

Gender construction in sexual offences cases: A case for fully reviving the Sexual Offences Courts

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Gender inequality, male hegemony and the power dynamics at the core of patriarchal society enable the high rate of sexual offences and the low conviction rate of sexual offenders when incidents are reported. The criminal justice system does not provide a safe space for the sexual offence victim/survivor to relate her experience of sexual violence. Sexual Offences Courts provided a victim-centred approach to the criminal justice system. The closure of these courts has been detrimental to the campaign for social justice and the constitutional rights of complainants. Feminist scholarship is employed as a lens through which to analyse and expose the deficiencies in the current framework used to secure convictions in sexual offences cases. Wishik's development and expansion of the 'woman question' is used to refine this method, subquestions are formulated to provide a systematic process for interrogating the status quo, and for finding remedies to redress the problems identified. The closure of Sexual Offences Courts may be seen as a form of discrimination against women. It is therefore recommended that these specialised courts are reintroduced as a matter of urgency as the state needs to meet its constitutional obligations.

I INTRODUCTION

Patriarchy refers to the power imbalances between men and women in various societal institutions; these imbalances enable male privilege and the subjugation of women.¹ Patriarchy is ubiquitous, permeates every facet of life, and is deeply embedded

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¹ C Albertyn & E Bonthuys 'Feminist theories and concepts' in C Albertyn & E Bonthuys (eds) *Gender, Law and Justice* (2007) 19.

in our consciousness, even filtering through to judicial systems.² Gender inequality, male hegemony and power dynamics are at the core of a patriarchal society, and enable the high rate of sexual offences and the low conviction rate of offenders when offences are reported to the police. The criminal justice system does not always provide a safe space for sexual offence victims/survivors to relate their experiences of sexual violence.³ This article examines the gendered nature of sexual offences, using the lens of feminist scholarship to analyse the harms that victims/survivors experience within the criminal justice system. The fundamental claim is that the Sexual Offences Courts (SOCs) should be fully re-established to provide a safer environment for victims/survivors. These courts would also contribute to the state fulfilling its constitutional obligation of providing mechanisms for gender equality.⁴

The court space may present a hostile environment for complainants in sexual offences cases. One example of this hostile setting is the widely publicised trial of Timothy Omotoso, the pastor accused of human trafficking, rape and sexually assaulting numerous young women in his church. One of the alleged victims, Cheryl Zondi, was commended for her difficult testimony, accounting her experiences of abuse. The trial procedure was heavily criticised for the manner in which Omotoso's attorney cross-examined the victim. The nation watched as Zondi was repeatedly and aggressively accused of fabricating events that implicated Omotoso. Mr Daubermann, legal counsel for the accused, even asked Zondi to describe the depth of sexual penetration by the pastor.⁵ Critics of this method of cross-examination argued

² K Millett 'What is to be done?' (2000) 75 *Chicago Kent Law Review* 659 at 659.

³ L Artz, T Meer, H Galgut & A Müller 'Participation in practice: A case study of a collaborative study of sexual offences in South Africa' (2017) 115 *Feminist Review* 81.

⁴ National Planning Commission *National Development Plan 2030* (2012) chapter 12 'Building safer communities' 63. The *National Development Plan 2030* asserts that the fear of crime 'has consequences for women and girls and their ability to achieve their potential in every sphere of social and productive life. GBV in all its forms denies women and girls the opportunity to achieve equality and freedoms enshrined in the Constitution.'

⁵ S Buthelezi 'Omotoso's lawyer's questions to Cheryl Zondi were abusive, says top advocate' *IOL News* 28 October 2018, available at <https://www.iol.co.za/sunday-tribune/news/omotoso-lawyers-questions-to-cheryl-zondi-were-abusive-says-top-advocate-17604186>.

that it violated the witness's right to privacy and dignity.⁶ Aside from the Zondi case, there is a scourge of rapes and femicide in South Africa. Anene Booysen, Anni Dewani, Reeva Steenkamp, Uyinene Mrwetyana and Jesse Hess are only some of the women who have died as a result of gender-based violence (GBV). Yet another victim is Eudy Simelane, a former national soccer player, who was gang-raped and killed due to her sexual orientation as a lesbian. During the trial, Judge Mokgoathleng expressed discomfort about using the word 'lesbian', asking the prosecutor if there was another word that he could use instead.⁷ These cases made the news headlines, and sparked national conversations and protests against the gendered nature of the harm that these women experienced, and about the treatment of victims/survivors of sexual offences in the criminal justice system.

However, in numerous cases the victims/survivors remain unnamed: their experiences do not receive any attention from the media and in social critique. The abject treatment of rape victims/survivors by the court system, together with the prevalence of sexual violence, begs the question why the special SOCs are not fully operational nationwide. This query is central to this paper, which explores the gendered nature of sexual offences before examining how the government has responded to the extremely high prevalence of GBV. The paper then argues for the full re-establishment of SOCs, while using a feminist lens to theorise about the continued increase of GBV, particularly regarding sexual offences, and the government's failure to secure convictions and provide services to victims/survivors of GBV.

II THE GENDERED NATURE OF SEXUAL OFFENCES IN SOUTH AFRICA

It is generally accepted that sex refers to the fixed biological differences between men and women, while gender is the social construction of male and female, based on their biology. The social construction of male and female attributes determines the

⁶ Constitution of the Republic of South Africa, 1996 provides for the right to privacy in s 14 and the right to dignity in s 10.

⁷ S Bornman 'The criminal justice system responses to sexual violence in South Africa' in M Verwoerd & C Lopes (eds) *Sexualised Violence in the National Debate: Cross-border Observations on India and South Africa* (2015) 51.

behaviour, roles, identity, power and privileges afforded to each.⁸ Crime in general, and sexual offences specifically, are not gender-specific. However, women are disproportionately affected by sexual offences and are often the targets of such crimes.⁹ GBV is defined as violence that targets individuals or groups of individuals based on their gender.¹⁰ Women in South Africa experience violence in many different forms, including rape, indecent assault, sexual harassment and verbal abuse.¹¹ Studies emphasise that girls are three to six times more likely than boys to experience sexual abuse, and the vast majority of sexual abuse is perpetrated by male, not female, adults.¹² Men's violence towards women is a clear display of the patriarchy and unequal power relations at play.¹³

Cultural and social norms often require males to be aggressive, powerful, unemotional and controlling – if they do not act in this way, then society portrays them as 'weak'.¹⁴ Expectations of females, on the other hand, are that they must be passive, nurturing, submissive and emotional, which reinforces the idea that women are weak, powerless and dependent on men.¹⁵ These dichotomies or binaries assign perceived male characteristics or perceived female traits, as the case may be, to individuals based on their biological bodies.¹⁶ The dichotomies therefore embody gender roles and

⁸ Albertyn & Bonthuys (n 1) 20–2.

⁹ Statistics South Africa (Report 03-40-05) *Crime Statistics Series Volume V Crime against Women in South Africa: An In-depth Analysis of the Victims of Crime Survey Data Report* (2018) 7 (hereafter Statistics South Africa).

¹⁰ Statistics South Africa (n 9) 7.

¹¹ Commission on Gender Equality *A Framework for Transformative Gender Relations in South Africa* (2000) 68.

¹² F Pickup, S Williams & C Sweetman *Ending Violence against Women: A Challenge for Development and Humanitarian Work* (2001) 18.

¹³ Pickup, Williams & Sweetman (n 12) 68.

¹⁴ PJ Fleming, JGL Lee & SL Dworkin "'Real men don't": Constructions of masculinity and inadvertent harm in public health interventions' (2014) 104 *American Journal of Public Health* 1029.

