

CHAPTER 1

INTRODUCTION

In January 2013, Andrew Harding, the correspondent for BBC Africa, wrote, ‘Will South Africans ever be shocked by rape?’ After investigating violence against women (VAW) in South Africa, Harding highlighted the casual attitude taken towards rape that was dominant in society. He reported an incident that had happened at the end of 2012. The police had arrested a rapist at a bar shortly after he had ‘attacked and raped a 17-year-old girl at his table, but apparently considered the incident so trivial that he had not even tried to flee... Nor had anyone else in the bar, besides the alleged victim, thought of contacting the police’.¹

As much as every South African woman has a well-founded fear of violence, it has become normalised in society. Many rape incidents lead to public outrage forcing the government to make promises or amend policies, many of which are implemented. However, the reactions of the public eventually fade and violence remains a real threat in women’s daily lives. Activists wonder why the South African public does not react to horrendous episodes of rape in the same way that the Indian public reacted to the bus gang-rape incident in December 2012.

At a time when Indians are re-examining their society in the light of a single, horrific incident of gang rape, South Africa seems numb – unable to muster much more than a collective shrug in the face of almost unbelievably grim statistics – seemingly far worse than India’s.²

¹ Andrew Harding, ‘Will South Africans ever be shocked by rape?’, BBC World News, 10 January 2013, accessed 17 July 2018 at www.bbc.co.uk/news/world-africa-20971240

² Ibid.

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Despite the immense resources dedicated to combat VAW, there has been an absence of collective outrage from the public that is persistent enough to recognise VAW as a grave violation against society. The one segment of society that has consistently attempted to tackle gender-based violence (GBV) is the nonprofit sector.

Scanning the development of women's rights in South Africa in the last two decades since the Constitution was enacted, it is evident that we cannot discuss GBV without putting nongovernmental organisations (NGOs) at the centre. While there is considerable research conducted on GBV in South Africa, there is a remarkable gap in the literature on the work of NGOs in fighting GBV at the local level, specifically focusing on the spaces and opportunities available for them in a young democracy like South Africa. This book aims to fill this gap, exploring the socio-legal space in which NGOs work to end GBV as mediators, advocates, lobbyists, service providers to GBV victims,³ counsellors, lawyers and *amicus curiae* (friends of the court). Undertaking this work, NGOs close the gap between the law and local communities – a journey in which they develop complex relationships with both parties: state institutions and beneficiaries. This is the other side of the arguments explored in this book. While the research is primarily focused on VAW, NGO activism on the topic frequently overlaps with GBV, and therefore the terms will be used interchangeably.

This book argues that the legal and political space for discussing, negotiating and developing laws and policies on violence against women is quite liberal and open in South Africa, leading to significant accomplishments. Nongovernmental organisations play a central role in directing the movement against VAW by adopting multidimensional approaches and building constructive partnerships.

In the last two decades, VAW has been recognised as a global problem, attracting significant debate at the international and local levels. Under international human rights law, violence against women is defined as 'violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty'.⁴ Some forms of VAW, such as rape

³ Women subjected to GBV are often referred to as either victims or survivors. This research will use the term 'victim' referring to a situation of victimisation – a victim in comparison to the offender. However, it remains at the woman's discretion to identify herself as victim or survivor.

⁴ CEDAW Committee, General Recommendation No 19 on Violence Against Women, (1992), UN Doc A/47/38, para. 6.

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and domestic violence are universal, while other forms are specific to geographic and cultural contexts. For example, female genital mutilation (FGM) is common in some African cultures, and the practice of dowry deaths is prevalent in India. Consequently, laws and policies have been designed to eradicate VAW at the international, regional and domestic levels.⁵ However, VAW is reinforced by the social, political and economic inequalities that women bear, which necessitates the development of multifaceted approaches to combat it.

I GENDER-BASED VIOLENCE IN SOUTH AFRICA: SETTING THE CONTEXT FOR RESEARCH

A Research Objectives

Violence has prevailed throughout the social and political history of South Africa for centuries. The apartheid system that was formally promulgated in 1948 and lasted for four decades segregated racial groups, ensuring that white people received the best services. By the 1990s, negotiations were taking place between political parties, leading to the first democratic elections in 1994. In addition, an interim Constitution was drafted in 1994 to make the transition from minority rule to democracy. In 1996, it was replaced by the final Constitution. Currently, South Africa has one of the most progressive human rights systems in the world, coupled with some of the highest VAW statistics globally.

