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Violence Against Women and Criminal Justice in Africa: Volume I

Legislation, Limitations and Culture

Edited by
Emma Charlene Lubaale · Ashwanee Budoo-Scholtz

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Ashwanee Budoo-Scholtz
Editors

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ISSN 2523-3084

ISSN 2523-3092 (electronic)

Sustainable Development Goals Series

ISBN 978-3-030-75948-3

ISBN 978-3-030-75949-0 (eBook)

<https://doi.org/10.1007/978-3-030-75949-0>

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Cover illustration: Korndanai Vitthayanukarun/EyeEm

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The registered company address is: Gewerbestrasse 11, 6330 Cham, Switzerland

To,

Every woman survivor of violence who is denied justice.

Foreword

Violence against women and girls is perhaps one of the most critical issues dominating discussions on the agendas of states across the African continent. This scourge is neither new nor unique to the African continent. Over the past few decades, however, it has become an increasingly public issue across states in Africa. The pervasiveness of violence against women and girls has seen some states label the scourge a national crisis warranting immediate redress. It can be considered as one of the main challenges to the realisation of women's rights in Africa.

Criminal justice systems in Africa have a fundamental role to play in the eradication of violence against women. Disheartening, however, progress has been extremely slow in as far as holding perpetrators of such violence to account is concerned. A significant number of cases, if at all reported, hardly make it through the criminal justice system. All considered, it is indisputable that violence against women and girls on the African continent has reached alarming levels. It is equally irrefutable that criminal justice responses are generally wanting. But also undeniable is the fact that most African states have made multiple reforms to national laws. Many have also committed themselves to international

obligations by way of ratification of treaties relevant to addressing the scourge of violence against women and girls. Even so, these strides have not generally translated into better criminal accountability across justice systems in Africa. The challenges and prospects of criminal justice for women and girls in Africa, despite these reforms, have hardly been the subject of scholarly discussion.

The two edited volumes of this publication fill in this scholarly gap. They echo the provisions of article 4 of the Protocol to the African Charter on Human and Peoples' Rights (Maputo Protocol) that requires States parties to adopt and enforce laws, including punishing perpetrators, to ensure the elimination of violence against women. The contributions present a comprehensive and rigorous overview of the salient features and major developments in Africa's criminal justice systems in as far as justice for women is concerned, while also focusing on vulnerable women. They offer a unique insight into the practical challenges of advancing justice for women in cases of violence in the different regions in Africa.

As someone who has been engaged on women's rights on the continent, including on the issue of violence against women, I believe that the publication of these two volumes is timely and that the recommendations therein, if implemented, can ensure more accountability for violence against women in the criminal justice systems of African countries.

Yaoundé, Cameroon

Commissioner Lucy Asuagbor
Outgoing Special Rapporteur on
the Rights of Women in Africa

Acknowledgements

The editors wish to express their appreciation to all authors for their patience and dedication in this process, with them having to work with close deadlines. The chapters in this Volume could not have been finalised without the independent reviewers' insightful comments. Special thanks go to the editorial team at Palgrave Macmillan, especially to Naveen Dass and Josephine Taylor, in ensuring that the publication was on time. Emma thanks the Research Office of Rhodes University and the National Research Foundation (Funding to EC Lubaale, Grant No: 127504) for funding her trips to Pretoria from Grahamstown so that she can have working sessions on the book with Ashwanee. Ashwanee is grateful for the financial support of the Centre for Human Rights, Faculty of Law, University of Pretoria, which assisted her in securing an editorial assistant, Janet Gbom, whose work is also acknowledged.

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Abbreviations and Acronyms

AC	African Commission
ÁCHPR	African Charter on Human and Peoples' Rights
AU	African Union
ACRWC	African Charter on the Rights and Welfare of the Child
AMTO	Assisted Medical Treatment Order
BEAM	Basic Education Assistance Module
BRADEA	Basic Rights and Duties Enforcement Act
CRC	Convention on the Rights of the Child
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CRSV	Conflict-Related Sexual Violence
CRIN	Child Rights International Network
CDU	Child Development Unit
COPTIP	Coordination Office for Prevention of Trafficking in Persons
CRC	Constitutional Review Commission
DRC	Democratic Republic of Congo
DEVAW	Declaration on the Elimination of Violence Against Women
DVA	Domestic Violence Act