¹⁵ AM Koenig 'Comparing prescriptive and descriptive gender stereotypes about children, adults, and the elderly' (2018) 9 *Frontiers in Psychology* 1.

¹⁶ Binaries or dichotomies include male/female; aggressive/passive; rational/emotional and strong/weak. Gilligan, on the other hand, argues that women embody an 'ethic of care' while men reason with an 'ethic of rights'. It is argued that this distinction is reflected in the gendered nature of international law. See generally C Gilligan *In a Different Voice: Psychological Theory and Women's Development* (1982).

stereotypes. Consequently, hegemonic masculinity is dominant in a society that oppresses women. Such masculinity presents how men should behave and how putative *real men* (emphasis added) do behave, in accordance with cultural ideals.¹⁷ Donaldson describes hegemonic masculinity as being ‘exclusive, anxiety-provoking, internally and hierarchically differentiated, brutal, and violent’.¹⁸

One study, which included interviewing South African men about their views on rape, yielded important data that correlates with the discourse on hegemonic masculinities.¹⁹ Most interviewees stated that they agreed with some rape myths, particularly, that the way the woman is dressed, contributes to whether she is raped, and that a sexual act constitutes rape only if, for instance, force or weapons were used, or if the woman physically fought the man and left marks and scratches in the process.²⁰ The study further revealed that interviewees regarded rape as a grievance against men, who could face consequences such as arrest, as opposed to rape being a violation of women.²¹ The narrative that emerges from these interviews renders women’s experiences of sexual domination invisible; in fact, she is viewed as a protagonist in her own harm. In addition, women must go to extremes, such as physically harming the perpetrator, to communicate their lack of consensus, as mere dissent is viewed as insufficient to stop the attack. This narrative further dichotomises the social structures by positing men as dominant and aggressive, with women as merely passive and vulnerable.²² Therefore, the patriarchal ideology underpinning social norms, and the accompanying power imbalance between men and women, play a fundamental role in shaping human behaviour such as criminal activity and vulnerability to crime.²³ Statistics South Africa’s *Victims of Crime*

¹⁷ R Morrell ‘Of boys and men: Masculinity and gender in Southern African studies’ (1998) 24(4) *Journal of Southern African Studies* 607.

¹⁸ M Donaldson ‘What is hegemonic masculinity?’ (1993) 22 *Theory and Society* 645; N Sibanda-Moyo, E Khonje & MK Brobbey *Violence against Women in South Africa: A Country in Crisis* (2017) 45.

¹⁹ Y Sikweyiya, R Jewkes & R Morrell ‘Talking about rape: South African men’s responses to questions about rape’ (2007) 21 *Agenda* 48–57.

²⁰ Sikweyiya et al (n 19) 51; Sibanda-Moyo et al (n 18) 44.

²¹ Sikweyiya et al (n 19) 51.

²² S Dosekun ‘“We live in fear, we feel very unsafe”: Imagining and fearing rape in South Africa’ (2007) 21 *Agenda* 90.

²³ Statistics South Africa (n 9) 9.

Survey (VOCS) corroborates this view,²⁴ stating that 51.1 per cent of men and 33.8 per cent of women believe that it is acceptable for a husband to hit his wife when she has offended him by not complying with what are regarded as her obligations as a wife.²⁵ This belief normalises GBV, not only in the private space, but also in the public domain.²⁶

Despite women's socio-cultural differences, sexual domination serves as a unifying factor for all women, irrespective of their specific experiences of oppression. The Justices in *Chapman v S* succinctly provided a statement of what women's lived experiences ought to be, when they stated:

Women in this country... have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives. Yet women in this country are still far from having that peace of mind.²⁷

Despite the ideal circumstances described above, in reality, violence against women affects all women, regardless of whether or not they were exposed to such violence. The common denominator for all women, whether they are affected or not, is that they live in fear. Weldon provides credence to MacKinnon's argument that all women are affected by sexual violence by claiming that—

[women] are expected to alter their behavior to minimize risk: they oughtn't stay late at the office alone, or walk unescorted after dark, or

²⁴ The *Victims of Crime Survey* is a statistical report published by Statistics South Africa that describes how crimes affect South Africans.

²⁵ Statistics South Africa (n 9) 10. The survey was based on whether a wife deserved to be hit if she did the following: went out without telling her husband, neglected the children, argued with her husband, refused to have sex, burnt the food, or cooked the wrong type of food.

²⁶ Chapell and Di Martino cite the International Labour Organisation observation that 'the orientation of a culture, or the shared beliefs within a sub-culture, helps define the limits of tolerable behaviour. To the extent that a society values violence, attached prestige to violent conduct, or defines violence as normal or legitimate or functional behaviour, the values of individuals within the society will develop accordingly. Attitudes of gender inequality are deeply embedded in many cultures and rape, domestic assault and sexual harassment can all be viewed as a violent expression of the cultural norm'. See D Chapell & V di Martino *Violence at Work* 3 ed (2006) 114.

²⁷ *Chapman v S* 1997 (3) SA 341 (A) 345A–B.

draw public attention to themselves, or be in private spaces with men – even men they know well. Thus, violence against women restricts the ability of all women to take advantage of their rights as citizens of a democratic public.²⁸

Women therefore often adapt their behaviour in order to avoid sexual aggression and violence. VOCS verifies these arguments, providing data that indicates that women adapt their behaviour due to fear of crime.²⁹ Crime therefore limits the activities of women far more than it limits the activities of men. The constant threat of rape prevents a woman from participating in average day-to-day activities, and her fears are justified. Rape targets women and girls more frequently than men, and has become such a serious problem in South Africa that the country has earned the title of ‘Rape Capital of the World’.³⁰ Statistics reveal that 80 per cent of *reported* sexual offences are rape cases, and that 68.5 per cent of sexual offences victims/survivors are women. Based on these statistics, the estimated number of women raped is 138 per 100 000.³¹ These estimates are based only on reported cases. There is no official way to capture and access accurate data on all rapes committed in South Africa.

III GOVERNMENT FRAMEWORK FOR INTERVENTION IN SEXUAL OFFENCES

(1) *Policies and structures to decrease GBV and sexual offences*

In the midst of widespread incidents of GBV and deaths, President Cyril Ramaphosa launched the Gender-Based Violence Summit in November 2018. In addition, he signed a declaration that committed

²⁸ L Weldon *Protest, Policy, and the Problem of Violence against Women* (2002) 11.

²⁹ Dosekun (n 22) 517–35. See also Statistics South Africa (n 9) 12. For example, 54 per cent of women felt very unsafe walking alone in their neighbourhood at night, opposed to 48 per cent men who felt the same. The percentage of women who felt that the way they dress would attract crime was 12.8 per cent, opposed to 10.1 per cent of men who felt the same. The percentage of women who felt that they would be a target for potential crime if they invested in or started a home business stood at 11.2 per cent, opposed to the 9.3 per cent of men who felt the same.

³⁰ ‘The Rape Capital of the World’ *News24* 21 August 2014, available at <https://www.news24.com/MyNews24/The-Rape-Capital-of-the-World-20140821>.

³¹ Statistics South Africa (n 9) 8.

government, together with communities and businesses, to fighting GBV and femicide.³² The President tasked the National Council on Gender Based Violence (NCGBV), formed in 2012, with developing a national strategy to curb GBV. These events are part of a long list of interventions since 1993, to decrease the prevalence of GBV, to convict perpetrators, and to provide fundamental services to the victims of GBV, particularly sexual offences. It is therefore necessary to provide an overview of government interventions and legislation to combat GBV and sexual offences, including the development of the SOCs, and to consider the reasons why the SOCs stopped functioning as specialised courts.

