

# TALKING ABOUT RAPE – AND WHY IT MATTERS

---

## Adjudicating rape in the Western Cape High Court

STACY MORELAND\*

stacylynnmoreland@gmail.com

<http://dx.doi.org/10.4314/sacq.v47i1.1>

*This article asks the question: how do judges know what rape is and what it is not? The statutory definition contained in the Criminal Law (Sexual Offences and Related Matters) Amendment Act<sup>1</sup> (SORMA) guides courts in adjudicating rape cases, and as such the definition is theirs to interpret and implement. This article analyses a small selection of recent judgements of the Western Cape High Court<sup>2</sup> (WCHC) for answers. The article begins by establishing why judgements are an important source for understanding what rape means in society at large; it then discusses the relationship between power, language, and the law. This is followed by specific analyses of cases that show how patriarchy still defines how judges express themselves about rape. It concludes by looking at the institutional factors that discourage judges from adopting new ways of talking about rape, and their constitutional mandate to do so.*

### WHY JUDGEMENTS MATTER

Communicating ‘rape’, to ourselves and to others, is difficult. To describe the experience of the violation of a person’s body, dignity and sense of self – to narrow the experience to a sequence of words – will often minimise the act. Language is a limited tool, and using it in a manner that manifests rape’s often intangible harms, requires skill. When judges write of rape in a bland and perfunctory manner they fail to communicate why rape is wrong, because their words do not convey how and why non-consensual sex is an infringement, or erasure, of women’s dignity, freedom and bodily integrity.<sup>3</sup>

Legal institutions have not given meaningful content to the common understanding of rape.<sup>4</sup> Rape, in popular consciousness, remains limited to brutal attacks by deviant strangers.<sup>5</sup> This excludes the majority of rapes, which may leave no physical trace and are commonly perpetrated by acquaintances.<sup>6</sup> These cases are cast as unclear – the survivor herself may be unsure as to whether she was raped – and they become part of the many unreported, not prosecutable, not effectively justiciable, and not socially condemnable, instances of gender violence.

Thus the adjudication of a rape case is an important moment where the law, which criminalises rape, and the gendered social structures that enable and accept rape, meet. It is up to the judiciary to determine which specific actions constitute rape and which sexual acts are therefore socially unacceptable.<sup>7</sup> How the courts

---

\* Stacy Moreland recently graduated from the University of Cape Town. She is currently employed as a candidate attorney in the labour field. This article was written in partial fulfilment of requirements for the LLB degree at the University of Cape Town.

implement SORMA – whether they fail to expand on the potential of its purpose or not – will influence women’s lived realities.<sup>8</sup>

When members of the judiciary fail to critically engage with the purposes underlying SORMA and the social structures from which the need for such legislation arises, the potential to elevate the lived experience of millions of women is lost. Judges should not be so immersed in traditional perceptions that they cannot see their flaws – this does not render them democratic. Instead it renders transformative law stagnant and entrenches inequality.

In the words of Justice Albie Sachs:

There are those who argue that patriarchy and sexism are older and even more pernicious than apartheid, and that a failure to construct a constitutional order expressly dedicated towards their abolition will result in the transition process from apartheid to post-apartheid being little more than the handing over of power from one gang of men to another ... the basic right underlying all other rights in this transition is the right of women to speak in their own voice, the right to determine their own priorities and strategies, and the right to make their voices felt.<sup>9</sup>

## POWER AND LANGUAGE

In his book, *Reproducing rape: domination through talk in the courtroom*,<sup>10</sup> Gregory Matoesian deconstructs the cross-examination of rape complainants, using conversation analysis, and interprets his findings using the sociological theory of structuration.<sup>11</sup> Matoesian reaches the conclusion that talk in the courtroom serves power, or more particularly patriarchy, and in so doing reconstructs women’s experiences of rape according to a male-privileged view of appropriate sexual behaviour.<sup>12</sup> He found that the defence counsel, in cross-examination, made use of their authoritative position in the trial structure to direct and dominate women’s personal narratives.<sup>13</sup> Language, according to Matoesian, functions as a symbolic embodiment of social values – an inference generating machine – which in these

cases was strategically deployed to mediate female experiences in conformity with patriarchal logic.<sup>14</sup>

Knox and Davies<sup>15</sup> portray law as a cultural object with dual capacity that enables and constrains us as it defines acceptable conduct, motives and justifications for our actions. The public perceives statute and judicial rulings as defining right and wrong, worthy and unworthy, truth and falsity. The power of the law is derived from its significance to our understanding of acceptable moral reasons and social practices.<sup>16</sup> The court’s vision of the world is therefore an authoritative representation of how we should act and what we should believe. It creates our values and our culture as much as it reflects them.<sup>17</sup>

