

https://dspace.org/

Prosecutorial Attrition: Its Implications for South Africa's Domestic and International Obligations to Uphold Women's Human Rights

Lebitse, Palesa

2021

https://hdl.handle.net/10539/47276

Lebitse, Palesa. (2021). Prosecutorial Attrition: Its Implications for South Africa's Domestic and International Obligations to Uphold Women's Human Rights [Master`s dissertation, University of the Witwatersrand, Johannesburg]. WIReDSpace. https://hdl.handle.net/10539/47276

Downloaded from a DSpace repository. https://dspace.org/

PROSECUTORIAL ATTRITION: ITS IMPLICATIONS FOR SOUTH AFRICA'S DOMESTIC AND INTERNATIONAL OBLIGATIONS TO UPHOLD WOMEN'S HUMAN RIGHTS

AS APPROVED BY POSTGRADUATE STUDIES COMMITTEE

By

PALESA LEBITSE

STUDENT NUMBER

2409805

Submitted in fulfilment of the requirements of the degree of Master of Laws (LLM) (Dissertation) at the University of the Witwatersrand, Johannesburg

Supervisor: Professor Bonita Meyersfeld

Date: 31 May 2021

Abstract

John Dugard states that a general rule of international law dictates that the conduct of a person with authority is an act of a state; however, the conduct of a private person is not considered to be an act of a state. An example is the state prosecutor. This research is concerned with the attrition of rape cases, with the purpose of determining whether rape prosecution failure is an international wrong of the state. To answer this, this study aims to broadly assess whether rape case attrition in South Africa is due to prosecutorial discretion being exercised in a deficient manner inconsistent with international human rights law, which leads to a violation of women's human rights and impunity for rape. This research will analyse evidence (i.e., the MRC report) that shows that prosecutors do not factually comply with international and constitutional standards. It is against the backdrop that this research argues that South Africa must ensure effective investigation and prosecution of rape cases to achieve compliance with international standards and the Constitution.

DECLARATION

I, Palesa Lebitse, declare that this Dissertation is my own, unaided work. It is submitted in fulfilment of the requirements of the degree of Master of Laws (LLM) (Dissertation) in the Faculty of Commerce, Law and Management at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

……

P. Lebitse

……

Date

DEDICATION

In memory of my loving grandmother Nodatini Evelyn Tsuela (Mama).

ACKNOWLEDGEMENTS

I acknowledge my supervisor and esteemed author Professor Bonita Meyersfeld who imparted her wisdom and guidance to me. Boni made this journey so easy — she got me, and I got her. Boni's comprehension of what I meant was constant, even when I was not sure what I was saying. Thank you so much, Boni!

Ms Judy Mafika for believing in me and her constant encouragement. I continue to value the talks that have helped me to keep my head high.

Ms Jean Moore for being so kind, so easy and witty. I am grateful for her eye for detail that shaped my thesis, and I am beyond grateful.

Mr Shaun de Waal, the best editor in the world. Thank you for helping to get my thesis into its final form. I am eternally grateful.

Last but not least, to my aunt Cynthia and Sami (my mother). Thank you for making it possible for me to complete this research full-time. My mother and aunt showed up for me, without them, there would be no thesis.

TABLE OF CONTENTS

ABSTRACT **2**

DECLARATION **3**

DEDICATION **4**

ACKNOWLEDGEMENTS **4**

TABLE OF CONTENTS **5**

CHAPTER 1 ..... **8**

INTRODUCTION **8**

1. THE THESIS **8**

1.1 THE FOCUS OF THE STUDY 9

1.2 THE PURPOSE OF THE STUDY 10

2. METHODOLOGY **11**

3. OVERVIEW OF THE LITERATURE IN THE FIELD OF VIOLENCE AGAINST WOMEN AND PROSECUTION **12**

3.1 ATTRITION TRENDS IN SOUTH AFRICA 12

3.2 THE SITUATION IN FOREIGN JURISDICTIONS 16

3.3 THE DEVELOPMENT OF RAPE JURISPRUDENCE IN SOUTH AFRICA 19

3.4 AN INTERNATIONAL LAW PERSPECTIVE 24

CHAPTER 2 ..... **29**

OUTLINING THE CHALLENGES OF RAPE AND PROSECUTION IN SOUTH AFRICA **29**

1. INTRODUCTION **29**

2. DEFINING THE PROBLEM OF RAPE IN SOUTH AFRICA **29**

3. THE RULES OF EVIDENCE: ITS INFLUENCE ON PROSECUTORIAL DECISION-MAKING IN RAPE CASES 34

4. PROCEDURAL OBSTACLES IN CASES OF RAPE 43

4.1 THE CHALLENGES OF CORROBORATION 43

4.2 THE CHALLENGES OF THE CAUTIONARY RULE 46

4.3 THE LEADING OF CHARACTER OF THE WITNESS 51

4.4 CONCLUDING REMARKS ON PROCEDURAL OBSTACLES IN CASES OF RAPE 53

5. SOUTH AFRICA'S ANTI-RAPE STRATEGY FAILURE AND ITS IMPLICATIONS FOR PROSECUTION 56

6. THE EXCLUSION OF EXPERT EVIDENCE AND ITS IMPACT ON RAPE CASE PROSECUTION 59

CHAPTER 3 66

PROSECUTORIAL DISCRETION 66

1. INTRODUCTION 66

2. DISCRETIONARY POWER AND CASES OF RAPE 72

3. THE IMPORTANCE OF A LIMITATION ON THE NPA'S DISCRETION FOR ACCOUNTABILITY 76

3.1 PROSECUTORS BEAR NO DUTY TO EXPLAIN THEIR DECISIONS 77

3.1.1 The significance of furnishing reasons to rape complainants 79

3.1.2 The limitation to recourse for complainants 81

4. THE ADMINISTRATIVE LAW DICHOTOMY ON REASONS 84

CHAPTER 4 91

PROSECUTORIAL ATTRITION 91

1. INTRODUCTION 91

2. THE STAGES OF ATTRITION 91

3. ATTRITION AND PROSECUTION OF RAPE CASES IN SOUTH AFRICA 92

4. SOUTH AFRICA'S INTERNATIONAL OBLIGATIONS 95

4.1. STATE RESPONSIBILITY 98

4.2 THE INTERNATIONAL PRINCIPLE OF 'DUE DILIGENCE' 100

5. INTERNATIONAL STANDARD OF PROSECUTORIAL COMPETENCY AND SOUTH AFRICA'S OBLIGATIONS 104

6. DOES FAILURE TO PROSECUTE RAPE AMOUNT TO A SERIOUS VIOLATION OF HUMAN RIGHTS? 108

6.1 THE CRITERION AND DETERMINATION 110

CONCLUSION 117

BIBLIOGRAPHY 121

CHAPTER 1
INTRODUCTION

1. The thesis

This study examines one of the most egregious forms of gender-based violence (GBV), namely, rape.[1] This is rape as contemplated in terms of s 3 of the Sexual Offences and Related Matters Act (Sexual Offences Act).[2] The thesis explores whether South Africa abides by its international obligations to protect women against rape through effective investigation and prosecution of rape cases. It examines whether rape case prosecution failure violates women's human rights. This chapter presents a brief overview of the literature concerning violence against women, particularly rape case attrition, and concludes with a discussion of the situation in an international context. In chapter 2 I explain the complex nature of acquaintance rape and test my theory that the decision to decline prosecution in cases of rape is based on (1) extra-judicial factors; (2) the victim-perpetrator relationship; and (3) a victim's character. Through my

---

[1] Rape is a form of GBV. See UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendation No.19: Violence against women, 1992 <https://www.refworld.org/docid/54d920c54.html> General comments (6) 'The Convention in article 1 defines discrimination against women includes 'gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflicts physical, mental, or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.' K Naidoo 'Rape in South Africa-a call to action' (2013) 10(3) *SAMJ: South African Medical Journal* 210. Naidoo states that, 'South Africa has one of the highest incidences of rape in the world.'

[2] Sexual Offences and Related Matters Amendment Act 32 of 2007 (hereafter referred to as the Sexual Offences Act). Section 3 decrees: 'Any person ('A') who unlawfully and intentionally commits an act of sexual penetration with a complainant ('B'), without the consent of B, is guilty of the offence of rape.'

analysis, I demonstrate that the government's anti-rape measures are undermined by discriminatory procedural obstacles (rules of evidence). The consequences of unfettered prosecutorial discretion are then discussed in chapter 3 and, following on from that, I turn to prosecutorial attrition and South Africa's domestic and international obligations in chapter 4.

1.1 The focus of the study

In this thesis, I focus on rape since South Africa has a very high incidence of rape, but few convictions are obtained, and I want to find out why that might be so. Therefore, I focus on rape case attrition in South Africa's criminal justice system.[3] Case attrition is the result of cases falling through the cracks at critical stages in the criminal justice system. Grace et al describe attrition as 'the process by which alleged offences never come to the attention of the criminal justice system through non-reporting – or because they are 'lost' or dropped as they go through the various stages from reporting to conviction.'[4] The narrow focus of this research is limited to attrition during the prosecution stage because the numbers show that a significant percentage of rape cases do not go beyond this stage for adjudication.[5] Attrition in cases of rape is a global

---

[3] S Grace, C Lloyd & L Smith *Rape: From Recording to Conviction* (1992) 1.

[4] Ibid.

[5] L Artz & D Smythe 'Case Attrition in Rape cases: A Comparative Analysis' (2007) 20 (2) *South African Journal of Criminal Justice* 158, 172. See L Vetten; R Jewkes, R Sigsworth, N Christofides, L Loots & O Dunseith 'Tracking Rape Case Attrition in Gauteng: The Police Investigation Stage' 2008 *Tshwaranang Legal Advocacy Centre, Medical Research Council, Centre for the Study of Violence and Reconciliation: Johannesburg,* 1. <http://www.csvr.org.za/docs/tracking_justice.pdf >

occurrence and high attrition rates are a great concern for any country seeking to improve the criminal justice's response to sexual offences.[6]

I use the phrase 'prosecutorial attrition' to refer to the poor decision-making process of the National Prosecuting Authority or NPA (their discretion) which results in the high number of rape cases dropping out of the system (attrition). The term GBV referred to in this thesis is limited to acts in which the victim is a woman, and although the definition includes children, the focus is on adults.

1.2 The purpose of the study

The purpose of this research is to highlight the value of a gendered approach to prosecutions so as to adapt to the specific situation of women, such as the specific threats posed to women's human rights. I argue that the National Prosecuting Authority Act 32 of 1998 must be amended to limit prosecutorial discretion when concerned with the prosecution of rape cases.[7] All cases of rape must be heard in courts of law. I argue further for the complete elimination of the cautionary rule in cases of rape including an amendment to s 227 and 174 of the Criminal Procedure Act (the CPA) because procedural obstacles in rape cases are central to the problems of rape case prosecution failure. [8] The burden of proof on the state is excessively high carrying with it dire

---

[6] K Daly & B Bouhours 'Rape and attrition in the legal process: A comparative analysis of five countries' in M Tonry (ed) *Crime and justice: An annual review of research* (2010).

[7] National Prosecuting Authority Act 32 of 1998 (hereafter referred to as the NPA Act). The NPA derives its discretion in terms of s 20(1)(c).

[8] Criminal Procedure Act 51 of 1977 (hereafter referred to as the CPA). This research shows that the cautionary rule is still applied in practice though it has been abolished.

implications for women's human rights and their access to justice. South Africa must have laws that promote accountability on the part of the state, as well as accountability by offenders, to meet their human rights obligations. As a part of my analysis, I highlight the importance of providing reasons to rape case complainants and why the NPA should adopt this practice. NPA must publish standards for prosecutor decision-making in rape cases and presiding officers must publish their judgments in writing. These measures will ensure the state adheres to international law and the Constitution, protecting women's rights and bringing an end to impunity for rape in South Africa. It is important to establish the impact of rape case prosecution failure and what the domestic and international consequences are for the state as opposed to the impact of the crime of rape which is already available in the literature.

2. Methodology

My research methodology is desktop research. I examine domestic and foreign jurisdictions' attrition trends to understand the prosecutors' motive for rejecting a significant percentage of cases. I rely on domestic case law on rape to ascertain what the courts take into consideration when adjudicating cases, compared to what the prosecutors consider based on domestic and international studies. To understand the state's international duty to prosecute, I examine international instruments and foreign case law. I explore domestic and international academic writings on the state's duty to act positively and exercise due diligence.

3. Overview of the literature in the field of violence against women and prosecution

3.1 Attrition trends in South Africa

Rape attrition studies in South Africa mainly focus on police attrition. The MRC report is the only study indicating the underlying factors of case attrition in the various stages but there are no specific studies on prosecutorial attrition. The first comprehensive study was in 1998 by CIETafrica.[9] It found that for every 394 women raped, 69 percent report the rape to the police, only five cases were prosecuted, and a single suspect would be convicted.[10] Research by Artz and Smythe reveals that prosecutors filed a 'massive 61% *nolle prosequi*', meaning that the cases would unlikely be heard in court unless someone undertakes a private prosecution.[11]

Another study by Vetten et al found that of all rape complaints, 50.5 percent of suspects were arrested, 33.4 percent of cases were filed for prosecution, but eventually, only 17.3 percent faced trial and the conviction rate stood at 6.2 percent.[12] The latest comprehensive research by Machisa et al shows that of all reported cases of rape, 57.7 percent of the suspects were arrested, 34.5 percent of the cases were filed for prosecution, 18.5 percent of the suspects eventually faced trial and the conviction rate was 8.6 percent.[13]

---

[9] N Andersson & S Mhatre 'Do Unto Others – and Pay the Price: Combating Sexual Violence in the South of Johannesburg' (2003) 3 *SA Crime Quarterly* 5, 6.

[10] Ibid.

[11] Artz & Smythe (note 5 above) 172.

[12] Vetten et al (note 5 above) 1.

[13] M Machisa, R Jina, G Labuschagne, L Vetten, L Loots, S Swemmer, B Meyersfeld & R Jewkes 'Rape Justice in South Africa: A Retrospective Study of The Investigation, Prosecution and Adjudication

These figures tell us that prosecutorial attrition accounts for most of the case attrition in the criminal justice system. Attrition is not solely the result of prosecutors. Even at the police level, it is not always the result of incompetence: women sometimes withdraw their complaints before they are referred to the NPA and when the matter is enrolled for prosecution or still under consideration. In observing these figures, I was merely noting that the most attrition did occur in the third stage - a prosecution phase rather than a police phase. In 1998, Artz and Smythe indicated 'that of more than 54 000 cases of rape reported, less than seven percent were prosecuted'.[14] It is interesting to note that the NPA, on the other hand, consistently reveals very high conviction rates, giving a false or misleading impression that cases of rape are effectively prosecuted. For example, in 2018/19 the conviction rate allegedly stood at 74 percent of the 3 499 cases finalized, 72.7 percent in 2017/18 out of 5 004 cases, and 71.7 percent in 2016/17 out of 4 780 cases, according to the NPA.[15]

On the other hand, the South African Police Service (SAPS) data shows that reported cases of rape are usually more than 42 000.[16] Of these, the NPA only prosecutes, on average, fewer than 5 000 cases. Interesting enough, the results of these underlying factors show that even when prosecutors accept cases for prosecution, most cases do not get to trial. In other words, even in

---

of Reported Rape Cases From 2012' 2017 *Gender and Health Research Unit, South African Medical Research Council* 29 (hereafter referred to as 'MRC report' or Machisa et al).