In 1993, the Wynberg Sexual Offences Court was the first SOC to be established in South Africa, with several more SOCs created in the Western Cape. Due to their success, SOCs were subsequently established in other provinces. This initiative was not created by legislation and, despite its success, a moratorium was placed on the further creation of SOCs.³³ Aside from the Wynberg initiative, since 1993, the South African government has introduced a multitude of legislation, policies and structures to meet its constitutional obligation to achieve gender equality. These include *Justice Vision 2000*, adopted by the former Department of Justice, which comprised a five-year strategy, the main objective of which was to make the criminal justice system accessible to everyone.³⁴ This strategy prioritised ‘vulnerable groups’ such as women and children.³⁵ This strategy was further supported by the *National Policy Guideline for Victims of Sexual Offences*, which created best practices for the manner in which victims and witnesses are treated in the criminal justice system.³⁶ In 1999, a Sexual Offences and Community Affairs Unit (SOCA Unit) was formed by the

³² President Cyril Ramaphosa ‘Speech at the launch of Declaration against Gender-Based Violence and Femicide and opening of Booyens Magistrate’s Court’, available at <https://www.gov.za/speeches/president-cyril-ramaphosa-launch-declaration-against-gender-based-violence-and-femicide-and>.

³³ Department of Justice and Constitutional Development: Ministerial Advisory Task Team on the Adjudication of Sexual Offence Matters *Report on the Re-establishment of Sexual Offences Court* (2013) 22 (the MATTSO Report).

³⁴ Department of Justice *Justice Vision* (2000) 2.

³⁵ Department of Justice (n 34) 2.

³⁶ Department of Social Development *Integrated Victim Empowerment Programme* (IVEP) 4th draft (2007).

National Prosecuting Authority (NPA) to strengthen government's ability to address sexual violence against women and children.³⁷

The NPA also adopted the *Service Charter for Victims of Crime in South Africa* (Victims' Charter) to ensure that victims are afforded the right to fairness, privacy, dignity, offering and receiving information, and the right to protection, assistance, compensation and restitution.³⁸ This victim-centred approach is also visible in the Integrated Victim Empowerment Programme (IVEP), with its guiding principles being the empowerment of victims through participation and self-determination.³⁹ Victims must be treated with dignity, particularly by service providers, who must be accountable for their efficient and effective delivery of services.⁴⁰ Another fundamental principle of the IVEP is restorative justice, in terms of which the perpetrator must be held accountable for the crimes committed. The IVEP expressly embraces the notion that restorative justice provides for real empowerment when the perpetrator admits to the crime against the victim and the ensuing harm, together with the recognition of the continuing needs of the victim as a result of that crime.⁴¹

The South African Law Commission published a paper on sexual offences in 1999, which underpinned all these policies and governmental structures. The paper also proposed a change to the narrow common-law definition of rape and other substantive issues relating to sexual offences.⁴² This was followed by its paper on processes and procedures relating to sexual offences, which adopts a multidisciplinary approach to reforming the procedures in the criminal justice system.⁴³ The proposed reforms include

³⁷ HB Kruger & JM Reyneke 'Sexual offence courts in South Africa: *Quo vadis?*' (2008) 33 *Journal for Juridical Science* 43.

³⁸ Department of Justice and Constitutional Development *Service Charter for Victims of Crime in South Africa* (2004) available at <https://www.justice.gov.za/VC/docs/vc/vc-eng.pdf> (the Victims' Charter). The Victims' Charter is aligned with the UN *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (1985) A/RES/40/34.

³⁹ IVEP (n 36) 5–7.

⁴⁰ *Ibid* 8.

⁴¹ *Ibid*.

⁴² South African Law Commission Issue Paper 85 (Project 107) *Sexual Offences: The Substantive Law* (1999) 68.

⁴³ South African Law Commission Issue Paper 102 (Project 107) *Sexual Offences: Process and Procedure* (2004).

interviewing victims, case flow management, the creation of sexual offences courts, and holistic psychological, medico-legal and social advice and assistance to the victim.⁴⁴ While the government was lauded for its efforts, this plethora of structures and policies, described as ‘patchwork’, were uncoordinated and did not yield the expected results.⁴⁵ However, during the same period, corresponding legislation was enacted to provide for increased protection from GBV.

(2) *Legislative developments to combat GBV and sexual offences*

The Prevention of Family Violence Act⁴⁶ prohibited intimate GBV and recognised spousal rape.⁴⁷ This Act was replaced by the Domestic Violence Act,⁴⁸ which provided even more protection to women.⁴⁹ The Criminal Law (Sexual Offences and Related Matters) Amendment Act (Sexual Offences Act)⁵⁰ extends the common-law definition of rape in order to be gender-neutral. In addition, rape includes non-consensual sexual acts that do not include penetration, such as forced oral sex on the victim/survivor, and those that include penetration of not only the vagina, but other body parts such as the anus. The legislation does not limit rape to forced penetration by a penis. Therefore, other body parts, objects and animals could be used in non-consensual sexual acts. Furthermore, the Sexual Offences Act creates a national sex offender register,⁵¹ and engages specifically with sexual offences against children⁵² and persons with mental disabilities.⁵³

Of great significance is the provision of services for victims of sexual offences and the compulsory HIV testing of alleged offenders.⁵⁴ These legislative developments must be read together

⁴⁴ South African Law Commission Issue Paper 102 (n 43).

⁴⁵ Bornman (n 7) 55. The issues preventing the success of the plans and strategies will be addressed below in the section on the SOCs.

⁴⁶ Act 133 of 1993.

⁴⁷ Section 5 provided that a husband can be charged with raping his wife

⁴⁸ Act 116 of 1998.

⁴⁹ The preamble to the Act states that one of the purposes of the Act is to align South African law with the country’s international obligations.

⁵⁰ Act 32 of 2007.

⁵¹ Chapter 6.

⁵² Chapter 3.

⁵³ Chapter 4.

⁵⁴ Chapter 5.

with other enactments, such as the Children's Act,⁵⁵ the amendments to the Criminal Procedure Act (CPA)⁵⁶ and the Sexual Offences Act. These enormous legislative developments were complemented by the publication of the draft Regulations to the Sexual Offences Act, which provided for the establishment of SOCs and the provision of services to victims.

(3) *Select case law dealing with gender-based violence and sexual offences*

The Constitutional Court has produced an important body of cases that address issues of GBV within the context of constitutional transformation and development. The legislation, policy and structural developments are supported by progressive Constitutional Court decisions. *S v Baloyi*⁵⁷ concerned domestic violence; in a unanimous judgment the court held that the onus of proof of protection orders, provided for in the Prevention of Family Violence Act, was not unconstitutional.⁵⁸ In *Carmichele v Minister of Safety and Security*⁵⁹ the court aligned the common law with the relevant constitutional provisions, holding that the state is delictually liable if its officials (in this case, the police) do not fulfil their obligations to protect women.⁶⁰ Important sexual offences judgments by the Constitutional Court also changed the constitutional landscape of South Africa. In *Masiya v Director of Public Prosecutions Pretoria and Another*⁶¹ the court extended the narrow common-law definition of rape to include forced anal penetration, while the *Teddy Bear Clinic* decision⁶² found certain provisions of the Sexual Offences Act to be unconstitutional for

⁵⁵ Act 38 of 2005.

⁵⁶ Act 51 of 1977.

⁵⁷ *S v Baloyi* 2000 (2) SA 425 (CC).

⁵⁸ At para 11.

⁵⁹ *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC).

⁶⁰ This landmark case created the precedent for cases such as *Van Eeden v Minister of Safety and Security* 2002 (4) All SA 346 (SCA), *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA), *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) and *F v Minister of Safety and Security and Another* 2012 (1) SA 536 (CC).

