

# BETRAYING WOMEN IN THE NAME OF REVOLUTION: VIOLENCE AGAINST WOMEN AS AN OBSTACLE TO DEMOCRATIC NATION-BUILDING IN SOUTH AFRICA

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## I. INTRODUCTION

This Article addresses a striking contradiction concerning the status of women in post-apartheid South Africa. Since the African National Congress' ("ANC") rise to power in 1994, women's formal legal rights have increased measurably. The final constitution enacted in 1996, its predecessor in 1993, as well as ANC statements, reveal a commitment to gender equality. Women have gained political visibility in Parliament and through the growth of their own political organizations. However, the gap between political visibility and material well-being is troubling. Even as women have ostensibly gained political power, they have, nonetheless, lost ground in daily life. This Article focuses particularly on how the epidemic of violence against women in South Africa highlights a marked contrast between the apparent rise of women's political and legal power and the decline in their social power. This Article discusses violence against women in the context of post-apartheid South Africa's new nation-building project. This Article also questions the integrity of a project which, despite its stated commitment to equality and unity, allows such violence to go unaddressed, thus prohibiting women from claiming a place in the new democracy. However, while the stark contrast between South Africa's democracy-building project and the violence against women crisis has been eloquently discussed by others,<sup>1</sup> this Article is primarily concerned with exploring how the violence crisis exemplifies the ideological tensions between nationalist and gender-based political projects and underscores the need for a more unified feminist-nationalist understanding of nation-building as applied to South Africa and more generally.

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<sup>1</sup> See generally Penelope Andrews, *Violence Against Women in South Africa: The Role of Culture and the Limitations of the Law*, 8 TEMP. POL. & CIV. RTS. L. REV. 425 (1999).

Part I discusses women's rise to political power in the post-apartheid era and the new South Africa's formal commitment to gender equality. Part II contrasts women's political power with social reality to show how violence against women bars realization of the national ideal of democratic equality and examines legal impediments to effective redress of this crime.<sup>2</sup> Part III situates South African women's social powerlessness, as demonstrated by violence against women, in the context of the anti-apartheid national liberation movement's subordination of women's issues, the ideological tension between feminism and nationalism, and tensions between *theories* of feminism and nationalism. This part then addresses and critiques some theoretical approaches to integrating gender concerns and nationalism.

## II. WOMEN'S POLITICAL POWER AND THE NEW SOUTH AFRICA'S COMMITMENT TO GENDER EQUALITY

The South African writer Nadine Gordimer delivered a speech in November 1990—nine months after the ANC was unbanned in South Africa<sup>3</sup>—hailing the beginning of a new era, one in which apartheid would no longer be the organizing principle of South African life. She opened with these words: "Progressive forces in our country are pledged to one of the most extraordinary events in world social history: the complete reversal of everything that, for centuries, has ordered the lives of all our people."<sup>4</sup> Gordimer spoke at a time of profound political transformation. This transformation would lead to the negotiation and adoption of an interim constitution in November 1993, to the April 1994 general election that would bring Nelson Mandela and the ANC to power, and to the certification of the final constitution in December of 1996.<sup>5</sup>

In 1991, at the outset of the constitution-building process in South Africa, sociologist and activist Jacklyn Cock identified the issues that the new South African constitution and its legal framework should address. She called for these new mechanisms to build a nation, to guarantee social justice, and to protect and celebrate the diversity that had formerly been the source of discrimina-

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<sup>2</sup> This Article reflects the author's research from the time this piece was written, which was in the Spring of 2000.

<sup>3</sup> Catherine Albertyn, *Women and the Transition to Democracy in South Africa*, in *GENDER AND THE NEW SOUTH AFRICAN LEGAL ORDER* 46 (Christina Murray ed., 1994). The ANC was the leading organization in the anti-apartheid fight. The South African government lifted the ban on the ANC in February 1990. *Id.*

<sup>4</sup> Jacklyn Cock, *Putting Women on the Agenda*, in *PUTTING WOMEN ON THE AGENDA* 28 (Susan Bazilli ed., 1991).

<sup>5</sup> SIRI GLOPPEN, *SOUTH AFRICA: THE BATTLE OVER THE CONSTITUTION* 3 (1997).

tion.<sup>6</sup> Her vision of diversity included her aspiration for a society where “power is equally shared” and men and women can both “experience the full range of human alternatives.”<sup>7</sup> Similarly, Nelson Mandela expressed the ANC’s commitment to remedying gender subordination: “It is vitally important that all structures of government, including the president himself, should understand this fully, that freedom cannot be achieved unless the women have been emancipated from all forms of oppression.”<sup>8</sup>

Legally, South African women appear to have obtained the equality and respect of which Cock and Mandela spoke. The lobbying efforts of women’s organizations, scholars, politicians, and women’s trade union groups resulted in the inclusion of gender equality provisions in both the interim constitution and the final constitution of South Africa.<sup>9</sup> In addition, women have gained increased political visibility and organizational strength in South Africa’s political scene.<sup>10</sup>

The South African Constitution (“Constitution”) is the most notable example of the nation’s professed commitment to gender equality. Penelope Andrews has canvassed the Constitution for its guarantees of “non-sexism,” which appear in the Founding Provisions, the Bill of Rights, and various other provisions.<sup>11</sup> The Constitution’s Founding Provisions list “non-sexism”<sup>12</sup> as among the tenets of the “democratic state.”<sup>13</sup> The Bill of Rights provision on “equality”<sup>14</sup> includes the statement that “[t]he 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.”<sup>15</sup> Andrews notes that while some of the anti-discrimination terms in the Bill of Rights may be derogated, the prohibition against discrimination based on “sex” may not be, along with the prohibitions of discrimination based on race, color, ethnic or social origin, religion,

<sup>6</sup> Cock, *supra* note 4, at 32.

<sup>7</sup> *Id.*

<sup>8</sup> *The Wit and Wisdom of Nelson Mandela*, EBONY, Aug. 1994, at 30, *quoted in* Adrien Katharine Wing & Eunice P. de Carvalho, *Black South African Women: Toward Equal Rights*, 8 HARV. HUM. RTS. J. 57, 57 (1995).