[14] Artz & Smythe (note 5 above) 169.

[15] See <www.npa.org.za>

[16] See <swww.saps.org.za>

instances where cases are filed for prosecution, a significant percentage is later withdrawn before the matter is adjudicated.[17] Research by Swemmer points to rape stereotypes and myths as the reason(s) behind this double attrition at the stage at which cases are 'referred to trial and those that result in a not-guilty verdict'.[18] Smythe likewise found that both domestic and international scholars agree that police officers and prosecutors perpetuate this 'real rape' stereotype.[19] On case attrition related to the victim-perpetrator relationship,[20] the MRC report found that prosecutors 'were much more likely' to prosecute stranger rapes, when the accused stranger had been arrested by the police, 'than with any other relationship group'.[21] In its report, the MRC found the following for example

> '31% of cases the rape perpetrators were strangers, but 69% were people known to the victim. 30.4% were acquaintances, 13.9% were current or ex-intimate partners, 10.8% were relatives or family members, while a further 9% did not fall into these categories (e.g., they were a teacher, fellow employee, prospective employer) but were still known to the victim. The relationship was not known in 173 cases (4.7%), mostly in the cases of children under 12 where the circumstances of the rape were unclear.[22]

---

[17] Machisa et al (note 13 above) 36.

[18] S Swemmer 'Justice denied? Prosecutors and presiding officers' reliance on evidence of previous sexual history in South African rape trials' (2020) 69 *South African Crime Quarterly* 45, 53.

[19] D Smythe *Rape unresolved: Policing sexual offences in South Africa* (2015) 4. Artz & Smythe (note 5 above) 160. See S Estrich *Real Rape: How the legal System Victimizes Women who say No* (1987); Z Adler *Rape on Trial* (1987).

[20] Machisa et al (note 13 above) 36.

[21] Ibid 31.

[22] Ibid.

The MRC report also found that cases involving 'relative and acquaintance perpetrators were much more likely to go to trial, and more often resulted in a guilty verdict'.[23] Findings on the other characteristics (such as age), the MRC report interestingly found the following

> there was a much higher arrest rate for perpetrators of offences against children, especially those under 12 years … there was [however] a much greater likelihood that cases involving children under 12 were declined prosecution on initial assessment by a prosecutor, than cases involving adults. A greater proportion of cases involving children under 12 than adults were also dropped during the stages of preparing for trial so that by the time the trial started a slightly higher proportion of teenager (12-17 years) cases went to trial than those involving children under 12.[24]

I must note that this research will not delve into child rape and the attrition of cases in that area. Nevertheless, it must be noted that children are disproportionately affected by rape.[25] The MRC report found that children comprised 46 percent of victims.[26] Heath et al found that, on average, the cases involving children 'constituted about 80-85 percent of the total caseload of the courts in the baseline study'.[27] Understanding why a prosecutor declines a case involving a minor may be imperative. This is outside the scope of this research but may require exploring in a future study.

---

[23] Ibid.

[24] Ibid 30.

[25] J Gallinetti & D Kassan 'Children and Sexual Offences' in L Artz & D Smythe (eds) S*hould we consent* (2008) 144.

[26] Machisa et al (note 13 above) 32.

[27] A Heath, L Artz, M Odayan & H Gihwala 'Improving Case Outcomes for Sexual Offences Cases Project: Pilot Study on Sexual Offences Courts. Cape Town, South Africa' 2018 *Gender Health and Justice Research Unit 12* 11.

I will now turn to foreign jurisdictions to show that rape case attrition is not unique to South Africa.

3.2 The situation in foreign jurisdictions

Research conducted in the United States (US), the United Kingdom (UK) and Australia show that a significant number of rape cases are filtered out of the criminal justice system.[28] Many studies are concerned with the low conviction rates apparent in their findings. The studies nevertheless also indicate that a significant percentage of cases fail to go beyond the prosecutorial stage.[29] For example, Galvin and Polk found that only 38 percent of cases referred

---

[28] See G Chambers & A Millar 'Proving sexual assault: Prosecuting the offender or persecuting the victim?' in P Carlen and A Worrall (eds) *Gender, Crime & Justice* (1987), J Galvin & K Polk 'Attrition in case processing: is rape unique? (1983) 20 (1) *Journal of Research and Delinquency* 132; R Wright 'A note of the attrition of rape cases' (1984) 24 *British Journal of Criminology* 399; Grace et al (note 4 above) 13. A sample of 335 cases wherein 165 cases sieved through the criminal justice system with only 40 percent of 165 reaching the final stage for conviction; S Lees & J Gregory *Rape and Sexual Assault: A Study of Attrition* (1993); J Harris & S Grace *A Question of Evidence?: Investigating and Prosecuting rape in the 1990s* (1999). The authors found that only 23 percent of cases were prosecuted and overall, 6 percent of the cases originally recorded by the police as rape resulted in convictions; K Polk 'A Comparative Analysis of Attrition of Rape Cases' (1985) 25(3) *The British Journal of Criminology* 280, SJ Lea and US Steve 'Attrition in rape cases: Developing a profile and identifying relevant factors' (2003) 43(3) *British Journal of Criminology* 583; J Fitzgerald 'The Attrition of Sexual Offences from the New South Wales Criminal Justice System' (2006) 92 C*rime and Justice Bulletin* 11.

[29] JW Spears & CC Spohn 'The Effect of Evidence Factors and Victim Characteristics on Prosecutors' Charging Decisions in Sexual Assault Cases' (1997) 14(3) *Justice Quarterly* 501, 519. See PA Frazier & B Haney 'Sexual assault cases in the legal system: Police, prosecutor, and victim perspectives' (1996) 20(6) *Law and human behavior* 607, 611.

by the police were prosecuted.[30] Chambers and Millar found that only 21 percent of the reported cases in their study reached the final stage.[31]

Other studies focus on the underlying factors associated with attrition including extra-legal factors, such as rape myths and stereotypes.[32] A key finding by Grace et al was that the 'classic rape' was still the most likely to be prosecuted and reach a conviction.[33] To be clear, the phrase 'classic rape' or 'real rape' refer to the same concept. These are plagued by rape myths and stereotypes. Spears and Spohn found that prosecutors' decision-making is based on 'attempts to avoid uncertainty and by predictions of convictability'.[34] Frohmann's found that prosecutors reject 'a significant percentage' of cases and only file cases that are characterized as 'solid' or 'convictable' as the reason behind this failure is credible.[35] Frohmann, who focuses on prosecutorial accounting for case rejection, says that prosecutors are actively seeking holes or

---

[30] Galvin & Polk (note 28 above) 132.

[31] Chambers & Millar (note 28 above) 58.

[32] See K Polk 'Rape reform and criminal justice processing' (1985) 31(2) *The British Journal of Criminology* 191; G La Free *Rape and Criminal Justice: The Social Construction of Sexual Assault*, Belmont, CA: *Wadsworth* (1989); W Kersetter 'Gateway to justice: Police and prosecutorial response to sexual assaults against women' (1990) 81 *Journal of Criminal Law and Criminology* 267; L Frohmann 'Discrediting victims' allegations of sexual assault: Prosecutorial accounts of case rejections' (1991) 38(2) *Social Problems* 213.

[33] Grace et al. (note 3 above) 27. The authors said that rape myths and stereotypes are easily exploited.

[34] Spears & Spohn (note 29 above) 521.

[35] Frohmann (note 32 above) 213.

problems with the victim's version as unbelievable, or not convincing beyond a reasonable doubt.[36]

Among the other important underlying factors, identified by Harris and Grace, is the sharp increase in acquaintance and intimate rapes.[37] Acquaintance rape stood at 45 percent and intimate rape at 43 percent.[38] Grace et al also noted in their study that rape by a person known to the victim was common in the UK. For instance, acquaintance rape accounted for 35 percent of cases and intimates and intimate rapes account for another 35 percent, whereas stranger rape accounts for the remaining 30 percent.[39] These figures indicate that the most prevalent rape is rape by a person known to the victim. These differences have important implications for the likelihood of successful prosecution and conviction of offenders. As a result, I will focus on this victim-perpetrator relationship, which I refer to as acquaintance rape. Lonsway defines acquaintance rape as 'rape that is committed by an individual known to the victim in some capacity: they could be friends, dates, lovers, former lovers or spouses, co-workers, neighbours, and so forth'.[40] The age of the victim was also found to be a significant indicator of whether a case is convictable according to Grace et al.[41] The rape of younger children and older women

---

[36] Spears & Spohn (note 29 above) 611.

[37] Harris & Grace (note 33 above) 5. The authors compared their findings to Grace et al.

[38] Grace et al (note 3 above) 6.

[39] Ibid 18.

[40] KA Lonsway 'Preventing acquaintance rape through education: What do we know?' (1996) 20(2) *Psychology of Women Quarterly* 229, 230.

[41] Grace et al (note 3 above) 25.

resulted in more convictions.[42] This is echoed by Harris and Grace.[43] Cases involving particularly young or particularly old complainants were most likely to be proceeded with, the authors found.[44] In contrast, Spears and Spohn state that criminal justice officials consider the age of the victim in addition to other factors. There are also variables outside of the legal sphere that may affect the case's outcome.[45]

So, what follows next is a summary of the South African rape case law development in an attempt to understand the process of improving the criminal justice system's response to sexual offences.

3.3 The development of rape jurisprudence in South Africa

Procedural rules, such as the cautionary rule and corroboration and resistance requirements, have been recognized as a hindrance to the prosecution of rape cases for many decades.[46] According to Combrinck, there was notably a lack of clarity on the government's duties towards women who are subjected to violence.[47] However, the courts in South Africa have over the years sought

---

[42] Ibid.

[43] Harris & Grace (note 28 above) 27.

[44] Ibid.

[45] Spears & Spohn (note 29 above) 506.

[46] L Artz & D Smythe 'Feminism vs. the state?: A decade of sexual offences law reform in South Africa' (2007) 21(74) *Agenda* 6, 16. For example, also see s 5 of the Prevention of Family Violence Act 133 of 1993 that abolished marital rape. See *Tshabalala v S*; *Ntuli v S* 2020 (5) SA 1 (CC) para 83 (hereafter referred to as *Tshabalala case*).

[47] H Combrinck 'Positive State Duties to Protect Women from Violence: Recent South African Developments' (1998) 20 *Human Rights Quarterly* 666, 667.

to correct this, heralding the movement of rape jurisprudence away from its patriarchal roots to a constitutional rights-based approach. There have been much 'infusing of procedural rules with constitutional values'.[48] The *State v Jackson* case in 1988 was the first to herald the end of sexist gender norms in rape trials when the cautionary rule on a single witness in cases of sexual offences was rejected.[49] This ultimately led to the abolition of the cautionary rule, an abolition later cemented in Section 60 of the Sexual Offences Act.[50] Unfortunately, even so, the cautionary rule, according to Swemmer, was still being applied in court despite being abolished. Swemmer notes the following

> Trial transcripts examined in the study show that it [the cautionary rule] is still applied (un)consciously by prosecutors, defence counsel and presiding officers, whose questioning of complainants appears to assume that women are lying about violations perpetuated against them and should be treated us untruthful until the evidence can show otherwise. In the case of *S v Magagula*, the presiding officer stated that 'it is always common that when one is sentenced to prison some members of the community will always take a chance to try and lay charges similar to rape.[51]

---

[48] *Tshabalala* case (note 46 above) 80.

[49] *S v Jackson* 1998 (1) SACR 470 (SCA) 21. The court held that the 'magistrate was not obliged to apply such a rule. The origin of the cautionary rule is a warning to judicial officers that the evidence of certain witnesses, such as complainants in sexual cases could not be safely relied upon without corroboration.

[50] Section 60 of the Sexual offences Act reads: 'Notwithstanding any other law, a court may not treat the evidence of a complainant in criminal proceedings involving the alleged commission of a sexual offence pending before that court, with caution, on account of the nature of the offence.'

[51] Swemmer (note 18 above) 52.

About a decade thereafter, the Constitutional Court developed the common-law definition of rape to include anal penetration in *State v Masiya*.[52] In that ruling, Nkabinde J reinforced the courts' constitutional rights-based approach, declaring that the focus on the crime of rape in South Africa was required to now be more focused 'on the breach of a more specific right such as the right to bodily integrity and security and safety of the person to be protected from degradation and abuse'.[53]

This constitutional rights-based approach was then advanced further in a recent landmark judgment in *Tshabalala v State*.[54] The case dealt with the doctrine of common purpose and instrumentality in a rape case, where the Constitutional Court ruled that the doctrine of common purpose applies to the common law of the crime of rape.[55] The judgment expresses the court's commitment to the development and implementation of 'sound and robust legal principles that advance the fight against GBV to safeguard the constitutional values of equality, human dignity,

---

[52] *Masiya v Director of Public Prosecutions Pretoria (The State) and Another* 9 2007 (5) SA 30 (CC) (hereafter referred to as *Masiya* case). See *S v Mahomotsa* 2002 (2) SACR 435 (SCA), *S v Abrahams* 2001 (2) SACR 358 (C) and *S v Mvamvu* 2005 (1) SACR 54 (SCA). In these cases, the courts dealt with the definition and ambit of substantial and compelling circumstances in the sentencing of sexual offenders.

[53] *Masiya* (note 52 above) 24. In the same matter, Langa CJ wrote a dissenting judgment that the definition should be taken further to include anal rape of men. Langa CJ similarly expressed that rape in this day and age was 'recognized as being less about sex and more about the expression of power through degradation and concurrent violation of the victim's dignity, bodily integrity, and privacy. In the words of the International Criminal Tribunal of Rwanda the 'essence of rape is not the particular details of the body parts and objects involved, but rather the aggression that is expressed in a sexual manner under conditions of coercion' para 78.

[54] *Tshabalala* (note 46 above) 66.