⁶¹ *Masiya v Director of Public Prosecutions Pretoria (The State) and Another* 2007 (5) SA 30 (CC).

⁶² *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* 2014 (2) SA 168 (CC).

criminalising consensual sexual activity between adolescents, who, as a result, could be registered as sex offenders.⁶³

Despite this progress, the gendered views and myths about rape often occur in the criminal justice system, affecting the outcome for victims/survivors of rape. Instead of the criminal justice system fulfilling its obligation of ensuring human rights for all, it has become a social and political system that favours men above women. The justice system, from the point of reporting a crime until sentencing, is so daunting for a woman who has suffered from a violent crime in society that seeking redress is no longer an avenue of recovery for her. Instead, seeking redress becomes a painful journey of further discrimination and injustice. A patriarchal justice system 'ensures that women are unable to protect their bodies, meet their basic needs and participate fully in society. The system allows men to perpetrate violence against women with impunity.'⁶⁴

The crimes committed against women are sometimes under-reported because of the ineffectiveness and insensitivity of the criminal justice system. Most law enforcement agents as well as members of the judiciary have negative attitudes, and this prevents women from using the justice system.⁶⁵ South Africa may have one of the most progressive constitutions, which affirms that all people are equal before the law and that everyone has the right to the equal protection and benefit of the law,⁶⁶ but the successful implementation of any law is dependent on law enforcement having a positive approach to solving crimes.⁶⁷

In terms of the Constitution, the state may not unfairly discriminate directly or indirectly against anyone on any grounds, including '*race, gender, marital status, ethnic or social origin, sexual orientation, age, disability or language*'.⁶⁸ However, women's access to the courts is hindered by a number of factors. First, a general problem for the poorer communities of South Africa is that the

⁶³ See s 50(2) of the Sexual Offences Act.

⁶⁴ Saferspaces 'Gender-based violence in South Africa' available at <https://www.saferspaces.org.za/understand/entry/gender-based-violence-in-south-africa>.

⁶⁵ Commission on Gender Equality (n 11) 66.

⁶⁶ Section 9(1) of the Constitution.

⁶⁷ Commission on Gender Equality (n 11) 66.

⁶⁸ Section 9(3) of the Constitution (emphasis added).

courts are located far from where most people live.⁶⁹ Second, many poor women cannot afford an attorney, or to travel to legal aid clinics, or to travel to the courts or pay some of the expenses required to use the courts.⁷⁰ This could be a result of them being economically dependent on their husbands since the start of their marriages. Third, the language used in courts is unfamiliar to many people, especially persons who have had little or no access to education.⁷¹ Last, the formalities and adversarial nature of courtrooms makes many women feel uncomfortable.⁷²

One objective of the Sexual Offences Act is to ensure that services rendered to victims of sexual offences will not result in secondary traumatising. This Act also encourages government departments, as well as all institutions, to adopt uniform and co-ordinated responses to dealing with matters relating to sexual offences.⁷³ Apart from the courtroom setting, certain legal rules could leave the victim/survivor feeling even more traumatised. In many jurisdictions, there is an all-encompassing and uncritical acceptance of the view that rape complainants are naturally suspect and may well make false accusations against men.⁷⁴ This innate suspicion is referred to as the cautionary rule and almost all jurisdictions, including South Africa, have adopted it. The rule requires judicial officers to exercise caution before accepting the evidence of certain witnesses because such evidence is potentially unreliable.⁷⁵ The cautionary rule creates a hostile environment for the victim who may feel that everyone is against her, and that the justice system believes the perpetrator. Fortunately, South Africa abolished the cautionary rule in sexual assault cases in *S v Jackson*.⁷⁶ Olivier JA held that 'the cautionary rule in sexual assault cases is based on an irrational and out-dated perception.

⁶⁹ Commission on Gender Equality (n 11) 65.

⁷⁰ Ibid.

⁷¹ Ibid 66.

⁷² Ibid.

⁷³ Section 62(1)(a) of the Sexual Offences Act.

⁷⁴ KE Mahoney 'Canadian approaches to equality rights and gender equality in the courts' in RJ Cook (ed) *Human Rights of Women: National and International Perspectives* (1994) 451.

⁷⁵ N Naylor 'The survival of the cautionary rule', available at http://www.ghjru.uct.ac.za/sites/default/files/image_tool/images/242/sexual-offence-bill/Cautionary-Rule.pdf.

⁷⁶ *S v Jackson* 1998 (1) SACR 470 (SCA).

*It unjustly stereotypes complainants in sexual assault cases (overwhelmingly women) as particularly unreliable ...*⁷⁷ This judgment was a triumph for rape victims who could now go into court without fearing hostility from the court.

Although the cautionary rule was abolished, the CPA still provides that evidence as to the complainant's character may be admissible in sexual assault cases.⁷⁸ Before the CPA adopted this provision, the common-law rule provided that in a case involving a charge of rape or indecent assault, the accused may adduce evidence on the complainant's bad reputation for lack of chastity.⁷⁹ Section 227(2)(a) and (b) of the CPA provides that no previous sexual experience or conduct of any person is allowed as evidence, other than evidence relating to sexual experience or conduct in respect of the offence that is being tried, unless an application is made to the court or the prosecution introduces such evidence to the court. This section retains the common-law rule but is now gender-neutral.⁸⁰ The wording of the section suggests, however, that the sexual history of a complainant is allowed if it is relevant to the offence being tried, without a prior application being needed.⁸¹ While it could be argued that the section guards against potential false rape accusations, it is a danger to the human dignity of any rape victim/survivor to have any of her sexual history brought into evidence on the basis that it is relevant to the current case. The application to the court to present such evidence should be made regardless of whether it is relevant to the offence being tried. Despite this, Mahoney cautions that 'the nature of the crime of rape, the long-term psychological injury to the victim and the prevalence of the crime, especially acquaintance-rape, are subjects that researchers have discovered that judges [and legislators] know little about.'⁸² The lack of education surrounding the impact of rape on the victim is evident in the way that laws are enacted. The possibility of her sexual history being examined may stop the victim from reporting the crime. The CPA allows for questions

⁷⁷ At 476E–F (emphasis added).

⁷⁸ Section 227 of the CPA.

⁷⁹ PJ Schwikkard 'Character evidence' in PJ Schwikkard & SE van der Merwe (eds) *Principles of Evidence* 4 ed (2016) 71.

⁸⁰ *Ibid* 73.

⁸¹ Section 227(2) of the CPA.

⁸² Mahoney (n 74) 451.

such as: 'What were you wearing? Who were you with? Where were you walking? Were you alone? And how much did you have to drink?' Therefore, the reluctance of the victim to access justice may be exacerbated by her fear of feeling that she may be to blame for the crime.

In this regard, s 34 of the Constitution provides that 'everyone has the right to have any dispute that can be resolved by the application of law decided on in a fair public hearing'.⁸³ Apart from this constitutional right, South Africa is a state party to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).⁸⁴ A key norm underlying CEDAW is gender equality.⁸⁵ Gender equality has become an issue of considerable importance internationally and CEDAW has become a standard for assessing a state's commitment to this issue.⁸⁶ It has been argued that rape and sexual violence are increasingly being recognised as crimes under international law.⁸⁷ Rape has been conceptualised under international law as an attack on the personal honour and dignity of a woman.⁸⁸ This is an important factor to consider when deciding whether the courtroom, the legal system and a public hearing accord with what international standards prescribe as being key to accessing effective human rights. The state has a duty to prevent and eventually eradicate any practices that expose women to degradation, indignity and oppression on account of their gender.⁸⁹ If South Africa is an equal society as portrayed in the Constitution, then in order to prevent the further human rights violations of women in the judicial system, we

⁸³ Section 34 of the Constitution.