<sup>9</sup> Penelope E. Andrews, *Striking the Rock: Confronting Gender Equality in South Africa*, 3 MICH. J. RACE & L. 307, 324 (1998).

<sup>10</sup> See *infra* notes 26-35 and accompanying text.

<sup>11</sup> Andrews, *Striking the Rock*, *supra* note 9, at 327-33.

<sup>12</sup> *Id.* at 328 (discussing S. AFR. CONST. § 1-6).

<sup>13</sup> *Id.* (discussing S. AFR. CONST. § 1(b)).

<sup>14</sup> *Id.* (discussing S. AFR. CONST. § 9).

<sup>15</sup> *Id.* (emphasis added).

and language.<sup>16</sup> She also contends that the reference to "direct" and "indirect" discrimination in Section 9 of the Bill of Rights acknowledges the "tenacity of institutionalized discrimination."<sup>17</sup> Furthermore, the inclusion of "sex" and "gender" among the bases upon which discrimination is forbidden in Section 9 evinces a commitment to address unequal treatment based not only on "biological and physical attributes," but on "social and cultural stereotypes" as well.<sup>18</sup>

The Bill of Rights includes other provisions that address gender equality, provisions dealing with bodily integrity, violence, and hate speech. Section 12 has important implications for women's choices concerning abortion and reproduction.<sup>19</sup> It provides that "[e]veryone has the right to bodily and psychological integrity, which includes the right (a) to make decisions concerning reproduction; (b) to security in and control over their body; and (c) not to be subjected to medical or scientific experiments without their informed consent."<sup>20</sup> In addition, Section 16(1) of the Bill of Rights could serve to protect victims of domestic violence by providing that people have a right to be free from all forms of violence.<sup>21</sup> Furthermore, the Constitution's free speech guarantee does not protect "advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm."<sup>22</sup>

In addition to its specific provisions, the Constitution mandates the creation of a Commission for Gender Equality ("Commission") to "promote respect for gender equality and the protection, development and attainment of gender equality."<sup>23</sup> The Commission, established in 1997,<sup>24</sup> is empowered to "monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality."<sup>25</sup>

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<sup>16</sup> *Id.* (discussing S. AFR. CONST. § 37(5)).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 329 (discussing S. AFR. CONST. § 12).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* (discussing S. AFR. CONST. § 16(1)).

<sup>22</sup> *Id.* (discussing S. AFR. CONST. § 16(2)(c)).

<sup>23</sup> *Id.* (discussing S. AFR. CONST. § 187(1)).

<sup>24</sup> Sheila Meintjes, *Gender, Nationalism and Transformation: Difference and Commonality in South Africa's Past and Present*, in WOMEN, ETHNICITY AND NATIONALISM: THE POLITICS OF TRANSITION 62, 82 (Rick Wilford & Robert L. Miller eds., 1998).

<sup>25</sup> Andrews, *Striking the Rock*, *supra* note 9, at 329 (discussing S. AFR. CONST. § 187(2)). Critics of the Commission fear that addressing women's issues through a separate body will "ghettoize" these concerns. *See id.* at 330 (citing Catherine Albertyn, *National Machinery for Ensuring Gender Equality*, in THE CONSTITUTION OF SOUTH AFRICA FROM A GENDER PERSPECTIVE 17 (Sandra Liebenberg ed., 1995)). Others, however, argue that such a separate structure is necessary to eradicate gender discrimination. *See id.*

The mobilization and lobbying power of women suggests that they have more political strength and visibility than ever before and that their political power is growing.<sup>26</sup> The formation of the Women's National Coalition ("WNC") in 1992 and their adoption of the Women's Charter for Effective Equality in 1994 indicate a significant move toward widespread recognition of gender-based inequality. The WNC was the result of the ANC Women's League's attempt to gather women to discuss the formulation of a charter articulating women's concerns for inclusion into the new constitution negotiated in the early 1990s.<sup>27</sup> As the first broadly based organization in South Africa dedicated to confronting gender inequity, the WNC drew from a group of women across the racial, political, linguistic, and cultural spectrum.<sup>28</sup> In two years, it grew from its original membership in 1992 of seventy national organizations and eight regional organizations to ninety-two national organizations and thirteen regional coalitions.<sup>29</sup> The coalitions' goals were to build a grassroots women's rights movement and then to influence the constitution-building process with the Charter for Effective Equality, a document cataloguing women's demands at the local level.<sup>30</sup>

In other respects over the past several years, women in South Africa have gained political prominence. Women participated in the constitutional negotiation process in 1993.<sup>31</sup> In addition, women have achieved greater representation in national and regional government.<sup>32</sup> Their numbers within Parliament increased from eight members in 1991 to 116 in 1994,<sup>33</sup> and women now hold seats in all nine of the provincial legislatures.<sup>34</sup> The South African government has also responded to women's concerns by assuming responsibility for creating the Report on the Status of South African Women for the 1995 Beijing Conference.<sup>35</sup>

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<sup>26</sup> Felicity Kaganas & Christina Murray, *Law and Women's Rights in South Africa: An Overview*, in GENDER AND THE NEW SOUTH AFRICAN LEGAL ORDER 37 (Christina Murray ed., 1994). For a more extensive discussion of women's political organizations and their influence during the transition to democracy, see Meintjes, *supra* note 24, at 69.

<sup>27</sup> Albertyn, *supra* note 3, at 50.

<sup>28</sup> *Id.* at 51.

<sup>29</sup> *Id.* at 50.

<sup>30</sup> *Id.* at 51; see also Lindiwe Zulu, *Role of Women in the Reconstruction and Development of the New Democratic South Africa*, 24 FEMINIST STUD. 147, 151 (1998).

<sup>31</sup> Kaganas & Murray, *supra* note 26, at 37.

<sup>32</sup> *Id.* At the urging of the ANC Women's League, the ANC in 1992 agreed to a gender quota system for Parliamentary representation, slating 33.3% of seats in the Parliament for women. Zulu, *supra* note 30, at 152.