MacKinnon, as cited by Knox and Davies, argues that sexuality is the locus of gender inequality. Rape, according to MacKinnon, is a mode of patriarchal subordination.<sup>18</sup> Patriarchy informs the law, and thus law’s norms, practices and discourses favour a male-privileged understanding of sex.<sup>19</sup> Thus, even when a court finds in favour of the complainant, a patriarchal view of women prevails.<sup>20</sup>

Throughout the 1980s and 1990s numerous academics focused their critical attention on how legal institutions symbolise rape and how this serves to perpetuate a hegemonic social order.<sup>21</sup> Those who adopted the critical legal studies (CLS) approach focused on how the authoritative talk of the court serves to bolster the dominance of the law and legal institutions.<sup>22</sup> Those who favoured a feminist or sociological approach found that legal talk conceals the coercive power of patriarchy and naturalises the social norms that benefit men.<sup>23</sup>

Feminists, through critical gender analysis and a methodological emphasis on women’s experience of the law and society, seek to reconstitute the law ‘neither to embrace nor to suppress difference but to challenge dualism and make the world safe for difference.’<sup>24</sup>

As cited by Mutua, Rhodes’s feminism, which does not assume the essentialist and privileged female identity that first and second wave feminists are

criticised as promoting, is capable of including Crenshaw's intersectionality.<sup>25</sup> Intersectional feminism acknowledges that women are disempowered by unique combinations of disadvantage that constrain them in different ways.<sup>26</sup> This is appropriate to the South African context in which a variety of intertwined cultural, geographical, racial and sexual identities create unique gendered experiences.

With due regard to the self-conscious ethic of critical legal studies, and the experiential honesty of feminist writing, it is only right that I acknowledge the multi-disciplinary mix of approaches that have directed this article. My approach to the judgements of the WCHC was at first to view them from a media studies perspective, which finds that judges, in telling us 'what really happened', mediate the evidence before them and transform it into a symbolic construction that we should accept as, firstly, factual reality and, secondly, a neutral and correct application of the law.<sup>27</sup>

By conceiving of judgements as narratives we accept that they are constructions and that creating and communicating these constructions is a process laden with potential biases. If this is so then judges should be sensitive to their role in directing the process.<sup>28</sup> Judges are authors or storytellers with the potential to understand and communicate a variety of more or less just constructions.<sup>29</sup> Judges thus need to be self-aware and self-critical – this is a central tenet of critical legal studies – and specifically they must be self-critical authors, aware of the meta-narrative. This awareness requires that the judiciary write with the knowledge that how the story is written is a fundamental part of the story itself.<sup>30</sup>

In 'discovering' the evidence in each case, a court in fact creates an image and idea of 'what really happened', which, in the case of rape, is entirely separable from a woman's experience of her own violation.<sup>31</sup> Language can therefore alter our perception of reality and, writes Matoesian, 'represents the ultimate weapon of domination':

... in a very tacit and taken for granted fashion, language categorises, objectifies, and legitimates our interpretations about social reality, sustaining some versions while disqualifying others, and conceals the hierarchical arrangements and sexual differences between men and women.<sup>32</sup>

This article offers a way of interpreting rape as a juridical construct. This construct is not neutral but is created by judges who must resist and avoid the pressures placed on them to conform to established rape narratives told in the traditional language of a patriarchal legal institution. For this article, judgements on rape in the WCHC were analysed for the years 2012 (January to December) and 2013 (January to August), including appeals of convictions and sentencing. This amounted to approximately 60 judgements.

## CHARACTER EVIDENCE

Section 227 of SORMA is a so-called rape shield law. It extends the ambit of inadmissible evidence to include the complainant's character or conduct, unrelated to the incident in question. Evidence of this type will only be relevant and admissible when it is in the interests of justice to admit it, taking into account potential prejudice to the complainant's dignity, and providing that such evidence is not adduced for the purposes of creating the inference that the complainant was more likely to consent or is less worthy of belief.<sup>33</sup>

Yet the judgement of the court in *S v Rapogadie*<sup>34</sup> reveals a judge who easily and unselfconsciously denigrates the character of the complainant. He writes with little regard for her dignity, and depicts her as 'the type of girl' who is likely to consent to sex and is less worthy of belief. The judge found that the complainant's evidence must be considered in light of her 'life experience':

She had some prior discussion with her cousin about sexual intercourse. She was rebellious and not controlled by her caregivers. She associated with friends much older than she was ...<sup>35</sup>

The judge continues in a similar vein for four paragraphs in which he undermines the credibility of the witness by characterising her as a 'rebellious' and 'experienced' girl.<sup>36</sup> Neither the facts of the case nor the law supports reliance on this kind of character evidence. His statements are both unnecessary and unlawful. The complainant was 11 years old at the time she was raped. Statutory rape was established and there was no need to go any further. Sexual intercourse was proved through DNA testing on the basis of which the accused was found to be the father of her child. Section 57 of SORMA makes it clear that a person under the age of 12 years is incapable of consenting to a sexual act because, as per s1(3)(d)(iv), they are incapable of appreciating the nature of the act.