[55] Ibid.

and safety and security'.[56] The failure to develop and implement sound and robust legal principals relating to the eradication of GBV would be a failure in the court's duty, Mothapo J held.[57] The South African courts also developed the common law and general principles relating to private-law duties towards individuals and delictual claims against the state. The courts in *Carmichele v Minister of Safety and Security*,[58] *van Eeden v Minister of Safety & Security*[59] and *K v Ministry of Safety and Security* found that the state failed to protect women from sexual violence.[60] In these cases, it was ruled that the state could be held liable for acts committed by state actors including liability for omissions. The South African case law has thus clearly established that state actors are duty-bound to act and that individuals have a duty to be protected from violence.[61] It was emphasized further that, of these positive obligations placed on state

---

[56] Ibid 63. The court held further that one of the ways in which to advance the end of patriarchy and rape culture is by disposing of the misguided and misinformed view that rape is a crime purely about sex.

[57] Ibid. Victor AJ echoed Mothapo J and held that 'the development of the common law and legislation in relation to cases of rape remains imperative to 'overcome reliance on existing rules of evidence and procedure.' The learned judge held furthermore that continuous 'vigilance within a constitutional context remained necessary in relation to any remaining (procedural rules) obstacles' para 83.

[58] *Carmichele v Minister of Safety and Security* 2001 (10) BCLR 995 (CC) (hereafter referred to as *Carmichele* case).

[59] van Eeden v Minister of Safety and Security 2002 4 All SA 346 (SCA) para 8.

[60] *K v Minister of Safety and Security* 2005 8 BLLR 749 (CC) para 41. The court held that the respondent (state) was liable for the rape by the three policemen. That rape was clearly a deviation from their duties. However, when committing the rape, the three policemen were simultaneously omitting to perform their duties as policemen.'

[61] *Tshabalala* (note 46 above) 78. The Constitutional Court called for joint effort by the courts, society and law enforcement agencies to curb this pandemic (rape). Khampepe J, in particular, called for effort from the not only the community but from all arms of state. See *Baloyi* (Minister of Justice Intervening) 2000 (1) BCLR 86 (CC) para 12. Where the criminal justice system is ineffective,

actors, 'few can be more important to women than freedom from the threat of sexual violence'.[62] Vivier ADP reminded us that 'state actions, court decisions and even the conduct of natural and juristic persons may be tested against since all private law rules, principles or norms, including those regulating the law of delict, are subjected to, and thus given content in the light of the basic values in the Bill of Rights'.[63] In *K v Minister of Safety and Security*, the court reminded us that great harm may result from omission, not just from the commission of wrongdoing.[64] Having

---

Sachs J in Baloyi reminded us that such ineffectiveness 'intensifies the subordination and helplessness of victims . . . [and] sends an unmistakable message to the whole society that the daily trauma of vast numbers of women counts for little.' In *Carmichele* (note 58 above) 62, it was held that '… the IC imposed a particular duty on the state to protect women against violent crime in general and sexual abuse in particular.' The court reminded us that constitutional obligations are firmly placed on the state to respect, protect, promote and fulfil the rights in the Bill of Rights and, in particular, the right of women to have their safety and security protected.

[62] C*armichele* (note 58 above) 90. Amicus intervening argued that 'sexual violence and the threat of sexual violence goes to the core of women's subordination in society. It is the single greatest threat to the self determination of South African women,' para 45. Also see *Tshabalala* wherein it confirmed that prosecution of gender-based violence has acknowledged a victim-centred approach whilst at the same time not losing sight of an accused's rights to a fair trial.' Also see Domestic Violence Act 116 of 1998, reinforced imposition of positive legal duties on the police. See Artz & Smythe (note 46 above) 15.

[63] *van Eeden v Minister of Safety and Security* (note 59 above) 8-12.

[64] *K v Minister of Safety and Security* (note 60 above) 52. 'The conduct of the policemen which caused harm constituted a simultaneous commission and omission. The commission lay in their brutal rape of the applicant. Their simultaneous omission lay in their failing while on duty to protect her from harm, something which they bore a general duty to do, and a special duty on the facts of this case. In my view, these three inter-related factors make it plain that viewed against the background of our Constitution, and, in particular, the constitutional rights of the applicant and the constitutional obligations of the respondent, the connection between the conduct of the policemen and their employment was sufficiently close to render the respondent liable.' See v*an Eeden v Minister of*

established that South African jurisprudence defines sexual violence against women in terms of constitutional principles, the following section will review the problem from a point of view of an international perspective.

3.4 An international law perspective

The impunity for rape is prohibited and condemned by international law.[65]

Copelon says that it makes no difference whether such an act is committed during war or peacetime.[66] Increasingly, rape is also being recognized as torture and degrading treatment within the context of international human rights law (IHRL).[67] But there is a dichotomy between

---

Safety & Security (note 59 above) 9, Vivier J clarified that 'an omission is wrongful if the defendant is under a legal duty to act positively to prevent the harm suffered by the plaintiff. The test is one of reasonableness. A defendant is under a legal duty to act positively to prevent harm to the plaintiff if it is reasonable to expect of the defendant to have taken positive measures to prevent the harm.'

[65] UN General Assembly, Convention on the Elimination of All forms of Discrimination against Women, 18 December 1979, A /RES/34/180, <https://www.refworld.org/docicd/3b00f2244.html> requires nation states to comply with international human rights law (IHRL) by adopting 'appropriate legislation and measures' that prohibits all forms of discrimination against women, through 'competent' public institutions. Also see United Nations, Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women, 27 October 1995, <https://www.refworld.org/docid/3dde04324.html>

[66] R Copelon 'Gendered war crimes: Reconceptualizing Rape in Time of War' Women's Rights, Human Rights: International Feminist Perspectives' in R Peters (ed) *Women's Rights, Human Rights: International Feminist Perspectives* (1995) 197, 208. The author says that 'the line between rape committed during wartime and at any other time is not so sharp.'

[67] See *O'Keeffe v Ireland*: ECHR (Application no. 35810/09) 28 January 2014 para 14. The court in O'Keeffe held that sexual abuse was 'undisputedly' torture because of its 'gravely invasive nature and consequent on the deep wounds that it inflicts on the psyche.' See CA Mackinnon 'Crimes of war, crimes of peace' (1993) 4 *UCLA Women's LJ* 59, 66.

public and private that is created by international law that has been criticized heavily.[68] The main rationale behind this dichotomy is that only violations by the state or state actors are recognized in terms of international law. On the other hand, violations committed by individuals are subject to domestic law. This implies that violations that are committed by individuals fall outside international law accountability, which is regarded as a limitation on women's human rights. Mackinnon said that if one's 'human rights are going to be violated', one should 'pray it is by someone who looks like a government, and that he already acted, and acted wrong'.[69] Firstly, I agree with this logic only since the crime of rape committed by individuals is appropriately subject to their domestic laws, while rapes used during war, for example, are properly categorized as international crimes recognized as grave breaches of international law. These are breaches subject to universal jurisdiction under the Geneva Conventions.[70] I argue that a state becomes complicit in rape when it fails to prosecute victims effectively — such a state violates treaty-based law. The idea of international accountability of the state based on acts committed by individual non-state actors against other individuals is steadily expanding, I discuss this in chapter 4. This is premised on the idea that a state must ensure that it acts diligently and enforces domestic rights. For example, the European Court of Human Rights ruled that the state of

---

[68] Ibid (MacKinnon) 204. R Cook 'Women's International Human Rights Law: The Way Forward' (1993) 15 *Human Rights Quarterly* 230, 234; C Chinkin 'A critic of the public/private dimension' (1993) (10)2 *European Journal of International Law* 387, 388; C Moore 'Women and domestic violence: the public/private dichotomy in international law' (2003) 7(4) *The International Journal of Human Rights* 93; C Romany 'Women as aliens: a feminist critique of the private/public distinction in international human rights law' (1993) 6 *Har. Hum. Rts. J* 87, 121.

[69] MacKinnon (note 67 above) 69.

[70] UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, <https://www.refworld.org/docid/3ae6b3a84.html>

Bulgaria had violated certain provisions of the European Convention on Human Rights that compel the state to investigate and prosecute cases of rape effectively.[71] Such interpretations and landmark rulings by regional human rights courts make it plain that the international community no longer perform a mere monitoring role. It must be noted that the effectiveness of sanctions against a violating state is not within the scope of this research. But I do accept MacKinnon's criticism of the CEDAW Committee, that 'all the committee does is report' and that apparent enforcement is mere denunciation.[72] Meyersfeld also reminds us that IHRL does not operate through international courts but through the conversion of norms and *mores* that can filter down to the government and state institutions.[73]

Second, I completely agree with Copelon's view on the distinction between private and public significantly minimizes the impact of the crime of rape by individuals as opposed to the crime of genocide, which is an international crime committed by individuals and are tried under international criminal law for that conduct.[74] Copelon bemoans this 'popular distinction' as 'unfortunately prevalent'.[75] The author says that differentiating between so-called normal rape

---

[71] *M.C v Bulgaria* 2003-XII E UR. C T. H.R. 1., appl. no. 39272/98, decision of Dec. 4, 2003 (hereafter referred to as *Bulgaria* case).

[72] MacKinnon (note 67 above) 78. The Committee on the Elimination of Discrimination against Women (CEDAW) is the body of 23 independent experts that monitors implementation of the Convention on the Elimination of All Forms of Discrimination against Women. See OHCHR | Committee on the Elimination of Discrimination against Women.

[73] B Meyersfeld *Domestic violence and international law* (2010) 3.

[74] Copelon (note 66 above) 204.

[75] Ibid.

and genocidal rape contrasts 'the common and tolerable with the unique and heinous', diminishing the seriousness of rape as a violent crime.[76]

MacKinnon, however, takes this further. She says that cases of women abuse such as rape are 'widely permitted as the liberties of their perpetrators, understood as excesses of passion or spoils of victory, legally rationalized or officially winked at or formally condoned'.[77] The author says this is so because 'men typically have enough power to violate women without the state explicitly intervening', meaning, therefore, that 'no state effectively guarantees women's treaty-based rights'.[78] She argues that the problem is not based on a lack of state action, and suggests 'the use of equality guarantees to address violence against women'.[79]

I agree with MacKinnon that the state 'winks' at serious violations perpetrated disproportionality against women. Furthermore, equality guarantees are insufficient in this particular instance because the NPA has vast prosecutorial discretion that cannot be challenged by merely invoking the equality clause. Cook also states that there were far too many violations of women's rights that are 'cruel and pervasive' and that these violations 'remain unremedied' and 'unnoticed as discriminatory' or as 'affront to human dignity'.[80] She calls this a widespread failure that poses a

---

[76] Ibid.

[77] MacKinnon (note 67 above) 62.

[78] Ibid 70.

[79] Ibid 85.

[80] Cook (note 68 above) 261.

challenge to the ‘credibility, universality and justice’ of IHRL.[81] Cook's points of view are accurate.

In the following chapter, I provide a broad overview of the problem of rape in South Africa. I will consider the challenges associated with acquaintance rape and procedural obstacles in prosecuting such cases.

[81] Ibid.

CHAPTER 2
OUTLINING THE CHALLENGES OF RAPE AND PROSECUTION IN SOUTH AFRICA

1. Introduction

This chapter defines rape in South Africa in an attempt to highlight the importance of effective prosecution. First, I discuss the forms of rape, in particular acquaintance rape. I will unpack the complex nature of rape, the issues of consent and coercion, and the problems of rape myths and stereotypes, in an attempt to ultimately highlight the importance of effective prosecution. In conclusion, I analyse the difficulty of evidentiary rules that burden the prosecution of rape and critique the government's anti-rape failures.

2. Defining the problem of rape in South Africa

Rape manifests in various forms. This includes acquaintance rape, child rape, gang rape, statutory rape, incest rape, spousal rape, and rape during wartime, among others. I focus on acquaintance rape because it is a global phenomenon.[82] This view is based on studies in the past as analysed in chapter 1 section 3.3 — there is a higher percentage of reports of acquaintance rape.[83] I argue that acquaintance rape is a prevalent form of rape in South Africa.[84] Research by

---

[82] Harris and Grace (note 33 above) 5. MR Gottfredson & JH Michael J 'A study of the behavior of law' (1979) 44 (1) *American sociological review* 3-18. Gottfredson et al argue that crimes between intimates are perceived as less serious than crimes between strangers.

[82] Grace et al (note 3 above) 6.

[83] Grace et al (note 3 above) 18. Harris and Grace (note 3 above) 5. The authors compared their findings to Grace et al, acquaintance rape stood at 45 % and intimate rape at 43 %.

[84] R Jewkes, Y Sikweyiya, R Morrell & K Dunkle 'Gender Inequitable Masculinity and Sexual Entitlement in Rape Perpetration South Africa: Findings of a Cross Sectional Study' (2011) 6(12) *PloS one* 5.

Frohman demonstrated the importance of the offender-victim relationship in predicting the outcome of legal proceedings — which is the focus of this research.[85] For example, acquaintance rape is also burdened with complexities that make it a very challenging crime to prosecute. It is central to the issues of consent and coercion because it is in acquaintance rape that the line between consent and coercion can become blurred.[86] According to Borges et al, 'consent takes place without coercion, violence, or abuse of power'.[87] South Africa is among many other countries that have embarked on law reform that sought to address this particular problem.[88] In

---

[85] Frohmann (note 32 above) 213.

[86] *Bulgaria* case (note 71 above) 132-139. The Court detailed that 'nowadays, the prosecution is required to prove sexual penetration and lack of consent. Any elements that might show lack of consent will be taken into account, but the prosecution will mostly try to prove the existence of at least one of the factors 'nullifying consent', set out in the second paragraph of Article 375, namely violence, coercion, ruse or disability, even if there is no proof of physical violence or physical resistance, proof of coercion is sufficient. Whether or not there was coercion is a question to be assessed with reference to the capacities of the victim (age, actual state at the time of the facts).' Furthermore, 'coercion is nowadays understood broadly and is not limited to threats of serious violence.' Importantly, 'evidence of lack of consent is particularly important in cases where the accused and the victim knew each other. While the act of saying 'no' would be a sufficient expression of lack of consent, proving that it was said and understood as being meant seriously could be difficult. The principle that the prosecution must prove lack of consent, and not the presence of force, is well established.'

[87] AM Borges, VL Banyard & MM Moynihan 'Clarifying consent: Primary prevention of sexual assault on a college campus' (2008) 36(1-2) *Journal of Prevention & Intervention in the Community* 75, 79.

[88] DJ Frank, T Hardinge & K Wosick-Correa 'The global dimensions of rape-law reform: A cross-national study of policy outcomes' (2009) 72(2) *American Sociological Review* 272, 272. Authors said: 'Between 1945 and 2005, countries around the world revised and rewrote their rape laws.' See H Combrinck. 'Rape law reform in Africa: 'More of the same' or new opportunities?' in C McGlynn & VE Munro (eds) *Rethinking Rape Law* (2010) 138.