<sup>33</sup> Kaganas & Murray, *supra* note 26, at 37.

<sup>34</sup> Wing & de Carvalho, *supra* note 7, at 86.

<sup>35</sup> *Id.*

However, these gains have not been without their limitations. Women were constrained in their ability to bring their demands to the forefront of constitutional negotiations. For example, although women were nominally represented in the negotiation process in 1993, their influence was limited by the fact that a number of delegations either refused to appoint women as instructed by the Negotiating Council or appointed them in non-speaking roles.<sup>36</sup> Those appointed women often found themselves excluded from constitutional debates that occurred through informal "old boy networks."<sup>37</sup> In addition, their efforts to direct attention to women's issues were often poorly received by other delegates.<sup>38</sup> Lastly, female delegates were limited by their own political inexperience.<sup>39</sup>

Furthermore, the greater number of women in national government has not directly translated into an equal increase in political power. Lindiwe Zulu, a female member of Parliament, writes that women in Parliament have confronted skepticism from other Parliament members and have received a lack of institutional support.<sup>40</sup> For example, female Parliament members lack sufficient administrative assistance and technical support that would allow them to do their jobs properly. Zulu herself does not have a computer. She explains that female Parliament members, responding to public skepticism toward them, decided to forego such niceties to avoid the impression that they were wasting taxpayers' money.<sup>41</sup> Furthermore, although some parties have set up women's caucuses, efforts to form a multi-party women's forum has met with resistance from male Parliament members.<sup>42</sup>

In addition to these difficulties on the national political scale, women's activists point to a number of areas where gender inequities persist in daily life. Among these areas of concern are family law, customary law, violence against women, labor, education, and health care.<sup>43</sup> Kaganas and Murray assert that gender equality based on the letter of the law might serve an important normative function, but it does not in and of itself inevitably transform women's lives.<sup>44</sup> They suggest that over-reliance on the Constitution's

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<sup>36</sup> Albertyn, *supra* note 3, at 55-56.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> Zulu, *supra* note 30, at 150.

<sup>41</sup> *Id.* at 153.

<sup>42</sup> Kaganas & Murray, *supra* note 26, at 37.

<sup>43</sup> *Id.* at 8-35; Wing & de Carvalho, *supra* note 7, at 92-98.

<sup>44</sup> Kaganas & Murray, *supra* note 26, at 36.

rhetoric of equality also obscures the gross inequities still faced by women today in South Africa.<sup>45</sup>

### III. VIOLENCE AGAINST WOMEN AS AN OBSTACLE TO DEMOCRATIC EQUALITY

#### A. Overview

One example of "gross inequity" facing women in post-apartheid South Africa is the epidemic of violence against women. To the extent that the problem substantially affects the daily lives of women, "widespread violence against women preclude[s] their access to the fruits of democracy . . . ."<sup>46</sup> Although there are a number of other areas in which women suffer inequities, violence against women and the threat of such violence present stark examples of the way in which coercion of women affects equal membership in society and betrays the promise of the new democratic South Africa. This section of the Article will attempt to describe the problem of violence against women,<sup>47</sup> some legal and governmental responses to the problem, and the limitations of those responses.

Statistics indicate that domestic abuse in South Africa cuts across all racial and class boundaries.<sup>48</sup> The South African domestic violence organizations, including People Opposing Women's Abuse (POWA), Coordinated Action for Battered Women, and the Advice Desk for Abused Women estimate that one in six women is abused by her partner.<sup>49</sup> The Women's Bureau estimates that one in four women is abused by her partner.<sup>50</sup> A recent survey conducted by the government-funded Human Sciences Research Council found that 43% of 159 married women surveyed in the Cape Town metropolitan area had been subjected to marital rape or assault.<sup>51</sup>

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<sup>45</sup> *Id.*

<sup>46</sup> Andrews, *Violence Against Women*, *supra* note 1, at 428.

<sup>47</sup> For purposes of this discussion, "violence against women" shall be construed to include domestic violence and rape. However, when referring to either of these forms of abuse individually, the author will refer to "domestic violence" and "rape" specifically.

<sup>48</sup> HUMAN RIGHTS WATCH/AFRICA, *VIOLENCE AGAINST WOMEN: THE STATE RESPONSE TO DOMESTIC VIOLENCE AND RAPE* 44 (1995).

<sup>49</sup> *Id.* at 45.

<sup>50</sup> *Id.* The incidence of domestic abuse in South Africa appears roughly equivalent to, or, by some measures, less frequent than domestic violence in the United States. In the United States, nearly one in three adult women will experience at least one physical assault by a partner. AM. PSYCHOL. ASS'N, *VIOLENCE AND THE FAMILY: REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION PRESIDENTIAL TASK FORCE ON VIOLENCE AND THE FAMILY* 10 (1996).

<sup>51</sup> HUMAN RIGHTS WATCH/AFRICA, *supra* note 48, at 45.

The incidence of rape in South Africa is even more startling. According to some reports, a woman is raped every twenty-six seconds in South Africa.<sup>52</sup> The rate of reported rapes in South Africa is double that of the United States, where the rape rate is significantly higher than in other developed countries.<sup>53</sup> Some observers conclude that, on a per capita basis, more rapes are committed in South Africa than in any other country in the world.<sup>54</sup> Unlike domestic abuse, rape is concentrated among the poor in South Africa and is disproportionately reported by black women.<sup>55</sup> Between 1980 and 1993, the numbers of reported rapes and attempted rapes more than tripled.<sup>56</sup> Human Rights Watch/Africa attributes this rise to increased reporting as well as increased sexual violence.<sup>57</sup> In 1994, 32,107 cases were reported, an increase of 16% from the previous year; eighty-eight rape cases were reported each day.<sup>58</sup> However, rape is persistently underreported, with the numbers of reported rapes constituting, by some measures, only 2.8% of all rapes.<sup>59</sup>

Although the ANC came to power over seven years ago, the problem of violence against women continues to grow. The comments of Sonti Maseko, who counsels battered women in Johannesburg, reveals the current urgency of the problem: "In my country violence is institutionalized. Our so-called liberators have failed dismally to do anything about [violence against women]. They are silent. They think it is not important."<sup>60</sup> Maseko's comments invite us to examine the legal system's approach to this problem and how it may be improved.