⁸⁴ UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women (1979) UNTS, vol. 1249, p 13, available at: <https://www.refworld.org/docid/3ae6b3970.html>.

⁸⁵ AM Banks 'CEDAW, compliance, and custom: Human rights and enforcement in Sub-Saharan Africa' (2008–2009) *Fordham International Law Journal* 796.

⁸⁶ *Ibid* 804.

⁸⁷ L van der Poll 'The emerging jurisprudence on sexual violence perpetrated against women during armed conflict' (2007) *African Yearbook of International Law* 10.

⁸⁸ *Ibid* 11.

⁸⁹ RJ Cook 'State accountability under the Convention on the Elimination of All Forms of Discrimination Against Women' in RJ Cook (ed) *Human Rights of Women: National and International Perspectives* (1994) 228.

need to actively call for the re-establishment of SOCs. The re-establishment of the courts could contribute to the successful and timely convictions of perpetrators of sexual offences.

(4) *The establishment of Sexual Offences Courts*

SOCs were first developed in South Africa to improve the prosecution and adjudication of sexual offences.⁹⁰ The first SOC was established in 1993, at the Wynberg Regional Court. This development was a direct result of the activism of women's rights NGOs, who were demanding that the criminal justice system improve its treatment of the victims/survivors of sexual offences.⁹¹ The objectives of the SOC were to respond to and prevent the increasing numbers of rape cases, and to act as an intervention mechanism against the secondary victimisation experienced by rape survivors when they engaged with the criminal justice system.⁹²

The Wynberg SOC differed from the general regional courts in both substantive and procedural ways. At the point of entry into the criminal justice system, a multi-disciplinary team offered assistance from the moment the victim/survivor reported a sexual offence.⁹³ A social worker from the Department of Welfare was appointed as a full-time support services coordinator tasked with the coordination and provision of, inter alia, intermediary and counselling to the victims/survivors.⁹⁴ To reduce secondary victimisation, the Sexual Offences Court was moved to a more appropriate floor of the Magistrates' Court building so that the victim/survivor did not come into contact with the accused or

⁹⁰ MATTSO Report (n 33).

⁹¹ M Sadan, L Dikweni & S Cassiem 'Pilot assessment: The Sexual Offences Court in Wynberg and Cape Town and related services' Idasa (2001) 5, available at http://www.endvawnow.org/uploads/browser/files/assessment_sexual_offences_courts_sa.pdf.

⁹² MATTSO Report (n 33) 8–9, 18. The pilot Wynberg SOC Court had three main objectives: first, to reduce the insensitive treatment of victims in the criminal justice system by following a victim-centred approach; second, to adopt a coordinated and integrated approach between the various role-players who deal with sexual offences; and lastly, to improve the investigation and prosecution of sexual offences cases, as well as the reporting and conviction rates. See also Sadan et al (n 88) 5.

⁹³ MATTSO Report (n 33) 18.

⁹⁴ Ibid.

other members of the public.⁹⁵ There were private, colourful victim-friendly waiting rooms.⁹⁶ Two prosecutors were allocated per court, to ensure that one prosecutor could consult, guide investigations and do trial preparation, while the other prosecutor was in court.⁹⁷ To avoid ‘burn out’, the magistrates assigned to this Sexual Offences Court worked on a rotational system, presiding in that court for one week in every six weeks.⁹⁸

The Wynberg SOC project was reviewed in 1997, and was found to be partially successful in establishing integration and teamwork between the different role-players involved in reducing victim trauma and in improving reporting and conviction rates.⁹⁹ As a result of this review, certain recommendations were made,¹⁰⁰ and the Department of Justice, through the NPA, drafted a blueprint for SOCs in South Africa in order to establish these courts across the country, particularly in areas with a high prevalence of sexual violence.¹⁰¹ The pilot run was a major success, maintaining a conviction rate of up to 80 per cent over a one-year period.¹⁰² Although the SOCs fulfilled their purpose, several challenges contributed to their downfall. Some of the challenges were—

a lack of a specific legal framework to establish these courts; a lack of a dedicated budget; poor visibility of these courts in remote areas; restricted space capacity in courts; a lack of training of court personnel; and a lack of a monitoring and evaluation mechanism developed specifically for the management of these courts.¹⁰³

⁹⁵ Ibid.

⁹⁶ Ibid.

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ Ibid 19.

¹⁰⁰ Ibid. For example, it was recommended that district surgeons be available 24 hours per day and that a mechanism to disseminate information to complainants be established.

¹⁰¹ MATTSO Report (n 33) 9 and 19. SOCs were first established in 1993. By 1999, the NPA had established courts in Mdantsane, Soweto, Bloemfontein, Durban, Parow and Grahamstown and, by the end of 2005, there were 74 SOCs countrywide.

¹⁰² MATTSO Report (n 33) 19.

¹⁰³ N Manyathi ‘Sexual offences courts to be re-established’ (September 2013) 534 *De Rebus* 10–11 at 10.

IV FULLY RE-ESTABLISHING THE SEXUAL OFFENCES COURTS

SOCs are special courtrooms that deal specifically with sexual offences, such as rape. They provide exclusive and sensitised services to rape survivors and other witnesses. The way in which SOC handle such matters is beneficial to the victim in the following ways:

[F]irst, it makes the secondary trauma of the survivor less difficult. Secondly, cases are speedup [*sic*] so that the matter can be resolved more quickly. Thirdly, court decisions and judgements are made by individuals who are better equipped in skill and experience to deal with the matter more effectively. Fourthly, the court process is less daunting which motivates more people to report the rape so that those who committed it will be brought to justice. Lastly, the fact that these courts only deal with sexual offences means that there is a chance that there will be more convictions and more perpetrators will be sent to jail.¹⁰⁴

Despite the challenges that led to the demise of SOC, a report on the outcome of the research done on SOC was released in 2013. The Ministerial Advisory Task Team on the Adjudication of Sexual Offences (MATTSO) was commissioned to investigate the viability of re-establishing SOC.¹⁰⁵ The MATTSO report developed a blueprint for a new SOC model.¹⁰⁶ This new court model focused on specific elements, such as a detailed outline of the set-up of the courtroom, the testifying room and the waiting areas for children, youth and adult witnesses.¹⁰⁷ The task team further revealed that 49 of the 567 courts sitting as regional courts had resources that were closest to the SOC model.¹⁰⁸ However, these courts are all located in urban areas, and are not nearly enough to serve the estimated 50 000 reported cases of rape each year.¹⁰⁹ Research has shown that the majority of incidences of rape

¹⁰⁴ Shukumisa Coalition 'Sexual Offences Courts' (nd) available at <https://shukumisa.org.za/wp-content/uploads/2017/11/Shukumisa-fact-sheet-sexual-offences-court.pdf> (accessed 22 January 2019).

¹⁰⁵ MATTSO Report (n 33).

¹⁰⁶ Rape Survivors Justice Campaign Booklet available at <https://rapecrisis.org.za/wp-content/uploads/Resources/Rape-Crisis-Justice-Campaign.pdf>.

¹⁰⁷ MATTSO Report (n 33) 11.

¹⁰⁸ *Ibid* 14.

¹⁰⁹ Rape Survivors Justice Campaign (n 106).

occur in rural areas or in areas where people live in abject poverty and difficult living circumstances.¹¹⁰ The opportunity to commit violent crimes, including rape, is far greater. Most women and children who are targeted in those areas lack the resources and/or knowledge to access justice. The existence of specialised SOCs so distant from rural areas is arguably a violation of the constitutional right to access to justice.