Furthermore, the judge does not establish why considering these alleged characteristics is in the interests of justice or relevant to the specific incident in question. In essence, the judge finds that the complainant altered her capacity to consent to sex by refusing to remain naïve. Curious girls, who exhibit signs of maturity, are thus painted as 'experienced', which, the judge makes clear, creates an inference that they are *in fact* sexually experienced. The complaints of rape by curious girls, according to this judgement, should be highly scrutinised because they are not 'real victims'.

Here the judge constructs the complainant as a false victim by writing with a 'sense of facticity' that disguises patriarchal prejudice at work.<sup>37</sup> The 'sense of facticity' is obscuring. It relies on the pretence that 'facts are facts', which conceals the way in which factual evidence is transformed by ideas in the process of mediation. Ideas become facts through authoritative writing.<sup>38</sup>

The admission of evidence as to the character, and concerning the previous sexual experience, of a complainant is prohibited by s227 of SORMA. However, this is qualified by the proviso that such evidence may be admitted if it is deemed to be related to the offence being tried.<sup>39</sup> Yet, it is not a fact that the complainant in the *Rapogadie* case was rebellious or experienced. This is the judge's

opinion, and a profoundly unsympathetic one, which is both irrelevant and unfounded. However, this is obscured by the judge's interweaving of his opinion with references to the complainant's testimony. This acts as a diversion. We are distracted from seeing the judge's 'opinion' for what it is. It is a depiction of the complainant as someone who has, through her own failing, positioned herself outside acceptable femininity.<sup>40</sup> As such she seems somehow 'less rapable' than the 'good girl' with whom she is implicitly contrasted.<sup>41</sup>

Gordon and Riger write of the construction of the categories of 'rapable' and 'unrapable' women as a means by which femininity, as constructed by hegemonic masculinity, must be maintained by a negative portrayal of women who challenge the boundaries of accepted gender performance.<sup>42</sup> These women are cast as unrapable. They cannot be raped because masculinity does not acknowledge that these women deserve the respect of having their violation portrayed as a crime.<sup>43</sup> They have not earned the same rights as 'rapable' women because they do not perform the obligations that the feminine role, as constructed, demands of them.<sup>44</sup>

Borgida and White analysed the implementation of 'rape shield' laws in the United States.<sup>45</sup> Like those in SORMA, these laws prevent the admission of evidence concerning the complainant's previous sexual history.<sup>46</sup> The writers found that the social perception of the victim was key to finding in her favour; the victim was as much on trial as the accused.<sup>47</sup> Where previous sexual history was admitted jurors considered it more likely that the complainant had consented to sex.<sup>48</sup>

Rape shield laws, according to Capers, attempt to render previous sexual history irrelevant.<sup>49</sup> Technically, as such evidence is generally inadmissible, this is the case. However, in substance, rape shield laws increase the prejudicial weight of a woman's sexual conduct.<sup>50</sup> Capers writes that these laws call for the court and the public to assume that rape survivors are, or were, virgins. Thus these laws privilege chastity and merely allow more complainants to pass as 'good girls' and thus deserving of victim status. Being 'experienced' is

still socially relevant even where it is rendered legally irrelevant.

Where judges engage in a meaning-making exercise to determine 'what really happened', they make use of and recreate an acceptable script of sexual interaction.<sup>51</sup> This script, drawing on the themes and symbols of a patriarchal world, inevitably provides a vocabulary of understanding that suits masculinity.<sup>52</sup> This script represents such a narrow and artificial conception of rape that it can be termed a 'rape myth'.<sup>53</sup> To legitimate their claims, complainants must conform to one of a category of 'real victims' who must perform an accepted role in the rape script. Complainants are thus cast as either 'the madonna' or 'the whore, the tease, the vengeful liar, or mentally and emotionally unstable'.<sup>54</sup> In this case the judge normalises this patriarchal falsehood by writing as though a negative characterisation of the complainant is inevitable, universal and objectively correct. We forget, because the judge chooses to render this fact unimportant, that she was only 11 years old at the time she was raped.

## CONSENT

The expanded statutory definition of rape was intended to move our society from understanding rape as an unusual act of deviance to understanding rape as a systematic means of acquiring power in a dysfunctional and unequal society.<sup>55</sup> The South African culture (or cultures) of sex mimic those of other patriarchal societies. We operate within an aggressive-acquiescing model in which men initiate sex, dictate its nature, and physically control the encounter while women are the sites on which men perform their dominance.<sup>56</sup> This model proposes that sexual aggression, including the propensity to rape, is an extension of normative sexual behaviour in these societies.<sup>57</sup> It is an enforcement of the social order and not a violation of it. It is a means by which men establish their identity.<sup>58</sup>