xx **Abbreviations and Acronyms**

DPP	Director of Public Prosecutions
ECHR	European Court of Human Rights
EAC	East African Community
FGM	Female Genital Mutilation
GBV	Gender-based violence
GR	General Recommendation
GBVF	Presidential Summit on GBV and Femicide
HIV/ AIDS	Human Immunodeficiency Virus/Acquired Immunodeficiency Syndrome
HAWA	Haki za Wanawake
ICCPR	International Covenant on Civil and Political Rights
IPV	intimate partner violence
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICGLR	International Conference in the Great Lakes Region
IMC	Inter-Ministerial Committee
ILO	International Labour Organisation
JOA	Juvenile Offenders Act
LHRC	Legal and Human Rights Centre
Maputo Protocol	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
MONUSCO	United Nations Organisation Stabilisation Mission in the DRC
NDP	National Development Plan
NCRC	National Crime Research Centre
NSSA	National Social Security Authority
NGOs	Non-Government Organisations
OC	Ombudsperson for Children
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the High Commissioner for Human Rights
PALERMO Protocol	Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime
PACOTIPA	Prevention and Combating of Trafficking in Persons Act
PFVA	Prevention of Family Violence Act 133 of 1993
PFGM	Prohibition of the Female Genital Mutilation Act

PHR	Physicians for Human Rights
POA	Programme of Action
POBS	Pensions and Other Benefits Scheme
PRC	Post Rape Care
PTIPA	Prevention of Trafficking in Persons Act
PTSD	Post-Traumatic Stress Disorder
SA	South Africa
SADC	Southern African Development Community
SAPS	South African Police Service
SARS	Severe Acute Respiratory Syndrome
SDGs	Sustainable Development Goals
SRVAW	Special Rapporteur on Violence Against Women
SOA	Sexual Offences Act
SOSPA	Sexual Offence Special Provisions Act
SOP	Standard Operation Procedure
TAWLA	Tanzania Women Lawyer's Association
TAMWA	Tanganyika Law Society. Media organizations like the Tanzania Media Women
TRRC	Truth, Reconciliation and Reparations Commission
UN	United Nations
UNPF	United Nations Population Fund
UDHR	Universal Declaration of Human Rights
UNGA	United Nations General Assembly
UNICEF	United Nations Children's Fund
US AID	United States Agency for International Development
UNFPA	United Nations Population Fund
UNDP	United Nations Development Programme
UPR	Universal Periodic Review
UNODC	United Nations Office on Drugs and Abuse
USAID	United States Agency for International Development
VAW	Violence Against Women
VAWG	Violence Against Women and Girls
WLAC	Women Legal Aid Centre
WHO	World Health Organisation
RAINN	Rape, Abuse and Incest National Network
ZRP	Zimbabwe Republic Police
ZANU-PF	Zimbabwe African National Union-Patriotic Front

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Part I

Introduction



1

Introduction

Emma Charlene Lubaale and Ashwane Budoo-Scholtz

The case of Buyisiwe, a survivor of gang rape in South Africa, exemplifies the plight of survivors of gender-based violence in their quest for justice.¹ Buyisiwe was gang raped on 2 October 2004. While four years after the rape, those accused of violence against her were convicted, her experience is far from praise-worthy. Buyisiwe's long walk to justice was an appalling

¹ Shadow Report of South Africa to the Committee on Elimination of Violence Against Women on criminal injustice: violence against women in South Africa (2010), https://tbintetnet.ohchr.org/Treaties/CEDAW/Shared%20Documents/ZAF/INT_CEDAW_NGO_ZAF_48_10364_E.pdf.

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one, with her experience being compounded by mishaps and secondary victimisation. In the course of the four years of her quest for justice, witness statements went missing. This led to the release of the accused persons and consequently, the striking off of the matter from the court roll. A year later, the matter was reinstated following protests from rights groups. Subsequent to this reinstatement, witness statements were re-taken because, as noted, the docket was missing. When the trial resumed, adjournments became the order of the day for reasons including non-appearance of defence witnesses in court. On two instances, the defence attorney failed to appear in court, only for the court to establish that he was not a registered legal practitioner. Securing a new defence attorney came with challenges including, requiring that Buyisiwe, who had already testified and been cross-examined, goes through the process of examination and cross-examination all over again. Hopes for a smooth trial after a new defence attorney took over the matter were shattered when the case was transferred to another court. Following this transfer, a new judicial officer had to be identified to preside over the case. Once again, this transfer came with glitches including, the non-availability of a judge to preside over the matter. After some time, a judge was identified to preside over the matter, proceedings continued and those accused were convicted. Four years later (on 4 September 2009), those accused of gang-raping Buyisiwe were sentenced. From the foregoing facts, it is undeniable that justice was served—but at what price for Buyisiwe?

