence against women in South Africa has a variety of roots in the country’s history, but that the violence has continued unchecked is chiefly the responsibility of inadequate policing in areas where women are most at risk. One commentator has described the police as “under-funded and incompetent,”73 and in townships, where women are most in danger,74 the safety concerns of women and complaints of domestic and sexual violence are rou-

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63. HUMAN RIGHTS WATCH, supra note 11.
65. Anderson, supra note 18, at 811 (reporting that fewer than half of reported rapes were prosecuted and only 9% of those prosecutions resulted in convictions in 1998); Mills, supra note 6 (noting that, nationally, only 7.7% of rape complaints resulted in conviction as of 2010); see also Channel 4 News, supra note 1 (noting that only thirty-one corrective rapes have been officially recorded in the past decade).
66. Andrews, supra note 18; see Catherine Albertyn & Beth Goldblatt, Equality, in CONSTITUTIONAL LAW OF SOUTH AFRICA 35-i, 35-4 n.3 (Stuart Woolman et al. eds., 2d ed. 2009) (noting that as few as one out of twenty rapes is ever reported).
67. See Nel & Judge, supra note 5, at 28 (noting that attacks on sexual minorities often go unreported because of fear of persecution); Narayan, supra note 18, at 347 (same); see also Mills, supra note 6, at 251–52 (“[O]nce women have been raped, they are vulnerable to secondary victimization and victim-blaming, because of the extent to which coercion has been normalized and the level of acceptance of rape myths.” (citation omitted)); Channel 4 News, supra note 1 (“Few lesbian women have faith in reporting to officers who often show little sympathy.”).
68. HUMAN RIGHTS WATCH, supra note 11; see also Kim, supra note 18, at 11 (noting the dearth of shelters to which victims of domestic violence can flee).
69. See Hunter-Gault, supra note 64 (“The U.N. estimates that about one in five South Africans between the ages of eighteen and forty-nine is H.I.V.-positive, and that around a thousand people die from AIDS-related causes every day.”).
70. See Anderson, supra note 18, at 793 n.26 (discussing the link between rape and HIV/AIDS); Andrews, supra note 18, at 344 (describing how the spread of HIV has exacerbated the risks associated with rape in South Africa).
71. HUMAN RIGHTS WATCH, supra note 11.
72. See supra note 18 and accompanying text.
73. Anderson, supra note 18, at 801.
tinely dismissed or ignored by authorities. Additionally, the low rate of conviction in rape cases is “[a]t least partly due to police insensitivity and incompetence.” And without better policing and investigation, as well as increased convictions of those who perpetrate these acts, there is also the risk of vigilante violence by those who take justice into their own hands to avenge raped women, deepening the cycle of violence. One report has also laid blame with district surgeons—who are responsible for conducting the forensic exams that are necessary for any subsequent prosecution—because they are poorly trained, reluctant to appear in court, unavailable to perform a timely exam, and unfairly vet or judge rape complainants. Finally, court delays, which can range from three months to three years, present additional barriers to justice.

It is also disturbing that violence against women in South Africa disproportionately affects poor, non-white women. For instance, a non-white woman is 4.7 times more likely to be raped than a white woman. One author reported that a rape victim is also “less likely to be believed” if she is black. Additionally, the prevalence of “jackrolling”—the “abduction, rape and occasional murder” of women by groups of men in townships—heightens the risk of violence. Absent the threat of arrest, prosecution, and conviction, such gang rapes are permitted to take place virtually without legal consequences. Taking all of this together, the problem of corrective rape and the extent to which South Africa is

75. See Anderson, supra note 18, at 792; Andrews, supra note 18, at 342; Govender, supra note 34, at 672–73; Kim, supra note 18, at 10; Mills, supra note 6; see also GAVIN CAWTHRA, POLICING SOUTH AFRICA: THE SOUTH AFRICAN POLICE & THE TRANSITION FROM APARTHEID 120 (1993) (noting “[t]he failure of the police to investigate and prosecute alleged murderers and planners of violence”); Christopher J. Roederer, The Constitutionally Inspired Approaches to Police Accountability for Violence Against Women in the U.S. and South Africa: Conservation Versus Transformation, 13 TULSA J. COMP. & INT’L L. 91, 133–34 (2005) (describing one of the tragedies of apartheid as “the breakdown of confidence in those enforcing the law”); Thomas, supra note 14, at 394 (noting that “[l]aw enforcement officers fail to pursue crimes against sexual minorities with the same zealousness as other crimes”); Dan Rather Reports, supra note 10 (describing how police refused to take the statement of a corrective rape complainant and instead criticized her for dressing like a man).
76. Anderson, supra note 18, at 793.
77. See id. at 793 n.25; see also CAWTHRA, supra note 75 (describing the breakdown in the rule of law leading to more private violence and retribution).
79. Govender, supra note 34, at 673.
80. See Anderson, supra note 18, at 789–90 & n.4; Andrews, supra note 18, at 343; Kim, supra note 18.
81. Anderson, supra note 18, at 792.
82. L. Vogelman, Violent Crime: Rape, in PEOPLE AND VIOLENCE IN SOUTH AFRICA 96, 126 (Brian McKendrick & Wilma Hoffmann eds., 1990).
83. Anderson, supra note 18, at 811; see Andrews, supra note 18, at 344 n.129.
84. See Anderson, supra note 18, at 811.
not protecting the most vulnerable in society come into sharp focus.\textsuperscript{85}

Admittedly, the law in South Africa has been improved to better respond to violence against women. Previously, for instance, rape law excluded certain types of rape; permitted the admission of a victim’s prior sexual history into evidence to determine consent; viewed the victim’s waiting too long before reporting the incident, standing alone, as evidence of the claim’s unreliability; and automatically allowed private, social, and psychological factors to be introduced in order to discredit the victim, thereby endorsing a cautionary evidentiary rule under which women and children were generally presumed to be unreliable.\textsuperscript{86} However, several authors have noted that, despite these improvements, legal reform alone is not enough; rather, to free women from the threat of corrective rape, legal reform must be accompanied by police training, support systems for victims, education, and changes in social attitudes.\textsuperscript{87} Because changing the law on the books will not alone protect women from violence—indeed, evidence suggests that, despite these improvements, men seeking to “correct” homosexuality continue to target gay women and those perceived as gay—the government must better train its police and better educate the public in order to prevent corrective rape. This raises the question, though, of how to obligate the government to undertake such action. In the past, absent recourse to the political process, South Africans had no mechanism to force the government to address gross levels of violence. Then came \textit{Carmichele v. Minister of Safety and Security}.\textsuperscript{88}

\section*{B. THE \textit{CARMICHELE} REVOLUTION: DEVELOPING THE COMMON LAW}

Francois Coetzee had a history of violent behavior, having committed a number of sexual offenses.\textsuperscript{89} On March 4, 1995, Coetzee attempted to rape and murder Eurona Terblanche.\textsuperscript{90} He appeared before a magistrate the following day on a charge of rape.\textsuperscript{91} Nonetheless, Coetzee was released on his own recognizance because the police saw no reason to deny Coetzee bail—and, in fact,
recommended his release—and the prosecuting authority did not bother to inform the magistrate of Coetzee’s violent past.\(^\text{92}\) While free, Coetzee “viciously attacked and injured” Alix Jean Carmichele.\(^\text{93}\)

In *Carmichele v. Minister of Safety and Security*, Carmichele brought suit against the government for damages, alleging that members of the police and the prosecutor in the Terblanche case had owed her a legal duty to protect her from harm and with which they had failed to comply.\(^\text{94}\) The trial court dismissed the case, finding “there was no evidence upon which a court could reasonably find that the police or prosecutors had acted wrongfully.”\(^\text{95}\) The Supreme Court of Appeal affirmed.\(^\text{96}\)

The Constitutional Court, however, reversed, referring the matter back to the trial court for further evidence.\(^\text{97}\) The Court noted that the lower courts applied the pre-constitutional test for delict \(^\text{98}\) without referring to either the 1993 or 1996 Constitutions.\(^\text{99}\) Referring to Sections 39(2) and 173 of the 1996 Constitution (operative at the time of the trial), the Court held that courts in South Africa have a “general obligation”—not simply the discretion—to develop the common law consistently with the Constitution where the common law is deficient.\(^\text{100}\) The Court reasoned that, because of their specific expertise regarding the common law, the lower courts were better equipped to develop the common law in light of the Bill of Rights.\(^\text{101}\) If the common law is insufficient, these courts must determine what ought to be done in order to ensure the common law reflects the values of the nation’s founding document.\(^\text{102}\)

In requiring lower courts to evaluate the wrongfulness component of the test for delict, \(^\text{103}\) the Constitutional Court instructed the courts to refer to the founding values of the Constitution—“dignity, equality and freedom”—to en-
sure the new test comported with “the ‘spirit, purport and objects of the Bill of Rights.’”\textsuperscript{104} The Court counseled that previous “‘policy decisions and value judgments’” might need “to be replaced, or supplemented and enriched” by constitutional norms.\textsuperscript{105} Importantly, the Court suggested that the lower courts might need “to cast the net of unlawfulness wider” because of the state’s constitutional duty to ensure that women’s rights to safety and security are protected.\textsuperscript{106} Referring to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and South Africa’s international legal obligations, the Court noted that

one finds positive obligations on members of the police force both in the [1993 Constitution] and [in statute]. In addressing these obligations in relation to dignity and the freedom and security of the person, few things can be more important to women than freedom from the threat of sexual violence. . . . South Africa also has a duty under international law to prohibit all gender-based discrimination that has the effect or purpose of impairing the enjoyment by women of fundamental rights and freedoms and to take reasonable and appropriate measures to prevent the violation of those rights.\textsuperscript{107}

The Court further observed that “the police [are] one of the primary agencies of the State responsible for the protection of the public in general and women and children in particular against the invasion of their fundamental rights by perpetrators of violent crime,”\textsuperscript{108} suggesting that gender must become a factor in the wrongfulness determination.\textsuperscript{109} Some have taken this observation to mean that other sufficiently compelling factors may warrant protection for additional

\textsuperscript{104} Carmichele, 2001 (4) SA at 957 para. 43 (quoting S. Afr. Const., 1996 § 39(2)); see also Combrinck, supra note 33, at 178 (describing the Carmichele Court’s characterization of the 1996 Constitution as embodying “an objective, normative value system” that requires courts to weigh the duty to be imposed in the context of the Constitution’s positive guarantees of dignity, equality, and freedom (citing Carmichele, 2001 (4) SA at 957 paras. 43–44, 961 para. 54)); Leinius & Midgley, supra note 100, at 19 (describing the Constitution as “an objective, normative value system” through which wrongfulness is to be determined by balancing the parties’ interests, the circumstances of the case, and the relevant public policy concerns (citing Carmichele, 2001 (4) SA at 957 para. 43, 961 para. 54)).

\textsuperscript{105} Carmichele, 2001 (4) SA at 962 para. 56; see also Frank I. Michelman, The Bill of Rights, the Common Law, and the Freedom-Friendly State, 58 U. Miami L. Rev. 401, 439 (2003) (describing one commentator’s view of the 1996 Constitution as “‘redeeming’” the common law, which had been polluted by racist, apartheid rule and therefore was not compatible with the Constitution); supra section I.A (detailing the ways in which apartheid rule has “polluted” the lives of millions of South African women).

\textsuperscript{106} Carmichele, 2001 (4) SA at 962 para. 57; see also Combrinck, supra note 33, at 175 (describing violence against women as “‘one of the most extreme manifestations of power inequality between women and men’” and how women accordingly look for “responsive and proactive” state intervention to prevent it (quoting A.E. Obando, How Effective Is a Human Rights Framework in Addressing Gender-Based Violence?, http://www.whrnet.org/docs/issue-genderviolence.html (last visited Feb. 2, 2005))).

\textsuperscript{107} Carmichele, 2001 (4) SA at 964–65 para. 62 & n.67.