SORMA defines consent as 'voluntary and uncoerced agreement'.<sup>59</sup> The factors listed in s1(3) attempt to expand this concept to include circumstances in which women submit to sex due

to their disempowerment.<sup>60</sup> Yet, the success of law reform will always be limited by the manner of its adjudication, because where the court perpetuates a narrow definition of rape, it normalises coercive, patriarchal sexual behaviour as appropriate intimacy and consensual sex.<sup>61</sup> Thus aggressive-acquiescing sexual norms remain when judges fail to clearly cast exploitative, abusive and violent behaviour as non-consensual criminal conduct.<sup>62</sup>

In the case of *S v Koopman*<sup>63</sup> the judge's depiction of the rape of the deceased victim is hesitant, and the language in use is cautious and qualifying, and fails to condemn the behaviour of the accused. In so doing the court depicts the complainant as complicit in her own subjugation.<sup>64</sup>

The court identifies two strands of evidence. The first is circumstantial but persuasive:

... it was submitted on the basis of evidence given by Mrs Kroese and Ms Strydom to the effect that Nicolene disliked Mr Koopman, that it was improbable that she would have consented to sexual intercourse with him. Further factors which led to the inference that consent had not been given, it was submitted, were that Nicolene was menstruating at the time; that a tampon had been carelessly discarded on the floor of the sitting room; that Ms Gouws was in the house, and that it is unlikely on this account that Nicolene and Mr Koopman would have engaged in intercourse in a readily accessible part of the house where they might have been discovered by her.<sup>65</sup>

At this point it appears, from words like 'unlikely' and 'improbable', that the court is leaning toward a conclusion of rape. The court clearly seems to be favouring an idea that the evidence here forms a sum; that the circumstantial evidence 'in addition' to clear evidence of a violent attack must amount to rape. This conclusion should have been cemented by the following:

In addition ... Nicolene had been viciously assaulted with a skateboard and had suffered extensive facial injuries and had scratched Mr Koopman with her fingernails in what must

have been an apparent struggle, [evidence of which] militated against the fact that she consented to having intercourse with Mr Koopman.<sup>66</sup>

The court asserts that its starting point is ‘the fact that she consented’. This is not our assumption, in law or in this case. The full weight of the evidence – Nicolene’s age, her relationship with the accused, and the extreme violence of his attack on her – in fact illustrates that it was improbable that she had consented.

Judges continually cage their reasoning in restrained and neutral language to maintain the illusion of their objectivity.<sup>67</sup> This strategic talk accords with Matoesian’s metaphorical reference to the criminal trial as a game in which the court seeks to legitimate its own authority in the process of determining who wins and who loses.<sup>68</sup> Facts do not just appear, but are constructed in this falsified contest between equals.<sup>69</sup> Rather than following a line of reasoning in a linear fashion, in which the evidence against the accused is arranged ‘in addition’ toward the truth, the adjudicative act is written in a back-and-forth structure in which the central line of objectivity must be maintained. Every time the evidence works against the accused, the judge responds with a qualifier that nullifies the trajectory of the complainant’s story.<sup>70</sup>

The problem with this is that the complainant and accused – as characters in the narrative of ‘what really happened’ – do not bear equal brunt of the allocation of blame.<sup>71</sup> In all the cases analysed it was found that the accused offered little to no evidence. Blanket denials, accompanied by little evidence, are the norm. As such, the ‘blame work’ must be done using the complainant’s evidence, and the accusatory sense generated by the interrogation of this evidence is directed solely at the complainant.<sup>72</sup> It is she, and not the accused, who becomes the object of suspicion.<sup>73</sup> Where she appears credible an inference is generated that she is ‘less’ blame-worthy. Where her evidence is insubstantial she appears ‘more’ blame-worthy, because when her evidence fails to portray the accused as wholly and clearly criminal, she

appears to have contributed to her own violation.<sup>74</sup> While this may be unavoidable in an adversarial system in which the state must discharge the burden of proof, this – the sheer weight of the continuing critique of the complainant’s evidence – results in her being cast as blame-worthy, irrespective of the accused’s conviction.<sup>75</sup>

Initially the South African Law Reform Commission advocated for a shift from consent as the major determinative standard of rape, to one that focused entirely on coercive circumstances. The Act ultimately incorporates both criteria.<sup>76</sup> Where the court continues to focus on evidence of the rape as relevant to consent alone it continues to place the responsibility for resisting rape in the hands of the complainant.<sup>77</sup> Furthermore, the consent standard does little to affect the normalisation of aggressive sexual behaviour, because the accused’s behaviour is not the object of scrutiny under this standard.<sup>78</sup> Irrespective of how aggressive the male’s behaviour was, the complainant’s ‘consent’ prevents the condemnation of this behaviour and instead characterises it as acceptable sexual behaviour. Thus, where the definition of rape continues to be interpreted in a consent-centric manner, it constricts the sphere of unlawful male activity.