### B. Rape Law

According to Michelle Anderson, there are no real legal consequences for the crime of rape, considering that only about 3% of

<sup>52</sup> Michelle Anderson, *Rape in South Africa*, 1 GEO. J. GENDER & L. 789, 790 (2000).

<sup>53</sup> *Id.* at 789. The rate of rape in the United States is thirteen times higher than Britain's, nearly four times higher than Germany's, and more than twenty times higher than Japan's. *Id.* at 789 n.2 (citing E. Salholz & E. Cliff, *Women Under Assault: Sex Crimes Finally Get the Nation's Attention*, NEWSWEEK, July 16, 1990, at 23-24).

<sup>54</sup> *Id.* at 789 (citing RAPE CRISIS (CAPE TOWN) ET. AL., LEGAL ASPECTS OF RAPE IN SOUTH AFRICA 1 (1999); Sylvia Vollenhoven, *South Africa Through Women's Eyes*, Ms., Sept-Oct. 1993, at 12).

<sup>55</sup> The South African police reports that 95% of rapes are reported by black women. HUMAN RIGHTS WATCH/AFRICA, *supra* note 48, at 52.

<sup>56</sup> *Id.* at 50-51. In 1980, there were 9,365 reported cases of rape, whereas in 1993, there were 27,056 reports of rape and attempted rape. *Id.*

<sup>57</sup> *Id.* at 50.

<sup>58</sup> The yearly report rate was 149.5 rapes per hundred thousand people. *Id.* at 50-51.

<sup>59</sup> *Id.* at 51 (citing *Huge Jump in Number of Reported Rapes*, SUNDAY TIMES, May 8, 1994).

<sup>60</sup> Anderson, *supra* note 52, at 819-20.

rapes in South Africa are ever reported, and of the small number reported in 1998, fewer than half were prosecuted, and only 9% ended in conviction.<sup>61</sup> She faults the legal system for limiting effective redress for rape victims.<sup>62</sup> The common law definition of rape—unlawful sexual intercourse with a woman without her consent—is inadequate because it fails to account for the range of possible sexual violations.<sup>63</sup> The definition excludes female rapists and other forms of rape outside the legal definition of “sexual intercourse” (i.e., anal or oral intercourse or rape with an object other than a penis).<sup>64</sup> Furthermore, the legal definition of consent, which is built into the definition of rape, allows admission of a rape victim’s prior sexual history to determine consent, although evidence of a defendant’s prior sexual history is inadmissible.<sup>65</sup> In addition, the “hue and cry” common law rule allows evidence that a victim reported the rape “after a long period and after a number of opportunities to do so.”<sup>66</sup> Lastly, the common law “cautionary rule” requires courts to “take cognizance of the dangers of possible unreliability in a complainant’s testimony, due to the private nature of the crime and the various social and psychological factors which might make this evidence unreliable.”<sup>67</sup>

Legal reform is in progress, and current efforts also suggest others areas of improvement. The new South African Law Commission has issued a discussion paper for public comment proposing a repeal of the common law definition of rape to be replaced by a new statutory definition.<sup>68</sup> Anderson proposes making a victim’s sexual history inadmissible and eliminating the “hue and cry” and cautionary rules.<sup>69</sup> She also proposes reforming the law enforcement system to provide more rigorous procedural training for police officers who investigate rape allegations, implementing standard procedures, and creating a statutory description of police officers’ duties in relation to victims who report attacks.<sup>70</sup> Training female officers to work in specialized sexual assault units presents

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<sup>61</sup> *Id.* at 811. Only 45% of reported cases were prosecuted. *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 813 (citing CR SNYMAN, CRIMINAL LAW 400 (1989)).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 814.

<sup>67</sup> *Id.* at 814-15.

<sup>68</sup> *Id.* at 816. The proposed changes include expanding the definition of rape to include a range of sexual violations, making the definition of rape gender-neutral, and making marital rape illegal. *Id.*

<sup>69</sup> *Id.* at 815.

<sup>70</sup> *Id.* at 817-18.

an additional option.<sup>71</sup> Nationwide re-education concerning rape is another important means of intervention.<sup>72</sup>

### C. Domestic Violence Law

Criticisms of the legal system's handling of domestic violence cases are numerous, including police ignorance of domestic violence law, police hostility and indifference toward victims, impediments in the judicial system, and inadequate and uncoordinated governmental services.<sup>73</sup>

Numerous reports have surfaced of police ignorance of existing domestic violence law.<sup>74</sup> A survey conducted in Natal showed that barely 60% of the police station commanders in the area even knew what the Prevention of Family Violence Act was, and few stations had forms available for domestic violence victims to fill out to report their cases.<sup>75</sup> In addition, reports show that police officers lack basic knowledge about the legal role of the police in domestic violence situations.<sup>76</sup>

Many domestic violence victims cite police hostility and indifference toward domestic violence as the reason for their unwillingness to report abuse.<sup>77</sup> Numerous reports describe police officers discouraging women from pursuing legal action against their husbands, trying to reconcile wives with their abusive husbands, failing to arrest husbands in violation of protection orders, and, in some egregious instances, leading husbands to their fleeing wives.<sup>78</sup> Laws like the Prevention of Family Violence Act have been criticized for their limited impact on women in townships who have difficulty in even getting the police to respond to domestic violence calls, let alone make use of the machinery of domestic violence law.<sup>79</sup> Delays in responding to calls are common; in one city, delays of up to twenty-four hours have been reported.<sup>80</sup>

Impediments within the judicial system also bar women from effective legal assistance. While the Domestic Violence Act passed in 1998 promised to resolve many of these problems, other difficul-

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> HUMAN RIGHTS WATCH/AFRICA, *supra* note 48, at 74-88.