\textsuperscript{108} Id. at 965 para. 62.

\textsuperscript{109} See Leinius & Midgley, supra note 100, at 21–22.
groups and that the police have a general duty to protect the most vulnerable in society. Given the levels of violence directed at gay women in South Africa, as well as their isolation and vulnerability, I believe that this duty extends to women at risk of corrective rape.

The Court was, however, mindful of open-ended liability and the chilling effect liability might have on the performance of prosecutors. The Court reasoned that a case-by-case approach would protect against second-guessing prosecutors and shield them from unfair criticism generated in hindsight. The Court also noted that prosecutors have “a duty to carry out their public functions independently and in the interests of the public,” but that each case must be treated on the merits with any possible chilling effect taken into account.

On remand, the trial court revisited the issue and reasoned that “[r]easonableness, on which the legal convictions of the community are based, is now to be found in the Constitution and not in some vague notion of public sentiment or opinion.” The trial judge inferred a legal duty to prevent harm, “enshrined” in Sections 7(2), 10, 11, and 12 of the 1996 Constitution, and determined that the facts merited a verdict for Carmichele. Thus, the trial court found that the government was required to do more to protect Carmichele and similarly situated women and, using the Constitutional Court’s analysis, imposed on the government an affirmative duty to better protect women from violence.

C. CARMICHELE AS ROADMAP: CORRECTING CORRECTIVE RAPE

Carmichele revolutionized the common law in South Africa and opened the doors to claims that the government must do more to protect women from all forms of violence. In Carmichele, the Constitutional Court found that the core constitutional values of dignity, equality, and freedom triggered the need to develop the common law to bring it in line with the Bill of Rights and did not hesitate to refer to South Africa’s international legal obligations in instructing

110. See id. at 23.
111. See supra notes 11–12 and accompanying text.
112. See supra notes 20–21 and accompanying text.
113. Carmichele, 2001 (4) SA at 968 para. 73.
114. Id. at 967 para. 72.
115. See id. at para. 73–74.
116. Carmichele v. Minister of Safety & Sec. 2003 (2) SA 656 (C) at 671 para. 31 (S. Afr.).
117. S. Afr. Const., 1996 § 7(2) (“The state must respect, protect, promote and fulfill the rights in the Bill of Rights.”).
118. Id. § 10 (right to dignity).
119. Id. § 11 (right to life).
120. Id. § 12 (right to freedom and security of the person).
121. Carmichele, 2003 (2) SA at 671 para. 30, 674 para. 38; see also Johan van der Walt, Horizontal Application of Fundamental Rights and the Threshold of the Law in View of the Carmichele Saga, 19 SAJHR 517, 523 (2003) (noting the trial judge’s “rather stark acceptance that the Constitution imposes a legal duty on public authorities to prevent harm that is not imposed by existing common-law principles or rules’’).
the lower court to develop the duty the government owed women like Carmi-
chele.\textsuperscript{122} So in the face of “epidemic” levels of violence against women\textsuperscript{123} and the government’s continuing failure to provide women with sufficient protection against corrective rape, \textit{Carmichele} offers an analytical foundation to obligate the government to prevent corrective rape.

Moreover, \textit{Carmichele}’s approach is more effective than existing civil and criminal remedies at preventing corrective rape. Although the tort system in South Africa is theoretically responsive to a claim by a raped woman against her perpetrator and although rape is a criminal offense, requiring victims of corrective rape to resort to these options presents a number of hurdles. These hurdles include: the risk of judgment-proof defendants providing no compensation; the trauma of enduring trial to seek justice; and that despite the existence of theoretically adequate civil and criminal remedies, these remedies have generated little, if any, deterrent effect on violence against women in general and on corrective rape in particular.\textsuperscript{124} Notwithstanding the societal opprobrium of being accused, tried, and convicted of or found liable for rape, criminal cases and, especially, civil suits provide only one-off deterrence. Most importantly, though, any such remedy will only ever be an ex post solution and will only affect the parties before the court. When dealing with the gravest violation of a woman’s rights—the deprivation of her bodily integrity, the heightened risk for HIV/AIDS, and, sometimes, even the loss of her life—it does no good to offer after-the-fact compensation for that which cannot be restored. And even if Bill of Rights protections were relied on to reach the conduct of private actors, given the misunderstanding of homosexuality and the animus toward gay people that motivate corrective rape, a suit against a single defendant or group of defendants would likely do little to address the systemic roots of corrective rape. As a black drag queen, asked about the meaning of the new Equality Clause at a 1997 Gay Pride March, put it: “It means sweet motherfucking nothing at all. You can rape me, rob me—what am I going to do? Wave the Constitution in your face?”\textsuperscript{125} On this basis, the \textit{government} must bear the burden of protecting women from corrective rape and must be held responsible for failing to act.\textsuperscript{126} The Constitutional Court’s analysis in \textit{Carmichele}, then, provides a roadmap for a preventative suit against the government alleging that South Africa has failed in its duty to protect women from violence in the form of corrective rape.

\textsuperscript{122} See supra notes 103–07 and accompanying text.
\textsuperscript{123} See Kim, supra note 18, at 7.
\textsuperscript{124} See Marius Pieterse, \textit{The Right To Be Free from Public or Private Violence After Carmichele}, 119 SALJ 27, 38 (2002) (noting the ineffectiveness of common law and statutory remedies in preventing private violence); supra notes 16, 65–66 and accompanying text.
\textsuperscript{125} Christiansen, supra note 14, at 1058.
II. HOW TO CORRECT CORRECTIVE RAPE: TRIGGERING THE HORIZONTAL REACH OF THE 1996 CONSTITUTION

Legal scholars have debated a number of ways in which the law could be shaped to protect women from violence, including through a suit modeled after *Carmichele*. In order to gauge the most effective means of preventing corrective rape, I have dedicated Part II to a discussion of constitutional doctrine. This includes the constitutional implications of corrective rape, the unique ways in which the 1996 Constitution can address private acts of violence and the government’s failure to prevent them, and the normative reasons to prefer the way in which *Carmichele* reaches private violence in order to best give effect to constitutional protections and prevent corrective rape.

A. THE CONSTITUTIONAL IMPLICATIONS OF CORRECTIVE RAPE

The problem of corrective rape goes beyond mere moral reprehension of conduct society considers outrageous; under the 1996 Constitution, corrective rape implicates a number of constitutionally protected rights. In *S v. Chapman*, for instance, the Supreme Court of Appeal discussed rape in general and stated that it constitutes “a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim.” The *Chapman* Court went on to underscore some of the ways in which rape denies women the promise of a post-apartheid South Africa by infringing women’s fundamental rights:

The rights to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilization.

Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go [to] and come from work, and to enjoy the peace and [tranquility] of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives.

Similarly, corrective rape robs its victims of their dignity and strikes fear in their hearts for merely contemplating the exercise of their everyday rights. Fortunately, however, the 1996 Constitution announced a panoply of fundamental rights that are implicated by corrective rape and that may be relied on to challenge private violence and the government’s failure to better protect against it.

Since the end of apartheid, South Africa has been well positioned to be a leader in equality for gay men and women; it is for this reason that the

\[127\] 1997 (3) SA 341 (A) at 344 J (S. Afr.).
\[128\] Id. at 345 A–B. Similar arguments have been made by other commentators. See supra notes 56–57 and accompanying text.
\[129\] See Thomas, supra note 14, at 394.
government’s inadequate response to corrective rape is so alarming. In 1994, South Africa became the first country in the world to constitutionalize equality on the basis of sexual orientation. From an early stage in negotiating the 1996 Constitution, the anti-apartheid movement tied the inclusion of sexual orientation in the Equality Clause to the fight against apartheid and South Africa’s post-apartheid commitment to human rights. This was a marked improvement from apartheid South Africa’s treatment of gay and lesbian people: the apartheid government treated gay people as criminals and enforced only those laws punishing “non-procreative sexual activity” that targeted gay men and women. Furthermore, gay South Africans were viewed with high levels of disapproval by the general public. For instance, when drafting the 1996 Constitution, the Constitutional Assembly invited submissions from the public. The Assembly received many submissions expressing vehemence toward the inclusion of sexual orientation in the Equality Clause: “How can any disgusting, deviant sexual behaviour have the phrase ‘fundamental rights’ protecting it?” Nonetheless, the 1996 Constitution entrenched the value of equality on the basis of sexual orientation; rather than counseling in favor of leaving gay equality by the wayside, comments such as the one above counseled in favor of robustly protecting the rights of the gay minority in South Africa. Relying on the inclusion of sexual orientation in the Equality Clause, the Constitutional Court of South Africa has struck down a criminal prohibition on sodomy between consenting male adults, ruled in favor of equality in immigration on the basis of sexual orientation, struck down a ban on same-sex adoption, and held that the exclusion of same-sex couples from the common law definition of marriage is unconstitutional.

In addition to the right to equality on the basis of sexual orientation, correc-

131. See Christiansen, supra note 14, at 1048.
132. Thomas, supra note 14, at 382.
133. See Christiansen, supra note 14, at 999–1000, 1021.
134. See id. at 999–1000.
135. See id. at 1007.
136. Id. at 1042 (internal quotation marks omitted).
137. See S. AFR. CONST., 1996 § 9(3) (“The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”).
138. See Nat’l Coal. for Gay & Lesbian Equal. v. Minister of Justice 1999 (1) SA 6 (CC) at 24 para. 18 (S. Afr.).
139. See Nat’l Coal. for Gay & Lesbian Equal. v. Minister of Home Affairs 2000 (2) SA 1 (CC) at 26 para. 40 (S. Afr.).
140. See Du Toit v. Minister of Welfare & Population Dev. 2003 (2) SA 198 (CC) at 210 para. 30 (S. Afr.).
141. See Minister of Home Affairs v. Fourie 2006 (1) SA 524 (CC) at 586 para. 162 (S. Afr.).
tive rape implicates a number of other rights enshrined in the South African Constitution. For example, the 1996 Constitution declares that sexual equality is a central tenet of the democratic state. To this end, the Constitution provides that there shall be no discrimination on the basis of “race, gender, sex, pregnancy, [or] marital status,” in addition to sexual orientation. The Constitution further declares that “[n]o person may unfairly discriminate directly or indirectly against anyone on one or more [of those] grounds.” The phrasing of Section 9—providing “the right to equal protection and benefit of the law”—entitles South Africans not only to facial equality in the laws passed by the government, but also to substantive equality. Moreover, the principle of nondiscrimination on the basis of sex is non-derogable, meaning that under no circumstances may the government fail to police sex discrimination, and equality on the basis of sex is on par with equality on the basis of race, meaning that state officials need not and in fact may not choose to value one over the other. The Constitution also enshrines the right to dignity, the right to life, the right to bodily integrity, the right to freedom of movement, and the right “to be free from all forms of violence from either public or private sources,” which, the Constitutional Court has declared, is “fundamental to the equal enjoyment of human rights and fundamental freedoms” and which entails affirmative obligations on the state. Additionally, the Constitution reaches equality indirectly through a number of other provisions, such as the Free Speech Clause, the Limitations Clause, and the Right to Freedom from Violence.

142. See S. Afr. Const., 1996 § 1(b). For an interesting account of women’s groups’ successful campaign to include sex equality in the 1996 Constitution in the face of opposition, see generally Andrews, supra note 18, at 329–32.
144. Id. § 9(4) (emphasis added).
145. Id. § 9(1).
146. See Christiansen, supra note 14, at 1018.
148. Id. § 10.
149. Id. § 11.
150. Id. § 12(2).
151. Id. § 21.
152. Id. § 29.
153. Id. § 12(1)(c).
155. Combrinck, supra note 33, at 174 (“[T]he right to freedom from violence] also imposes a duty on the state to take certain positive or proactive steps to ensure the realisation of this right, which may include measures to prevent acts of private violence against women.”); Combrinck, supra note 126, at 668–69 (describing the state’s tripartite duty “to avoid violating the right in question, . . . to protect from violation of the right, and . . . to aid those whose rights have been violated”); Pieterse, supra note 124, at 29 (arguing that Section 12(1)(c) represents a positive obligation on the state to prevent violence from either public or private sources).
156. See S. Afr. Const., 1996 § 16(2)(c) (providing that the right to free expression does not extend to “advocacy of hatred that is based on race . . . [or] gender . . . and that constitutes incitement to cause harm”).
the clause protecting cultural, religious, and linguistic minorities, and the clauses directing courts on the manner in which they must interpret the Constitution. Finally, it is worth repeating that “[t]he state must respect, protect, promote and fulfil[]” these rights and that “law or conduct inconsistent with [them] is invalid,” triggering affirmative obligations on behalf of the state.