## THE CAUTIONARY RULE

The Department of Justice and Constitutional Development, according to departmental publications, is under the impression that *S v Jackson*<sup>79</sup> abolished the general cautionary rule, as it pertains to rape complainants, in common law.<sup>80</sup> This rule made it mandatory for judges to treat the testimony of a rape complainant with caution as ‘women are habitually inclined to lie about rape.’<sup>81</sup> The Department’s assumption – that the cautionary rule is no longer applied in all rape cases – is worrying. The cautionary rule has not been ‘abolished’. Despite the Department of Justice’s portrayal, it remains applicable. The judges of the WCHC still refer to the court in *Jackson* as advocating for the application of the cautionary rule on a discretionary basis, as ‘the evidence in a particular case may call for a cautionary approach.’<sup>82</sup>

The Department's misunderstanding means that the intention behind s60 of SORMA, which states that 'a court may not treat the evidence of a complainant ... with caution, on account of the nature of the offence', is at odds with its interpretation. Confusion remains as to whether the cautionary rule, although no longer mandatory, is applicable at the judge's discretion. This divergence, between the clearly stated legislative objective of s60 and the failure of the judiciary to expand on the *Jackson* ruling, demonstrates the judiciary's reluctance to dispense with archaic precedent in favour of the proactive interpretation of modern legislation. Instead, judgements of the WCHC suggest that the cautionary rule is applicable 'where reasonable grounds are suggested by the accused for suspecting that the State's witnesses have a grudge against him or a motive to implicate him'.<sup>83</sup> However, I suggest, this is not a circumstance (as the court implies) that falls outside s60's caveat of 'on account of the nature of the offence'. The notion that 'women habitually lie about rape' is born of the idea that women falsely accuse men of rape for vindictive reasons. Suggesting that the complainant may have a 'grudge' or 'motive' to falsely implicate the accused therefore falls within the ambit of s60, because these words are mere proxies for the same male-privileging idea; namely that women are liars who 'cry rape' to further their own malicious agendas.<sup>84</sup> Yet judges prefer to refer to *Jackson*, rather than attempt such a reading of s60.

Furthermore, the cautionary rule is still applied in cases in which the complainant is a single witness. Once again it should be clear that the legislature's intent when drafting s60 was to abolish any and all rules demanding that a complainant's testimony in a rape trial be approached with caution. However, yet again, the judiciary has not taken up this challenge. This is particularly obvious when one considers the implications of the application of this rule,<sup>85</sup> as it depicts complainants in rape cases as deserving of greater mistrust and scrutiny. Where their testimony is uncorroborated, the court undermines their credibility by asserting the necessity of a rule which, in effect, implies that it is possible, even probable, that the complainant is

lying.<sup>86</sup> Where judges continue to routinely apply the single-witness cautionary rule, without acknowledging its prejudicial nature, they fail to realise that this rule unnecessarily clouds the complainant's character and, symbolically, the character of complainants in general.<sup>87</sup> It is difficult to see how, when complainants in rape cases are so often single witnesses, this specific cautionary rule does not relate to 'the nature of the offence' and as such should be abolished by s60.<sup>88</sup>

## INSTITUTIONAL CONSTRAINTS

In writing a judgement a judge has the power to recreate traditional rape narratives.<sup>89</sup> Doing so requires the conscious acknowledgement that the standard narrative and language of a rape judgement assumes a normative pattern plagued by the patriarchal understandings described above.<sup>90</sup> Yet, while the law enables and constrains culture, the legal institution has its own culture that constrains judges' freedom of thought and action.

Knox and Davies write that the legal institution must act to 'efface its own rhetoricity' and claim neutrality and objectivity in order to function with authority and thus legitimacy.<sup>91</sup> This depicts the normative pattern of rape judgements as needing to create an authoritative verdict, founded in clear and logical reasoning, and based in legal principle and precedent.<sup>92</sup> The security provided by the historical status of this pattern continues to give the judiciary, as judges join and leave the Bench, the appearance of consistency, objectivity and timeless authority.<sup>93</sup>

The maintenance of this image is an institutional goal, like patriarchal goals, that exerts considerable force on the judiciary. The trajectory of the judicial reasoning must serve this end as well as, or sometimes better than, the ends of patriarchal ideology.<sup>94</sup> Thus judgements, in this instance, not only talk about rape. They also talk about law and the judiciary symbolising the continuing dominance of traditional legal reasoning. This is the same mode of reasoning that, as has been noted by Rifkin, for many

decades comfortably accommodated the idea that women were property.<sup>95</sup>

In approximately half of the rape trials brought before the WCHC in the last two years, the state brought its cases on behalf of a woman murdered by the accused. In instances where the complainant is deceased, the state – first in prosecution and then from the Bench – must speak for or ‘be’ the complainant.<sup>96</sup> The accused’s testimony, the male character, speaks directly, while the female character is spoken for – her actions are scrutinised, her motivations and reasoning are inferred, and an artificial person is constructed. She is ‘told’ by the court.<sup>97</sup> This is problematic. While judges often make mention of the trauma caused to living complainants they cannot seem to be overly sympathetic towards, or appear wary of, the character in the narrative ‘played’ by themselves.<sup>98</sup> These judgements, while no less likely to result in a guilty verdict, are somewhat hollow in terms of any real grasp of the nature of the suffering of rape victims. In these instances rape becomes a statutory term and not a tangible, lived experience.