South Africa, the Sexual Offences Act provides that consent means voluntary or uncoerced agreement. There is certainly no consent when there is a 'threat of harm' against the complainant, or when there is an 'abuse of power or authority' by the accused, for example.[89] There can also never be consent in situations in which the complainant is 'incapable in law of appreciating the nature of the sexual act' as a result of being 'asleep; unconscious; or in an altered state of consciousness' as a result of 'influence of any medicine, drug, alcohol or other substance'.[90]

The list of coercive circumstances that operate to vitiate consent is not exhaustive. This implies that a woman under certain circumstances can be raped, even though 'the minimum requirements for accepting a rape complaint, which includes the threat of force (77.3% of cases), physical proof of penetration (50%), the use of physical force (38%) and evidence of resistance (24.7%)' are unlikely to be present.[91] For this reason alone, acquaintance rape demands considerable attention, for effective investigation and prosecution.[92] An additional factor that is of considerable concern is that acquaintance rape usually occurs in spaces where women should be safe, such as their homes.[93] The latest crime stats released by the SAPS showed that '…more

---

[89] Section 1 (3) a – d of the Sexual Offences Act.

[90] Ibid.

[91] Artz & Smythe (note 5 above) 160.

[92] *S v Vilakazi* 2009 (1) SACR 552 (SCA) para 21.

[93] *Tshabalala* (note 46 above) 74. Khampepe held that: 'The notion that rape is committed by sexually deviant monsters with no self-control is misplaced. Law databases are replete with cases that contradict this notion. Often, those who rape are fathers, brothers, uncles, husbands, lovers, mentors, bosses and colleagues. We commune with them. We share stories and coffee with them. We jog

than 4,900 of the rape incidents took place at the home of the victim or the home of the rapist'.[94] More vigilant policing can, therefore, do little to stop the scourge of acquaintance rape.[95] It is also a kind of rape that is intertwined with a variety of issues such as fear of reporting which usually leads to under-reporting and rape myths and stereotypes that impose challenges to successful prosecution. For example, acquaintance rape is a force that is prone to rape myths and stereotypes.[96] According to Fisher, Cullen and Turner, rape myths allow us to believe that a 'real rape' is one in which a victim is raped by a stranger who jumps out of the bushes with a weapon, and in which she fought back, was beaten and bruised, reported the event to the police, and had medical evidence collected immediately'.[97] The authors explain what is generally considered as 'real rape' as follows

> the victim has never had sex with the assailant before, is preferably a virgin, was not intoxicated, was not wearing seductive clothing, and has a good reputation. …

---

with them. We work with them. They are ordinary people, who lead normal lives.' See *H v S* (A400/2012) 'This case was one of three appeals heard during the course of the week that involved the rape of an under-aged girl by someone who either was her custodian or whom she knew and trusted. The abuse of a custodial relationship or position of trust in all three cases is disturbing,' at para 77.

[94] Crime stats: murder and rape increased in past three months (timeslive.co.za). <www.timeslive.co.za>

[95] Andersson & Mhatre (note 9 above) 6. The authors found that '60% of rapists are known to their victims, there is little that a police presence on the street will do to prevent these rapes

[96] M Hester & S Lilley 'Rape investigation and attrition in acquaintance, domestic violence and historical rape cases,' (2017) 14 (2) *Journal of investigative psychology and offender profiling* 175, 177.

[97] BS Fisher; FT Cullen & MG Turner, 'The sexual victimization of college women. Research report' 2000 *Washington, DC: Department of Justice* 1, 9. Also see; J Du Mont; KL Miller & TL Myhr 'The role of 'real rape' and 'real victim' stereotypes in the police reporting practices of sexually assaulted women' (2003) 9(4) *Violence Against Women* 466, 467.

> Unfortunately, acquaintance sexual assaults contain few, if any, of those elements. In many acquaintance rape situations, the victim had been drinking, did voluntarily go with the man to his apartment or room, was not threatened with a weapon, did not fight back, did not report the event to the police immediately, did not have medical evidence collected, and may have even had sex with the assailant voluntarily before.[98]

It can be argued that South Africa's efforts to combat sexual violence are significantly undermined by these rape myths and stereotypes, along with the NPA's focus on judicial outcomes.[99] It is also very unhelpful to select certain cases where there is clear evidence of physical injury, medical evidence and where the perpetrator is unknown to the victim and so forth because that only creates a false idea of what rape is. It remains unknown which factors, therefore, should be considered when prosecuting cases of acquaintance rape. This research hopes to answer this – taking into consideration international law, as well as domestic legal requirements for successful prosecution, such as unlawfulness, *mens rea* (intention) and proof of guilt.

The following section will contain some further insights into the phenomenon of rape myths including factors related to the victim's credibility, physical injury, and medical evidence that ultimately influence prosecutor charging decisions.

---

[98] Fisher et al (note 97 above) 9.

[99] Machisa et al (note 13 above) 109. 'Prosecutors signed performance contracts in which they committed to achieving a 69% conviction rate in sexual offences cases.' See, Arts & Smythe (note 5 above) 181.

3. The rules of evidence: its influence on prosecutorial decision-making in rape cases

The credibility and impression of the witness must be taken into account by the NPA before energy is poured into a prosecution. In terms of the NPA policy, factors to be taken into consideration when evaluating the evidence include

- Whether the state witnesses be credible?
- What sort of impression is the witness likely to make?
- Are there any matters, which might properly be put by the defence to attack the credibility of the witness?
- If there are contradictions in the accounts of witnesses, do they go beyond the ordinary and expected, thus materially weakening the prosecution case.[100]

Why are these factors important? These factors must be considered because the court places a lot of emphasis and weight on the credibility of the witness during trial in all categories of crimes. According to Schwikkard and van der Merwe, 'the credibility "geloofwaardigheid" of a witness can be decisive to the outcome of a case'.[101] In other words, the NPA credits such factors as the credibility of a testimony because it understands that securing a conviction in court is unlikely if a witness's credibility is unsatisfactory. Thus, it comes as no surprise that the prosecutor is responsible for evaluating the credibility of the witness when exercising their discretion.

[100] NPA Prosecution Policy (Revision Date: June 2013) 6. <TABLE OF CONTENTS (npa.gov.za)>

[101] Schwikkard & van der Merwe *Principles of Evidence* (2016) 574 citing *Hees v Nel* para 32.

This consideration, however, creates room for a number of problems in cases of rape specifically, as studies show that prosecutors apply stereotypes to assess the credibility of rape complainants.

For example, Frohmann found that prosecutors rely on stereotypes about what constitutes 'genuine victims' and appropriate behavior when assessing the credibility of a rape witness.[102] Stanko criticized 'prosecutorial strategies' that are determined by factors such as the character and credibility of the victim in rape cases.[103] Spears and Spohn found that prosecutorial discretion appears to be influenced not only by the assessment of convictability at trial but such an assessment is usually based on extra-judicial factors.[104]

Prosecutors in South Africa are not immune to this problem. Machisa et al found that rape myths and stereotypes shape prosecutors' thinking when decision-making.[105] Artz and Smythe found that rape myths continue to pervade the criminal justice system in sexual offences cases.[106] In another study, Artz and Smythe said that 'both investigating officers and prosecutors inevitably approach a rape complaint from a cost-benefit perspective that is ultimately focused on the

---

[102] Frohmann (note 32 above) 235.

[103] E Stanko 'The Impact of Victim Assessment on Prosecutor's Screening Decisions: The Case of the New York Country District Attorney's Office' (1988) 16 *Criminal Justice Law and Politics* 225, 170.

[104] Spears & Spohn (note 29 above) 520.

[105] Machisa et al (note 13 above) 108.

[106] L Artz & D Smythe (eds) *Should we consent? Rape Law Reform in South Africa* (2008) 1, 260. Also see; Smythe (note 19 above) found that stereotypes have become scripted into criminal justice practice; Swemmer (note 18 above) 49.

'convictability' of the case and an evaluation of whether the case has evidential difficulties'.[107] The MRC report found, comparably, that prosecutors in Gauteng Province were inclined to prosecute cases following a rigorous selection based on convictability.[108] Swemmer found that presiding officers and prosecutors continue to rely on evidence that is prejudicial to complainants despite the prohibition of such practices by the Sexual Offences Act.[109] Swemmer states: 'They [scholars] argue that these beliefs [stereotypes] have become scripted into criminal justice practice, with the result that the cases filtered out of the system are not those that are intrinsically weak, but rather those that offend the normative assumptions of decision-makers'.[110]

Unfortunately, in acquaintance rape cases, this problem is aggravated by its association with 'real rape' stereotype as opposed to stranger rape. The 'difficulties' facing prosecutors are described as follows by Spohn et al.

> The defendant in a sexual assault case involving acquaintances typically claims that the victim consented. Consequently, 'the woman's character is inevitably a critical issue' (Bryden and Lengnick (1997: 1204). In this type of case, in other words, the jurors have to evaluate the victim's character and behavior at the time of the incident in order to determine whether she fabricated or exaggerated the sexual assault or had a motive to lie about the incident. In contrast, the defendant in a sexual assault involving strangers cannot plausibly claim that the victim consented; instead, he acknowledges that she was sexually assaulted but claims that he was misidentified. Because the defendant denies that he had sexual intercourse with the victim, he does not need to persuade the jury that she is promiscuous, vindictive, or

---

[107] Artz & Smythe (note 5 above) 170-171.

[108] Machisa et al (note 13 above) 30.

[109] Swemmer (note 18 above) 49.

[110] Ibid 4.

> dishonest. Moreover, in a stranger rape the possibility that the parties misunderstood each other's signals does not arise.[111]

In summary, it appears that this procedural obstacle is in fact circular.[112] The main problem and bottom-line is that credibility assessments determine the outcome of prosecutorial decision-making based on extra-judicial factors in cases of rape.[113] But a prosecutor cannot pour energy into what they deem a hopeless case in the first place, when their assessment is that the witness is not credible. This is so since the court will in any event determine a witness' credibility — following an attack by the defence on that witness' credibility. This is aggravated when it appears that there can be no rebuttal following an attack on a witness' credibility, for example, where medical evidence is unavailable or neutral. This will leave the prosecution without any options. I will demonstrate below how the assessment of the credibility of a witness is actually determined by the application of the cautionary rule and evidence of the character of the witness, which are inherently discriminatory in nature. This means that prosecutors are likely to consider a complainant's version with caution when assessing their credibility. Only when a complainant passes this test, will their case be enrolled, where their credibility will be tested again in the courtroom.

---

[111] C Spohn, D Beichner, E Davis Frenzel & D Holleran 'Prosecutors' charging decisions in sexual assault cases: A multi-site study, final report' 2002 *Washington DC: National Institute of Justice* 1, 51.

[112] Frohmann (note 32 above) 235. Stanko (note 103 above) 170. Artz & Smythe (note 106 above) 260. Smythe (note 19 above) 21. Swemmer (note 18 above) 49. Machisa et al (note 13 above) 108.

[113] Artz & Smythe (note 46 above) 16. See Article 23 of the CEDAW General Recommendation No. 33.

I argue that these facts are a major challenge for prosecutors. The burden of proof on the state is excessively high in cases of rape. The crux is that the credibility of a rape complainant can be challenged with ease by merely pointing to deficiencies in their version. It must be kept in mind that there is also usually very little corroborative evidence in cases of acquaintance rape because of the nature of this particular rape, as emphasised above.[114] Spears and Spohn explain it as follows

> In these types of cases, little physical evidence may exist to connect the suspect to the crime, and typically there are no eyewitnesses who can corroborate the victim's testimony. The likelihood of conviction thus depends primarily on the victim's ability to articulate what happened and to convince a judge or jury that a sexual assault occurred. As a result, discretionary decisions are more susceptible in rape than in other types of crime to the interjection of personal attitudes toward women, sexuality, race, and class.[115]

Also, consider a case where the accused cites consent as a defence – medical evidence such as the DNA may become redundant.[116] Such evidence may be more useful in cases of stranger rapes

---

[114] Spears & Spohn (note 29 above) 503. In *R M v S* (A158/2018) [2019] ZAGPJHC para 28 (hereafter referred to as *R M v S)*. The court explained, generally, the difficult nature of the crime of rape. the court held, '… there were only two witnesses to most of the crimes in this case; the Appellant has the same dilemma as the State.'

[115] Spears & Spohn (note 29 above) 503.

[116] *S v Gentle* (317/2003) [2005] ZASCA 26 para 18 (hereafter referred to as *Gentle* case). The court held that: 'But the fact that the complainant's evidence accords with the evidence of other State witnesses on issues not in dispute does not provide corroboration. Thus, in the present matter, for example, evidence that the appellant had sexual intercourse with the complainant does not provide corroboration of her version that she was raped, as the fact of sexual intercourse is common cause. What is required is credible evidence which renders the complainant's version more likely that the sexual intercourse took place without her consent, and the appellant's version less likely that it did

because an accused can never claim consent with a stranger. DNA, under those circumstances, may well serve as corroboration for that complainant. It has been shown, for example, that medical evidence such as DNA, or physical injury (to the hymen and so forth) may be key in cases where the complainant is a minor.[117] This problem is aggravated further in instances where the rape has not been reported immediately. It is trite that women often report cases late, hence section 59 of the Sexual Offences Act clarifies that no negative inference can be drawn by a

---

not.' Also see; *M S v S* (CA40/2017) [2019] ZANWHC 2 para 12. For example, the court in *M S v S* held the following: The complainant claim[ed] non-consensual sexual intercourse while the appellant claims consensual sexual intercourse. The J88 reflects no injuries, either physical or gynaecological and renders the medical evidence neutral. The medical evidence, therefore, does not assist either the state or the appellant. The central question is whether the evidence of the complainant, bearing in mind the onus on the state, is such that it renders non-consensual sexual intercourse more probable than the appellant's version of consensual sexual intercourse.'