The contrast between law and society inspired this research, which aims to answer the following questions:

- What are the enabling factors within a socio-legal environment that affect the work of NGOs in fighting for women's rights in law and society?
- How do NGOs negotiate the threshold of human rights and state responsibility, specifically in the case of violence against women?
- How do NGOs, as third parties, affect women's access to justice when they are subjected to violence?

These questions will be answered in this socio-legal qualitative study, which is supported by primary research conducted in South Africa between 2010 and 2012. Additional fieldwork was undertaken in 2018

⁵ See UN Department on Economic and Social Affairs, Handbook for the Legislation on Violence against Women, (New York, 2010) UN Doc ST/ESA/329. Also see UN Department on Economic and Social Affairs, Supplement to the Handbook for Legislation on Violence against Women (New York, 2011) ST/ESA/331.

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in South Africa to capture updates and add a comparative component to the research. In the final chapter, the author will use the case of Egypt to compare the socio-legal space available to NGOs working on gender issues. Fieldwork included interviews with NGO employees, victims of VAW, and GBV shelter staff. This methodology is inspired by Hutchinson's reasoning that social science methods can be used by lawyers to identify the gap between legal theory and practice, as well as to explore the impact of law on society.⁶ Similarly, social scientists study law to understand its background, evaluate its impact and suggest reforms.⁷

B Research Structure

This research argues that NGOs in South Africa operate in a plural socio-legal environment that encourages openness and partnerships. This space allows NGOs to play a pivotal role translating international human rights into local principles and initiatives to fight GBV using a variety of methods. Nongovernmental organisations design and implement programmes to engage with institutions of formal law and GBV victims, as well as institutions of customary law, traditional leaders and local communities. The nature and dynamic of this engagement are the core of this book. Acting as cultural translators, NGOs convey human rights principles to local communities and, simultaneously, NGOs provide the state with invaluable insights on the relevance of laws and policies to women's lived realities. Essentially, NGOs seek to close the gap between women and the law.

This introductory chapter will give an overview of the research project and a brief discussion of the literature on VAW globally; this will be followed by a review of the methodology.⁸ Chapter 2 will discuss relevant domestic legislation and South Africa's obligations under international human rights law, demonstrating the liberal values enshrined in the formal legal system, paving the way for an open and engaging socio-legal environment. Recognising the limitations of law and institutions of formal justice, Chapter 3 will focus on the channels of informal justice, introducing customary law in South Africa, and locating it within formal law. The chapter will also identify the role of

⁶ Terry Hutchinson, *Researching and Writing in Law* (Pymont, NSW: Lawbook, 2006), p. 89.

⁷ Sayed Hassan Amin, *Research Methods in Law* (Glasgow: Royston Publishers, 1992) p. 61.

⁸ The term 'women's movement' will be used to refer to a national, regional or international group of non-governmental organisations who form networks for women's rights.

NGOs as mediators, offering women an option other than official and customary law. Chapter 4 will track the women's movement in South Africa in the last few decades and analyse its relationship with the state, demonstrating a functional yet imperfect dynamic, with the two parties moving towards the same goals: advancing women's rights and fighting GBV. Chapter 5 will zoom in on the judiciary, first looking at its gender composition and then presenting the practice of cause lawyering. The chapter aims to showcase courts as a space for identifying and negotiating the limits of human rights and state responsibility, with the contribution of all concerned parties: litigants, the state, and NGOs; this will be exemplified by some case analyses. Chapter 6 will take a closer look at the value of cause lawyering, pinpointing some enabling factors and indicators of success. Chapter 7 will analyse the role of NGOs in facilitating women's access to justice, and whether this leads to empowerment. Chapter 8 is the comparative component added to the research in South Africa; to demonstrate the value of an open socio-legal and political environment that guarantees the freedom of NGOs to work on women's rights. This chapter will present Egypt as an opposite example, where the freedom of NGOs is curtailed in a shrinking public space, and where their work is therefore jeopardised. Chapter 9 presents a conclusion.

C Research Methods

This research is based on multiple theoretical backgrounds so as to honour its multidisciplinary approach: namely, feminist theory and legal pluralism theories, as well as theoretical perspectives on power and mediation.