Thus, the 1996 Constitution takes a holistic view of the rights deemed fundamental to every human being and offers a number of ways through which to attack corrective rape. The large number and the breadth of the rights in the 1996 Constitution implicated by corrective rape are arguably sufficient to trigger a court’s obligation under Carmichele to determine whether the government’s common law obligations adequately give effect to the Bill of Rights for victims of corrective rape.

B. HORIZONTALITY

1. Direct Versus Indirect Horizontal Application

Much debate has centered on the most effective way to protect rights from infringement. Given the level of violence against women in South Africa today and the number of Bill of Rights protections such violence implicates, what is the most effective way to use legal doctrine to prevent corrective rape? Bring an ex post suit in tort against a perpetrator of corrective rape in the hope that a damages award sufficiently deters other instances or perpetrators? Allege the violation of one or more constitutionally protected rights? Against the state? Against a private party? Or bring a Carmichele suit against the government, arguing that the common law of delictual wrongfulness must be developed to reflect the state’s affirmative duty to protect women from violent crime and prevent corrective rape?

157. See id. § 36 (providing for the permissible limitation of rights only if “the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom” (emphasis added)).

158. See id. § 31(2) (providing that the rights of cultural, religious, and linguistic communities “may not be exercised in a manner inconsistent with any provision of the Bill of Rights”).

159. See id. § 39(1) (requiring courts, “[w]hen interpreting the Bill of Rights,” to “promote the values that underlie an open and democratic society based on human dignity, equality and freedom” (emphasis added)); id. § 39(2) (requiring courts, when interpreting legislation or “developing the common law or customary law,” to “promote the spirit, purport and objects of the Bill of Rights”); id. § 211(3) (requiring courts to apply customary law, but “subject to the Constitution”).

160. Id. § 7(2); see also Lourens du Plessis, Interpretation, in CONSTITUTIONAL LAW OF SOUTH AFRICA 32-i, 32-123 (Stuart Woolman et al. eds., 2d ed. 2009) (reasoning that the Constitutional Court indicated that Section 7(2) is justiciable in Doctors for Life International v. Speaker of the National Assembly 2006 (6) SA 416 (CC) at 432–33 paras. 17–18 (S. Afr.)).


Traditionally, according to the classical liberal model of constitutionalism, a constitution was meant to protect the individual from the state, entailing purely vertical application. Under this view, adopted in American constitutional jurisprudence, state action is generally required to invoke constitutional protections, meaning “individual rights bind . . . only the government and not private actors [so that] [r]ights regulate only the conduct of governmental actors in their dealings with private citizens but not relations among private citizens.” The state action doctrine epitomizes a public–private distinction inherent in classical liberal constitutionalism. An important corollary of this distinction, at least in the United States, is “the common refusal of courts to interpret the rules of the Constitution as imposing affirmative duties on the state.” Whether, and to what extent, constitutional protections extend “horizontally,” then, becomes central to whether the state has any affirmative duty to protect its citizens.

However, just as “the recognition and protection of fundamental human rights . . . gradually expanded to the relations between private individuals,” there has been a corresponding doctrinal shift through which constitutional rights have been gradually expanded to include private relations within their


165. See, e.g., The Civil Rights Cases, 109 U.S. 3, 11 (1883) (“It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the [Fourteenth Amendment].”).


167. Kay, supra note 164, at 330. But see id. at 358 (noting that “[t]here is nothing inherent in the idea of a constitution that makes it incapable of application to private conduct or of imposing affirmative duties on the state”); Kumm & Comella, supra note 166, at 265 (“[T]he fact that a constitution is addressed only to public authorities and not to individuals does not preclude private law from being fully subjected to substantive constitutional standards . . . .”).
Applying fundamental rights directly to the conduct of private parties is called horizontal application. Under this theory of human rights and, later, constitutional rights, commentators observed that individual liberty can be as threatened by the exercise of private power as it can by the exercise of government power and that fundamental rights should therefore apply equally as against private parties.

Yet even though constitutional rights may have a horizontal reach, there are competing schools of thought as to the manner in which these rights might apply as against private individuals. On one end, there is direct horizontal application, in which fundamental rights are directly applicable to the conduct of private parties. Thus, under direct horizontal application, “the regulation of private relations is automatically subjected to the provisions of the bill of rights and can never result in the infringement or limitation of any fundamental right protected in such an instrument.” On the other end, there is indirect horizontal application, through which fundamental rights are applicable to the conduct of private parties, but only indirectly through the development of the government’s common law duties, which in turn affect the rights of private parties. Thus, under indirect horizontal application, the “rights in the Bill of Rights [are] justiciable only in disputes in which an action of the state, or a statute or executive act relied upon by a private party, is attacked as unconstitutional.” Additionally, “values underlying fundamental rights protected in a bill of rights [must] be considered as policy factors determining public policy or the boni mores in the circumstances” so that the common law, applied against the government, is developed and interpreted in light of and consistent with the

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168. See van Aswegen, supra note 164, at 51.
169. See Gardbaum, supra note 166, at 395; see also Currie & De Waal, supra note 164, § 3.3(b)(i), at 43 (noting that the South African Bill of Rights sometimes “directly protects individuals against abuses of their rights by other individuals by providing for the direct horizontal application of the Bill of Rights”).
170. See, e.g., Currie & De Waal, supra note 164, § 3.3(b)(i), at 43; Dennis Davis et al., Fundamental Rights in the Constitution: Commentary and Cases 31 (1997); Gardbaum, supra note 166, at 395; Kumm & Comella, supra note 166, at 241, 243; Michelman, supra note 105, at 413–14; Tushnet, supra note 101, at 79, 91; see also Kay, supra note 164, at 350 (noting that “we now are subject to injuries from concentrated centers of non-governmental power . . . unknown when the relevant constitutional provisions were enacted”).
171. See van Aswegen, supra note 164, at 53.
172. Id.; see Currie & De Waal, supra note 164, § 3.1, at 32; Woolman, supra note 164.
173. See Currie & De Waal, supra note 164, § 3.1, at 32. Conventional wisdom notwithstanding, see supra notes 164–66 and accompanying text, indirect horizontal application may not be such a foreign concept to American courts, at least at the state level, see Judith S. Kaye, Foreword: The Common Law and State Constitutional Law as Full Partners in the Protection of Individual Rights, 23 Rutgers L.J. 727, 738, 743 (1992) (describing “a common law infused with constitutional values” wherein “constitutional values—especially the values so meticulously set out in our lengthy state charters—also can enrich the common law”).
174. Sprigman & Osborne, supra note 166, at 26 n.3; see Currie & De Waal, supra note 164, § 3.1, at 32; Gardbaum, supra note 166, at 398, 404.
Bill of Rights.\textsuperscript{175}

2. The 1996 Constitution: Direct or Indirect Horizontal Application?

Many argue that the 1996 Constitution was meant to reject the classical liberal model and instead announce certain fundamental rights that reach the conduct of private parties. The Constitutional Court, for instance, has commented on the transformative nature of the 1996 Constitution and the Framers’ intent to write a constitution representing a decisive break from the wrongs of the apartheid regime.\textsuperscript{176} Furthermore, several justices of the Constitutional Court have reflected on the intent of the Framers to avoid the privatization of apartheid by writing a constitution applicable to private conduct.\textsuperscript{177} This viewpoint is also shared by a number of commentators.\textsuperscript{178} A comprehensive reading of South African history, politics, and law points to a transformative quest by South Africa’s leaders to develop a new democratic order premised on universal respect for human rights and on a forthright rejection of the oppressive and racist apartheid regime.\textsuperscript{179} For example, the ANC’s draft constitution provided that the Bill of Rights would be applicable to private parties and institutions \textit{where appropriate} and that any legislation, common law, or customary law in existence could not infringe fundamental rights unless there were a permissible limitation under the Limitations Clause.\textsuperscript{180} The drafters were likely informed by reports during apartheid of egregious acts of violence that were committed by

\textsuperscript{175} van Aswegen, supra note 164, at 56. For an example of indirect horizontal application, see \textit{Carmichele v. Minister of Safety and Security} 2001 (4) SA 938 (CC) (S. Afr.), and \textit{supra} section I.B. For a critique of the dichotomy between direct and indirect horizontal application, see, for example, Kunm & Comella, \textit{supra} note 166, at 243–44, 249–54.

\textsuperscript{176} See, e.g., \textit{S v. Makwanyane} 1995 (3) SA 391 (CC) at 487 para. 262 (S. Afr.) (Mahomed, J., concurring) (“The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive . . . .”); \textit{see also} Roederer, \textit{supra} note 75, at 118–19 (“These [Constitutional Court] decisions are part of a shift in values from an authoritarian and racist legal system . . . to a system that fosters a culture of justification, public accountability and transparency.”).

\textsuperscript{177} \textit{See} \textit{Du Plessis v. De Klerk} 1996 (3) SA 850 (CC) at 892 para. 75 (S. Afr.) (Mahomed, D.P., dissenting); \textit{id.} at 927 para. 163 (Madala, J., dissenting).


\textsuperscript{179} \textit{See} \textit{Roederer, supra} note 75, at 118–119; \textit{see also, e.g.}, \textit{Makwanyane}, 1995 (3) SA at 487 para. 262 (Mahomed, J., concurring). \textit{But see} Sprigman & Osborne, \textit{supra} note 166, at 40–41 (arguing that the 1996 Constitution should be understood as a quest for majority rule, which militates in favor of judicial deference to legislative compromises by South Africa’s newly elected democratic officials).

\textsuperscript{180} \textit{See} \textit{van Aswegen, supra} note 164, at 54. \textit{But see} Sprigman & Osborne, \textit{supra} note 166, at 31 n.20 (arguing that “different individuals and political groups involved in drafting and voting on the 1996 Constitution had substantially different views on application [and that the] indeterminacy of [Section] 8 [providing that the Bill of Rights applies, in some circumstances, to “a natural or juristic person”] may thus simply reflect failure to agree on a definitive approach”).

For an overview of the history of the negotiations surrounding the 1996 Constitution, see generally
both public and private sources, militating in favor of a Bill of Rights with horizontal reach.

Notwithstanding these arguments, considerable debate has been focused on the extent to which South African constitutional law has adopted direct versus indirect horizontal application. Some have argued that the 1996 Constitution adopts only indirect horizontal application of the Bill of Rights. Under the 1993 Constitution, the Constitutional Court decided Du Plessis v. De Klerk, holding that the interim constitution applied only to vertical relations between the state and its subjects and that the Bill of Rights could apply to private legal subjects, but only to the extent that the application of all law must be reconciled with and promote the values of the Bill of Rights. Notwithstanding the Constitutional Court’s signals to the contrary in Khumalo v. Holomisa, there are those who argue that Du Plessis “is not dead.”

On the other side of the debate, Frank I. Michelman, building on the work of Owen Fiss, has described South Africa as the “freedom-friendly state.” Under Michelman’s thesis, the purpose of the Bill of Rights is the fulfillment of everyone’s rights. Because rights are in danger of infringement equally by private people as by the government, it is illogical to limit application of constitutional protections to government actors only. Accordingly, there is an affirmative obligation on the state, when exercising its power, to protect individual rights against private infringements. Many commentators have followed Michelman and argued in favor of direct horizontal application under the

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181. See, e.g., CAWTHRA, supra note 75, at 117 (describing “indirect” policing via vigilante groups wherein only one out of every ten unrest-related deaths was attributable to the police).