Violence against women and girls remains one of the most alarming pandemics worldwide. Research reveals that one in every three women globally has experienced some form of violence in their lifetime.² Inevitably therefore, women are time and again interacting with the criminal justice system in seeking justice. However, what are these women's experiences in the justice system like? Are they even approaching the justice system to start with? Irrefutably, a few women are approaching the justice system. The question though is, are they accessing the much-desired justice they are seeking? For many survivors of gender-based violence in Africa, access to justice remains a myth. The

² World Health Organisation, Violence Against Women (November 29, 2017), <https://www.who.int/news-room/fact-sheets/detail/violence-against-women#:~:text=A%202013%20analysis%20conduct%20by,partner%20or%20non%2Dpartner%20sexual>.

case of Buyisiwe is the very tip of the iceberg of the hoops and hurdles that survivors of gender-based violence have to jump through to access justice. Fortunately for Buyisiwe, her story had a fairly good ending as a conviction was sustained. However, for many survivors, such endings remain a fairytale.

Needless to say, in light of Buyisiwe's experience, a decision to pursue justice for most women means consenting to the innumerable forms of victimisation that come with the rotten aspects of Africa's criminal justice systems. Ramadimetja et al. describe Buyisiwe's cross-examination experience as atrocious.³ They consider the court environment she was subjected to as hostile and having no regard for the act of gang rape she went through.⁴ Extremely disheartening was Buyisiwe's case timeline. Some dubbed her experience as a second form of rape⁵—the second time around by the criminal justice system which ought to have protected her but instead, 'raped', or, victimised her further. Especially disturbing is the fact that these flaws in the justice system rest comfortably alongside African states' international and national commitment to protecting women against violence. This causes one to take a step back to ponder whether there is real commitment to protect women. It does appear like commitment to international standards has become some form of window-dressing by African states. The questions for us as scholars then become: Where do we go from here in a bid to foster the much-needed change on the African continent? Could we perhaps add voice to the already loud voices on the rights of women? Conceivably, evidence-based scholarly research and publication could contribute towards the change we yearn for, hence, the timeliness of these two edited volumes.

The overriding objectives of the two edited volumes on *Violence against women and criminal justice in Africa* are as follows. First, the volumes stimulate scholarly discussions, interest and engagement with the challenge of violence against women. The volumes do so by presenting a

³ Ramadimetja Mogale, Kathy Kovacs Burns and Solina Richter, 'Violence Against Women in South Africa: Policy Position and Recommendations' 18 *Violence Against Women* (2012): 580–594.

⁴ *Ibid.*

⁵ SangoNet Pulse, Buyisiwe Court Case - Raped Again! (2009), <http://www.ngopulse.org/press-release/buyisiwe-court-case-raped-again>.

comprehensive analysis of the latest research, thinking and practices of criminal justice systems on the African continent. Second, for the first time, they bring together high quality original and innovative material from diverse perspectives developed by legal practitioners, criminal justice experts and scholars from different criminal justice traditions operating on the African continent. Effectively, the volumes ensure that the African voice is heard on issues of justice for women. Third, in light of the fact that most African states share features such as geographical proximity, the colonial legacy, economic, social and cultural conditions, these volumes, in addition to individual country studies, adopt a comparative approach that highlights the gaps and good practices in a manner that provides a rich source of authoritative information for promoting an intra-African dialogue and cross-fertilisation of ideas across the different criminal justice traditions in Africa. Finally, the volumes act as a repository for generation of knowledge, expertise and experience on the continent on the subject of justice for women and girls. In so doing, they constitute an authoritative reference point for researchers, criminal justice practitioners, academics and policymakers. All four objectives have been advanced through scholarly contributions from emerging and internationally recognised African scholars, practitioners and experts in the fields of criminal justice, violence, gender studies and African legal studies. The majority of the contributors to both volumes are female.

The thematic focus of the book *Violence against women and criminal justice in Africa* is distinct. Despite the voluminous material on violence against women, this has long been a neglected topic in and on Africa. African scholarship and academia have largely been silent in this area of research, writing and teaching. The editors and contributors in the volume are Africans, based largely in Africa. The situations in all five of the main geopolitical blocks in Africa (West, East, Central, North and Southern Africa) are reviewed; while regional contributions are discussed, making this edited volume a comprehensive collection of African voices on the topic. The volumes invoke the use of case studies and doctrinal legal research approaches that espouse the current approaches and transformations in African criminal justice systems' approaches to violence against women. Given the dearth of research in the thematic focus of this volume and the unique African lens through which the volume

is approached, there is no doubt that this volume makes a significant contribution to the existing body of knowledge on the subject of ‘Violence against women and criminal justice in Africa’. The topical nature and rampancy of violence against women makes both volumes of the book extremely instructive not only for criminal justice practitioners but also women and girls, who, for lack of justice, are failing to realise their own potential and have for years failed to be free from violence and fear. Therefore, the central contribution that these volumes make is the uniquely African perspective through which national accountability for violence against women and girls is approached, understood and can be improved upon.