<sup>74</sup> *Id.* at 74-76. When the Human Rights Watch/Africa report was written, these domestic violence laws were determined by the 1993 Prevention of Family Violence Act, which was later superceded by the 1998 Domestic Violence Act. *Id.*

<sup>75</sup> *Id.* at 76.

<sup>76</sup> *Id.* at 74-75.

<sup>77</sup> *Id.* at 76.

<sup>78</sup> *Id.* at 79-81.

<sup>79</sup> *See generally id.*

<sup>80</sup> *Id.* at 80.

ties still exist. The process of obtaining protection orders (known as "interdicts") has typically been an arduous one for many women—particularly poor, rural women—who are forced to travel long distances to obtain these orders.<sup>81</sup> Furthermore, court clerks are often ignorant about the procedures for filing applications for interdicts and sometimes overstep their boundaries by discouraging or preventing women from filing their applications.<sup>82</sup> In addition, victims of domestic abuse who have pressed charges against their abusers have been exposed to further danger because of prosecutors' negligence.<sup>83</sup> Prior to 1994, criminal suspects bore the burden of proof to demonstrate why bail should be granted.<sup>84</sup> However, the burden was then shifted to the state to prove why bail should not be granted.<sup>85</sup> Since this change, domestic abuse suspects have often been released on bail because prosecutors, failing to adapt to the new burden shift, have neglected to meet their burden of proof to show that bail should not be granted.<sup>86</sup>

A final obstacle victims of domestic abuse face is the dearth of shelters for those who seek to leave their abusive homes. The small number of nationally based shelters are concentrated in urban areas, and as of 1995, no shelters received state funding.<sup>87</sup> Government services for abused women and coordinated efforts between governmental and non-governmental agencies are scarce, but they are strongly recommended by activists.<sup>88</sup>

The Domestic Violence Act of 1998 has corrected some of the failures of the Prevention of Family Violence Act.<sup>89</sup> The Act declares the government's commitment to the elimination of domestic violence, in accordance with the Constitution, the UN Convention on the Elimination of All Forms of Discrimination Against Women, and the Convention on the Rights of the Child.<sup>90</sup> The definition of domestic relationships covered by the Act extends beyond heterosexual marriages formally recognized by the state to include marriages under customary law and gay and lesbian unions.<sup>91</sup> The Act also includes parents, children, and certain

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<sup>81</sup> *Id.* at 84-85.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 85.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 86-87.

<sup>88</sup> *Id.* at 88.

<sup>89</sup> See, e.g., Andrews, *Violence Against Women*, *supra* note 1, at 449-53.

<sup>90</sup> *Id.* at 450.

<sup>91</sup> *Id.*

family members.<sup>92</sup> Among a number of other reforms, the Act places affirmative duties on police and court officers to inform women of their rights and to arrest and prosecute batterers.<sup>93</sup>

Although a number of legal changes have occurred in response to the alarming incidence of rape and domestic abuse, commentators agree on the compelling need for further reform.<sup>94</sup> Violence against women has profound implications for South Africa as a nation. The persistence of violence against women undermines the legitimacy of a democracy that has failed to ensure the basic physical liberty of its female population. In addition, violence bars women from effective participation in political life by literally curbing their daily freedom. To the extent that this problem goes unresolved, women will be unable to participate in a meaningful way in the political and civic life of the nation.

#### IV. BETRAYING WOMEN IN THE NAME OF REVOLUTION

The alarming epidemic of violence against women illustrates the precarious position of women who are formally, but not socially, empowered. It also challenges us to ask whether women have been left behind in the national liberation struggle. South African trade unionist Emma Mashinini asks: "Are we South African women still going to be led by men when we get our liberation, although we were oppressed together with them, and fought against this oppression together?"<sup>95</sup> The epidemic of violence against women suggests that the answer to Mashinini's question is an uneasy "yes." It highlights the fact that although women have fought against apartheid in the name of equality for all, the revolution has failed them in some significant respects.

This section will consider this failure in three parts. Part III(A) will address the historical subordination of women's issues by the national liberation struggle against apartheid. Part III(B) links this subordination to the failure of traditional theories of nationalism to consider the relevance of gender within nationalist movements and the processes of nation-building. Part III(C) identifies some theoretical attempts to integrate nationalism and gender.

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<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 453.

<sup>94</sup> See generally Anderson, *supra* note 52.

<sup>95</sup> DIANA E. H. RUSSELL, LIVES OF COURAGE: WOMEN FOR A NEW SOUTH AFRICA 344 (1989).

A. *Women and the Anti-Apartheid Movement*

Women's issues have historically been subordinated to the anti-apartheid national liberation agenda. Although women were granted full membership and voting rights in the ANC in 1943, they have not gained full recognition in the national liberation struggle. Female activists have criticized the ANC for its hypocrisy, embodied in the contradiction between its rhetoric of inclusiveness and its hierarchical and patriarchal internal structure.<sup>96</sup> The subordination of women's issues resulted from the assumption that the root of all social problems was apartheid, rather than other forces, such as patriarchy. Cock criticizes this view as "the outcome of a kind of reductionism; a tendency to reduce all our problems to apartheid."<sup>97</sup> She continues, "[T]he implication is that with the dismantling of apartheid, women's oppression will disappear."<sup>98</sup>

Historically, both women themselves and male anti-apartheid leaders have relegated women's issues to a lower place on the political priority list. The Federation of South African Women ("FSAW"), established in 1954, drafted a Women's Charter describing its aspirations for the organization and listing of pragmatic demands to improve women's lives, particularly the lives of black women.<sup>99</sup> However, the Charter failed to address gender inequity effectively because it adhered to the limited role of women as wives and mothers in the nationalist struggle.<sup>100</sup> In addition, the Char-

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<sup>96</sup> Anne McClintock, "No Longer in a Future Heaven": *Nationalism, Gender, and Race*, in *BECOMING NATIONAL* 278 (Geoff Eley & Ronald Grigor Suny eds., 1996). For its first thirty years, the ANC's leadership structure consisted of an upper house of male chiefs, a lower house of elected male representatives, and an all-male executive. Wives of members could join as auxiliary members but were denied the power to vote. *Id.*

<sup>97</sup> To illustrate this apartheid-centered approach, Cock cites an April 1990 report produced by a joint workshop between the ANC and the Cosatu Economic Trends Group in Harare which stated pithily: "One of the legacies of apartheid and its economic system is discrimination against women." Cock, *supra* note 4, at 28.