South Africa was chosen as a case study for several reasons. First, in the pluralist nature of South African society, various ethnic and racial groups adopt different customs and informal normative orders, yet they are subject to one Constitution. The different procedures by which formal and informal legal systems operate under the same jurisdiction warrant an investigation of their responses to GBV. Second, alarming levels of GBV prevail despite the enactment of progressive laws that exceed the standards of international human rights law, which raises important questions about enforcement. Third, despite the persistent high levels of violence, the South African state prioritises this issue and recognises its limitations to curb GBV, giving space to NGOs to practise their expertise on the topic. This position opens up a crucial space of collaboration between NGOs and state institutions on many fronts.

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As a result, South Africa has a civil society not only active in service provision, but also in law and policy development and in improving the capacity of state institutions to fight GBV. The methodology section towards the end of this chapter will give more details on the project, and present the research respondents.

II GENDER, RACE AND VIOLENCE IN THE SOUTH AFRICAN CONTEXT

A Tracing Violence to Apartheid

Researchers and academics have been trying to trace the growing normalisation of violence in South African society, which has created a suitable environment for VAW to flourish. Anglin states, ‘it is not that human beings are inherently violent, but rather that certain contexts and social formations seem to produce violence’.⁹ The violent history of South Africa, especially during the apartheid era, induced VAW. Moffett argues that sexual violence in contemporary South Africa is rooted in the inequalities lived in South African history and society. Apartheid legitimised violence in both public and private spheres as members of the white minority group exercised various forms of violence against the black¹⁰ majority.¹¹

While Roman Dutch law, the common law of South Africa, was discriminatory towards women, Andrews considers that African women living under customary law were more vulnerable.¹² This is because customary law treated women as minors who did not have rights. Furthermore, customary law was based on the collective interest of the community, and consequently, women were reluctant to challenge the system.¹³ This bias prevails in South Africa today, as will be discussed in Chapter 3. Through a review of case law, Banda shows that ‘a few’ women ‘challenge patriarchal laws and attitudes’ because the social

⁹ Mary K Anglin, ‘Feminist perspectives on structural violence’ (1998) 5 *Identities: Global Studies in Culture and Power*, 2, 146.

¹⁰ The terms ‘black’, ‘white’ and ‘coloured’ are commonly used in South Africa (in official documents and by the population at large) to describe racial groups. See IV. Methodology and Data.

¹¹ Helen Moffett, ‘These women, they force us to rape them: rape as narrative of social control in post-apartheid South Africa’ (2006) 32 *Journal of Southern African Studies*, 1, 129.

¹² Penelope Andrews, ‘Violence against women in South Africa: the role of culture and the limitations of law’ (1998–1999) 8 *Temple Political & Civil Rights Law Review*, 430.

¹³ Southern African Research and Documentation Centre, *Beyond Inequalities: Women in South Africa* (Southern African Research and Documentation Centre, 1997).

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cost is often high, especially for women who depend on familial financial support.¹⁴ Moreover, African women have had to endure racism and sexism, in addition to poverty and poor living conditions, which has made them more vulnerable than women from other racial groups. Living conditions during apartheid perpetuated GBV, particularly against black women. Black people were required to live in townships that were crowded, 'lawless, isolated, and impoverished'.¹⁵ Therefore, women had neither privacy nor protection.¹⁶

Women rarely reported violence to the apartheid police. On the one hand, the police did not attend to VAW victims because their mandate was to control the political opposition;¹⁷ to 'protect whites from blacks, not to protect black communities from crime'.¹⁸ On the other hand, the community did not encourage the reporting of VAW. In fact, reporting rape was considered a betrayal, specifically by black women, because the police 'were seen as enemies of the community who often violated the victim further'.¹⁹ Moreover, sexual violence was frequently used as a tool for political control. Black women were particularly targeted and abused by members of the police and military as they were obliged to carry passes, unlike women of other races.²⁰ In addition, female political prisoners were constantly threatened with rape and sexual abuse.²¹ Unsurprisingly, the apartheid government did not respond to the high rates of GBV. Wojcicki also notes that the low conviction rates and lenient sentences for rapists were tolerated,²² in part due to the narrow

¹⁴ Fareda Banda, 'Women, law and human rights in Southern Africa' (2006) 32 *Journal of Southern African Studies* 13, 20.