[117] *R M v S* (note 114 above) paras 31, 36. In this case, the complainant was an eleven-year-old minor who was raped by her biological father. The court held that '…the undisputed evidence of Dr V is that there was an injury to the hymen. That constitutes clear corroboration of the testimony by the complainant that a penis penetrated her. The penis is the cause of the injury to her hymen. Dr V is qualified to make such a finding and the evidence has not been gainsaid,' furthermore, '...the Doctor's findings that there was an insult to the hymen which is consistent with sexual intercourse not only corroborates the complainant's testimony that there was penetration, but also that she felt pain. The complainant was infected with a sexually transmitted disease. Such factors are clearly proven beyond reasonable doubt.' Also See; *M v S* 2020 (1) SACR 241 (WCC) para 31. The complainant in this case was also an eleven-year-old raped by her biological father. The court said that the uncontroverted evidence confirmed that the appellant's DNA was found in the complainant's undergarment. This fact, coupled with the complainant's injuries which established that she had been recently sexually assaulted, required an explanation. The appellant's failure to challenge the evidence of the first reporter or of the medical expert and his decision to remain silent in the face of the *prima facie* evidence of the assault having been committed by him, gives rise to the consequences enunciated by the judgments referred to above.'

court from this.[118] This provision was promulgated because the legislator was mindful that women often report incidents of rape late. But I note that in order to warrant an outright rejection of evidence, inconsistencies must be material, but what constitutes 'material' seems subjective.[119] This is because there is no test, except that the evidence must be considered in whole.[120] Thus, it is a process that unfortunately involves a lot of speculation.[121] The motive of a

---

[118] Section 59 of Sexual Offences Act, states the following: 'In criminal proceedings involving the alleged commission of a sexual offence, the court may not draw any inference only from the length of any delay between the alleged commission of such offence and the reporting thereof.' See *B C v S* (A8/2020) [2020] ZAFSHC 180 para 25. The court held: 'Reporting of a rape is not an exact science. One of the accepted principles in sexual offences cases is that the complainant is expected to make a report at the earliest convenience. This, however, does not mean that failure to report "timeously" or even not at all, means a person was not raped. The circumstances surrounding the fiasco must dictate the meaning of "timeously".'

[119] *Y v S* (Case no 537/2018) **[2020] ZASCA 42** para 48 (hereafter referred to as *Y v S* case) the Court cited *State versus Sauls* 1981 (3) SA 172 (a) to (h): '… there is no formula to apply when it comes to the consideration of the credibility of a single witness.'

[120] *Cele v State* [2016] 2 All SA 75 (KZP) para 69 (hereafter referred to as Cele case). 'Evidence of credibility cannot be approached in a piecemeal manner. All the evidence for and against each party has to be viewed holistically.' In *S v Trainor 2003* (1) SACR 35 SA 41 (b), it was held that '… a conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside evidence that maybe found to be false. Independent verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable the quality of the evidence must of necessity be evaluated and there must be corroborative evidence, if any. Also see; *Abrahams v S* (A491/2010) [2011] ZAWCHC 77 para 23 (hereafter referred to as *Abrahams* case). The court held that 'the process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence.' See *S v Sauls and Others* 1981 (3) SA 172 (A) 180.

witness is also usually taken into consideration by the courts.[122] This is even though there is 'no empirical data to support the view that a greater number of false charges are laid in respect of

---

[121] *Y v S* (note 119 above) 132. The majority held the view that the complainant (a minor) was manipulative based on speculation, the court said: 'In her statement to the social worker the complainant appears to have been careful to make the time of the rape in the caravan coincide with the time that the applicant would have been off work, namely the morning.' The minority judgment held an opposite view: 'The majority judgment finds that the complainant was 'careful to make the time of the rape in the caravan coincide with the time that the applicant would have been off work, in the morning'. There is no basis for this conclusion, given the fact that the applicant's own version was that he would sometimes be off duty over weekends, which obviously meant that he would have been home both in the morning and at night.' See *Cele* (note 120 above) 9. Pillay J bemoans the other judge for speculating about the complainants injuries who is a minor, and said: 'Respectfully, Chili J speculates from this that 'the bruising and erythema could have been self-inflicted' by the complainant scratching herself. None of these speculations were put to either of the prosecution witnesses. Significantly, it was never an issue at the trial. If self-infliction caused the bruising and erythema, it does not explain away the vaginal penetration.' The SCA in *L v S,* for instance, doubted whether an 11-year-old would not have bled following penetration beyond the hymen and questioned the fact that the complainant did not testify having bled. The Court held that there is insufficient evidence to support a finding that the appellant (accused) was guilty beyond reasonable doubt.

[122] *S v Hanekom* (A304/10) 2011 (1) SACR 430 (WCC) para 13 (hereafter referred to as *Hanekom* case). The court said: 'Indeed, a court should be particularly alert to an application of the cautionary rules where factors such as evasiveness on the part of the witness, the lapse of a significant period of time between the incident complained of and the trial, the fact that a witness had a grudge against the complainant or a motive falsely to implicate him.' In *Y v S* (note 19 above) 66. The court highlighted that the complainant had reason to implicate the accused. 'she had reason to implicate him,' the court said. However, the dissenting judgment held a different view and said: '… the majority judgment further states that the complainant was deeply aggrieved by the beating and concludes that 'she had reason to implicate him'. I disagree with this point of view,' furthermore, 'it is clear that the applicant's version relating to the State witnesses' motive for falsely implicating him was nothing else but a ruse, … considering the body of evidence adduced by the State witnesses, the trial

sexual offences than in any other category of crime'.[123] To sum this up, the assessment of the credibility of a witness in cases of rape is a process that is suspectable to the influence of rape myths and stereotypes even in the courtroom.[124] For example, the minority in *Y v S* observed that the majority failed to take rape and trauma, especially on a child, into account. The minority wholly disagreed with the majority' reasoning, Molemela JA (Mojapelo AJA concurring) held the following

---

court correctly took a dim view of his failure to present his conspiracy theory to all the alleged conspirators,' at para 130 – 133. Also see, *S v M* 1992 (2) SACR 188 (W) 272. Cameron JA in a dissenting judgement said that it was impermissible 'for motives to be freely imputed to sexual offence complainants at appellate level.'

[123] P J Schwikkard 'Sexual Offences-The Questionable Cautionary Rule' (1993) 110 *S. African LJ* 47. See *R v Henry and Manning* (1969) 53 Cr App (R) 150. See, *S v D* 1992 (1) SA 513 1992 (1) SACR 143 (Nm).

[124] Ibid 95. See, Schwikkard (note 132 above) 227. Thring J held that from experience it was known that such an atmosphere of continual family friction was fertile ground for false accusations of all kinds. The court noted that in these cases the court frequently had to hear long and bitter but largely irrelevant testimony of the intimate details of a couple's private life. This, Thring J noted, was the price to be paid for legislating that a man could be guilty of marital rape.' In *Hanekom* (note 122 above) 14, the court stated its displeasure with the fact that '… there was indeed a lapse of a significant period of time between the incident complained of and the trial, namely a period of some three years … the complainant did not get on well with her father and certainly her mother, who was close to her, had a grudge against the Appellant because of the breakup of their marriage. Most pertinently, it does not seem as if there was ever any report of any more than one incident of indecent assault on the complainant. However, in giving evidence in chief and following a leading question from the prosecutor in the *court a quo*. the complainant suddenly elevated the number of assaults to two She thereafter ran into considerable difficulty in explaining when each of them had been reported and to whom and in what circumstances. Such an incident suggests to me not only the fact that the complainant in the present case had difficulty separating reality from fantasy, but also gives an indication as to her suggestibility.'

> In assessing the complainant's evidence, it is important to bear in mind that the complainant was traumatised by the sexual assault and rape… the majority judgment's observation that the complainant 'appeared petulant refusing to answer questions' pays little regard to the complainant's trauma. The complainant was forthright in mentioning that she was trying to block out the memories of the historical sexual abuse she suffered at the hands of the applicant from her mind. This is not an uncommon reaction from victims of child rape. Furthermore, in relation to the complainant's testimony to the effect that she was soft spoken and thus spoke softly when she told the applicant to leave her alone, the majority judgment reasons that '[a] soft spoken person is not prevented from speaking more loudly or even shouting'.[125]

Having disclosed that judicial officers hold differing views on the assessment of credibility of witnesses and that prosecutors face procedural challenges that influence their decision-making, I will discuss challenges relating to corroboration before revealing two rules in relation to this vexing question of credibility: (i) the cautionary rule and (ii) the character of the witness and how these rules relate to the prosecution of cases.

4. Procedural obstacles in cases of rape

4.1 The challenges of corroboration

The credibility of a witness is not to be confused with corroboration.[126] Schwikkard and van der Merwe explained that the credibility of a witness is not the equivalent of corroboration, for

---

[125] *Y v S* (note 119 above) 98-99.

[126] *R M v S R M v S* (note 114 above) 29. The court held that 'the complainant informed her mother about the incidents and the mother took her to the clinic. This clearly proves that the complainant is consistent, and she is a credible witness. On the other hand, in *S v Gentle,* Cloete JA refused to treat as corroboration the alleged victim's complaint made to her sister-in-law, who had arrived on the scene when the victim was without her panties and in what appeared to be an injured state. It was said that the complaint 'is not corroboration' and only proves consistency: 'It is relevant solely to her credibility. The complaint cannot be used as creating a probability in favour of the State case.'

example, whenever corroboration is present, the standard of proof is deemed satisfied.[127] In *Cele v State*, it was held that 'consistency is another safeguard, bar the rule against self-corroboration'.[128] The court further held that for corroboration to be 'relevant and material, such corroboration must point to the guilt of the accused'.[129]

Also see; *B C v S* (A8/2020) [2020] ZAFSHC 180 para 21. In *B C v S*, it was held that the evidence of a social worker could be accepted not as corroboration but as indicative of the complainant's consistency. The court held: 'The evidence of Heidi Joubert [social worker] is accepted in that it is indicative of the consistency of the complainant.'

[127] *R M v S* (note 114 above) 31, it was held that the undisputed evidence of Dr V is that there was an injury to the hymen. That constitutes clear corroboration of the testimony by the complainant that a penis penetrated her. The penis is the cause of the injury to her hymen. Dr V is qualified to make such a finding and the evidence has not been gainsaid. The judge in *R M v S* cited *S v AM* 2014 (1) SACR 48 (FB) 'physical and emotional condition of the victim some six hours after the incident and as described by the aunt to whom the victim had reported the rape, was also treated as corroboration of the victim's evidence that her stepfather had raped her.' In *Gentle* (note 116 above) 19, it was explained what was not regarded as corroboration. The court said: 'I shall deal with each of the facts that we were asked to take into account as providing corroboration. First, it was pointed out that the complainant had complained to her sister-in-law that she had been raped when the latter arrived on the scene. That is not corroboration. This court held in the as yet unreported decision in *Hammond v S* (SCA case 500/03 in which judgment was delivered on 3 September 2004) that the fact and contents of a complaint in a sexual misconduct case can be used only to show that the evidence of a complainant who testifies that the act complained of took place without her consent, is consistent. It is relevant solely to her credibility. The complaint cannot be used as creating a probability in favour of the State case i.e. it cannot be argued that because the complainant complained shortly after the incident, it is probable that the incident took place without her consent.'

[128] *Cele* (note 120 above) 2. See *B C v S* (A8/2020) [2020] ZAFSHC (180) 21. The court explained corroboration, it held that, for example, that the complainant was 'corroborated by her mother with regard to the mark on the penis and the fact that urinating was part of their sexual relationship.'

[129] Ibid (*Cele v State*) 2.

On the other hand, it appears that even when corroboration is satisfied, it does not always cure inconsistent evidence by a complainant who does not meet the threshold of credibility. In other words, inconsistent evidence may outweigh even the benefit of some corroboration. For example, in *S v Gentle*, the complainant's pair of panties were handed in as an exhibit in court and were torn. The accused denied that the panties were torn. The court concluded that the torn panties served as corroboration for the complainant's evidence on that point.[130] Indeed this points to force — there is no other reasonable explanation. Yet despite this corroboration, the court ultimately found that the evidence on the record as a whole did not establish the guilt of the appellant beyond a reasonable doubt. The court explained this as follows

> The appellant [accused] was an unsatisfactory witness and was proved to have lied as to whether the complainant's panties were torn. On the other hand, the complainant's evidence was patently unsatisfactory, and except for the aspect I have just mentioned [torn panties], uncorroborated; and she was furthermore contradicted on two important aspects of her evidence, namely, whether she had screamed for help and whether the appellant has hit her on the face leaving a visible mark. A cautionary approach is called for in the circumstances of this particular case for the reasons I have given. The natural sympathy which one has for a woman who says that she has been raped, cannot be allowed to play any role in deciding whether the onus of proof in a criminal case has been satisfied. In the present case, it has not.'[131]

This case reveals three (3) things: First, even where an accused is accepted as a poor witness, such does not cure deficiencies in the complainant's testimony.[132] Similarly, Schwikkard's

---

[130] *Gentle* (note 116 above) 22.

[131] Ibid 30.

[132] P J Schwikkard 'Backwards to the cautionary rule: *S v Van der Ross* 2002 (2) SACR 362 (C)' (2003) 19(2) *South African Journal on Human Rights* 256, 260.

analysis of *S v Van der Ross* found that although the judge had agreed with the magistrate's finding that the appellant was a poor witness, he similarly held that it did not cure the weaknesses in the complainant's testimony.'[133] Second, this ruling defies the notion that although corroboration is not required in practice, some kind of corroboration will establish the accused's guilt beyond a reasonable doubt.[134] Third, it defies the notion that the application of the cautionary rule (which is discussed in the following section) will be satisfied by some corroboration.[135] It appears that evidence is insufficient even when it is credible.[136] I will show that this is the result of the application of the cautionary rule, which will be discussed next.

4.2 The challenges of the cautionary rule

It appears that even where the evidence is accepted as consistent it may still be rejected due to the application of the cautionary rule.[137] For instance, Schwikkard analysing *S v Van der Ross* 2002 (2) SACR 362 (C) noted the following

> The magistrate found the complainant's testimony to be clear and satisfactory and devoid of contradictions. The magistrate found no indication that the complainant might have had a motive to falsely implicate the appellant [accused]. Nevertheless, Thring J held that the magistrate had failed to sufficiently warn himself against the dangers in the complainant's testimony. Thring J then noted that the complainant was not only a single witness in relation

---

[133] Ibid.

[134] F Viljoen 'Removing Insult from Injury: Reviewing the Cautionary Rule in Rape Trials' 1992 *JS Afr. L* 743, 744. Viljoen cited S v D 1951 4 SA 450 (A) 455G). See, *Cele* (note 116 above) 1-2; *Rex v Ncanana* 1948 (4) SA 399 (A).

[135] M Bekink 'Defeating the anomaly of the cautionary rule and children's testimony — *S v Haupt* 2018 (1) SACR 12 (GP)' (2018) 51(2) *De Jure Law Journal* 318, 319.

[136] Schwikkard (note 132 above) 257.

[137] Schwikkard (note 132 above) 257.

> to crucial aspects of the prosecution's case, but also that the charge was of a sexual nature and took place in a domestic situation and, consequently, the magistrate had made a mistake in only taking into account the single witness status of the complainant.[138]

A reading of this note by Schwikkard confines the problem relating to the credibility of the witness to the application of the cautionary rule. The origins of this rules lie in the practice of warning the court against 'facile acceptance' of evidence by certain witnesses such as rape complainants and children.[139] By the 1950s the rationale behind the cautionary rule was questioned and challenged.[140] It was found that the rule was a postulated discrimination against women.[141] This came as no surprise because it was a rule 'formulated in another century when women were considered irresponsible to even vote,' said Schwikkard.[142] In *R v Henry and Manning* it was held that, 'experience has shown that female complainants have told false stories for various reasons, and sometimes for no reason at all'.[143] The following examples of further discriminatory views of presiding officers are listed by Schwikkard

---

[138] Ibid.