<sup>98</sup> *Id.*

<sup>99</sup> Albertyn, *supra* note 3, at 43.

<sup>100</sup> The Women's Charter states in part:

We women share with our menfolk the cares and anxieties imposed by poverty and its evils. As wives and mothers, it falls on us to make small wages stretch a long way . . . . It is we who feel the cries of our children . . . . [I]t is our lot to keep and care for the homes . . . . We know the burden of looking after children. . . . We know what it is like to keep family life going in *pondokhies* or shanties.

*Id.* at 44 (citing C. WALKER, *WOMEN AND RESISTANCE IN SOUTH AFRICA* 279 (1982)).

Sheila Meintjes writes about the traditional role that women have played in the nationalism of both Afrikaners and Africans as the "mothers" and "nurturers" of the nation. Meintjes, *supra* note 24, at 69. She argues that this identification of women was an important step in confining them to "patrimony"; it conferred a "special and revered place, but also allowed for their continued subordination to the broader nationalist project. Recognizing and revering mothers was to deny them autonomy and authority beyond the domestic realm." *Id.*

ter's explicit promotion of national liberation as the paramount concern in the fight against apartheid placed gender equality in a subordinate position.<sup>101</sup> Women have continued to subordinate their concerns more recently. The report from the ANC delegation to the 1985 Nairobi Conference on Women quotes one female delegate claiming, "It would be suicidal for us to adopt feminist ideas. Our enemy is the system and we cannot exhaust our energies on women's issues."<sup>102</sup>

Anti-apartheid nationalist leadership also considered women's issues of secondary importance to the anti-apartheid campaign. During the anti-apartheid struggle, the ANC denied women some key opportunities for placing their concerns in a more prominent position on the political agenda. In an attempt to introduce women's concerns into the Freedom Charter of 1955,<sup>103</sup> FSAW drafted the document "What Women Demand" for inclusion into the Charter.<sup>104</sup> However, the provision that would have significantly improved poor rural women's lives, i.e. the demand for basic social amenities on the reserves, was excluded from the Freedom Charter because it proposed an improvement to the apartheid-imposed reserve system, a system which the ANC wanted to eradicate entirely.<sup>105</sup> The ANC has also been criticized for failing to take gender equality seriously enough in its early attempts at constitutional reform. Catherine Albertyn argues that the perception of gender equality as secondary to racial equality explains the ANC's failure to include in its 1988 Constitutional Guidelines a bar on gender discrimination in the same provision that created a constitutional duty to eliminate race discrimination.<sup>106</sup> The Guidelines did include a separate clause addressing gender equality that appeared later in the document. Article (w) of the Guidelines reads: "Women shall have equal rights in all spheres of public and private life and the state shall take affirmative action to eliminate inequities and discrimination between the sexes."<sup>107</sup> Critics have attacked

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<sup>101</sup> Albertyn, *supra* note 3, at 45.

<sup>102</sup> McClintock, *supra* note 96, at 279 n.82. Albertyn attributes this attitude to "deeply rooted patriarchal attitudes and values" often held by women. Albertyn, *supra* note 3, at 45.

<sup>103</sup> Albertyn writes, "[T]he Freedom Charter is widely recognized as the first substantive document to provide a framework for a united, democratic South Africa." Albertyn, *supra* note 3, at 41.

<sup>104</sup> *Id.* at 45.

<sup>105</sup> *Id.* at 46.

<sup>106</sup> *Id.* at 46-47 (citing THE ANC'S CONSTITUTIONAL GUIDELINES FOR A DEMOCRATIC SOUTH AFRICA (1988)).

<sup>107</sup> *Id.* at 47.

the provision, however, for its flimsy language, arguably guaranteeing nothing more than equality between women.<sup>108</sup>

During the 1993 constitutional negotiation process, women again found themselves at odds with ANC leadership, this time over whether the Constitution's Bill of Rights should be applicable to the customary legal system. Customary leaders sought immunity from the Bill of Rights for customary law.<sup>109</sup> They particularly objected to including a gender equality provision that would threaten the patriarchal customary political and social order.<sup>110</sup> However, women's rights activists sought a gender equality provision for women across the board, even those governed by customary law.<sup>111</sup> Because the ANC and the government perceived the traditional leaders as an important source of political support for the constitutional process, they were reluctant to dismiss these leaders' demands.<sup>112</sup> In the end, although women's rights activists achieved some success with the inclusion of a gender equality provision in the Bill of Rights, the scope of the provision was limited by the Bill of Rights' protection of "cultural rights" aimed at safeguarding customary law.<sup>113</sup>

One reason for resistance to feminist concerns by the anti-apartheid movement may have been the perception of feminism as the product of western imperialist culture and white, upper-class privilege. By this view, feminism looks irrelevant and even threatening to national liberation. When female unionists at a recent Congress of South African Trade Unions ("COSATU") convention raised the issue of sexual harassment in the unions, their demands were quickly dismissed as the manifestations of "bourgeois imperialist feminism."<sup>114</sup> South African women themselves were wary of the feminist consciousness developing in universities in the 1960's and 70's because it looked like the product of white, middle-class privilege.<sup>115</sup> They continue to approach feminist ideas with reluctance,<sup>116</sup> viewing feminism as irrelevant to women in the histori-

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<sup>108</sup> Dorothy Driver, *The ANC Constitutional Guidelines in Process: A Feminist Reading*, in PUTTING WOMEN ON THE AGENDA, *supra* note 3, at 82.

<sup>109</sup> Albertyn, *supra* note 3, at 47.

<sup>110</sup> *Id.* at 57.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 60.