183. 1996 (3) SA 850 (CC) at 885–87 para. 60–62 (S. Afr.). But see id. at 914–15 para. 135 (Kriegler, J., dissenting) (arguing that the Bill of Rights applied to horizontal relations between private legal subjects as long as there was law involved in the relation between the parties and to which one party resorted, triggering the Constitution, to which all law must conform).

184. See 2002 (5) SA 401 (CC) at 420 para. 31 (S. Afr.) (stating that Section 8(2) may be applied to natural persons). For a black-letter summary of Khumalo and criticism of the Court’s decision, see Woolman, supra note 164, at 31–6 to -13.

185. See Sprigman & Osborne, supra note 166, at 25–26. The Du Plessis decision, though, reserved the question of whether specific rights might apply horizontally only if there is law relied on in a court proceeding, despite the Framers’ fear of the privatization of apartheid.

186. Michelman, supra note 105, at 412.

187. Id. at 411–12.

188. Id. at 413–14.

189. Id. at 414.

190. Id. at 415.
1996 Constitution. Thus, there is a strong argument in favor of the position that South Africa, via the 1996 Constitution, chose to adopt direct horizontal application at least as to some fundamental rights.

3. The Normative Appeal of Indirect Horizontal Application

Resolving the exact extent to which South African constitutional law under the 1996 Constitution adopts direct versus indirect horizontal application is beyond the scope of my Note. However, it cannot be the case that the 1996 Constitution and the Constitutional Court’s decision in Khumalo overruled Du Plessis or the Court’s decision in Carmichele. Moreover, Carmichele provides for indirect horizontal application of the Bill of Rights and was decided in 2001, five years after the 1996 Constitution came into effect, so the new constitution could not have eliminated indirect horizontal application. Therefore, given that fundamental rights may still reach private conduct via indirect horizontal application, I will discuss several reasons to prefer indirect over direct horizontal application.

First, under indirect horizontal application, courts develop the common law in a manner that may require affirmative action on the part of the government. As in Carmichele, the common law may need to be developed in a way that imposes an affirmative, preventative duty on the state to protect women from corrective rape, the only means to prevent, rather than simply punish, corrective rape. Second, indirect horizontal application is contextual and therefore flexible. Because violence against women can be diverse and unpredictable, crafting a uniform rule may be impossible; therefore flexibility and a context-sensitive analysis are desirable. Third, although the common law is
developed to better reflect the spirit, purport, and objects of the 1996 Constitution, the newly developed law does not rise to the constitutional level but rather may be amended by judges or modified by Parliament.\textsuperscript{197} This may allay the separation of powers concerns of those who worry about ceding too much lawmaking authority to unelected elites on the bench when the power to craft rules of private conduct is traditionally left to democratically elected representatives.\textsuperscript{198} Institutional competency also favors policymaking by legislatures rather than courts because legislative policymaking involves “exhaustive investigation, committee deliberation, publicity, debate, negotiation,” and the ability to amend the work later.\textsuperscript{199} Fourth, once a ruling is made developing the common law, subsequent cases in respect to that ruling are not considered constitutional litigation and may be handled exclusively by the lower courts.\textsuperscript{200} Fifth, development of the common law and the careful balancing of rights is what common law courts do best.\textsuperscript{201} Thus, when developed, the common law historically adapted basic legal principles to changing circumstances and incorporated the community’s legal convictions, which today are represented by the values underpinning the Bill of Rights.\textsuperscript{202} Moreover, any change in the balancing of rights through the common law is more likely to produce incremental, rather than dramatic, changes to the law.\textsuperscript{203} Sixth, indirect horizontal application does not run the same risk of overdeterrence as direct horizontal application, which, by rendering certain private conduct a constitutional violation, may induce greater stigmatization and deterrent effect than pronouncing a common law violation arrived at through indirect application.\textsuperscript{204} Finally, both courts and

\textsuperscript{197} See Currie \& De Waal, supra note 164, § 3.5, at 74; Ellmann, supra note 191, at 454; Kumm \& Comella, supra note 166, at 245, 263; Sprigman \& Osborne, supra note 166, at 28–29.

\textsuperscript{198} See Cheadle \& Davis, supra note 191, at 56; Ellmann, supra note 191, at 454; see also Kay, supra note 164, at 340 (arguing that horizontal application of the U.S. Constitution involves a “substantial transfer of power” from lawmaking agencies to courts); Sprigman \& Osborne, supra note 166, at 43, 48 (reasoning that the political choice inherent in balancing rights is better left to the legislature owing to its policymaking competency).

\textsuperscript{199} See Sprigman \& Osborne, supra note 166, at 46.

\textsuperscript{200} Cheadle \& Davis, supra note 191, at 63.

\textsuperscript{201} Id. at 63–64.

\textsuperscript{202} Id. at 64.

\textsuperscript{203} See, e.g., Currie \& De Waal, supra note 164, § 3.4, at 69 (“[W]hen the common law is developed it must be done incrementally and on a case by case basis.”); Cheadle \& Davis, supra note 191, at 63 (referring to the Oxford English Dictionary’s definition of “develop” and reasoning that the word “contain[s] the notion of the existence of some prior thing changing, unfolding and growing,” counseling for incremental changes to the common law); Murray Hunt, The “Horizontal Effect” of the Human Rights Act: Moving Beyond the Public–Private Distinction, in UNDERSTANDING HUMAN RIGHTS PRINCIPLES 161, 178 (Jeffrey Jowell \& Jonathan Cooper eds., 2001) (a court “must not create entirely new causes of action where nothing analogous previously existed”); Jeremy Sarkin, The Common Law in South Africa: Pro Apartheid or Pro Democracy?, 23 Hastings Int’l \& Comp. L. Rev. 1, 21 (1999) (noting a “reluctance to drastically transform the common law” by the Constitutional Court (emphasis added)).

\textsuperscript{204} Michelman, supra note 105, at 410 n.44.
litigants have, in practice, preferred indirect horizontal application over direct horizontal application.\textsuperscript{205} The Constitutional Court has observed that courts around the world generally prefer to avoid constitutional questions,\textsuperscript{206} which indirect horizontal application allows them to do, and the Court has approved this “salutary rule” for the courts in South Africa.\textsuperscript{207} Additionally, private litigants likely prefer indirect horizontal application because there are few practical advantages to direct horizontal application and these litigants may have difficulty envisioning what a remedy under direct horizontal application would look like or, alternatively, find the remedy unattractive.\textsuperscript{208}

Thus, by reference to \textit{Carmichele} and the potential for indirect horizontal application under the 1996 Constitution, we can begin to see how such a preventative suit against the government, compelling the state to better protect women from corrective rape, would look. However, before proceeding, it is important that I anticipate counterarguments against indirect horizontal application: chiefly, that indirect horizontal application creates irreconcilable competition between fundamental rights and that it implicates separation of powers concerns when courts impose affirmative duties on the government.

4. Anticipating Counterarguments

Under indirect horizontal application, the 1996 Constitution can reach private parties to the extent that common law—relied on against the government—insufficiently reflects the spirit, purport, and objects of the Bill of Rights and must therefore be developed. One might question the extent to which this is truly horizontal because the common law that is developed shapes the government’s duty without primary effect on the conduct of private parties. However, indirect horizontal application \textit{does} affect the conduct of private individuals. For example, after \textit{Carmichele}, the police and prosecuting authorities must place before the magistrate all relevant information in making a determination

\begin{itemize}
  \item \textsuperscript{205} See Currie & de Waal, supra note 164, § 3.3, at 50–51, § 3.4, at 64.
  \item \textsuperscript{206} See Zantsi v. Council of State 1995 (4) SA 615 (CC) at 617–18 para. 2 (S. Afr.) (Chaskalson, P., concurring).
  \item \textsuperscript{207} See id. at paras. 2–5.
  \item \textsuperscript{208} See Currie & de Waal, supra note 164, § 3.3, at 50–51; see also Johan van der Walt, Progressive Indirect Horizontal Application of the Bill of Rights: Towards a Co-operative Relation Between Common-Law and Constitutional Jurisprudence, 17 SAJHR 341, 351 (“[T]he future impact of the Bill of Rights . . . will predominantly take place through what has come to be understood as the indirect horizontal application of the Bill of Rights.”).
  
Others have put forward additional reasons for preferring indirect over direct horizontal application. See, e.g., Daniel Lazare, America the Undemocratic, \textit{New Left Rev.}, Nov.–Dec. 1998, at 3, 28–29 (posing that in the United States, where courts are solely responsible for civil rights, the elected branches are “relieved” of their duty to act constitutionally, which counsels in favor of indirect horizontal application to avoid the atrophying of the legislature’s constitutional responsibility); Pieterse, supra note 124, at 37 (arguing that indirect horizontal application ensures the integrity of the common law by making sure it comports with the nation’s highest law); Sprigman & Osborne, supra note 166, at 30 (reasoning that indirect horizontal application involves shared responsibility for lawmaking between the legislature and common law courts).
on bail. Although the *Carmichele* ruling arguably stands for the proposition that lower court judges, rather than individuals, violate the Constitution when they inappropriately develop the common law, *Carmichele* in practice is nonetheless a strong incentive for police and prosecutors not to seek bail rather than risking after-the-fact tort liability when a defendant commits a crime while free.\footnote{209. See Michelman, supra note 105, at 410, 431–32.}

Thus, although the courts develop the common law only vis-à-vis the government, a person denied bail nonetheless feels the effects of *Carmichele* and its progeny when courts effectively impose affirmative duties on the government.\footnote{210. See supra notes 80–93 and accompanying text.}

This has led to two objections to the practical impact of *Carmichele* suits. First, because *Carmichele*, in practice, affects Francis Coetzee and others denied bail,\footnote{211. See, e.g., Sprigman & Osborne, supra note 166, at 42, 46–47; van der Walt, supra note 121, at 521 n.8; see also Tushnet, supra note 101, at 84, 90 (constitutionalizing private behavior “‘would put an end to private autonomy’” (quoting DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 161 (1994))).} some have noted the tension inherent in the indirect horizontal application of fundamental rights: indirect horizontal application pits individual right against individual right—for example, the right to be free from violence against the right to bail or, more generally, the right to be free from aggressive policing, which intrinsically invades personal autonomy.\footnote{212. See Michelman, supra note 105, at 412.} But this tension is not irreconcilable. First, the problem is narrower than it seems at first glance: although we are discussing liberty versus liberty, the rights we seek to prefer—or “super-value”\footnote{213. See van der Walt, supra note 121, at 521 n.8.}—are the rights to life and freedom from violence, which arguably should trump some other freedoms. Not only may the right to be free from violence trump the right to bail, but also the harm to Coetzee when bail is resisted may be less than the harm to society—and to Coetzee—by permitting easy access to bail and the violence subsequently performed.\footnote{214. See Tushnet, supra note 101, at 93 (comparing the right to nondiscrimination to the right to freedom of association); see also Eric Barendt, State Action, Constitutional Rights, and Private Actors, in HUMAN RIGHTS AND THE PRIVATE SPHERE: A COMPARATIVE STUDY 399, 403 (Dawn Oliver & Jörg Fedtke eds., 2007) (describing Erwin Chemerinsky’s critique of the rights-versus-rights debate by pointing out that it protects the freedom of the few and the powerful and that, moreover, it is contradictory to limit individual freedom in the name of avoiding limitations on individual freedom).} This holds true for those subject to greater police intervention in townships as well. Some have also suggested that horizontal application is appropriate as long as no similarly vital counternorm exists.\footnote{215. See supra section II.B.2.} On this basis, we may super-value the right to freedom from violence because there is no equally strong counternorm or legitimate interest in exacting violence on another. Second, it is the limitation of the exercise of certain rights and, through it, the conduct of private parties that I hope to reach through indirect horizontal application, the goal being the prevention of corrective rape. As discussed previously,\footnote{209. See Michelman, supra note 105, at 410, 431–32.} indirect horizontal application places the onus on the government to prevent corrective rape, which
may necessarily involve a demand that the government inhibit the exercise of certain rights in order to protect women from violence.