[139] Schwikkard & van der Merwe (note 101 above) 588. Viljoen (note 134 above) 744. 'Such a cautionary rule also applies to the testimony of accomplices, agents provocateurs, children, prostitutes and the complainants in sexual offences, whether they are single witnesses or not.

[140] *R v J* (1958 (3) SA 699 (SR) para 90. The court held that although there may be circumstances that necessitate special caution, 'the exercise of caution must not be allowed to displace the exercise of common sense'. See *S v D* 1992 (1) SA 513, 1992 (1) SACR 143 (Nm).

[141] South African Law Reform Commission Project 45 *Women and Sexual Offences in South Africa* (1985) para 3.55. 'A cautionary rule is applied to evidence in rape ... because experience has shown that it is dangerous to rely on the uncorroborated evidence of the complainant in such circumstances.'

[142] Schwikkard (note 123 above) 47.

[143] Viljoen (note 134 above) 744 citing *R v Henry and Manning* (1969) 53 Cr App R 150.

> Schreiner JA in *R v Rautenbach* 1949 (1) SA 135 (A) at 143 said: 'It is not only the risk of conscious fabrication that must be guarded against; there is also the danger that a frightened woman, especially if inclined to hysteria, may imagine that things have happened which did not happen at all.'
>
> In *R v W* 1949 (3) SA 772 (A) at 780 Watermeyer CJ noted that, in addition to the reasons mentioned in Rautenbach's case, cases of sexual assaults required special treatment because '[where pregnancy has supervened and in that way it has become necessary for the girl to explain her condition, she may be tempted to shield some young friend who is the actual wrongdoer and to implicate someone of relatively sound financial standing who may be better able than the actual father of the child about to be born to provide it with maintenance.'
>
> This theme is elaborated on by Flemming AJP in *S v M* supra at 194f-g: 'As die beskuldigde aan die klaagster bekend is en 'n goeie huweliksproposisie is, is daar 'n logiese risiko ('n moontlikheid wat aanwesig mag wees) dat die klaagster wat eers verkragting beweer het toe haar swangerskap ontdek is, haar langtermyn belange versorg en die werklike pa verbygaan. Daardie moontlikheid word verswak as dit blyk dat die klaagster die beskuldigde so haat dat sy nie met hom wil trou nie.'[144]

These are clearly misogynistic and discriminatory views. It was against this backdrop that the cautionary rule was abolished in South Africa by the late 90s.[145] Olivier J's reasoning for abolishing this rule was as follows

> In my view, the cautionary rule in sexual assault cases is based on an irrational and outdated perception It unjustly stereotypes complainants in sexual assault cases (overwhelmingly women) as particularly unreliable. In our system of law, the burden is on the State to prove the guilt of an accused beyond reasonable doubt - no more and no less. The evidence in a

---

[144] Schwikkard (note 123 above) 48.

[145] Section 60 of the Sexual Offences Act.

> particular case may call for a cautionary approach, but that is a far cry from the application of a general cautionary rule.[146]

In spite of its abolishment, this rule continues to be applied in practice. One of the reasons it continues to be applied is because the South African Law Commission concluded that the rule was merely refined by Olivier J.[147] I disagree with view and so does Schwikkard — Olivier clarified that the rule is neither obligatory nor is it essential.[148] It is a rule that is applied by the courts disjunctively. Some courts apply the cautionary rule to the single witness only.[149] Other courts, take it further applying it to both the nature of the offence (sexual offence).[150] Viljoen described this as the use of a 'double cautionary approach: once for having been alone, [and]

---

[146] *S v Jackson* 1998(1) SACR 470 (SCA) 476e-f.

[147] Schwikkard & van der Merwe (note 101 above) 596-597. Thring J in *S v Van der Ross* 2002 (2) SACR 362 (C) at bid 365h. Thring J summarised the court's interpretation of *S v Jackson* as follows: 'Myns insiens is al wat die uitspraak in *S v J* beteken dat daar nie noodwending in elke sodanige saak 'n algemene, onwrikbare versigtigheidsreel op die getuienis van 'n klaagster toegepas hoef to word nie' Translation: 'In my view the judgment in S v Jackson merely means that there is not necessarily, in a case of this nature, a general unyielding (fixed) cautionary rule that must be applied to the evidence of the complainant' Ibid 365i. Thring called for a double attrition. Translation: 'In my view this case cries out for a double cautious approach to the complainant's evidence: not only because she is a single witness, but also because of the nature of the complaint'

[148] P Schwikkard 'Getting Somewhere Slowly — The Revision Of A Few Evidence Rules' in Artz & Smythe (eds) S*hould we consent* (2008) 73.

[149] *Y v S* (note 119 above) 48-49. 'The evidence in a particular case may call for a cautionary approach,' but that is a far cry from the application of a general cautionary rule, the court held.

[150] *Gentle* (note 116 above) 30 'A cautionary approach is called for in the circumstances of this particular case for the reasons I have given. The natural sympathy which one has for a woman who says that she has been raped, cannot be allowed to play any role in deciding whether the onus of proof in a criminal case has been satisfied. In the present case, it has not.'

once for having been raped'.[151] Its application in sexual offences cases aims to protect the accused from a wrongful conviction from a possible ill motive of the complainant.[152] Viljoen explains this as follows

> The complainant's motive for deciding to complain and testify is regarded with suspicion. This is based on a dual image of women: one is that of the deliberate, vengeful creature who deliberately fabricates evidence when sexually rejected or frustrated in her attempts at attention. The other image is that of an individual who, inspired by sexual fantasies, imagines having been raped (see *R v J* 1966 1 SA 88 (SRA) 92B; *R v Rautenbach* 1949 1 SA 135 (A) 142).[153]

Therefore, given its nature, the cautionary is often exploited by convicted rapists as a ground for an appeal in an attempt to overturn their convictions and sentencing.[154] Put differently, a convicted rapist will appeal his sentences claiming that the court failed to apply the cautionary rule during the trial — pointing to inconsistencies in the complainant's evidence. The cautionary rule is also not only open to exploitation, but a prosecutor will also caution himself when assessing the credibility of a witness before trying a case. Therefore, it is a process subject to prosecutors' discriminatory views as discussed above, that will often lead to a *nolle prosequi*.

In the following section, I will show that the question on the credibility of a rape complainant is further bolstered by the leading of evidence relating to the character of the witness in terms of s 227 of the CPA, which is similar to the cautionary rule.

---

[151] Viljoen (note 134 above) 744.

[152] Ibid.

[153] Ibid.

[154] *Abrahams* (note 120 above) 14. *Cele* (note 120 above) 7.

4.3 The leading of character of the witness

Generally, the point of departure is that the character or disposition of the complainant is irrelevant to credibility, according to Schwikkard: 'The general rule is that the accused may adduce evidence of his own good character, but the prosecution is prohibited from adducing evidence of his bad character, subject to specified exceptions'.[155] This is because adducing the bad character of the accused might 'have a disproportionately prejudicial effect upon the jury'.[156] Yet there is a common-law rule that the accused is permitted to adduce evidence that points to the complainants 'bad reputation for lack of chastity' in cases of rape or indecent assault, according to Schwikkard.[157] Only in sexual offence cases is the character of the complainant relevant to credibility and allowed in terms of s 277.[158] And although s 277 has been amended twice, it is a provision that remains prejudicial to rape complainants despite those amendments.[159]

---

[155] Schwikkard & van der Merwe (note 101 above) 71. 'The general rule is that the accused may adduce evidence of his own good character, but the prosecution is prohibited from adducing evidence of his bad character, subject to specified exceptions.' DT Zeffert & AP Paizes *The South African law of evidence* (2009) 237. The authors state that relevance is a criterion of admissibility of evidence.

[156] Schwikkard & van der Merwe (note 101 above) 65 citing May Criminal Evidence 3 ed (1995) 118.

[157] Schwikkard & van der Merwe (note 101 above) 71.

[158] Ibid 71 'Evidence to contradict any denials may be led only if such evidence is relevant to consent.' Citing R v Cockcroft 1870 11 Cox CC 410; R v Cargill 1913 2 KB 271.

[159] Ibid 72 'on the basis that the very purpose for which they were enacted was undermined by the very wide discretion conferred to judicial officers. The same judicial officers who in the past failed to exercise their discretion to exclude irrelevant previous sexual history evidence were now being asked to exclude the very same discretion, albeit preceded by an application held in camera.'

This amendment abolishes the leading of prior sexual history but introduces an exception that it may be led if introduced by the prosecution or with leave of the court.[160] It confers the discretion to judicial officers which does not help, bearing in mind that Swemmer found that judicial officers are not immune from rape myths and stereotypes.[161] Swemmer found further that prosecutors too led this kind of evidence, nor do judicial officers exercise their discretion to prohibit the leading of such evidence.[162] We also already know that Swemmer's found that in some instances prosecutors failed to 'object to the defence's line of questioning' as to 'the complainant's previous sexual history' whereas the legislation prohibits questioning along the lines of the victim's previous sexual history. But in some cases, 'prosecutors also failed to insist upon a s 227 CPA application by the defence' for the court to permit such questioning.[163]

According to Swemmer to stop the use of previous sexual history questions, the current law needs to be strictly enforced.[164] She suggests further provisions to enforce formal action against prosecutors who fail to adhere to the legislation.[165] In other words, where there is an unwillingness by prosecutors, defence counsel and presiding officers to abide by these laws, there must be sanctions. This could take the form of 'misconduct procedures undertaken by the Magistrate Commission for presiding officers, the NPA for prosecutors and the Legal Practice Council for defence counsel', and so forth.

---

[160] Ibid 73.

[161] Swemmer (note 18 above) 49.

[162] Ibid 22.

[163] Ibid 53.

[164] Ibid.

[165] Ibid.

4.4 Concluding remarks on procedural obstacles in cases of rape

I argue that both the cautionary rule and s 277 must be completely abolished in law and practice. The sexual history of a witness can never be relevant. In regard to s 277, I agree with the views expressed by Helen Alexander of SWEAT: 'the sexual history of a complainant should not be considered relevant evidence in a sexual offences trial…. the proposed grounds in s 227(3)(a) – (e) would allow the judge significant discretion with regards to admitting such evidence. She suggests that past sexual history should never be admitted'.[166] On the cautionary rule, I argue that it should be abolished specifically in cases of rape, meaning that the cautionary rule should not be applied even to a single witness, because it is a rule that is inherently susceptible to discriminatory views. I am not suggesting anything new.[167] In addition, I am conscious that a complete abolishment may not limit decision-makers' prejudice. This was highlighted by Viljoen in the following manner

> A complete repeal of the cautionary rule will only partly alleviate the problems related to the cautionary rule. Abolition of the requirement does not restrain the discretion decision-makers have to weigh up the evidence and make findings. This process is based on fixed patterns of behaviour and sociological factors.[168]

The crime justice system thus needs to train key role players in the criminal justice system such as prosecutors and judges. It is important to prevent these role players from using discriminatory rules as a justification for discriminatory practices. In addition, the application of these rules

---

[166] South African Law Reform Commission Project 107 *Discussion Paper 85* (1999) 204 (hereafter referred to as SALRC (Project 107)).

[167] S Moreland 'Taking About Rape-and Why it Matters: Adjudicating rape in the Western Cape High Court' (2014) 47 *South African Crime Quarterly* 5, 11.

[168] Viljoen (note 134 above) 747.

defies the avowed shift of South Africa's rape jurisprudence away from its patriarchal roots to a constitution-based approach that was discussed in Chapter 1 (s 3.3). In my opinion, it is an approach that needs to be further embraced because constitutional values and norms can permeate the NPA and enhance how prosecutors approach cases. Section 60 of the Sexual Offences Act must be interpreted to its fullest advantage in order to protect women from discrimination. We must view the development of common law discussed in chapter 1 more as obligatory than discretionary.

In this respect, I recommend all rape victims be allowed to give evidence by testifying in a court law, but this must be done without imposing excessive burdens on complainants by unfair procedures. At the worst, a witness on the stand can be so unsatisfactory that the court will be compelled to grant an accused a discharge in terms of s 174 of the CPA. Keeping in mind the accused's right to a fair trial and their constitutional rights, I believe it is fundamental that an accused must take the stand in cases of rape, since the nature of the crime of rape is not the same as that of other crimes. In those circumstances, it may be necessary to amend s 174 insofar as rape cases are concerned — a discharge should be granted in those cases or if the victim is a minor. This would complement the cautionary rule, which should be completely abolished in sexual offences cases, as indicated above. Similarly, single evidence of corroboration should suffice specifically in cases of rape. I disagree with the judgment in *S v Gentle*, corroboration should always outweigh inconsistent evidence, because whether a witness is inconsistent or whether such inconsistencies are material is subjective (to judicial officers) as indicated above. Corroboration should at all times be treated similarly to hard evidence in cases of rape. Such an

approach will also ensure that the cautionary rule is limited in such cases (where there is evidence of corroboration). This is merely a matter of substantive equality that I am advocating.

Likewise, we must be vigilant for situations in which victims allege coercive circumstances prevented their consent (as is mostly the case in acquaintance rape). As I see it, the accused is only required to create doubt about consent, while the state retains the onus of proving there was no consent beyond all reasonable doubt. This is wrong. The onus ought to be shifted to the accused to prove consent asserted by an accused.[169] The South African Law Reform considered this problem and posited the following viewpoint

> In order to solve the problem faced by prosecuting authorities and victims of rape to prove the absence of consent, it is suggested that the element of unlawfulness be approached by considering the circumstances in which the sexual intercourse took place. Once unlawfulness is established by proof that the rape took place in certain circumstances the *onus* must be on the accused to prove his or her defence which may, or may not, be based on consent as a justification for his or her actions. Such an approach will require the prosecution to prove that the sexual intercourse took place in coercive circumstances, rather than without consent.[170]

---

[169] SALRC (Project 107) 113. The Commission stated: 'the use of physical force, weapons, or threats of physical harm - are in reality no more than indicators of lack of consent. It is said that the sort of evidence which will tend to prove that the accused 'coerced' the victim to engage in intercourse will essentially be the same as the evidence indicating whether or not the victim consented, and that this change therefore simply entails referring to 'absence of consent' as the alternative 'coercive circumstances.'

[170] Ibid 113-114.

In light of the intersection between evidence and rape prosecution, I will demonstrate in the following section how government measures have fallen short in an attempt to show what is expected from the state.