As stated by Davis J in the judgement of *Dauids v S*:<sup>99</sup> ‘... the best we can do in the circumstances of this case is to understand the enormity of that which was perpetrated on you.’<sup>100</sup> Yet it appears from the judgements analysed that judges fail to meet this standard. They write sparsely. Often no explicit mention is made of fundamental rights and no attempt is made to capture the complainant’s experience of her violation beyond a token mention of the victim’s evident pain. Instead, ‘real rape’ is defined by the impersonal content of the J88 medico-legal report and a description of ‘real evidence’. Rees writes that, in refusing to neither clearly confirm nor deny the complainant’s allegations, judges reinforce their expertise by distancing themselves from contentious issues.<sup>101</sup> This ensures their authority but limits the significance of their judgements.<sup>102</sup>

The contemporary judgements of the WCHC do not reveal a sense of dialogue or negotiation involved in the application of rules. On the contrary, every judicial decision appears

unambiguous and certain, and thus inevitable. These judgements do not explicitly or implicitly reveal that judges have any discretion at all. Instead their exact process, method, structure and understanding appear as though it is and was the only choice available to them. The meta-narrative – the story about how the story is told – is missing, and the judges’ creative role in defining the parameters within which rape is reproduced is concealed.<sup>103</sup>

Through Menkel-Meadow’s lens it appears that our lower courts are mostly concerned with what she calls mid-level discourse.<sup>104</sup> It is mid-level in that it focuses on the dominant principles desired by the legal institution itself, such as efficiency, predictability, flexibility and fairness.<sup>105</sup> It does not incorporate lower discourses such as empathetic inquiries into the lived reality of citizens.<sup>106</sup> Nor does the WCHC make use of high-level discourse such as philosophy, social and political theory.<sup>107</sup> Ultimately, writes Menkel-Meadow, ‘this midlevel discussion of rules separates theory from practice and in the end teaches neither.’<sup>108</sup> Disregarding modern theories and experiences that should inform modern legal rules renders these rules static and, as a cultural producer, creates ‘real rape’, which is decidedly unreal.

A further factor restricting the judiciary to formal, unsympathetic language is the tradition of the authoritative ‘voice’.<sup>109</sup> The judiciary needs the appearance of authority to perpetuate its own legitimacy. Authority is associated with masculine traits, and judges, regardless of their gender, who want to establish their own credibility according to these established norms must display the archetypal masculine mind of a judge.<sup>110</sup> They must appear unemotional, powerful, rational and certain. To do so they must speak precisely and dispassionately. They cannot be openly self-critical because uncertainty is a stylistic feature of feminine speech.<sup>111</sup> Thus judges are doubly restricted by patriarchy and their institutional culture. It is unsurprising that a judge who creates a female character within these constraints will craft an unrealistic non-person with whom it is not easy to empathise. The concept of ‘real rape’ necessarily reflects patriarchal and institutional



pressures.<sup>112</sup> Yet, although a judge's individual capacity to manipulate tradition is limited, it is not non-existent:

... social structures do not do anything. If social structure exists and persists it is only because members make social facts happen and if social structure pre-exists and constrains it is only because members interpret, reify and reproduce such properties as stubborn facticities.<sup>113</sup>

Adjudication in its current form is not a fact; it is a system developed for solving legal disputes. As the law and legal claims evolve, so too should the approach of those who must resolve these disputes. The judiciary, as an independent branch of government, must actively accept this challenge. In this regard it is important to recall that the independence of the judiciary and the structures supporting this independence ensure judges' security of tenure. The judiciary does therefore have a measure of security that empowers it to develop a judicial culture to better suit the constitutional era.<sup>114</sup>

The potential to write judgements that empower women and women's understandings of the law is evident in the 'feminist judgements' of initiatives such as the Women's Court of Canada and the UK Feminist Judgements Project.<sup>115</sup> These judgements are characterised by intersectional portrayals of women, a refusal to rely on 'expert' evidence, and the incorporation of social science and policy sources.<sup>116</sup> They actively attempt to lend content and power to 'feminist common knowledge' and 'feminist practical reasoning'.<sup>117</sup>

Altering the way judges adjudicate need not be a complete and instantaneous revolution.<sup>118</sup> Judges do, however, have a duty to infuse constitutional values into our law and to implement SORMA in keeping with its purposes. In light of the Constitution and modern consciousness of the relationship between gender, power and violence in our society, one of the end goals of adjudicating rape cases should be to reproduce an appropriate image of 'real rape' and 'real victims'.<sup>119</sup>

## CONCLUSION

Our Constitution requires that the law be a means to achieve social justice. Gender shapes the legal system and, should the judiciary continue to speak with a patriarchal voice, the achievement of gender equality will be slowed.<sup>120</sup> Women need to be listened to, heard and spoken for by self-conscious and critical judges. Rape complainants require more than just the vindication of a purely legal claim; they require the validation of their interpretation and experience of harmful sexual behaviour. SORMA has the potential to allow for this. Yet, when judges let the constant noise of patriarchy, which has been so constant that we forget it need not be so loud, overwhelm them, they curtail this potential.