But this reveals the second counterargument: that *Carmichele* and its progeny do too much damage to the separation of powers established by the 1993 and 1996 Constitutions. Imposing affirmative obligations on the government via *Carmichele* typically involves courts making policy or ordering the government to spend money. Thus, Marc Bossuyt, by analogy, makes a compelling case that raises concerns about the ability of courts to simply command governments to do more to give effect to fundamental rights. Bossuyt contends that states may avoid realizing socioeconomic rights by making an appeal to finite resources and the need to set national priorities without judicial interference. This is particularly true where constitutional provisions protecting socioeconomic rights are frequently couched in caveats, for example, calling on the state to realize rights progressively rather than immediately. Comparing social rights to civil rights, Bossuyt writes:

> [I]n spite of the often very general and vague formulations of civil rights, a judge . . . is able to decide whether or not civil rights have been observed in a specific case and . . . whether in the context of a specific case national laws do or do not secure the civil rights of all persons . . . . [However,] no judge is in a position to rule whether in a specific case a State has fulfilled its obligations in the field of social rights, because—depending on the available resources—it is up to each State to decide which social rights should be implemented first and which citizens should be first entitled to the benefits of those rights. National political authorities[, not judges] have to establish those priorities.

Although I concede having a judge police the policy obligations of the state may create challenges, I offer two points of rebuttal. First, even where a state’s duty is limited to the progressive realization of a right, the state must make a good faith effort to give effect to that right, an effort courts are empowered to review. Second, for those with separation of powers concerns, many have commented that even when the judiciary rules to enforce an individual’s civil or political rights, courts make policy and order the spending of resources, two

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217. See id. at 52.

218. See, e.g., S. Afr. Const., 1996 § 26(2) (“The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.”) (emphasis added).


220. See, e.g., *Gov’t of the Republic of S. Afr. v. Grootboom* 2001 (1) SA 46 (CC) at 86 para. 95 (S. Afr.) (holding that the government’s then-existing housing program was not a “reasonable” fulfillment of the 1996 Constitution’s guarantee of “access to adequate housing”).
tasks traditionally associated with the legislature. Thus, “separation of powers concerns will arise whenever a court’s common law (or equivalent) rulings are responsive to constitutional concerns through indirect horizontal effect, and not merely when private actors are held directly to the constitution’s requirements.” Moreover, South Africa, through the 1996 Constitution, is well equipped to handle the challenges related to the horizontal reach of the Bill of Rights. As former Constitutional Court Justice Albie Sachs noted,

judges . . . know about human dignity, about oppression and about things that reduce[] a human being to a status below that which a democratic society would regard as tolerable. . . . This is where the vision of the judiciary, institutionally tunnelled in the direction of respect for human dignity, comes into its own.

Thus, South African courts are meant to police compliance with constitutional protections, even where such policing, by the nature of the rights enforced, imposes affirmative duties on the government. Accordingly, under indirect horizontal application, the government may be under a duty—which the courts are empowered to review—to affirmatively act to protect women from well-documented and epidemic levels of the grossest forms of violence. Notwithstanding colorable objections to the practical effects of indirect horizontal application under Carmichele as described above, the 1996 Constitution was written in a way that indicates that its Framers intended courts to wrestle with these challenges. Given the textual and precedent-bases for indirect horizontal application, the preceding objections are no answer to the Constitution’s commands.

C. PUTTING IT ALL TOGETHER: BRINGING A CARMICHELE SUIT, INDIRECT HORIZONTAL APPLICATION, AND DEVELOPING THE COMMON LAW

Having established that constitutional protections under the 1996 Constitution may reach private conduct through indirect horizontal application, how does it all work?

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221. See Tushnet, supra note 101, at 96–97 (arguing that in ordinary nuisance cases when deciding between property rights and the public’s right to be free from nuisances, judges make policy); cf. In re Certification of the Constitution of the Republic of S. Afr. 1996 (4) SA 744 (CC) at 800 para. 77 (S. Afr.) (reasoning that, because the enforcement of civil and political rights implicates budgetary concerns, traditionally the province of legislatures, the separation of powers was not threatened by including socioeconomic rights in the 1996 Constitution).

222. Tushnet, supra note 101, at 95 (footnote omitted).

223. See supra notes 176–79 and accompanying text; cf. Kumm & Comella, supra note 166, at 277 (arguing that proportionality analysis enables courts to appropriately balance competing interests in private litigation).


225. Cf. Rebecca J. Cook, State Responsibility for Violations of Women’s Human Rights, 7 HARY. HUM. RTS. J. 125, 137, 151 (1994) (“States must be answerable for their acts and omissions, their initiatives, and their maintenance of the status quo despite evidence of pervasive inequality.” (emphasis added)).
1. Standing To Bring a Preventative Suit

To preventatively challenge the constitutionality of the government’s failure to protect women from corrective rape, a suit may be brought by a women’s group on behalf of all women at risk of corrective rape or in the public interest. The 1996 Constitution established broad standing rights for those wishing to challenge the constitutionality of government action or inaction. 226 Section 38 of the Bill of Rights declares that “[a]nyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief.” 227 Section 38 goes on to list the persons who may “approach a competent court”:

(a) anyone acting in their own interest;
(b) anyone acting on behalf of another person who cannot act in their own name;
(c) anyone acting as a member of, or in the interest of, a group or class of persons;
(d) anyone acting in the public interest; and
(e) an association acting in the interest of its members. 228

On this basis, a woman need not wait until she is the victim of corrective rape to bring a challenge to the government’s inaction. Nor need she bring a complaint on her own, running the risk of “outing” herself or being subject to the social stigma many in South Africa reserve for gay people. 229 Rather, a group, acting on behalf of all similarly situated women or in the interest of the public, may bring the suit. 230 Based on the startling statistics discussed earlier and the high likelihood that lesbian women in South Africa, particularly those who are poor and black and live in townships, will face at least the threat of corrective rape in their lifetimes, 231 a group could bring suit and make a compelling case that the court need not wait for a woman to be the victim of corrective rape, but rather should analyze the extent to which the common law fails to adequately reflect the government’s affirmative obligations to prevent this violence.

227. Id. (emphasis added).
228. Id.
229. Cf. Thomas, supra note 14, at 390 (reasoning that when members of unpopular minorities have to disclose membership in that minority to register a complaint, that act can become the basis for further discrimination).
230. See S. Afr. Const., 1996 § 38(c)–(d); see also Nat’l Coal. for Gay & Lesbian Equal. v. Minister of Home Affairs 2000 (2) SA 1 (CC) at 22 para. 29 (S. Afr.) (describing “the objective theory of unconstitutionality” wherein “a litigant who has standing may properly rely on the objective unconstitutionality of a statute for the relief sought, even though the right unconstitutionally infringed is not that of the litigant in question but of some other person”).
231. See supra section I.A.
2. Making Out a Delictual Claim

The South African law of delict closely resembles negligence in U.S. tort law.\textsuperscript{232} To make out a delictual claim, a plaintiff must show: (1) wrongfulness (or duty);\textsuperscript{233} (2) negligence (or breach);\textsuperscript{234} (3) factual and legal causation (but-for and proximate causation);\textsuperscript{235} and (4) damages.\textsuperscript{236} In \textit{Carmichele}, on remand with instruction from the Constitutional Court to develop the common law in light of the spirit, purport, and objects of the 1996 Constitution, the lower court held that the police and prosecuting authority in the case breached their duty to prevent harm to the applicant, a duty developed to comport with the Bill of Rights.\textsuperscript{237} This was a form of indirect horizontal application—developing the government’s duty toward the plaintiff in such a way that the requirements of the 1996 Constitution indirectly reached Francois Coetzee by obligating the government to protect women like Carmichele from Coetzee and others like him. Accordingly, this section will focus on the impact of the \textit{Carmichele} ruling and indirect horizontal application on the wrongfulness prong of the law of delict.

Wrongfulness is defined as the infringement of a subjective right or the breach of a legal duty to prevent harm.\textsuperscript{238} The existence of a legal duty, though, is based on a reasonableness standard determined by reference to the legal convictions of the community (or \textit{boni mores}),\textsuperscript{239} which, after \textit{Carmichele}, must be interpreted in light of the Constitution.\textsuperscript{240} This is a natural extension of the traditional \textit{boni mores} analysis:

\begin{quote}
[T]he bill of rights reflects the fundamental legal values accepted in a society, and as such it represents a crystallised form of public policy. The policy considerations determining the contents and application of open-ended rules can therefore to a significant extent be extracted from the provisions of the bill of rights.\textsuperscript{241}
\end{quote}

\footnotesize
\begin{itemize}
\item \textsuperscript{233} See Neethling, \textit{supra} note 232, at 579–86.
\item \textsuperscript{234} See id. at 586–87.
\item \textsuperscript{235} See id. at 588–89.
\item \textsuperscript{236} See id. at 589.
\item \textsuperscript{237} \textit{Carmichele v. Minister of Safety & Sec.} 2003 (2) SA 656 (C) at 272 para. 32 (S. Afr.).
\item \textsuperscript{238} See Loubser, \textit{supra} note 232, at 284; Neethling, \textit{supra} note 232, at 579.
\item \textsuperscript{239} See Loubser, \textit{supra} note 232, at 284; Neethling, \textit{supra} note 232, at 579 & n.60.
\item \textsuperscript{240} See Neethling, \textit{supra} note 232, at 580 & n.6; \textit{supra} note 116 and accompanying text; see also Leinius & Midgley, \textit{supra} note 100, at 20 (arguing that the wrongfulness prong of the delictual test is the correct locus for determining “whether constitutional obligations have delictual equivalents”).
\item \textsuperscript{241} van Aswegen, \textit{supra} note 164, at 60; see also van der Walt, \textit{supra} note 208, at 352 (“The indirect horizontal application of the Bill of Rights should therefore be expected to have a definite bearing on how [South African] courts are to construe the scope of subjective rights and legal duties.”).
\end{itemize}
Legal duties reach both acts and omissions. Although omissions, such as the
government’s failure to prevent corrective rape, are not wrongful per se, such
omissions may be considered under a totality-of-the-circumstances analysis:
thus, the court balances the interests of the parties before it with the interests of
the community and ensures that the resulting balance comports with the com-
mands of the Bill of Rights.242

Students of U.S. constitutional law will recall that the government is under no
affirmative obligation to protect citizens from harm: the government may
choose not to act without incurring liability for any harms that result from such
inaction.243 However, in South Africa, after Carmichele, the courts have a
momentous opportunity to chart a different course by defining the wrongfulness
prong more broadly in order to more effectively protect women from corrective
rape.244 One option would be to create a duty requiring police to take reason-
able steps to protect women from private acts of violence245 and impose
liability for failure to perform this constitutionally mandated duty246 absent a
compelling reason.247

Although the focus of a court tasked with developing the common law to
comport with the Bill of Rights is wrongfulness, the plaintiff must also show
negligence, causation, and damages in order to prevail on a delictual claim.
Negligence resembles the breach prong for the tort of negligence in U.S. law:
the test in South Africa is “whether the reasonable person in the position of the
defendant would have foreseen the reasonable possibility of damage to another,
and would have taken reasonable steps to guard against such damage.”248 To
prove foreseeability, the plaintiff must show that the general nature of the harm,
rather than the precise harm or manner in which it occurred, was reasonably
foreseeable by the defendant.249 The plaintiff must also show factual causation
(that there was a causal link between the state’s act or omission and the
harm),250 legal causation (that the state’s act or omission proximately caused the
harm, meaning that the act or omission is of the kind for which the state should

243. See, e.g., DeShaney v. Winnebago Cnty., 489 U.S. 189, 195 (1989) (no affirmative constitu-
tional duty to protect individuals from violence).
244. See, e.g., Neethling, supra note 232, at 580 (“The element of wrongfulness should therefore be
defined more broadly to provide better protection of the values (such as physical integrity) underpin-
ing the Bill of Rights.”).
245. Id. at 581. For further discussion on the precise contours of this affirmative duty, see infra Part
IV.
246. See supra sections I.B and II.A; see also S. Afr. Const., 1996 § 205(3) (“The objects of the
police service are to prevent, combat and investigate crime, to maintain public order, [and] to protect
and secure the inhabitants of the Republic . . . .” (emphasis added)).
248. See Neethling, supra note 232, at 587; see also First Nat’l Bank of S. Afr. v. Duvenhage 2006
(5) SA 319 (A) at 320 para. 2 & n.2 (S. Afr.) (stating the test for negligence and citing Kruger v.
Coetzee 1966 (2) SA 428 (A) at 430 E–G (S. Afr.), “which has been applied by [the Supreme Court of
Appeal] in countless cases”).
249. Neethling, supra note 232, at 587.
250. Id. at 588.
be held liable), and damages to make out a delictual claim.