This first edited book volume, comprising of eleven chapters, focusses on two themes: *Criminal legislation and its implementation, and Limitation of criminal justice responses*. Subsequent to this introduction, Chapter 2 which is authored by Lubaale and Ashwanee provides an exposition of the book. With the two major themes running through the volume as a golden thread being *violence against women and criminal justice in Africa*, the authors locate accountability for violence against women within the broader framework of the sustainable development goal on elimination of violence against women and the African Union aspirations on achievement of gender equality. They provide meaningful content to the various expressions of gender-based violence and accordingly conceptualise freedom from violence as a right to be enjoyed by all women. They demonstrate that freedom from violence is a human right that comes with corresponding obligations, with these obligations deriving force from international, regional, sub-regional and national human rights standards. They underscore that these obligations mandate states to protect women from violence and to punish perpetrators when such violence occurs and one of the means to bringing perpetrators to justice is criminal prosecution.

The first theme of the volume deals with *Legislation and its implementation in addressing violence against women*. Notably, criminal laws are critical in responding to violence against women. They set norms and standards regarding acceptable conduct in societies and provide a basis for criminal justice practitioners to commence proceedings against perpetrators of violence against women. The United Nations reports

that hundreds of countries have enacted laws on redress of violence against women.⁶ It laments, however, that most of these laws are not implemented, let alone, in alignment with international standards.

In Chapter 3, Matadi and Calvino underscore the role of criminal law in addressing gender-based violence. Their comparative study of the Democratic Republic of Congo and South Africa, through the lens feminist legal theories, reveals that the poor implementation of legislation and the failure of the criminal justice system to protect survivors of violence impact negatively on their access to justice. They make recommendations for revision of the criminal justice frameworks of both countries at both the policy and legislative levels.

Mauritius remains the ideal travel destination for many, however, beneath the glamorous picture that the beautiful beaches of Mauritius paints are unaddressed gender-based violence issues including the child marriage problem. In Chapter 4, Georgijevic and Budoo tackle the issue of violence against girls in Mauritius. They examine the existing laws and the soon to be enacted Children's Bill with a view to assessing whether the country has enough safeguards to ensure that the girl child who is a survivor of violence has access to the justice system. They conclude that while the Children's Bill will bring a new child protection landscape, the country also needs to focus on non-legal measures to ensure a change in mindset, and to appraise the girl child of her rights.

The police system is the first port of entry for survivors of gender-based violence. Consequently, the manner in which the police system executes its tasks has a key bearing on whether or not women and girls have access to justice. In Chapter 5, Mothibi and Tirivangase highlight the role of police capacity building in dealing with domestic violence cases in South Africa. They proceed on the premise that police capacity-building in implementing the Domestic Violence Act of South Africa is an entry point for women to access justice. Their analysis reveals that the police system in South Africa is generally ill equipped and this is a barrier to women's access to justice. Against this backdrop, they propose Dr.

⁶ United Nations Office on Drugs and Crime, *The work of UNODC on violence against women* (2019) 3, https://www.unodc.org/documents/commissions/CCPCJ/CCPCJ_Sessions/CCPCJ_28/Brown-bag-lunches/Brown_bag_Swen_Pfeiffer.pdf.

Bengt-Ake Lindval's four knowledge taxonomy principles as an assessment tool to evaluate police domestic violence training procedures. They make recommendations on how to better equip the police system to effectively confront the scourge of gender-based violence.

It goes without saying that if cases of gender-based violence are not reported, access to justice remains in the rhetoric. In Chapter 6, Warega provides a socio-legal analysis of case reporting in Kenya. The author does this by focussing on access to justice for sexual violence against women. She demonstrates that while Kenya has made progress in terms of legislative reform, the law remains redundant because cases are hardly reported. The author submits that case-reporting is a prerequisite to access to justice for women. She subsequently interrogates the reporting structures and procedures in place, considers the socio-legal issues that arise and proffers possible solutions to combating these challenges.