The Sexual Offences Act, enacted with the intention of protecting all vulnerable persons from the violation of their constitutional rights,¹¹¹ requires government to introduce a national policy framework that recognises the enhancement of service delivery to victims of sexual offences, regardless of geographical differences, because of the high prevalence of such offences.¹¹² This Act requires a plan to be put into place that progressively works towards achieving that goal.¹¹³ South Africa has an international legal obligation to ensure that it deals effectively with matters affecting the human rights of women.¹¹⁴ It is, however, recommended that, in drafting policy and a framework for addressing sexual offences, the government and the legislature should include women in strategic and decision-making processes,¹¹⁵ since women are the most affected by the commission of sexual offences.

It is clear from most of the reports and research done, including the report provided by MATTSO that without an effective court system that specifically deals with sexual offences, the issue of injustice in the judicial system towards sexual offence victims, especially rape survivors, will continue to worsen. MATTSO

¹¹⁰ See L Vetten 'Geography and sexual violence: Mapping rape in Johannesburg' (1998) 2(2) *CSVr Development Update* available at <https://www.csvr.org.za/publications/1625-geography-and-sexual-violence-mapping-rape-in-johannesburg>. See further S Smith 'We have a major problem in South Africa' *The Guardian* 18 November 2010 available at <https://www.theguardian.com/lifeandstyle/2010/nov/18/south-africa-murder-rape>.

¹¹¹ Preamble to the Sexual Offences Act.

¹¹² Section 62(1)(c) read with the preamble to the Sexual Offences Act.

¹¹³ Section 62(1)(c) of the Sexual Offences Act.

¹¹⁴ South Africa is a signatory to CEDAW and its obligation to protect the vulnerable groups in society is confirmed in the preamble to the Sexual Offences Act.

¹¹⁵ Banks (n 85) 798.

conducted empirical research at five identified SOCs,¹¹⁶ with the objective of obtaining information about the historical and current functionality, successes and limitations of the operations of dedicated SOCs from certain identified court personnel, who included the regional magistrates, prosecutors and intermediaries.¹¹⁷ The research confirms that the SOCs were used to deal with matters other than sexual offences cases. For instance, at one of the courts, it was found that none of the regional courts operated as dedicated SOCs.¹¹⁸

All ten courtrooms are now operating as ordinary regional courts dealing with all cases. Sexual offences cases are dealt with on a daily basis, but are not disaggregated from other cases.¹¹⁹ There were allegations that these sexual offences cases had become contaminated by other cases on the court roll, which resulted in delays in finalising the cases, thus causing witnesses to suffer undue distress. This was only one of the many issues uncovered by the research.¹²⁰ Further research has shown that the attrition in rape cases at the entry point, which is the reporting stage, is so dire that victim/survivors are often discouraged from even considering reporting the matter. Scholars studying attrition in rape cases generally explain the low rate of reporting and conviction in these cases by pointing to the stereotypical views held by criminal justice actors about what constitutes a sexual offence.¹²¹ The re-establishment of the SOCs would therefore strengthen the establishment of a victim-centred court system that is prompt, responsive and effective.¹²²

¹¹⁶ MATTSO Report (n 33) 27. These courts were the Protea Magistrates' Court (Johannesburg), the Wynberg Magistrates' Court (Cape Town), the Durban Magistrates' Court (Durban), the Mdantsane Magistrates' Court (East London), and the Sibasa Magistrates' Court (Thohoyandou).

¹¹⁷ MATTSO Report (n 33) 27.

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.* See 27–8 for a list of challenges identified from interviews conducted with the personnel working at the courts.

¹²¹ A synopsis of D Smythe *Rape Unresolved: Policing Sexual Offences in South Africa* (2015) was published by Newsroom *University of Cape Town News* on 29 February 2016 titled 'Why so few reports of rape end in conviction in South Africa' available at <https://www.news.uct.ac.za/article/-2016-02-29-why-so-few-reports-of-rape-end-in-conviction-in-south-africa>.

¹²² MATTSO Report (n 33) 96.

V A FEMINIST FRAMEWORK FOR ANALYSING GENDER-BASED VIOLENCE AND SEXUAL OFFENCES

A feminist framework for analysing the harm that victims/survivors experience in the court system is important because it questions seemingly neutral laws, processes, policies and conduct, exposing the patriarchal and gendered nature embedded in them, and creates a space for legal reform based on women's experiences.¹²³ The feminist method of asking the 'woman question'¹²⁴ is appropriate for this analysis: it describes women's experiences, and explores ways of solving the social, political or legal problems. Gender oppression is not only revealed; the method also necessitates determining how to achieve the ideal circumstances.¹²⁵

However, women have varied experiences, lives and beliefs, and therefore cannot be viewed as a homogeneous group.¹²⁶ The 'woman question' thus becomes complex when acknowledging the intersectionality of identities and the fact that women have different stories.¹²⁷ Whose voice, then, is the 'woman question' representing? By employing the 'woman question', the conceptual challenge is to recognise a pattern of gender-related inequalities, while trying to avoid falling into the essentialist trap of homogenising women. Wishik's development and expansion of the woman question refines this method, and the subquestions are structured to provide a systematic process for interrogating the status quo, and for finding remedies to redress the problems identified.¹²⁸ This expanded construction of the 'woman question'

¹²³ CA MacKinnon 'Feminism, Marxism, method and the state: An agenda for theory' (1982) 7 *Signs* 515.

¹²⁴ K Bartlett 'Feminist legal methods' (1990) 103 *Harvard Law Review* 837. See Bartlett for a discussion of the various ways that the 'woman question' may be used to challenge laws (at 837–49).

¹²⁵ HR Wishik 'To question everything: The enquiries of feminist jurisprudence' (1985) 1 *Berkeley Women's Law Journal* 64.

¹²⁶ P Smith 'Introduction' in P Smith (ed) *Feminist Jurisprudence* (1993) 3.

¹²⁷ See generally K Crenshaw 'Demarginalizing the intersection of race and sex: A black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics' (1989) *University of Chicago Legal Forum* 138; M Frye 'The necessity of difference: Constructing a positive category of women' (1996) 21 *Signs* 991; IM Young *Intersecting Voices* (1997); E Spelman *Inessential Woman* (1988).

¹²⁸ Wishik (n 125) 72–7.

will be used to evaluate the experiences of victims/survivors of sexual violence in the court system.

The first question in the inquiry is how women's past and present experiences of sexual offences have been addressed by the specific law and its processes.¹²⁹ The Constitution is the pinnacle of South African law, and provides specifically for gender equality,¹³⁰ dignity¹³¹ and the right to freedom and security of the person.¹³² As stated above, legislative developments and Constitutional Court jurisprudence have played an important role in improving the laws and decisions in relation to GBV and, more specifically, rape. While the Domestic Violence Act and the Sexual Offences Act are not without their faults, they provide broader definitions of domestic violence and rape. Policy development and decisions have led to the creation of important structures, such as the SOCs. Furthermore, the South African Human Rights Commission and the Commission for Gender Equality were also created to monitor human rights violations and gender inequality, with the power to make decisions and recommendations for change.¹³³ Unfortunately, the inability of the state to implement many of these policies and appropriate legislation has resulted in *de jure* protection, but *de facto* gender inequality and vulnerability. Smythe describes the situation thus:

South Africa is paper rich when it comes to dealing with sexual violence. It has ratified the leading international and regional human rights treaties and instruments seeking to address these problems, and enshrined a constitutional protection against privately perpetrated violence, applied and enforced through decisions of our highest courts. At a policy level, the South African government and the police service have identified violence against women as a critical policing priority and enacted institutional safeguards against inappropriate

¹²⁹ Wishik's first question is paraphrased to accommodate the 'Life Situation', refers to women's experiences of the law and society under investigation, and thus includes the data collection of these experiences. This investigation should try to include as many different women's experiences as possible.