A number of factors—such as the knowledge or foreseeability of violence on the part of the state, any representation by the state that the victim will be protected, and the possible or probable extent of the harm the victim may suffer—may be considered when imposing a duty on the government to protect women from corrective rape. The stark statistics on the level of violence against women in South Africa today counsel in favor of imposing a legal duty on the state under the foreseeability factor. Given these statistics, we can infer that the South African government is aware—at least constructively—of the terrible pattern of violence against women; it is also in a unique position to end this violence. Additionally, a number of substantive provisions in the Bill of Rights counsel courts to examine whether the wrongfulness prong of the delictual test needs to be developed to better protect women from violent crime for the representations of dignity, freedom, and equality in the Constitution to be true. Thus, there is a compelling case that the requirements of Carmichele have been triggered. In a suit against the government arguing that not enough has been done to protect women from corrective rape, the court must: (1) analyze whether the current common law of delict imposes an affirmative duty on the government to prevent corrective rape; (2) if the delictual test in its present form does not obligate the government to act, determine whether the common law must be developed so that it comports with the strictures of the Bill of Rights; and (3) if the delictual test must be developed to bring it in line with constitutional protections, announce the duty with which South Africa must comply in order to satisfy its common law and constitutional obligations. The answer to (1) is likely “no” and, based on this answer and the constitutional implications of corrective rape discussed in section II.A, the answer to (2) is arguably “yes.”

But what about the answer to (3)? What is the duty with which the South African government must comply? If the Bill of Rights directs a court to develop the common law of delict, having determined that the old common law duty was insufficient, what duty should a court develop in its place? In Part III, I discuss international human rights law and the doctrine of due diligence as delictual legal duty. Because the 1996 Constitution commands courts to enforce South Africa’s international legal obligations, the doctrine of due diligence—which requires that states prevent, investigate, and punish private human rights violations—is the appropriate analytical building block to insert into the newly developed wrongfulness prong in a Carmichele suit.

251. Id. at 588–89.
252. The plaintiff must both show damage actually suffered and prove the extent of that damage. Id. at 589.
253. See Loubser, supra note 232, at 288–90; Neethling, supra note 232, at 583–85.
254. See supra section I.A.
255. See supra section II.A.
256. See infra section III.A.
III. THE STATE’S DUTY TO CORRECT CORRECTIVE RAPE: INTERNATIONAL LEGAL OBLIGATIONS AS DELICTUAL LEGAL DUTY

Although there are a number of factors courts may consider when determining whether and how to impose a duty on the state when developing the common law to comport with constitutional principles under *Carmichele*, there is no exhaustive list. For instance, in *Carmichele*, the Constitutional Court made reference to South Africa’s international legal obligations before remanding to the lower court to develop the common law. Since emerging from apartheid, South Africa has made a firm commitment to its international legal obligations, comparative legal analysis, and the values of human rights. Because of this high regard for international law, common law courts may look beyond South Africa’s borders for universal principles that fit neatly into the newly developed wrongfulness prong of the test for delict and counsel in favor of holding the state responsible for inadequately protecting women from corrective rape.

In contrast to the oppression of the apartheid regime, modern South Africa has embraced human rights and placed international law in a central position in the country’s new constitutional regime. Although several commentators have studied the weaknesses of international human rights law—noting, for instance, that a state agrees to value human rights only to the extent that it consents to be bound and that the “views” of human rights monitoring bodies are neither binding nor directly enforceable in domestic courts—South Africa has a rich tradition of incorporating human rights protections into domestic law, making these protections justiciable, and fulfilling the state’s promise to respect these rights. Therefore, South African courts are not exempt from the duty on the state—and all its organs—to give effect to the country’s international legal obligations.

A. INTERNATIONAL LAW IN SOUTH AFRICA

The high esteem with which the 1996 Constitution holds international and foreign law when arriving at solutions to constitutional problems is quite

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257. See supra notes 233–36 and accompanying text.
258. *Carmichele v. Minister of Safety & Sec.* 2001 (4) SA 938 (CC) at 964–65 para. 62 (S. Afr.).
260. *See K*, 2005 (6) SA at 437 para. 35 (“Our Courts will look at other jurisdictions for enlightenment and assistance in developing our own law.”).
262. See Bossuyt, *supra* note 216, at 50–51; Miller & Faux, *supra* note 261, at 76.
263. Miller & Faux, *supra* note 261, at 76.
264. Cf. id. (observing that reporting obligations create “constructive dialogues” between the States Parties to a human rights convention and the treaty monitoring body).
different from the conventional view in the United States regarding the value of international and foreign law sources in interpreting the U.S. Constitution. The courts in South Africa, in interpreting the Bill of Rights, “must consider international law[,] and . . . may consider foreign law.”265 Although the 1996 Constitution requires implementing legislation before treaties may have domestic effect unless the treaty is self-executing,266 the Constitution provides that customary international law is binding domestically unless inconsistent with the Constitution or legislation267 and that, when interpreting any legislation, courts must arrive at interpretations, wherever reasonably possible, that do not conflict with South Africa’s international legal obligations.268 And although Section 233—requiring reasonable interpretations of legislation consistent with international law—refers to legislation only, the Constitutional Court has noted that the presumption created by Section 233 “must apply equally to the provisions of the Bill of Rights and the Constitution as a whole,”269 requiring interpretations of the Bill of Rights that do not conflict with South Africa’s international legal obligations. Moreover, South Africa is under a duty to interpret its treaty obligations in good faith,270 based on “[t]he presumption of good faith,” which implies that “states parties intend treaties [they enter into] to be effective.”271

265. S. Afr. Const., 1996 § 39(1)(b)–(c); see S v. Makwanyane 1995 (3) SA 391 (CC) at 413–14 para. 35 (S. Afr.) (noting, in the context of Section 39(1)(b)’s predecessor in the 1993 Constitution, that “public international law would include non-binding as well as binding law,” including the U.N. Human Rights Committee, the Inter-American Court of Human Rights, and the European Court of Human Rights); du Plessis, supra note 160, at 32-172 (noting, in the context of Makwanyane, that international and foreign authorities “may be considered [to interpret all of the 1996 Constitution] because they are of value in their own right”); Hennie Strydom & Kevin Hopkins, International Law, in CONSTITUTIONAL LAW OF SOUTH AFRICA 30-1, 30-3 (Stuart Woolman et al. eds., 2d ed. 2009) (noting that Section 39(1)(b) “turns international law into a mandatory canon of constitutional interpretation”); see also Statute of the International Court of Justice art. 38(1), June 26, 1945, 59 Stat. 1055, 1060 (listing the sources of international law, including judicial decisions); Strydom & Hopkins, supra, at 30-3 (same).

266. S. Afr. Const., 1996 § 231(4); see also Miller & Faux, supra note 261, at 83 n.75 (describing the difference between self-executing and non-self-executing treaties in the United States).


268. Id. § 233; see also Strydom & Hopkins, supra note 265, at 30-12 (noting, in the context of Makwanyane, that because international law is considered when interpreting the Bill of Rights and “embraces both binding and non-binding international law . . . the obligation to consider international law would include such a . . . treaty” to which South Africa is not yet a party).

269. See Kaunda v. President of the Republic of S. Afr. 2005 (4) SA 235 (CC) at 251 para. 33 (S. Afr.); see also Gerhard Erasmus, The Incorporation of Trade Agreements and Rules of Origin: The Extent of Constitutional Guidance, 28 SAYIL 157, 175 (2003) (reasoning that Section 233 requires courts to interpret legislation consistently with international law even if there is no ambiguity in the legislation).

270. See Vienna Convention on the Law of Treaties, art. 26, opened for signature May 23, 1969, 1155 U.N.T.S. 331 (parties to a treaty must fulfill their treaty obligations in good faith); see id. at art. 27 (mandating that States Parties to a treaty “may not invoke the provisions of its internal law as justification for its failure to perform a treaty”). Although South Africa has not ratified the Vienna Convention, the Convention’s terms largely codify customary international law, see LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 453 (4th ed. 2001), which South Africa is under an obligation to observe, see S. Afr. Const., 1996 § 232.

271. See Cook, supra note 225, at 147.
interpreting these mandates, the Constitutional Court has not shied away from referring to international and foreign law sources in its opinions.272

On this basis, international law is an additional source for outlining the contours of the duty that rests with the state to protect individuals from private acts of violence generally and corrective rape specifically. In fact, one of the chief concerns of the modern human rights regime has been molding legal doctrine to better address instances of fundamental rights violations by private persons. The result: the doctrine of due diligence.

B. DUE DILIGENCE: THE STATE’S DUTY TO PREVENT, INVESTIGATE, AND PUNISH PRIVATE VIOLENCE

1. Due Diligence: Roots

According to the classical model, international law regulates relations between states, not between a state and its citizens.273 Today, however, states are not the exclusive—although they remain the primary—international actors.274 Following the atrocities of World War II, human rights law emerged and modified this classical conception.275 The United Nations, for example, was created to prevent future atrocities and preserve fundamental freedoms by requiring members of the global community to have respect for and give effect to human rights.276 As a means to this end, Article 1 of the United Nations Charter provides that one of the purposes of the United Nations is “promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.”277

Initially, human rights law incorporated a public–private distinction akin to that of the state action doctrine.278 Governments were accountable only for the acts and omissions of their own actors and a limited number of non-state actors.279 Thus, certain spheres considered intimate or personal were insulated from government interference and the early understanding of human rights law failed to recognize that governments may owe a duty to protect private individu-

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272. See, e.g., Bhe v. Magistrate 2004 (1) SA 1 (CC) at 608 para. 51 (S. Afr.) (noting that “many open and democratic societies” and “[a] number of international instruments[,] to which South Africa is a party” also share the 1996 Constitution’s regard for the equality of women); Carmichele v. Minister of Safety & Sec. 2001 (4) SA 938 (CC) at 964 para. 62 (S. Afr.) (noting that “South Africa also has a duty under international law to prohibit all gender-based discrimination”).


274. Miller & Faux, supra note 261, at 69.

275. See id. at 67 (describing the paradigm shift of modern doctrine as moving from what states may do to preserve individual rights to what states must do to enable all individuals to enjoy their rights); Strydom & Hopkins, supra note 265, at 30-2 to-3.