¹⁵ Helen Wells and Louise Polders, 'Anti-gay hate crimes in South Africa: prevalence, reporting practices, and experiences of the police' (2006) 2 *Agenda*, 3, 25.

¹⁶ Lorenzo Di Silvo, 'Correcting corrective rape: Carmichele and developing South Africa's affirmative obligations to prevent violence against women' (2011) 99 *Georgetown Law Journal*, 5, 1476.

¹⁷ Michelle J. Anderson, 'Rape in South Africa' (1999–2000) 1 *Georgetown Journal of Gender and the Law* 789, 791–792. Also see Jacklyn Cock, *Women and War in South Africa* (London: Open Letters, 1992) p. 18.

¹⁸ Wells and Polders, 'Anti-gay hate crimes' 25; Penal Reform International, *Access to Justice in Sub-Saharan Africa: The Role of Traditional and Informal Justice Systems* (UK: Penal Reform International, 2000), p. 45.

¹⁹ Mathogonolo Maboe, 'Strategies to tackle rape and violence against women in South Africa' in Center for Women's Global Leadership ed., *Gender Violence and Women's Human Rights in Africa* (New Brunswick, NJ: Douglass College, Center for Women's Global Leadership, 1994), p. 31.

²⁰ Wells and Polders, 'Anti-gay hate crimes', 24. Also see Cock, *Women and War*, pp. 1–26.

²¹ Wells and Polders, 'Anti-gay hate crimes', 24.

²² Janet Maia Wojcicki, 'She drank his money: survival sex and the problem of violence in taverns in Gauteng Province, South Africa' (2002) 16 *Medical Anthropology Quarterly*, 3, 271.

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definition of rape.²³ Under common law, rape was limited to an act of intentional sexual intercourse committed by a man against a woman without her consent.²⁴

By 1990, negotiations between political leaders started on the transitional process. It was decided that all policemen and women would resume their roles in the new South African Police Service (SAPS).²⁵ The transformation of the role of the police from ‘protectors of apartheid’ to ‘protectors of the community’ was challenging²⁶ because of the resentment that the community felt towards members of the police. The government, therefore, introduced the Police Act in 1995,²⁷ which established Community Police Forums. These forums were supposed to provide space for communication between the police and the community, in an attempt to resolve their differences.²⁸ However, conflict arose between the two parties, particularly due to disagreements over priority issues. Schärf elaborated, ‘when some communities in poor residential areas expressed the view that rape constituted the crime that worried them most, the police were floored, seeing that rape, and any form of sexual or domestic assault was considered entirely peripheral to the interests of the police’.²⁹ This disagreement increased the gap between local communities and the police.

In South African history, women’s issues were never prioritised. During the transition to democracy, the hardships faced by women, including GBV, were redefined in terms of race. For example, the issue of rape was ‘subsumed in narratives about race or class, not gender’.³⁰ Moffett refers to cases where anti-rape activists were accused of racism, not only by nationalists but also by society.³¹ Gender issues therefore presented a threat to the national project in South Africa.

²³ Ibid.

²⁴ South African Law Commission, *Sexual Offences: The Substantive Law* (Discussion Paper 85, 1999).

²⁵ Wilfried Schärf, ‘Community justice and community policing in post-apartheid South Africa’ (2001) 32 *IDS Bulletin*, 1, 74.

²⁶ Human Rights Watch, *Violence Against Women in South Africa: State Response to Domestic Violence and Rape*, research report (Human Rights Watch, 1995).

²⁷ Police Act 68 of 1995 (South Africa).

²⁸ Ibid., s. 18.

²⁹ Schärf, ‘Community justice’, 76.

³⁰ Moffett, ‘These women’, 135.

³¹ Ibid., 133–135.