The Ministerial Advisory Task Team on the Adjudication of Sexual Offences Matters recently published its guidelines for the re-establishment of dedicated Sexual Offences Courts.<sup>121</sup> Continued mention of the Courts' adoption of a 'victim-centred approach' is made in this document, yet it provides no idea of what this approach may look like. Without training or direction, judges must rely on judicial culture, which they are capable of influencing, to determine how they will talk about rape in future. It is only by being self-critical, and writing critically, that judges can alter their institution from within.



To comment on this article visit  
<http://www.issafrica.org/sacq.php>

## NOTES

1. Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.
2. This research was based on an analysis of judgements in rape cases in the Western Cape High Court provincial division for the years 2012 (January-December) and 2013 (January-August), including appeals of convictions and sentencing.
3. C Van der Bijl and P Rumney, Attitudes, rape and law reform in South Africa, *Journal of Criminal Law* 73(5) (2010), 414-449.
4. Ibid.
5. J L Singleton, The South African Sexual Offences Act and local meanings of coercion and consent in KwaZulu-Natal: universal human rights?, *African Studies Review* 55(2) (2012), 59-75.

6. Ibid.
7. D Tyson, *Sex, culpability and the defence of provocation*, New York: Routledge, 2013, 91.
8. S Dharmuri, Gender, sexualities and law (review), *Human Rights Quarterly* 34(1) (2012), 312-316.
9. A Sachs, Judges and gender: the constitutional rights of women in post-apartheid South Africa, *Agenda* 7 (1990), 1-11.
10. G M Matoesian, *Reproducing rape: domination through talk in the court room*, Cambridge: Polity Press, 1993, 31.
11. Ibid., 36.
12. Ibid., 37.
13. Ibid., 166.
14. Ibid., 11.
15. S L Knox and C Davies, The force of meaning, *Cultural Studies* 27(1) (2012), 1-10.
16. Ibid., 5.
17. Ibid., 7.
18. Ibid.
19. A Gruber, Domestic violence law and feminism's identity crisis: toward a 'neo-feminist' legal theory, University of Colorado Law School, 2012, [http://works.bepress.com/aya\\_gruber/7](http://works.bepress.com/aya_gruber/7).
20. Ibid.
21. Ibid., 522.
22. Ibid.
23. Ibid., 526.
24. Ibid., 638.
25. A D Mutua, Multidimensionality is to masculinities what intersectionality is to feminism, *Nevada Law Journal* 13 (2013), 341-367.
26. Ibid.
27. R Kapur, Pink chaddis and SlutWalk couture: the postcolonial politics of feminism lite, *Feminist Legal Studies* 20(1) (2012), 1-20.
28. Ibid.
29. Ibid., 35.
30. Ibid.
31. L B Bourque, Why do we blame the victims of sexual assault, *Contemporary Sociology* 23(2) (1994), 294.
32. G M Matoesian, *Reproducing rape*, 42.
33. Criminal Law (Sexual Offences and Related Matters) Amendment Act (SORMA), s227(5) and (6).
34. *S v Rapogadie* (36/2010) [2012] ZAWCHC 15 (24 February 2012).
35. *S v Rapogadie*, para 11.
36. Ibid.
37. K T Bartlett, Feminist legal methods, *Harvard Law Review* 103(4) (1990), 835.
38. Ibid., 836.
39. SORMA, 1 at s227(2).
40. D Tyson, *Sex, culpability and the defence of provocation*, 7.
41. Ibid.
42. Ibid., 101.
43. Ibid., 121.
44. Ibid.
45. E Borgida and P White, Social perception of rape victims: the impact of legal reform, *Law and Human Behaviour* 4(2) (1978), 341.
46. Ibid., 339.
47. Ibid.
48. Ibid., 345.
49. B Capers, Real women, real rape, *UCLA Law Review* 60 (2013), 826-879.
50. Ibid.
51. K M Ryan, Further evidence for a cognitive component of rape, *Aggressive and Violent Behaviour* 9 (2004), 579-604.
52. G M Matoesian, *Reproducing rape*, 50.
53. M O'Sullivan and C Murray, Brooms sweeping oceans? Women's rights in South Africa's first decade of democracy, *Acta Juridica* (2005), 32.
54. Kimberlé Crenshaw, quoted in B Capers, Real women, real rape, 59.
55. Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, preamble.
56. J L Singleton, The South African Sexual Offences Act and local meanings of coercion and consent in KwaZulu-Natal: universal human rights?, *African Studies Review* 55 (2012), 62.
57. Ibid., 67.
58. R Jewkes, J Levin and L Penn-Kekana, Risk factors for domestic violence: findings from a South African cross-sectional study, *Social Sciences & Medicine* 55 (2002), 1611.
59. Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, s1(2).
60. Ibid., s1(3).
61. D Tyson, *Sex, culpability and the defence of provocation*, 111.
62. H Frith and C Kitzinger, Talk about sexual miscommunication, *Women's Studies International Forum* 20(4) (1997), 519.
63. *S v Koopman* (SS05/2011) [2012] ZAWCHC 109 (16 February 2012).
64. G M Matoesian, 'You were interested in him as a person?': rhythms of domination in the Kennedy Smith rape trial, *Law & Social Inquiry* 22(1) (1997), 55-93.
65. *S v Koopman*, 58.
66. Ibid.
67. G M Matoesian, *Reproducing rape*.
68. Ibid., 112.
69. Ibid.
70. Ibid., 143.
71. Ibid., 153.
72. Ibid., 110.
73. Ibid.
74. Ibid., 164.
75. Ibid., 171.
76. C Van der Bijl and P Rumney, Attitudes, rape and law reform in South Africa, 416.
77. Ibid., 419.
78. R Jewkes, J Levin and L Penn-Kekana, Risk factors for domestic violence, 68.
79. *S v Jackson*, 1998 (1) SACR 470 (SCA).
80. M J Maluleke and T Madonsela, *Women and the law in South Africa: gender equality jurisprudence in landmark court decisions*, Department of Justice and Constitutional Development, Republic of South Africa.
81. Ibid.
82. J Bozalek, quoting from the judgement of Olivier, JA in *S v Jackson*, 474(E), in the judgement of *Jacobs v S* (A326/2012) [2012] ZAWCHC 299 (31 August 2012).
83. J Goliath, quoting from the judgement in *S v V* (2000)1 (SASV) 453 (HHA), in the judgement of *S v Van*