<sup>114</sup> McClintock, *supra* note 96, at 280.

<sup>115</sup> *Id.* at 279-80.

<sup>116</sup> As discussed earlier, the comments of the ANC Delegation to the Nairobi Conference on Women in 1985 illustrate this reluctance. See *supra* notes 99-102 and accompanying text.

cally colonized "Third World."<sup>117</sup> This skepticism toward western feminism is one explanation for the subordination of women's issues to the anti-apartheid agenda.

### B. *The Tension Between Feminism and Nationalism*

The subordination of gender-based claims by the anti-apartheid movement is consistent with the way nationalist movements treat women's claims in general. In building movements through "[c]ontestable assumptions and mythical claims" of ethnic or cultural commonality, national liberation projects often enjoin claims that appear to threaten the cohesion of national identity.<sup>118</sup> This results in suppression of "perceived fractures and counter-politics" and the "pragmatic exaltation of the nationalist agenda over competing subaltern politics."<sup>119</sup> In other words, nationalist ideology is built upon forming cohesion by exclusion, drawing boundaries, and enforcing distinctions between insiders and outsiders.<sup>120</sup> Gender-based claims are as vulnerable as other "counter-politic[al]" claims to the coercion of nationalist ideology.<sup>121</sup> Women's concerns are often greeted with assurances of the prophylactic potential of national liberation, rather than treated as viable and important claims in and of themselves.<sup>122</sup>

The subordination of gender-based claims by nationalist ideologies finds its corollary on the theoretical level, with traditional theories of nations and nationalism typically failing to consider the gendered aspects of nationalist movements and national identity formation. Nira Yuval-Davis critiques the "hegemonic" theories of nationalism advanced by scholars like Gellner, Hobsbawn, Kedourie, Smith, and even some women, like Greenfeld, for treating gender relations as irrelevant to analyses of nations and nation-

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<sup>117</sup> Jo Beall et al., "A Bit on the Side?": *Gender Struggles in the Politics of the Transformation in South Africa*, 33 FEMINIST REV. 30, 31 (1989). Feminism takes on different meanings for "western" women and "Third World" women because of the differences in socio-political status between these two groups. Meintjes, *supra* note 24, at 32. Western feminists have traditionally viewed women's emancipation as their primary goal, whereas "Third World" women have viewed women's liberation as irrelevant without freedom for their people overall. Meintjes contends that western feminists are able to privilege women's liberation above all other issues because they take for granted their participation in the "hegemonic collectivity," whereas Third World women are part of a "subjugated collectivity" and lack the privilege of hegemonic membership or the assurance of a political space to organize as feminists. *Id.*

<sup>118</sup> L. Amede Obiora, *New Skin, Old Wine: (En)gaging Nationalism, Traditionalism, and Gender Relations*, 18 IND. L. REV. 575, 578 (1995).

<sup>119</sup> *Id.* at 577-78.

<sup>120</sup> *Id.* at 578.

<sup>121</sup> *Id.* at 577.

<sup>122</sup> *Id.*

alism.<sup>123</sup> In addition, she points out the failure of theorists such as Amin, Zubaida, Smith, and Gellner to engage gender in their expositions of the social and political forces that create and perpetuate nationalist ideology.<sup>124</sup>

Rejecting the assumption held by “hegemonic” theories of nationalism that gender is irrelevant, feminist scholars have identified the ways nationalism implicates gender. According to Anne McClintock, gender difference both constitutes and is constituted by nationalism.<sup>125</sup> Gender constitutes national identity, in part, through women’s role as “symbolic bearers of the nation”<sup>126</sup> and as the “boundary and metaphoric limit”<sup>127</sup> of the national body politic. In South Africa, both Afrikaner and African women have been inscribed in (and have willingly assumed) the role of the “mothers” of the nation.<sup>128</sup> More generally, Yuval-Davis and Floya Anthias demonstrate how gender constitutes nationalism by identifying five major ways women have tended to participate in ethnic and national processes and in relation to state practices:

- (a) as biological reproducers of members of ethnic collectivities;
  - (b) as reproducers of the boundaries of ethnic/national groups;
  - (c) as participating centrally in the ideological reproduction of the collectivity and as transmitters of its culture;
  - (d) as signifiers of ethnic/national differences—as a focus and symbol in ideological discourses used in the construction, reproduction and transformation of ethnic/national categories;
- [and]

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<sup>123</sup> Nira Yuval-Davis, *Gender and Nation, in* WOMEN, ETHNICITY AND NATIONALISM: THE POLITICS OF TRANSITION 23 (Rick Wilford & Robert L. Miller eds., 1998) (citing E.R. GELLNER, NATIONS AND NATIONALISM (1983); E. HOBBSAWM, NATIONS AND NATIONALISM SINCE 1780 (1990); E. KEDOURIE, NATIONALISM (1993); A. SMITH, THE ETHNIC ORIGINS OF NATIONS (1986); A. SMITH, NATIONS AND NATIONALISM IN A GLOBAL ERA (1995)).

<sup>124</sup> *Id.* (citing S. AMIN, THE ARAB NATION (1978); E.R. GELLNER, NATIONS AND NATIONALISM (1983); A. SMITH, THE ETHNIC ORIGINS OF NATIONS (1986); S. Zubaida, Nations: Old and New: Comments on Anthony D. Smith’s, The Myth of the “Modern Nation” and the Myths of Nations, Address at the Anthropology Seminar Series, University College, London (1989)).

<sup>125</sup> McClintock, *supra* note 96, at 260-61.

<sup>126</sup> *Id.* at 261.

<sup>127</sup> *Id.*

<sup>128</sup> The *volksmoeder* (“mother of the nation”) has been a central symbol of Afrikaner nationalism. *Id.* at 275-76. McClintock writes:

[W]hite men were seen to embody the political and economic agency of the *volk*, while women were the (un)paid keepers of tradition and the *volk*’s moral and spiritual mission . . . In the photographs of the *Gedenkboek*, women serve as boundary markers visibly upholding the fetish signs of national difference and visibly embodying the iconography of race and gender purity.