5. South Africa's anti-rape strategy failure and its implications for prosecution

In 1996, Coomaraswamy was mindful that the adopted governmental measures against rape had only been in place for a short period and therefore its effectiveness could not be properly evaluated.[171] More than two decades later, it has now become evident that anti-rape measures have fallen short. South Africa's anti-rape strategies and integrated governmental strategies for prevention and support for rape victims, included awareness campaigns, the implementation of Thuthuzela Care Centres (TCCs), the Sexual Offences Courts, and reform to the law on sexual offences. On the one hand, successful post-rape care has somewhat been achieved. According to Vetten, the roll-out of TTCs was the most significant and enduring of state responses to rape that emerged.[172] On the other hand, the shortcomings are glaring. TCCs are inadequately funded, and services are disjointed.[173] Furthermore, although the TCC model is a product of the NPA, it cannot be regarded as an anti-rape measure because it is mainly concerned with post-rape care. TCCs on their own will not reduce the scourge of rape. TCCs were meant to address the time

---

[171] R Coomaraswamy 'Report on the mission of the Special Rapporteur to South Africa on the issue of rape in the community' *United Nations Economic and Social Council Report.* UN Document <E/CN.4/1997/47/Add.3> 19.

[172] L Vetten 'It sucks/It's a wonderful service: Post-rape care and the micro-politics of institutions' 2015 *Johannesburg: Shukumisa Campaign and ActionAid South Africa* 14.

[173] Ibid 39.

constraints and advance the preparation of cases.[174] The Sexual Offences Courts model is equally a success. Walker and Louw found that a significant number of rape victims and their families felt positive about Sexual Offences Courts' attempt to provide improved justice and to reduce secondary victimization.[175] The courts were a worthwhile addition to the judicial landscape, the researchers said.[176] The authors found that specialized court personnel ensure higher conviction rates and have a more efficient approach to heavy caseloads.[177]

However, despite these measures, the problem of rape persists.[178] The increase in the percentage of prosecutions vis-a-vis the number of reported cases reveals this failure as indicated in chapter 1 (subsection 3.1) – on average the number of reported cases stands at 42 000 - 43 000 but less than 5 000 cases are prosecuted. These anti-rape measures have neither eliminated the scourge of rape nor have they increased the number of prosecuted cases of rape. They do not serve as a preventive measure or deterrent.[179]

---

[174] C Barberton & A Grieve 'An Investigation Into The Cost, Management And Ways Of Improving The Thuthuzela System' 2005 *Cornerstone Economic Research* 1, 7.

[175] SP Walker & DA Louw 'The Bloemfontein Court for Sexual Offences: Perceptions of its functioning from the perspective of victims, their families and the professionals involved' (2004) 17(3) *SACJ* 289, 308.

[176] Ibid.

[177] Walker & Louw (note 176 above) 308. Heath et al (note 27 above) 19.

[178] Heath et al (note 27 above) 20. 'Many studies conducted over the last decade have highlighted that the implementation of these has remained a challenge.'

[179] Smyth (note 19 above) 16. 'Rape in South Africa increased from 27 056 reported cases in 1993 to a peak of 55 114 between April 2004 and March 2005, reflecting a prevalence rate that is among the highest reported anywhere in the world.' Total reported sexual offences in South Africa between 2003-2013 area as follows: 2003/2004: 66 079; 2004/2005: 69 117; 2005/2006: 68 076; 2006/ 2007:

But among all the anti-rape measures, the reform to the law on rape renewed hope that a lasting solution could be achieved. According to Artz and Smythe, the reformed Sexual Offences Act had been anticipated as a legislative 'social statement about sexual violence'.[180] It was aimed at eradicating rape myths and stereotypes and improving the victim's experience in the criminal justice system. Regrettably, these stereotypes continue to plague society and are central to the criminal justice system failures, as discussed above.[181]

The most insidious problem I see regarding the Sexual Offences Act can be attributed to the exclusions from the 2003 Bill due to public submissions.[182] According to Schwikkard, the legislature failed to embrace all recommendations by the SALRC on the rules of evidence.[183] Arts and Smythe described these exclusions as 'battles lost'.[184] Walker and Louw described the Bill as having reverted from a 'victim-orientated approach to what appeared to be a more conviction-driven operation'.[185] I argue that these exclusions provide the answer to why the legislation falls short in ensuring effective prosecution of rape specifically. For example, the

---

65 201; 2007/2008: 63 818; 2008/2009: 70 514; 2009/2010: 68 332; 2010/2011: 66 196; 2011/2012: 64 514; 2012/2013: 66 387. Source: <www.saps.gov.za>.

[180] Artz & Smythe (note 106 above) 8.

[181] Ibid.

[182] Criminal Law (Sexual Offences) Amendment Bill 50 –2003.

[183] P Schwikkard (note 148 above) 85.

[184] Artz & Smythe (note 106 above) 6.

[185] Walker & Louw (note 175 above) 290.

amended Sexual Offences Act fails because it makes little provision to compel the management of investigations and prosecution.[186]

Nevertheless, the greatest failure is that victim impact statements were excluded from evidence at trial, and I discuss that next in the concluding section.

6. The exclusion of expert evidence and its impact on rape case prosecution

Pithy et al argued for an introduction of provisions requiring courts to consider victim impact statements before sentencing.[187] The authors stated that the state held a duty to enact specific measures relating only to rape victims (as opposed to victims of other forms of violent crime) to attain substantive equality.[188] This reasoning correlates with the gendered approach to rape outlined in this study. I would like to take Pithey et al's argument a step further: The use of expert opinion relating to the psychological suffering of the complainant must be permitted in rape cases. I am not suggesting anything new. In 2002, the SALRC recommended that expert evidence be adduced at the pre-trial phase'.[189] SALRC proposed that this be done as follows

> The Commission recommends that provision be made in the proposed Sexual Offences Bill for adducement of evidence regarding the surrounding circumstances and impact of any sexual offence upon a complainant. Evidence relating to the surrounding circumstances of a

---

[186] L Vetten 'New crimes and old procedures can the new sexual offences bill deliver on its promises?' (2007) 22 *SA Crime Quarterly* 21, 25. 'The Bill paid considerably less attention to reforming legal procedures applicable to the investigation and prosecution of sexual offences.'

[187] B Pithey, L Artz, H Combrinck & N Naylor 'Legal Aspects of Rape in South Africa' (1999) *Discussion Document* 1, 138.

[188] Ibid 13.

[189] SALRC (Project 107) 191.

> sexual offence will address issues such as the cause of a late disclosure and the context in which a child sexual abuse victim finds him or herself as opposed to evidence merely portraying the result of the sexual offence.[190]

This submission was however ignored by the legislature.[191] I argue that the legislature made a mistake. There are there several factors to consider: First, in as much as medical evidence such as DNA, tears and proven penetration bears weight in rape cases (serving as corroboration), so should psychological and emotional symptoms such as PTSD and depression for example. Rape trauma syndrome is the label attached to the post-traumatic stress disorder experienced by rape victims.[192] The definition of expert evidence includes medical evidence and psychological evidence.[193] It is also trite to say that rape impacts women's mental and psychological health and rape is recognized as a public health problem.[194]

Second, the skill of an expert is usually greater than that of the court regarding psychological impact, especially in cases where there is no corroborating medical evidence. Expert evidence does not only have the potential to enhance the credibility of a complainant, but it is also useful insofar as explaining to the court the reasons behind certain behaviour (such as failure to immediately report). This can assist the court to draw an inference from the facts in favour of the state's case based on informed opinion regarding complexities laden in rape cases. In other

---

[190] Ibid 199.

[191] Schwikkard (note 148 above) 85.

[192] H Lauderdale 'The Admissibility of Expert Testimony on Rape Trauma Syndrome' (1984) 75(4) *The Journal of Criminal Law and Criminology* 1366, 1366. 'The label rape trauma syndrome was coined by Ann Burgess and Linda Holmstrom in their article Rape Trauma Syndrome.'

[193] NPA policy directives 72.

[194] EG Krug, JA Mercy, LL Dahlberg & AB Zwi 'The world report on violence and health' (2000) 36 (9339) *The lancet* 1083, 1083.

words, expert evidence may be crucial in dispelling the myriad rape myths prevalent in rape cases.[195]

Third, it must also be kept in mind that there is usually very little physical and medical evidence available in cases of rape which compromises the prosecution of rape cases. The only available evidence as stated above is the complainant's testimony. Prosecutors cannot take forward hopeless cases because they will have to account for such decision-making.

When considered this way, the picture becomes clearer. The problem relating to rape case prosecution failure is not limited to rape myths and stereotypes. The problem is circular and associated with procedural obstacles that cannot be rebutted by the prosecution when physical evidence is unavailable, which is often the case.

Simply put, it is problematic that the state (prosecutors) cannot counter the high burden of proof based on discriminatory procedures. I argue that this may impacts prosecutors' attitude towards cases. Furthermore, I contend that these procedural obstacles foster a culture of impunity within the criminal justice system, which ultimately filters to society.

---

[195] Article 5 & 8 of the Schedule to the SALRC Bill (Annexure A of the Report on Sexual Offences (2002)) s 19. 19(1) Evidence of the surrounding circumstances and impact of any sexual offence upon a complainant may be adduced at criminal proceedings where such offence is tried in order to prove —

…..

under coercive circumstances as referred to in s 3(3).

The introduction of expert evidence has the potential to ease some of the difficulties associated with rules of evidence. For example, expert evidence can serve as a rebut following an undue attack on the character of the witness and application of the cautionary rule.[196] I have already stated that such evidence can dispel rape myths reliably and independently for the court. There is no reason to believe that psychological symptoms are not demonstrable physically and can therefore assist the court in reaching a fair decision.

I argue that the benefit of expert evidence in cases of rape has the potential to similarly enhance confidence in prosecutors to take a case forward. As things currently stand, the burden of proof on the state is excessively high carrying with it dire implications for women's human rights and access to justice. The use of expert evidence will not usurp the function of the court but will instead improve prosecution of very complex cases.

I am not suggesting something impossible. According to van der Berg and van der Merwe, expert opinion is admissible and relevant if it is able to assist the court in deciding the issue.[197]

---

[196] SALRC (Project 107) 196. The SALRC cited a submission made by Ms Irene Filander, Social Worker, Child Welfare, Vereeniging; Carol Bower, Executive Director, Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN): 'They opine that expert evidence of this nature should not be used as a diagnostic tool to prove that a woman or a child was sexually assaulted or abused but should be used as an explanatory tool to rebut defence claims in relation to an inconsistency or a victim's deceit.'

[197] Schwikkard & van der Merwe (note 101 above) 89.

The opinion must be relevant and have a probative force to be considered admissible.[198] The authors said: 'If the issue is of such a nature that the witness is in a better position than the court to form an opinion, the opinion will be admissible based on its relevance. Such an opinion has probative force'.[199]

I argue that an expert witness must be impartial and independent. They must be properly qualified for purposes of psychological impact/symptoms of a complainant – such as a psychologist. On the other hand, for purposes relating to an explanatory tool to assist the court to comprehend the experiences of sexual offence complainants and the context in which an individual sexual offence complainant acted — such an expert must have knowledge and experience of sexual abuse.[200] Finally, I must point out that a prosecutor may in any event adduce expert opinion evidence in terms of the NPA policy directives which states the following

> Prosecutors should determine whether any expert evidence will be required. This may include medical evidence, psychological evidence, or evidence regarding the dynamics of violence or of grooming and the effect of the sexual offence on the victim and or relevant

---

[198] Ibid 89 citing *Helen Suzman Foundation v President of the Republic of South Africa and Others* 2015 (2) SA 1 (CC) para 30.

[199] Schwikkard & van der Merwe (note 101 above) 93 citing Zeffert 1976 SAJL 275.

[200] SALRC (Project 107) 196. The Commission cites Dr Müller who suggests that was useful: the recommendation be expanded to provide that panels of multi-disciplinary experts convene to assess dossiers before a trial commences so as to advise the prosecutor on the need for expert witnesses, e.g., a psychologist, forensic expert etc

> others. Care should, however, be taken to ensure that the complainant is not subjected to unnecessarily repetitive consultations or interventions.[201]

Unfortunately, this directive proffers further discretion to prosecutors, which is undesirable. I argue that provision in the NPA policy directive must be amended to compel expert evidence relating to the psychological impact/symptoms of the complainant in all cases of rape unless a prosecutor is of the opinion that the state's case has enough evidence to secure a conviction. Again, alleviating the burden of proof on prosecutors will not prejudice the accused right to a fair trial.

In any event, it is an approach that is justified because it is important to attain substantive equality which South African law permits. It is a gendered approach that policy considerations likewise will permit. It does not help that common law principles permit the admission of expert evidence, as stated by Schwikkard: 'in practice some presiding officers are overly cautious when it comes to applying this common-law rule.[202] Schwikkard argues that presiding officers would

---

[201] NPA policy directives 72. Schwikkard & van der Merwe (note 101 above) 96. 'The prosecution is required to however inform the accused that such evidence will be led' citing *Shabalala and Others v Attorney-General of Transvaal and Another* 1995 (2) SACR 761 (CC) 72.

[202] SALRC (Project 107) 192. The Commission identified two possible solutions relating to the introduction of expert evidence in this regard. Firstly, the presiding officer could subpoena an expert as a witness in terms of s 186 of the Criminal Procedure Act to present evidence on the symptoms surrounding a sexual offence. Secondly the presiding officer could appoint an expert assessor, in terms of s 145 of the Criminal Procedure Act, who specialises in this field and has practical experience with victims of sexual offences.

'benefit from social context training on the benefits that such testimony can provide'.[203] Under any circumstances, the court may reject expert evidence that is irrelevant to the matter before it.

In my conclusion, I wish to point out that this chapter aimed to highlight the value of adopting a gendered approach to cases of rape. The procedural rules present difficulties that have a circular effect insofar as rape myths and stereotypes, and prosecution of rape cases are concerned. These procedural obstacles are only present in cases of rape. South Africa's priority should be to eliminate procedural obstacles and protect complainants from discrimination. This could have been possible through the SALRC recommendations had it been adopted by the legislature. I must also point out that it is unfortunate that the lower courts, where rape cases are usually heard, do not report (publish) their judgements.[204] Consequently, I recommend that judicial officers presiding over cases of sexual offences put their rulings in writing, and that the NPA publish rape prosecution guidelines.

In the following chapter I will discuss problems associated with unguided and unfretted prosecutorial discretion that requires limitation urgently.

---

[203] Schwikkard (note 148 above) 85.

[204] The Southern African Legal Information Institute (SAFLII) is an online repository of legal information from South Africa that aims to promote the rule of law and judicial accountability by publishing legal material for open access in line with the objectives of the global Free Access to Law Movement.