- Rensburg* (A587/2012) [2013] ZAWCHC 36 (22 February 2013).
84. G M Matoesian, Language, law, and society: policy implications of the Kennedy Smith rape trial, *Law and Society Review* 29(4) (1995), 669-702.
  85. The majority of rape cases of the WCHC, 2012-2013, made reference to the 'appropriate application' of the cautionary rule in cases where the complainant is a single witness.
  86. G M Matoesian, Language, law, and society, 95.
  87. *Ibid.*
  88. *Ibid.*
  89. H Moffett, These women, they force us to rape them: rape as narrative of social control in post-apartheid South Africa, *Journal of Southern African Studies* 32(1) (2006), 129-144.
  90. *Ibid.*, 133.
  91. S L Knox and C Davies, The force of meaning, 1-10.
  92. *Ibid.*, 140.
  93. *Ibid.*
  94. D Tyson, *Sex, culpability and the defence of provocation*.
  95. *Ibid.*, 166 referencing Janet Rifkin.
  96. C Van der Bijl and P Rumney, Attitudes, rape and law reform in South Africa.
  97. *Ibid.*
  98. *Ibid.*
  99.  *Davids v S*, (A238/2012) [2012] ZAWCHC 283 (10 August 2012).
  100. J Davis writing in the judgement of *Davids v S*.
  101. G Rees, 'It is not for me to say whether consent was given or not': forensic medical examiners' construction of 'neutral reports' in rape cases, *Social and Legal Studies* 19(3) (2010), 373.
  102. *Ibid.*, 377.
  103. *Ibid.*, 377.
  104. C Menkel-Meadow, Feminist legal theory, critical legal studies, and legal education or 'The fem-crits go to law school', *Journal of Legal Education* 38 (1988), 67.
  105. *Ibid.*, 70.
  106. *Ibid.*
  107. *Ibid.*, 73.
  108. *Ibid.*, 71.
  109. D Tyson, *Sex, culpability and the defence of provocation*, 177.
  110. S Dharmuri, Gender, sexualities and law (review).
  111. A E Taslitz, Forgetting Freud: the courts' fear of the subconscious in date rape (and other) cases, *Public Interest Law Journal* 16 (2007), 145-194.
  112. D Tyson, *Sex, culpability and the defence of provocation*, 196, referencing Durkheim regarding the coercive power of structures that are considered 'social facts'.
  113. G M Matoesian, *Reproducing rape*, 176.
  114. A Sachs, Judges and gender, 1-11.
  115. R Hunter, Feminist judgements as teaching resources, *Onati Socio-legal Series* 2(5) (2012), 47-62.
  116. *Ibid.*
  117. *Ibid.*
  118. A Sachs, Judges and gender, 125.
  119. *Ibid.*
  120. S Dharmuri, Gender, sexualities and law (review).
  121. Ministerial Advisory Task Team on the Adjudication of Sexual Offences Matters, Report on the re-establish-

ment of Sexual Offences Courts, Department of Justice and Constitutional Development, Republic of South Africa, August (2013), 1-108.