276. See Bossuyt, supra note 216, at 47.

277. U. N. Charter art. 1, para. 3.

278. See supra notes 164–67 and accompanying text.

als from other private parties as well as from state actors.\textsuperscript{280} This was the case even though violence against women, in the context of rape, often takes place in the public sphere. Thus, like the state’s failure to provide greater safety and more forceful investigation and prosecution of domestic violence, omissions by the state as to rape lead to gross violations of human rights.\textsuperscript{281}

Modern human rights law has largely ignored this public–private distinction.\textsuperscript{282} For instance, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which obligates states to remove discriminatory barriers from the full and free exercise of rights by women, reaches \textit{any} actor.\textsuperscript{283} The Convention’s duty to modify the conduct of private citizens to ensure equality for women\textsuperscript{284} covers attitudes that include the inferiority of women and stereotyped gender roles,\textsuperscript{285} which arguably encompass the animus toward gay women that motivates many men to commit corrective rape.\textsuperscript{286} Furthermore, in elaborating on states’ obligations under CEDAW, the treaty’s monitoring body announced that the Convention requires not only adequate legal protection, but also appropriate support services, gender-specific training for police officers, and the collection of statistics on gender-based violence\textsuperscript{287} and declared that a state’s failure to act or exercise due

\begin{itemize}
  \item \textsuperscript{280} Miller & Faux, \textit{supra} note 261, at 71; \textit{see} Sullivan, \textit{supra} note 43, at 127; \textit{see also} Andrews, \textit{supra} note 18, at 341 (describing how, during apartheid, violence against women was acknowledged as serious, but either private or not the concern of law enforcement); Combrinck, \textit{supra} note 33, at 173 (reasoning that the inclusion in the 1996 Constitution of the right to be free from violence from public and private sources was significant because the “perceived distinction between ‘private’ and ‘public’ violence has traditionally served to justify a reluctance on the part of state actors to intervene in private matters such as marital rape and other forms of domestic violence”); Cook, \textit{supra} note 225, at 134, 137 (“Because of the historic respect international law has given to the principle of noninterference in states’ domestic affairs, which have been analogized to private sector activities, the injustices that women experience under domestic laws and practices have gone largely unrecognized by international lawyers.”).
  \item \textsuperscript{281} See Miller & Faux, \textit{supra} note 261, at 71; \textit{see also} Sullivan, \textit{supra} note 43, at 127 (attributing the failure of international law to address civil rights violations by private individuals to three factors: “the state-centered nature of international law, the dominance of civil and political rights discourse, and deference to the institution of the [traditional] family”).
  \item \textsuperscript{282} See Sullivan, \textit{supra} note 43, at 130 (listing examples of human rights conventions that “impose duties on the state to prevent and respond to breaches of certain rights by private persons”).
  \item \textsuperscript{283} Convention on the Elimination of All Forms of Discrimination Against Women art. 2(e), \textit{opened for signature} Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW] (obligating States Parties “[t]o take all appropriate measures to eliminate discrimination against women by \textit{any} person” (emphasis added)); \textit{see also} id. at art. 3 (obligating States Parties to take “all appropriate measures, including legislation, to ensure the full development and advancement of women”); CEDAW General Recommendation 19, \textit{supra} note 33, ¶ 23 (noting that CEDAW addresses violence by government and private individuals).
  \item \textsuperscript{284} CEDAW, \textit{supra} note 283, at art. 5(a) (obligating States Parties to take all appropriate measures “[t]o modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women”).
  \item \textsuperscript{285} See Andrews, \textit{supra} note 18, at 331.
  \item \textsuperscript{286} See \textit{supra} notes 5–7 and accompanying text.
  \item \textsuperscript{287} CEDAW General Recommendation 19, \textit{supra} note 33, ¶ 24.
\end{itemize}
diligence may lead to responsibility of the state when violence is committed.\footnote{CEDAW General Recommendation 19, \textit{supra} note 33, ¶¶ 9–10; see also Sullivan, \textit{supra} note 43, at 129–30 (“General [R]ecommendation [] 19 emphasizes that the prohibitions of gender discrimination and gender-based violence are not restricted to acts by or on behalf of government, but extend also to acts by private persons.”).

288. CEDAW General Recommendation 19, \textit{supra} note 33, ¶¶ 9–10; see also Sullivan, \textit{supra} note 43, at 129–30 (“General [R]ecommendation [] 19 emphasizes that the prohibitions of gender discrimination and gender-based violence are not restricted to acts by or on behalf of government, but extend also to acts by private persons.”).


290. International Covenant on Civil and Political Rights art. 2, \textit{open for signature} Dec. 16, 1966, 999 U.N.T.S. 171; see also \textit{General Comment No. 3: Article 2: Implementation at the national level}, Human Rights Committee, 13th Sess., at 1, U.N. Doc. HRI/GEN/1/Rev.1 (1994) (“[T]he obligation under the Covenant is not confined to the respect of human rights, but that States parties have also undertaken to ensure the enjoyment of these rights to all individuals under their jurisdiction.”).

291. See, e.g., Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, \textit{open for signature} Dec. 10, 1984, 108 Stat. 382, 1465 U.N.T.S. 85 (requiring States Parties to take effective steps to prevent torture or other acts of cruel, inhuman, or degrading treatment, whether such acts are committed by the instigation, consent, or acquiescence of the state); American Convention on Human Rights art. 1, \textit{open for signature} Nov. 22, 1969, 1144 U.N.T.S. 123 (requiring States Parties to “undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms”); International Convention on the Elimination of All Forms of Racial Discrimination art. 2, \textit{open for signature} Dec. 21, 1965, 60 U.N.T.S. 195 (requiring States Parties not to discriminate, to prevent discrimination by others, and to provide effective remedies); Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, \textit{open for signature} Nov. 4, 1950, 213 U.N.T.S 222 (requiring States Parties to “secure to everyone within their jurisdiction the rights and freedoms” of the Convention).}
private individuals. Thus:

Emerging jurisprudence . . . has interpreted the obligation to ensure rights as
entailing affirmative duties on the state to take the steps necessary to enable
individuals to exercise their rights—marking a growing recognition of a duty
on the part of the state to protect human beings against violations of their
fundamental rights.292

This accords with the gloss the Constitutional Court has put on the 1996
Constitution and the Bill of Rights—particularly to the extent that the latter was
written as a break from South Africa’s racist, apartheid past and a regime that
did not value human rights293—as well as a recent report by the U.N. Special
Rapporteur on Violence Against Women:

Increasingly . . . international legal interpretations and norms are evolving to
define more clearly the positive role and responsibility of the State in prevent-
ing abuses perpetrated by . . . private actors. The concept of State responsibil-
ity has developed to recognize that States also have an obligation to take
preventive and punitive steps where human rights violations by private actors
occur.294

The Special Rapporteur further argued that merely criminalizing violence
against women is insufficient;295 rather, states must undertake affirmative duties
to protect women from violence by private actors,296 leading some commenta-
tors to conclude that states must review government programs designed to
prevent violence against women.297

2. Due Diligence: Vela´squez Rodrı´guez v. Honduras

As international agreements grew to increasingly encompass private as well
as state action, the doctrine of due diligence evolved. Due diligence represents

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293. See supra notes 176–79 and accompanying text.
294. Special Rapporteur on Violence Against Women, Its Causes and Consequences, Further
Promotion and Encouragement of Human Rights and Fundamental Freedoms, Including the Question
of the Programme and Methods of Work of the Commission; Alternative Approaches and Ways and
Means Within the United Nations System for Improving the Effective Enjoyment of Human Rights and
(by Radhika Coomaraswamy) (emphasis added); see also CEDAW General Recommendation 19, supra
note 33, ¶ 9 (noting that states may be responsible for failing to protect women from violence against
women); supra section II.A (discussing constitutional implications of corrective rape). See generally
James D. Wilets, International Human Rights Law and Sexual Orientation, 18 HASTINGS INT’L & COMP.
L. REV. 1, 26–119 (1994) (surveying international human rights law and its applicability to sexual
orientation).
295. Special Rapporteur on Violence Against Women, Its Causes and Consequences, supra note 294,
¶ 37.
296. Id. ¶ 32.
297. See Miller & Faux, supra note 261, at 79.
an affirmative duty on the part of the state to protect individuals from rights violations, including from private sources.\footnote{See Cook, supra note 225, at 151; Miller & Faux, supra note 261, at 67, 78.} Under the doctrine, a state that does not itself commit human rights violations may nonetheless be responsible for the infringement of human rights within its territory.\footnote{See Sullivan, supra note 43, at 130.} A state may be held accountable for failure to take positive steps to incorporate human rights law into domestic law\footnote{See Govender, supra note 34, at 668.}—thereby violating its obligations under a treaty—or a state may be responsible for private acts of violence where the state fails to exercise due diligence.\footnote{CEDAW General Recommendation 19, supra note 33, ¶ 9; see also Cook, supra note 225, at 127 (noting that recent developments in international law now require states to “protect an individual’s exercise and enjoyment of human rights”); Govender, supra note 34, at 668 (observing that to hold South Africa responsible for violating its international obligations, it must be shown that South Africa “failed to act with due diligence or was complicit in the violent crimes being carried out against women”).} In the latter case, a state is responsible for failing to exercise due diligence when private human rights violations take place because, absent due diligence, the state is tacitly condoning the private violence that occurs.\footnote{See Kenneth Roth, Domestic Violence as an International Human Rights Issue, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 326, 330 (Rebecca J. Cook ed., 1994); Dinah Shelton, State Responsibility for Covert and Indirect Forms of Violence, in HUMAN RIGHTS IN THE TWENTY-FIRST CENTURY: A GLOBAL CHALLENGE, supra note 34, at 265, 273–74; Sullivan, supra note 43, at 129; see also Cook, supra 225, at 151 (“[A] state may be considered to have facilitated an international wrong or to be complicit in its commission when the wrong is of a pervasive or persistent character.”).} Included in this duty is: (1) protection from violence; (2) adequate investigation of violence; and (3) mechanisms for holding violators accountable, including remedies for the victims.\footnote{See Cook, supra note 225, at 127; see also Special Rapporteur on Violence Against Women, Its Causes and Consequences, supra note 294, ¶ 31 (“States also have an obligation to take preventative and punitive steps where human rights violations by private actors occur.”).} Nor is this doctrine without precedent in traditional international law: under the historical antecedents to the due diligence doctrine, a state could be held liable for private actors’ attacks on aliens if the state had not taken adequate steps to prevent or remedy the attacks or to apprehend and hold the attackers responsible.\footnote{Shelton, supra note 302, at 272; see also United States Diplomatic & Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, ¶ 58, 63–67 (May 24) (holding that although seizure of the U.S. embassy by militants was not initially “directly imputable to the Iranian State,” the government’s subsequent approval of these actions and its failure to take appropriate steps to protect the embassy constituted a violation of international law); Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4, 23–24 (Apr. 9) (finding that, although Albania did not lay any mines in the Corfu Channel, Albania knew or should have known they were present; therefore, failure to warn British warships of this danger rendered Albania liable under international law).}

Perhaps the most seminal decision on the duty of due diligence is Velásquez Rodríguez v. Honduras,\footnote{Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988).} heard in the Inter-American Court of Human Rights against the backdrop of “disappearances” of private citizens during the dictator-
ship of General Gustavo Alvarez Martinez in Honduras in the 1980s. At the time, in order to conceal human rights violations, many states denied responsibility for abuses and insulated themselves from liability by removing any indicia of state action; at the same time, however, states permitted—if not actually directed—human rights violations by private or quasi-governmental entities, enabling the government to conduct its affairs with impunity in what were called disappearances. Under these circumstances, the Inter-American Court of Human Rights held that states have an affirmative duty to exercise due diligence in response to human rights violations by private parties. The court found Honduras responsible, even though the disappearances were not carried out by agents acting under color of state authority, because the state failed to act to prevent the disappearances, investigate and apprehend the perpetrators, or punish those responsible. The court held that:

An illegal act which violates human rights and which is initially not directly imputable to a State . . . can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the [American] Convention [on Human Rights].

In this case, the government’s acquiescence to the occurrence of private violence was fatal to the state’s theory of non-responsibility.