*Id.* at 276. African nationalism has similar “mother of the nation” iconography. Winnie Mandela has been hailed the “Mother of the Nation,” and the South African singer Miriam Makeba has been addressed as “Ma Africa.” *Id.* at 279.

(e) as participants in national, economic, political and military struggles.<sup>129</sup>

Gender not only constitutes nationalism, but it is also constituted by nationalism. McClintock contests Benedict Anderson's theory of "imagined communities" for its treatment of nationalisms as benign "phantasmagoria of the mind" and as mere "systems of cultural representations whereby people come to imagine a shared experience with an extended community."<sup>130</sup> She highlights the constitutive power of nationalisms as "historical practices through which social difference is both invented and performed."<sup>131</sup> She contends that the processes by which nationalisms constitute people's identities are "social contests that are frequently violent and always gendered."<sup>132</sup> In the end, nationalisms that have promised "popular unity" have historically resulted in "sanctioned institutionalization of gender difference."<sup>133</sup> McClintock points out that "no nation in the world grants women and men the same access to the rights and resources of the nation-state."<sup>134</sup> South Africa is no exception. As illustrated by violence against women, nationalism has failed to give women the same access to the "rights and resources" of the new South African nation-state. The post-apartheid national agenda has perpetuated gender difference by failing to fulfill its promise of democratic freedom for women.

### C. *Integrating Feminism and Nationalism*

Scholars and activists have attempted to bridge the gap between feminism and nationalism by offering more unified theories that would avoid what appear to be political betrayals of women in the name of revolution. The problem of violence against South Africa's women emphasizes the need for a more unified theory combining nationalism and feminism to avoid situations such as the present one, in which women are so physically threatened that they cannot truly participate in civic and political life.

McClintock offers a four-fold feminist theory of nationalism, which identifies as its goals:

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<sup>129</sup> WOMAN-NATION-STATE 7 (Nira Yuval-Davis & Floya Anthias eds., 1989). Yuval-Davis and Anthias acknowledge that this list is not exhaustive or fixed across differing political circumstances. *Id.*

<sup>130</sup> McClintock, *supra* note 96, at 260 (citing BENEDICT ANDERSON, IMAGINED COMMUNITIES 6 (1983)).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

- (1) investigating the gendered formation of sanctioned male theories;
- (2) bringing into historical visibility women's active cultural and political participation in national formations;
- (3) bringing nationalist institutions into critical relationship with other social structures and institutions; and
- (4) at the same time paying scrupulous attention to the structures of racial, ethnic and class power that continue to bedevil privileged forms of feminism.<sup>135</sup>

The theory is appealing on an ideological level, particularly regarding its focus on bringing to light women's contributions to national formation. However, the theory falls short in its failure to provide a normative basis for integrating feminist concerns with nationalist ones. Merely acknowledging the gendered nature of nationalist ideology or documenting women's participation in nationalist struggle may not alter the basic assumption that women's emancipation must necessarily be subordinated to nationalist concerns.

Jo Beall, Shireen Hassim, and Alison Todes propose a socialist-feminist approach to uniting women's concerns with national/class struggles. They propose that women's oppression be considered part of the broader struggle, and they stress that the incorporation of gender struggle may transform the terms of the broader battle and the type of socio-economic development policy that ensues from it.<sup>136</sup> However, like McClintock's theory, this approach lacks a normative thrust; although it suggests that women can have a strong impact on revolutionary movement, it fails to provide a compelling reason to interpret feminist issues as nationalist issues.

The problem of violence against women in South Africa suggests weakness in the South African nation-building project and confirms the need for a theory that unifies nationalism and feminism. The persistence of violence illuminates the inadequacy of a post-apartheid, democratic agenda that has failed to guarantee women basic freedom. An alternative nationalist-feminist theory would argue that by failing to remedy gender discrimination, self-proclaimed national liberation movements merely reenact the oppression they fought to overcome. This alternate theory would recognize that merely cabining feminist concerns as "women's issues" renders them invisible and marginal to the nationalist agenda. The epidemic of violence against women in South Africa is not simply a defect or aberration in a democratic system but an obstacle to

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<sup>135</sup> *Id.* at 261.

<sup>136</sup> Beall et al., *supra* note 117, at 30-31.

building a democratic nation. A satisfying theory would explain that feminist concerns are nationalist ones and that nations and nationalist movements are suspect to the extent that they allow, despite rhetoric to the contrary, such widespread discrimination against women.

## V. CONCLUSION

Throughout its transition to democracy, the post-apartheid South African government has promised its people a new era of equality and unity. During the past several years, South Africa's women have gained political power and formal legal rights. However, despite the new South Africa's formal commitment to equality for women, this declared commitment has served as no guarantee against the "practical obstacles to political participation, nor can it guarantee the achievement of actual social and economic equality."<sup>137</sup> Women's rise to political power and the apparent national commitment to gender equality contrast starkly with the social reality of many women's lives, as highlighted by the epidemic of violence against women. Although this particular problem is but one example of gender inequity facing South African women, it is a harsh illustration of women denied democratic equality because they are deprived of basic physical liberty. Conditions disproportionately affecting women, such as violence against women, raise the question of whether the nation's new political order has failed South Africa's women. If the pervasive disabilities faced by women are a price of the new South Africa, the legitimacy of this new democracy comes into doubt.

The historical subordination of women's issues by the South African national liberation movement and by nationalisms generally suggests why this gross disparity between women's political and social power continues to occur. This subordination may explain the apparent betrayal of women's concerns in favor of a nationalist liberation agenda in South Africa. However, insofar as it delegitimizes the new South Africa's democratic nation-building project, the pervasiveness of violence against women and its disabling effect on women's democratic participation highlights the need to unite nationalism with feminism and to view gender concerns as nationalist ones. The problem of violence against women asks us to rescue gender equality from the margins of the national agenda and understand it as crucial to national liberation and democratic nation-building.

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<sup>137</sup> Albertyn, *supra* note 3, at 61.