B Gender-based Violence in Contemporary South Africa

In contemporary South Africa, gender issues have received a fair amount of attention; however, violence prevails. While women in South Africa experience many forms of violence, rates of rape and domestic violence are particularly alarming. One study conducted in 2004 by the Medical Research Council in South Africa found that every six hours, a woman is murdered by her intimate partner.³² Reported rapes have increased annually since 1994, when official records showed that the 44,751 rapes reported in 1994–1995 grew to 71,500 in 2008–2009.³³ This was estimated to be 1–15 per cent of the actual number.³⁴ In a survey conducted with 2600 South African men in 2016, 56 per cent admitted that they had either beaten or raped a woman in the previous 12 months.³⁵ Another study showed that the services available to victims of sexual assault in South Africa are inadequate, criticising the poor quality of medical services, lack of privacy during examination, long waiting times and incompetent healthcare providers who treat victims of sexual assault.³⁶ Research also revealed that GBV can be reinforced by social myths, which is an additional challenge to the movement against GBV. For example, the myth that raping a virgin cures HIV³⁷ and the myth that raping a lesbian ‘corrects’ her sexual orientation perpetuate violence against women and girls. Social attitudes reflecting pervasive sexism exacerbate increases women’s vulnerability to violence; in 2007, a prohibition against wearing trousers was imposed on women in Umlazi, a township in KwaZulu-Natal. The news on the ban went nationwide when one woman who defied the ban was stripped of her trousers in public as punishment.³⁸

³² Shanaaz Mathews et al., ‘Every six hours a woman is killed by her intimate partner’, Policy Brief (Medical Research Centre, 2004).

³³ South African Shadow Report submitted to the CEDAW Committee, 48th Session (17 January–4 February 2011), para. 3.1.3.9.

³⁴ Ibid., para. 3.1.3.2.

³⁵ Sonke Gender Justice, ‘Wits-Sonke study reveals alarming levels of women’s violence against women in Diepsloot’, press release, 28 November 2016, accessed 17 July 2018 at <http://genderjustice.org.za/news-item/wits-sonke-study-reveals-alarming-levels-mens-violence-women-diepsloot/>

³⁶ Nicola Christofide et al., ‘The state of sexual assault services: findings from a situation analysis of services in South Africa’, research report (The South African Gender-based Violence and Health Initiative, 2003).

³⁷ Report to the CEDAW Committee, South Africa (24 March 2010) CEDAW/C/ZAF/2–4 (hereinafter, South Africa CEDAW report 2010), pp. 167–169.

³⁸ ‘Anger at South Africa woman trouser “ban”’, BBC News, 26 July 2007, accessed 28 June 2018, at <http://news.bbc.co.uk/2/hi/africa/6917332.stm>

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III FEMINIST MOVEMENTS AND THE LAW

Sidelining women's issues is not limited to South Africa, it is global. Women's rights are considered peripheral at the local, regional and international levels. It is commonly argued that this is because the law, legal institutions and policy-making bodies are comprised of men, and therefore they reflect male priorities.³⁹ This section will discuss critiques of the gendered nature of law and institutions, reflecting the prevalence of gender-biased norms across borders.

A The Global Nature of Gender-based Violence

Gender-based violence includes sexual violence, physical violence, emotional and psychological violence, harmful traditional practices and socio-economic violence (such as discriminatory access to economic and social services).⁴⁰ The consequences of GBV on women include 'depression, sexually transmitted diseases, substance abuse, and sometimes murder'.⁴¹ A plethora of literature has been devoted to investigate the causes, repercussions and eradication of GBV. Charlesworth and Chinkin demonstrate the indiscriminate nature of GBV, which affects women globally. They write:

Battery is the major cause of injury to adult women in the United States, where a rape occurs every six minutes. In Peru, 70 percent of all crimes reported to police involve women as victims. In India, 80 percent of wives are victims of violence, domestic abuse, dowry abuse or murder. In 1985, in Austria, domestic violence against the wife was given as a factor in the breakdown of marriage in 59 percent of 1,500 divorce cases. In Australia, a recent survey indicated that one in five men believed it acceptable for men to beat their wives; while surveys by the Papua New Guinea Law Reform Commission found that up to 67 percent of wives had suffered marital violence.⁴²

In 2013, research conducted by the World Health Organization (WHO) showed that 35.6 percent of women globally have experienced one or

³⁹ See Doris Buss and Ambreena Manji (eds.), *International Law: Modern Feminist Approaches* (Oxford: Hart, 2005).

⁴⁰ For more information and statistics see K Gibbons and T Johnson, *Integrated Approaches to Eliminate Gender Based Violence* (London: Commonwealth Secretariat, 2003).

⁴¹ Jennifer Ulrich, 'Confronting gender-based violence with international instruments: is a solution to the pandemic within reach?' (2000) 7 *Indiana Journal of Global Legal Studies*, 2, 634.

⁴² Hilary Charlesworth and Christine Chinkin, 'The gender of jus cogens' (1993) 15 *Human Rights Quarterly*, 1, 71–72.