¹³⁰ Section 9.

¹³¹ Section 10.

¹³² Section 12.

¹³³ These commissions are two of the so-called Chapter 9 institutions, created in Chapter 9 of the Constitution to support the state in achieving constitutional democracy. Section 184 creates the Human Rights Commission, while s 187 creates the Commission for Gender Equality.

responses to rape complainants through National Instructions and Standing Orders. The problem is not with the law in the books but with criminal justice practice. It is in the practical realities of everyday policing and in the attendant discretionary choices that police responses to rape crumble, reinforcing the pretext that rape is, essentially, a crime that is impervious to policing.¹³⁴

The inability of the state to effectively implement these laws and policies, together with the high occurrence of rape and other sexual offences, exacerbates the prevailing masculine hegemony. Further questions in Wishik's formulation of the 'woman question' ask what assumptions, descriptions, assertions and definitions of gendered experience the law makes. One prevalent assumption, evident in the content of legislation, is that rape is gender-neutral. In *Masiya v Director of Public Prosecutions Pretoria and Another* a nine-year-old girl had experienced forced anal penetration at a time when the common law recognised only non-consensual and forced vaginal penetration as rape. While Justice Nkabinde, for the majority, extended the common-law definition to include forced anal penetration, she did not broaden this definition to include male rape.¹³⁵ The minority judgment, per Justice Langa, decided that the definition of rape should be gender-neutral and should therefore be extended to include male rape, as this would give greater effect to constitutional values such as the right to equality. Justice Langa's judgment demonstrates an eloquent perspective on the importance of non-discriminatory laws on rape. This view may, however, prevail at the expense of constructing rape and other sexual offences as a form of discrimination against women. While it is important for the law to have provisions that recognise and criminalise male rape, the gender-neutral provisions in the Sexual Offences Act fail to address the disproportionately large number of women who experience rape and other sexual offences. The gender-neutral definition of rape has therefore 'edited out the structural reality of gender-based violence'.¹³⁶

¹³⁴ D Smythe *Rape Unresolved: Policing Sexual Offences in South Africa* (2015) 46.

¹³⁵ *Masiya v Director of Public Prosecutions Pretoria and Another* (n 61) para 31.

¹³⁶ L Artz & D Smythe 'Feminism vs. the State? A decade of sexual offences law reform in South Africa' (2007) 74 *Agenda* 10. See also B Goldblatt 'Violence against women in South Africa – Constitutional responses and opportunities' in R Dixon & T Roux (eds) *Constitutional Triumphs, Constitutional Disappointments:*

Once we have established the assumptions inherent in the law, it is necessary to answer the third question in the ‘woman question’ inquiry, which is: what is the mismatch, distortion or denial created by the law’s assumptions or imposed structures? Despite the legal and social developments and structures, the number of reported rape cases remains high while the number of convictions remains low. There is therefore an incongruency between the broader statutory definition of rape and women’s lived realities. Why does this mismatch exist and why does the high rate of rape of women and girls persist? The existing laws and policies fail to reflect an understanding of how patriarchy deeply entrenches the power imbalance between women and men. As noted by MacKinnon, the essence of this imbalance is sexual inequality.¹³⁷ These sexual hierarchies manifest in the highly organised construction of difference and power.¹³⁸ Behavioural and social scripts ensure that sexual roles are maintained to ensure masculinity, expressed as male sexual domination, and femininity, expressed as sexual female subordination. These scripts inform men’s views on rape, as in the afore-mentioned study in which the interviewees did not categorise certain instances of sexual offences as rape.¹³⁹ The belief in sexual hierarchies and rape myths do not remain within communities, but permeate the court system as well.

A Critical Assessment of the 1996 South African Constitution’s Local and International Influence (2018) 141–73.

¹³⁷ CA MacKinnon ‘Points against postmodernism’ (2002) 75 *Chicago Kent Law Review* 688. See also MacKinnon (n 123) 516, where she argues that ‘implicit in feminist theory is a parallel argument: the molding, direction, and expression of sexuality organises society into two sexes: women and men. This division underlies the totality of social relations. Sexuality is the social process through which social relations of gender are created, organized, expressed, and directed, creating the social beings we know as women and men, as their relations create society. As work is to Marxism, sexuality to feminism is socially constructed yet constructing, universal as activity yet historically specific, jointly comprised of matter and mind.’

¹³⁸ MacKinnon (n 123) 533. MacKinnon states that ‘sexuality, then, is a form of power. Gender, as socially constructed, embodies it, not the reverse. Women and men are divided by gender, made into the sexes as we know them, by the social requirements of heterosexuality, which institutionalizes male sexual dominance and female sexual submission. If this is true, sexuality is the linchpin of gender inequality’.

¹³⁹ Sikweyiya et al (n 19).

Evidence of this can be found in the Cape High Court decision in *S v Rapogadie*, where the judge's decision was partly influenced by the perceived character of the victim/survivor, who was 11 years old at the time of the offence, but 13 years old at the time of the trial.¹⁴⁰ The accused was a 53-year-old man who faced two charges of rape, with the offences occurring two months apart. The victim subsequently fell pregnant and gave birth to a son. The judge stated that her testimony needed to be treated with 'due regard' to her age and life experience.¹⁴¹ The judge proceeded to highlight the character of the victim/survivor, stating that she was rebellious, could not be controlled by her carers, and spent a lot of time with older teenagers.¹⁴² The judge even questioned why she chose to accompany the accused in his vehicle if, as she alleged, she had been raped two months before under similar circumstances.¹⁴³ The judge appears to adopt the social scripts about rape victims/survivors – that they need to present as timid, not rebellious to be perceived as 'real victims'.¹⁴⁴

In arguing for mandatory minimum sentences, the Western Cape Consortium on Violence Against Women noted that there was a pattern of cases where the presiding officers would impose lighter sentences in sexual offences.¹⁴⁵ The Consortium's findings demonstrated that the factors that informed the lighter sentences included the sexual history of the victim/survivor, the lack of what is perceived as extreme force in the commission of the offence, the perceived absence of physical and psychological harm to the victim/survivor, and an existing relationship between the victim/survivor and the accused at the time of the offence.¹⁴⁶ These examples reflect once again the views of the male interviewees who subscribed to various rape myths. The presiding officers themselves are postulating and applying the dominant masculinity ideology and thereby sustaining patriarchy in the courtroom.

¹⁴⁰ *S v Rapogadie* (36/2010) [2012] ZAWCHC 15 (24 February 2012) para 15.

¹⁴¹ *Ibid* para 11.

¹⁴² *Ibid*.

¹⁴³ *Ibid* para 14.

¹⁴⁴ S Moreland 'Talking about rape – and why it matters: Adjudicating rape in the Western Cape High Court' (2014) 47 *SA Crime Quarterly* 7.

¹⁴⁵ J Sloth-Nielsen & L Ehlers 'Assessing the impact: mandatory and minimum sentences in South Africa' (2005) 15 *SA Crime Quarterly* 17.

¹⁴⁶ *Ibid* 17–18.

When this happens, there is a mismatch between the law, court decisions and the constitutional values upholding gender equality.