The duty of due diligence, the court stated, requires states to prevent, investigate, and punish violations, as well as provide compensation to individuals whose rights are violated. The court reasoned that a state is accountable under international law if it allows a human rights violation to occur without taking these affirmative measures. The court further stated that if state actors or private individuals act “in such a way that the violation goes unpunished and the victim’s full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and

307. Shelton, supra note 302, at 265.
309. Id. ¶¶ 174–76.
310. Id. ¶ 172.
311. Id. ¶¶ 178–80.
312. Including through “all those means of a legal, political, administrative and cultural nature that promote the protection of human rights.” Id. ¶ 175.
313. The court stated that “[t]he State is obligated to investigate every situation involving a violation of the rights protected by the [American] Convention [on Human Rights].” Id. ¶ 176.
314. Id. ¶ 174.
315. Id.
316. Id. ¶¶ 174–76.
full exercise of those rights to the persons within its jurisdiction." Thus, the duty of due diligence requires states “to organize the governmental apparatus and, in general, all the structures through which public power is exercised, [including courts,] so that they are capable of juridically ensuring the free and full enjoyment of human rights.” With the evolution of the due diligence doctrine, states must undertake affirmative duties to fulfill and give effect to rights promised its citizens.

Similarly, South Africa, although not directly responsible for instances of corrective rape, is obligated under the doctrine of due diligence to take affirmative steps to better protect women from corrective rape’s alarming prevalence. And courts, when developing the common law to comport with the Bill of Rights, must take cognizance of South Africa’s international legal obligations. Therefore, having triggered the need to develop the common law under Carmichele, courts may look to the due diligence doctrine when updating the wrongfulness prong of the test for delict.

C. ENFORCING THE DUE DILIGENCE DOCTRINE VIA CARMICHELE

Based on the foregoing analysis, South Africa is under an international legal obligation not only to refrain from committing human rights violations, but also to undertake affirmative steps to protect individuals—especially those most vulnerable to the grossest forms of human rights violations—from private violations. South Africa must make good faith efforts to ensure this duty is fulfilled by protecting women from violent acts and, ideally, preventing such

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317. Id. ¶ 176; see also X & Y v. The Netherlands, 91 Eur. Ct. H.R. (ser. A) at 11 (1985) (holding that a state’s failure to prosecute sexual assault by a private person violates the victim’s right to privacy and stating that the European Convention may require “the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves”); Airey v. Ireland, 32 Eur. Ct. H.R. (ser. A) at 14 (1979) (noting that the European Convention “necessitates some positive action on the part of the State; in such circumstances, the State cannot simply remain passive”); Godinez Cruz v. Honduras, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 5, ¶ 182 (Jan. 20, 1989) (holding, in the context of “disappearances” for which there was no direct evidence of government involvement, that a state may be responsible for an act of violence by a private party “because of the lack of due diligence to prevent the violation or to respond to it”); Human Rights Comm. Views of the Human Rights Committee Under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights Concerning Communication No. 195/1985 para. 5.5, U.N. Doc. CCPR/C/39/D/195/1985; GAOR, 39th Sess., Supp. No. 40 (Aug. 23, 1990) (holding that it is a violation of a state’s duty to respect and ensure rights found in the International Covenant on Civil and Political Rights to fail to properly investigate threats against the security of the person).

318. Shelton, supra note 302, at 273.

319. Cf. Cook, supra note 225, at 135 (“Meticulously documented events-based data may show that human rights abuses represent policies rather than merely individual aberrations. Cases codify the absence of government efforts to eliminate and remedy abuses, and indicate trends over time.”); Geen, supra note 7 (“[Corrective rape] continue[s] unabated and with impunity, while governments simply turn a blind eye.”); Kelley, supra note 4 (describing “a report . . . condemn[ing] the culture of impunity around these crimes, which [the report] says are going unrecognised by the state and unpunished by the legal system”).

320. See supra section III.A; cf. Cook, supra note 225, at 140 (advocating for the fostering of “cross-fertilization” by jurists between domestic and international law).
violence from ever taking place.\(^321\) But where the government fails to act, thus failing to give effect to its international legal obligations, all organs of the state must take cognizance of international law, so it is appropriate for the courts, under *Carmichele*, to develop the government’s common law duties by directly incorporating the due diligence doctrine into the test for delict.

Accordingly, given that the state has failed to adequately protect women from corrective rape, recourse may be had in the form of the courts developing the common law to better protect women, which would help reduce these terrible acts of violence and, I hope, prevent them from happening.\(^322\) When presented with a case involving corrective rape, courts should look to the values in the Bill of Rights that require South Africa to give effect to the rights to life, equality, and freedom from violence and must rule in a manner that is consistent with South Africa’s international human rights obligations.\(^323\) Therefore, directly incorporating the doctrine of due diligence into the wrongfulness prong of the test for delict may satisfy the court’s obligation to develop the common law, give life to the government’s duty toward women at risk of corrective rape, and help prevent corrective rape.

### IV. Correcting Corrective Rape: Developing South Africa’s Affirmative Obligations

*Carmichele* directs courts to develop the common law of delict to ensure it adequately reflects the commands of the Bill of Rights. In finding a need to develop the wrongfulness prong of the delictual test based on the constitutional implications of corrective rape, courts may look to South Africa’s international legal obligations for guidance on what legal duties to impose on the government. That being said, though, what will be the precise contours of the state’s affirmative duties?

Many authors have outlined these duties and have made recommendations. These recommendations, which focus mainly on the prevention and investigation arms of the due diligence doctrine, include better police training,\(^324\) standardized procedures when investigating a rape complaint,\(^325\) reporting systems for victims of anti-gay crimes,\(^326\) specialized women-led sexual assault units,\(^327\) awareness-raising programs and guidelines to address service-provider discrimination,\(^328\) shelters and adequate housing,\(^329\) support schemes for abused

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\(^{321}\) See Pieterse, *supra* note 124, at 29.  
\(^{322}\) See Anderson, *supra* note 18, at 819.  
\(^{323}\) See *supra* section III.A.  
\(^{325}\) See Anderson, *supra* note 18, at 818.  
\(^{326}\) See Nel & Judge, *supra* note 5, at 32.  
\(^{327}\) See Anderson, *supra* note 18, at 817.  
women, and, perhaps most important given the extent to which many view corrective rape and violence against women as acceptable, public education programs.

Gauging the efficacy of these possible duties, it is important to consider the lessons of Carmichele. After Carmichele, the threat of suit made police better at investigating violence against women, which points to the success of imposing duties on police to protect women from violence. A preventative suit, and the subsequent threat of more suits asserting that the government is not doing enough to prevent corrective rape, may have a similar effect—particularly when it comes to forcing the government to act to reshape the attitudes that give rise to corrective rape. For instance, corrective rape results from gaps in policing and safety infrastructure, much of which is the legacy of apartheid. However, given the attitudes motivating the men who commit corrective rape, the biggest hurdle the government must overcome is arguably educating the public on the reasons why anti-gay attitudes are antithetical to a society that values equality and human rights. Here, forcing the government’s hand by imposing an affirmative duty to educate the public about corrective rape and tolerance toward homosexuality will have the most lasting impact. For example, although Brown v. Board of Education outlaws segregation on the basis of race in public education and although hate crimes legislation criminalizes hate-induced motives for committing crime, both arguably also have great symbolic importance: they stand for the larger proposition that certain discriminatory attitudes have no place in modern society. Likewise, mandating that the government work to erase hateful attitudes that lead to corrective rape may help eliminate the underlying causes of corrective rape and thus go further toward truly preventing it.

I acknowledge that publicly prosecuting and convicting perpetrators of corrective rape (under general statutes prohibiting violent crime), and the societal opprobrium that would attach were the South African Parliament to expressly

331. See supra note 14.
332. See Anderson, supra note 18, at 818 (advocating for public education that prioritizes “teaching nonviolent conflict resolution, gender equality, and respect for sexual autonomy”); Kaganas & Murray, supra note 86, at 26; cf. Sullivan, supra note 43, at 133 (arguing that the state’s duty to take measures against domestic violence should be defined to include preventive educational measures).
333. See Govender, supra note 34, at 675.
334. See supra section I.A.
336. See Andrew E. Taslitz, Condemning the Racist Personality: Why the Critics of Hate Crimes Legislation Are Wrong, 40 B.C. L. Rev. 739, 750–52 (1999) (discussing the importance of hate crimes legislation as a means for society to express its disapproval of hate crimes); cf. Martha Minow, Regulating Hatred: Whose Speech, Whose Crimes, Whose Power?—An Essay for Kenneth Karst, 47 UCLA L. Rev. 1253, 1263 (2000) (“In a society in which hateful incidents are common, the government’s response of silence itself conveys powerful messages that such views and conduct are within bounds and evade the official disapproval of the community.”).
criminalize it, would have some deterrent effect on corrective rape. Nonetheless, preventing corrective rape remains the ultimate goal; successful prosecution for acts of violence and criminalization provide only one-off and ex post solutions that fail to make whole a woman who has been raped or, worse, killed.338 Moreover, merely offering women who are victims of corrective rape the possibility of a prosecution or a tort remedy may not satisfy South Africa’s international legal obligations under the doctrine of state responsibility, particularly “when the state fails to address systemic causes of violation within its own state structures.”339 Thus:

If the violation occurred due to the lack of appropriate preventive measures, the state’s provision of an ex post facto remedy against a private wrongdoer does not protect the state against international liability. Thus, a state might not discharge its international responsibility to protect human rights merely by compelling individuals to pay compensation or penalties . . . .340

Any duty developed that obligates the government to correct the prevalence of corrective rape must take into account the institutional and cultural infirmities that give rise to corrective rape in order to systematically erase the practice. In so doing, courts must take a holistic view—evaluating existing common law, analyzing new protections in the 1996 Constitution, and considering South Africa’s international legal obligations—in determining the best way to truly prevent corrective rape from happening.

CONCLUSION

My hope is that this Note triggers a conversation, not only in South Africa, but in other countries as well, about violence against women in general and corrective rape in particular. Much has yet to be written about corrective rape—the homophobia that animates it, the infrastructural infirmities that fail to stop it, and the ways in which legal institutions can be called upon to help prevent it—but South Africa is uniquely situated to address the phenomenon. Having only recently emerged from an oppressive and racist past, South Africa has managed to transition to a constitutional democracy with the help of its legal institutions. Once reviled tools of the apartheid regime, today these institutions are bastions of liberty, equality, and dignity. For precisely this reason, South Africa is uniquely able to “correct” corrective rape. The 1996 Constitution enshrines myriad rights on the basis of which a group may challenge the circumstances that give rise to corrective rape; constitutional

338. See supra section I.C.
339. Cook, supra note 225, at 169 (emphasis added).
340. Id. at 175.
doctrine makes available several possibilities for bringing suit, and South Africa manifests an openness to international and comparative law that makes it possible to incorporate human rights approaches to preventing private rights abuses. My Note, then, is a starting point to these and other discussions.

No matter the outcome of these discussions, my hope is that when articulating the contours of the state’s duty to protect women from corrective rape, courts will take into account the history of violence against women and the reality of gay women in South Africa today as well as the ways in which the constitutional and international protections South Africa owes women may be truly and effectively vindicated. As the U.N. Special Rapporteur on Violence Against Women noted in 2003, “[i]f the [last] decade emphasized standard-setting and awareness-raising, the [next] decade must focus on effective implementation and the development of innovative strategies to ensure that the prohibition against violence is a tangible reality for the world’s women.”

Absent affirmative protections that make real the guarantees of equality, dignity, and freedom from violence, women like Eudy Simelane, the football star stabbed, gang raped, and killed by a group of young men while walking near her home, cannot help but look on longingly as the promise of a new South Africa is taken from them and the state stands idly by.

341. These include applying constitutional guarantees to the perpetrators of corrective rape, arguing that these guarantees inherently require affirmative obligations on behalf of the state to protect, or relying on the Bill of Rights to breathe new life into the common law.

342. Andrews, supra note 18, at 348; Govender, supra note 34, at 676.