The second theme of the volume focusses on the *Limitations of criminal justice responses to violence against women*. The theme comprises of five chapters and it is premised on the fact that criminal justice systems cannot operate in isolation, hence, the critical need for a coordinated approach to curbing gender-based violence. The theme commences with a chapter by Lansink and Nampewo who conceptualise human trafficking as a form of gender-based violence against women. Using South Africa and Uganda as case studies, the authors recognise the gendered nature of this crime. While underscoring the critical role of criminal prosecution in curbing the trafficking of women, they acknowledge the limitations of exclusive reliance on punitive responses. Against this backdrop, they recommend, among others, a multisectoral and victim-centred criminal justice approach.

In Chapter 8, Abourabi and Lubaale carry the theme of the section of limitation forward by engaging with the limits of legal reform in North Africa. While acknowledging the strides made and the critical role of legal reform in ensuring that women access justice in North Africa, the authors demonstrate that access to justice for women in North Africa will take more than legal reform. They accordingly provide enlightenment into the accountability gap of gender-based violence in two North African countries (Morocco and Egypt) by establishing the link between the deeply entrenched discriminatory social and religious attitudes on the

one hand, and access to justice on the other. They recommend measures geared towards a change in social attitudes as well as interpretation of Muslim religious texts within their proper context. At the heart of this chapter is demonstration of the viewpoint that while various interpretations of the Quran by some Muslim societies in North Africa have justified acts of violence against women, there are alternative interpretations to these texts that are pro-women's rights and can be leveraged to fight against VAW in these countries.

There is no denying that issues of access to justice have an economic dimension to them. Notably, in instances where the perpetrator is a caregiver, most survivors have been hesitant to confront and report cases of violence, let alone pursue justice. In these circumstances, access to justice has been close to impossible because reporting has meant losing the much-needed financial support from the perpetrator. Cognisant of this complex issue, Mokoena's discussion in Chapter 9 highlights the need for discussions and actions on access to justice to go beyond mere implementation of criminal laws. She traverses the limits of exclusive reliance on prosecution by providing a link between the right to social security and access to justice for survivors of sexual violence in Zimbabwe. She concludes that social security is central to ensuring case-reporting and ultimately, access to justice for females suffering sexual abuses in Zimbabwe and Africa generally.

While governments are expected to be protectors of the rights of women, in Chapter 10, Rajmohamed brings an interesting perspective to the challenge of female genital mutilation in the Gambia and how the government of the Gambia has played a role in maintaining the practice. She revisits the roots of gender-based violence against women in the Gambia with focus on female genital mutilation as a form of gender-based violence. She demonstrates that the Gambia is yet to view female genital mutilation as a form of violence against women due to the internal suffering from pertinent and powerful 'resistors to change'. This, in the author's view, undermines legal enforcement. She concludes that lack of political will underpins female genital mutilation and prevents the criminal justice system from holding perpetrators to account. In her submission, all legal 'tools' opposing the practice including law reform and criminalisation have failed and will continue to fail due to deeply

entrenched societal norms bleeding into higher powers. She takes a bold stance to the effect that the barriers to justice for women in the Gambia are found within the government itself and justice will only be achieved if the nation reevaluates its stance on the matter and makes efforts to denounce the practice.

It is an indisputable fact that violence against women in Africa is a complex social problem rooted in gender inequality and deeply entrenched social and cultural norms. Many societies continue to normalise acts of violence against women and girls despite their devastating effects on the rights and lives of women and girls. Stereotypical societal norms to the detriment of women run deep, penetrating the criminal justice system to undermine women's access to justice. In Chapter 11, Ngaiza and Omari engage with this issue by providing a socio-legal perspective to violence against women in Tanzania. They demonstrate that the high incidence of violence against women in Tanzania is partly attributed to the historical socio-cultural practices which render the implementation of otherwise excellent laws illusory. Against this backdrop, they conclude that ensuring access to justice for victims of violence will take resolute efforts to change the socio-cultural challenges that go back in Tanzania's history.

In conclusion, all the chapters in this volume not only constitute uniquely contribute to literature but also call for action by relevant players in criminal justice structures including Africa's judiciaries, legislatures, executive arms of government and rights groups. They address key issues that are relevant to eliminating violence against women in Africa and in doing so, breathe life to the provisions of article 4 of the Maputo Protocol that requires States parties to hold perpetrators of violence to account and to eliminating all forms of violence against women and sustainable development goal 5 on elimination of all forms of violence against women and girls. The second volume of this book *Violence against women and criminal justice in Africa* carries the discussion further by engaging with two themes: *Sexual violence and vulnerability*.