Having identified the mismatch, the next inquiry is what patriarchal interests are served by the mismatch.¹⁴⁷ Patriarchy is embedded in law too; therefore, it is necessary to determine how it benefits from the mismatch between the problems with the laws on sexual offences and their actual gendered consequences. The most important patriarchal interest that is served is the perpetuation of male domination and female subjugation through sexual hierarchies.¹⁴⁸ To sustain the illusion of normalcy of the gendered social scripts, social and legal institutions need to silence the narratives of the marginalised persons: in this instance, the victims/survivors of sexual offences. Victims/survivors are silenced when they are shamed for the sexual violence they experience; they are silenced when they are too afraid to report their attacks; they are silenced when the police do not believe them when they decide to report their experiences; and they are silenced when the presiding officers question their characters and sexual histories. Each act of silencing has the effect of eroding the statistics on the prevalence of sexual offences against women, and of denying the existence of male sexual privilege.

Wishik proposes that the next level of inquiry should be how reforms would affect women both practically and ideologically. The nationwide re-establishment of the SOCs is crucial for the reform of the criminal justice system in relation to sexual offences. If these courts are indeed re-established with all the necessary facilities, then police and court staff and officials must receive adequate training and capacity building around the key issues relating to victims/survivors of sexual offences. In addition, prosecutors and other officials are continually exposed to traumatic information when working in this court, and might suffer from depression

¹⁴⁷ Wishik proposes three further questions as part of this inquiry, namely: what social, political, economic and cultural events occurred at or near the time this law or doctrine emerged? During its development, what events marked the moments when the law or doctrine shifted? What ideology or statements of belief surround this area of the law? What past or present women's interests and needs were or are met by this area of law, and what ones were or are not met? See Wishik (n 125) 75.

¹⁴⁸ MacKinnon (n 123) 533.

and fatigue as a result.¹⁴⁹ These experiences, together with a lack of support in the form of staff debriefing sessions, are primary reasons for the collapse of SOCs, and for the inflow of non-sexual crimes into the dedicated SOCs.¹⁵⁰ Trained and well-supported staff could create a more sensitive environment, and could mean that more victims/survivors of sexual offences will report sexual offences. In addition, they would not experience the secondary victimisation and trauma that are the results of mistreatment by state institutions and processes.¹⁵¹

Legislation, policies and administrative as well as physical structures exist, but political will is required to implement the strategies and to ensure accountability for deliverables. The most fundamental change requires a recognition of the insidious nature of patriarchy and the manner in which it infiltrates every societal institution, and the manner in which it leads to power imbalances and gender inequality.¹⁵²

The final inquiry, within Wishik's construction of the 'woman question', is how the law could be re-envisioned.¹⁵³ Wishik is really asking what the situation would look like in an ideal world. In an ideal world, sexual offences would not exist at all. An ideal world would be devoid of the pervasiveness of patriarchy. But the existence of patriarchy, human rights violations and sexual violence necessitates action to provide criminal and social justice for victims/survivors of sexual offences. The state should engage collaboratively with victim support centres, such as the Teddy Bear Clinics (TCCs), in order to prevent further trauma by the legal processes.¹⁵⁴ The TCCs are one-stop facilities¹⁵⁵ that have been

¹⁴⁹ S Waterhouse et al 'Implementation brief on the management of child sexual offences in courts: Failing systems, broken promises' RAPCAN (2014) 20.

¹⁵⁰ Ibid 21.

¹⁵¹ Kruger & Reyneke (n 37) 43.

¹⁵² Millett (n 2) 659.

¹⁵³ Wishik's questions have been adapted here. The last two questions in her construction read: 'In an ideal world, what would this woman's life situation look like, and what relationship, if any, would the law have to this future life situation?' and 'How do we get there from here?' See Wishik (n 122) 72-7.

¹⁵⁴ Kruger & Reyneke (n 37) 45.

¹⁵⁵ TCCs are multi-disciplinary institutions that consist of a multi-disciplinary team consisting of the National Prosecuting Authority, the Rape Crisis Cape Town Trust, health professionals and the South African Police Services.

introduced as a critical part of South Africa's anti-rape strategy.¹⁵⁶ Their collective aim is to reduce secondary victimisation and to increase the conviction rate.¹⁵⁷ The TCCs' approach to rape care is one of respect, comfort, restoring dignity and ensuring justice for victims of sexual violence.¹⁵⁸ Our country's heritage of structural violence means that rates of inequality, poverty, unemployment, substance abuse and HIV are high, which in turn means that rape rates are even higher. Women feel unsafe and are unable to live free from violence, they do not feel supported in reporting rape, and they suffer from extended psychological effects. Victims/survivors face secondary trauma, which makes it difficult for them to testify in court, so rapists are not convicted.¹⁵⁹ The use of the TCCs as a means of preventing secondary victimisation at a pretrial stage could encourage the victim/survivor to report the crime and could even assist with her ability and readiness to testify.

To achieve practical changes, however, the state must activate the blueprint for the SOCs in regard to three aspects: its staff and officials,¹⁶⁰ its structure and facilities, and its victim-centred services.¹⁶¹ The Wynberg SOC is testament to the success of these

¹⁵⁶ Rape Crisis Cape Town Trust 'Anti Rape Strategy: Thuthuzela Care Centre' available at <https://rapecrisis.org.za/programmes/road-to-justice/thuthuzela-care-centre/>.

¹⁵⁷ Ibid. For a list of TCCs and contact details see https://www.gov.za/sites/default/files/gcis_documents/Thuthuzela_Centres_Final_List_Sep_2018.pdf.

¹⁵⁸ Ibid. When the victim reports the rape, the rape victim is removed from crowds and intimidating environments, such as the police station, to a more victim-friendly environment before being transported by the police to the TCC at the hospital.

¹⁵⁹ Rape Crisis Cape Town Trust *Annual Report 2017/2018* (2018), available at <https://rapecrisis.org.za/wp-content/uploads/Resources/AnnualReport2018.pdf>.

¹⁶⁰ There is a concern that those who have to deal with the trauma of rape daily may become over-burdened with information and by the tasks required to attain justice for the victim concerned. The potential for 'burnout' might have dire consequences for all the parties concerned and measures should be put in place in order to avoid this possibility, or at least recommendations must be made on how to address it. Institutions can anticipate ways of dealing with the development and wellness of staff in many ways, especially when they are dealing with traumatic matters daily. The Rape Crisis Cape Town Trust deals with the 'burnout' of staff by implementing, enforcing and updating a 'burnout' prevention policy, including training sessions for staff on how to identify and address 'burnout' in staff teams: see Rape Crisis (n 156).

¹⁶¹ Rape Crisis (n 156) 47.

courts: partnering with the TCC, it has achieved a 95 per cent conviction rate for the 2005/2006 period and the 2006/2007 period.¹⁶² Therefore, an ideal world would mean the state investing time, resources and political thrust to reactivate the SOCs and to make them viable and successful once again.

VI CONCLUSION

The patriarchal nature of social structures facilitates and supports dominant masculinities, which in turn enable gender inequality and sexual hierarchies, and often perpetuate sexual violence against women. This inequality is visible in courtrooms, where stereotypes about women, sex and sexuality influence the narratives of judgments and lead to low conviction rates for sexual offences.

While the re-establishment of the SOCs may not decrease the prevalence of sexual offences, a high reporting and conviction rate would provide legal recourse and also a voice for the victims/survivors of these crimes. Wishik's construction of the 'woman question' facilitates an interrogation of the legislation, policies and decisions, revealing the incongruence between the law and women's experiences of the legal system. The method exposes the construction of gender and gender inequality in the law and court processes. However, women like Cheryl Zondi will continue to experience the aggression of the legal system, unless the state revises the system from both a conceptual and a practical perspective. Laws, processes and conduct must be reimaged and reformed, and must withstand constitutional interrogation.

¹⁶² Ibid 63.