CHAPTER 3
PROSECUTORIAL DISCRETION

1. Introduction

In this chapter, I discuss prosecutorial discretion, and, following on from that, I turn to prosecutorial attrition in Chapter 5. Here I describe the general problem of prosecutorial discretion in South Africa, the justification for the limitation on discretion and prosecutorial accountability.

2. The general problem of discretion

A primary focus of this thesis is the manner in which the NPA treats cases of rape. A key issue here is the general problem of prosecutorial discretionary powers in South Africa.[205] The problem largely relates to the NPA's independence, or lack thereof, an issue that has been subject to much criticism for many years.[206] The NPA has been embroiled in several domestic

---

[205] L Muntingh, J Redpath & K Petersen 'An Assessment of the National Prosecuting Authority: A Controversial Past and Recommendations for the Future' 2007 *Africa Criminal Justice Reform* 1, 7. In South Africa, the National Director of Public Prosecutions (NDPP) has high political status and wields considerable power but is subject to limited oversight. This creates a number of risks, which are the focus of this report.'

[206] The Constitution of South Africa provides for a single, independent national prosecution authority in terms of s 179 Constitution of the Republic of South Africa Act 108 of 1996. See Redpath 'Failing to prosecute? Assessing the state of the National Prosecuting Authority in South Africa' 2012 *Institute for Security Studies*. See, for example, the official opposition party, the Democratic Alliance (the DA) have challenged some of the decisions taken by the NPA to decline to prosecute certain politicians. In *Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others* 2012 (6) BCLR 613 (SCA) and subsequent decisions following from this matter; *Southern African Litigation Centre and Another v National Director of Public Prosecutions and Others* [2012] 3 All SA 198 (GNP). See 'NPA independence must be fortified against

political issues and accused of failing to prosecute high-profile politicians in the face of clear wrongdoing.[207] This has resulted in a decrease in the public's confidence in the state organ over the years.[208] This problem is, however, not unique to South Africa.[209] Wolf explains that similar

---

politically connected crooks' (dailymaverick.co.za), 21 October 2020 https://www.dailymaverick.co.za/opinionista/2020-10-21-npa-independence-must-be-fortified-against-politically-connected-crooks/>

[207] Muntingh et al (note 205 above) 12. The researchers said that '… a potted history of the concerns regarding the independence of the NPA begins with the decision by NDPP Bulelani Ngcuka not to prosecute then Deputy President Jacob Zuma.' Also see, *National Director of Public Prosecutions v Zuma* [2009] 2 All SA 243 (SCA) para 3, the court explained the political conundrum relating to the charges on a certain politician. The court held that 'Mr Zuma was appointed as Deputy President of the RSA on 19 June 1999. He was, however, dismissed by Mr Mbeki during June 2005. During December 2007, he became the president of the governing political party, the African National Congress (the ANC), at the expense of Mr Mbeki, the incumbent and only other candidate for that position. It is common knowledge that subsequent to the judgment of the court below Mr Mbeki resigned as President of the country and that Mr Zuma is said to be the ANC's candidate for that post after the 2009 general election. Mr Zuma regards the indictment as an impediment to his political future and the present case is an attempt by him to seek on procedural grounds, closure of the criminal proceedings.' Also see, L Wolf 'The Unsuccessful Constitutional Transition of the NPA' (2013) 71 *The Journal of the Helen Suzman Foundation* 20, 25. The then President Mbeki 'subjected two NDPPs on spurious grounds to commissions of inquiry to consider their fitness to hold office.'Also see news article, 'NPA probe should assess whether Zuma is to blame for the mess,' Mail & Guardian, 25 July 2014, <http://mg.co.za/article/2014-07-24-npa-probe-should-assess-whether-zuma-is-to-blame-for-the-mess.>

[208] Ibid 12. Muntingh elaborated the problem succinctly and said: '… whereas initially there may have been concerns that the NDPP might target political opponents of the ruling party, in recent times the concern is perhaps more so that prosecutions are not being undertaken against allies of the ruling party, and that, furthermore, the review of such decisions is being resisted in a methodical and litigious manner.' Ibid (Wolf) 25 'Zuma's quest to avoid criminal prosecution has carried on for more than a decade and has seriously damaged criminal justice. Selective prosecutions in prima

to South Africa, the instigation of criminal proceedings in the UK created conflict between prosecutors and political office bearers, despite the adoption of the doctrine of independent aloofness during the 1920s to counter any political interference in the domain of state prosecution.[210] For example, prosecutors in the UK 'tend to be regarded as an extended arm of the executive in Great Britain and many Commonwealth countries'.[211]

In South Africa, political meddling in the NPA is also linked to the fact that the head of state appoints the NPA head (the National Director of Public Prosecutions – the NDPP).[212] This matter was, however, long put to bed, in 1996, when the Constitutional Court was required to adjudicate on whether this constituted a breach of the doctrine of separation of powers.[213] In its

---

facie cases that would have merited a prosecution are obviously not in the spirit of the Constitution and undermine the rule of law. Unwarranted *nolle prosequis* also infringe upon judicial power because it has the effect of non-judicial acquittals.' Also see calls for the NPA to be independent 'NPA independence: Our prosecutors are neither fish nor fowl (News24), 22 October 2020; <https://www.news24.com/news24/columnists/guestcolumn/paul-hoffman-npa-independence-our-prosecutors-are-neither-fish-nor-fowl-20201022>

[209] Wolf (note 207 above) 25.

[210] Ibid.

[211] Ibid 21.

[212] Wolf (note 207 above) 24. As suggested by Wolf that the appointment of the NDPP should rather done by 'a panel consisting of senior judges, senior prosecutors and members of the justice committee of parliament that represent all major political parties in equal numbers but excluding any members of the executive.' 'NPA needs its independence made explicit' (Business Day) 20 October 2020 <https://www.businesslive.co.za/bd/opinion/editorials/2020-10-20-editorial-npa-needs-its-independence-made-explicit/>.

[213] The Constitution and the NPA Act provide that the NDPP is appointed by the President in terms of s 10 of the NPA Act.

finding, the court stamped the executive authority over the appointment of the NDPP and held that '… the mere fact that the appointment of the head of the national prosecuting authority is made by the President does not in itself contravene the doctrine of separation of powers'.[214] But Wolf disagreed with the court's finding and reasoning.[215] The scholar argued that such appointments ought to be made by an independent personnel department in the prosecuting authority.[216] Wolf criticised this model (executive authority over the appointment of NDDP) as blurring the lines between the executive state administration and the administration of justice.[217] She said that 'criminal law is thus invoked as a form of administrative action' and this has made it 'easy for politicians to exercise undue influence on prosecutors to shield politicians or executive office-bearers from criminal prosecution'.[218] I note furthermore that the appointment

---

[214] *Ex Parte Chairperson of the Constitutional Assembly: in re certification of the Constitution of the Republic of South Africa 1996*1996 (10) BCLR 1253 (CC) para 141.

[215] Wolf (note 207 above) 24. Wolf criticised the Constitutional judgement saying that the court, 'without considering the logical option that the prosecuting authority is a state organ in its own right in the third branch of state power, the Court rather bluntly argued that the prosecutors were not part of the judiciary, and consequently, they must be part of the executive branch.' She even suggests that the court may have reached its conclusion due to being 'influenced at a subconscious level by the imposing stature of former President Mandela. Unfortunately, his successors have not shown the same kind of executive restraint and respect for the independence of the state prosecutors.'

[216] Ibid 25.

[217] Ibid 25-26. A criminal justice power to investigate and prosecute criminal offences has therefore unconstitutionally been turned into an executive power. Criminal law is thus invoked as a form of administrative action. This blurs the boundaries between criminal law and administrative law completely.

[218] Ibid. Wolf said that this model 'explains why presidents in the past construed the prosecuting authority as a part of the executive and subject to orders of the cabinet. The outcome has been most

of leaders within the NPA remains the subject of much debate and contention because the NDPP, including his/her deputies, continue to be appointed by the head of state.[219] Many continue to allege and complain that the NPA directors remain pawns of the executive targeting certain individuals for reasons of political power and contestation thereover. Notwithstanding this, I argue that it is somewhat superficial to link the power of the executive as the main reason for this malaise within the NPA.

First, I agree with the Constitutional Court's ruling that the appointment of the NDPP by the head of state does not contravene the doctrine of separation of powers. A clear distinction can be drawn.

---

unsatisfactory. It has politicised the prosecuting authority and has undermined the rule of law and the neutrality of criminal justice.'

[219] Muntingh et al (note 205 above) 12. '… the lack of oversight over the decision not to prosecute has raised a great deal of controversy about the NPA's motives and integrity, with these concerns arising from the fact that key appointments are made by the President.' The head of state may, after consultation with the NDPP and Minster of Justice, appoint up to four Deputy National Directors of Public Prosecution (DNDPP) in terms of s 11(1) of the NPA Act. The head of state also appoints the Provincial Directors of Public Prosecutions (PDPP) in terms of s 13(1) of the NPA Act. The Minister, after consultation with the NDDP, appoints the deputy PDPP in terms of s 15(1)(a) of the NPA Act. In addition, the Minster may in terms of s 15 (1)(c) of the NPA Act and 'in respect of the Office of the National Director appoint one or more Deputy Directors of Public Prosecutions to exercise certain powers, carry out certain duties and perform certain functions conferred or imposed on or assigned to him or her by the National Director.'

The reason for the malaise within the NPA is linked to vast prosecutorial discretion.[220] In other words, it would not matter who is appointed as NDPP or by whom, because the problem of prosecutorial discretion is not only apparent in cases where politicians are involved or have an interest.[221] Generally, prosecutors are required to exercise of a great deal of discretion. Even junior prosecutors also exercise vast discretion. As indicated throughout this thesis, it is junior prosecutors at the district level (Magistrates Courts) who exercise vast discretion in cases of rape, which discretion is shown to be exercised in a deficient manner that impedes the rights of victims to justice. The general problem of prosecutorial discretion is, therefore, not restricted only to the discretion exercised by those directly appointed by the head of state or where a matter implicates a politician. South Africa needs to find constructive ways to enhance the criminal justice systems response to rape and the constitutional rights of complainants.

That said, it is apparent that excessive discretion is at odds with true constitutional goals. Hoexter reminds us that 'uncontrolled or unguided discretion is hopelessly at odds with modern constitutionalism' and importantly, the 'holder of discretionary power never has a completely

---

[220] Redpath (note 206 above) 108. The authors described discretion as the central malaise affecting the NPA.

[221] *National Director of Public Prosecutions v Zuma* 2009 2 SA 277 (SCA) para 28. The court reminds us that the NPA 'is also not responsible to government to justify the exercise of his discretion because this political office has judicial attributes.' Political interference can be easily dealt with, provided there is enough political will. As suggested by Wolf that the appointment of the NDPP should rather done by 'a panel consisting of senior judges, senior prosecutors and members of the justice committee of parliament that represent all major political parties in equal numbers but excluding any members of the executive.'

free hand' and is required to act wisely following due reflection.[222] The question of discretionary powers was also dealt with extensively in *Dawood v Minister of Home Affairs*, 'wherein the court held that discretionary powers conferred to officials must be in line with constitutionalism and guidance must be given concerning the exercise of broad discretions to promote the spirit, purport and objectives of the Bill of Rights'.[223] However, discretion must be exercised according to the law and within the spirit of the Constitution. As Wolf succinctly put it

> The decay of justice is at a much deeper level. When state prosecution does not function properly, justice suffers because the prosecutors usurp judicial power with selective prosecutions that filter out cases that ought to have been prosecuted. This might lead to grand-scale inequality in pre-trial criminal justice, which directly impacts on the capacity of the judiciary to deliver on their constitutional obligations.[224]

In this following section, I discuss the problem of unfretted discretion in respect of rape specifically.

2. Discretionary power and cases of rape

The abuse or misuse of discretionary powers is unfortunately rampant in cases of rape as shown by the literature discussed in chapter 1.[225] In chapter 2, I already revealed that in rape cases,

---

[222] C Hoexter *Administrative Law in South Africa* (2012) 47.

[223] *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) para 54.

[224] Wolf (note 207 above) 26. See *S v Basson* [2004] (6) BCLR 620 (CC) para 32. The court reminded us that the '[t]he constitutional obligation upon the State to prosecute those offences which threaten or infringe the rights of citizens is of central importance in our constitutional framework.'

[225] Smythe (note 19 above) 4. 'They[scholars] argue that these beliefs [stereotypes] have become scripted into criminal justice practice, with the result that the cases filtered out of the system are not those that are intrinsically weak, but rather those that offend the normative assumptions of decision-

prosecutors are often influenced by rape myths and stereotypes when required to exercise discretion. The discriminatory procedural barriers further influence prosecutor decision-making. This is in contrast to the political influences described above. Arts and Smythe, for example, state that prosecutors (through their discretion) are capable of 'completely block[ing] a rape victim's access to justice.'[226] This was echoed by Swemmer.[227] As shown in the previous chapter, unsatisfactory statements by the complainant can be used to discredit the complainant's account and prosecutors will also impute ulterior motives to the victim to justify case rejection.[228] I will not repeat all the issues, but Spohn et al, succinctly put it as follows

> Prosecutors use their knowledge about the victim's current circumstances, relationship with the suspect, and behavior at the time of the incident to question her assertion that the sexual activity was non-consensual and/or - to suggest that she had a reason to file a false complaint attempts to 'avoid uncertainty' (Albonetti 1987) by filing charges in cases where the odds of conviction are good and rejecting charges in cases where conviction is unlikely. These studies suggest that prosecutors' assessments of convictability are based primarily-although not exclusively-upon lesa1 factors such as the seriousness of the offence (Albonetti 1987;

---

makers.' Also see, S Estrich R*eal Rape: How the legal System Victimizes Women who say No* (1987); Z Adler *Rape on Trial* (1987); Artz & Dee (note 5 above) 160.

[226] Artz & Smythe (note 46 above) 16.

[227] Swemmer (note 18 above) 49. '… approaches to rape cases by the police are often dominated by prevalent rape myths and stereotypes, and in particular, the notions that women easily lie about rape and that where there are no signs of violence it is unlikely that a rape has occurred. D Smythe & S Waterhouse 'Policing Sexual Offences: Policies, Practices and Potential Pitfalls' in L Artz & D Smythe (eds) *Should we consent* (2008) 199 – 200. '…. for example, found that 'once reported, the majority of cases are withdrawn by the police or the prosecution. The Crime Information Analysis Centre reported, for example, that during 2000 between 40 percent – 60 percent of rape cases reported in South Africa were withdrawn by the police or prosecution.'

[228] Frohmann (note 32 above) 206.

> Jacoby et al. 1982; Mather 1979; Miller 1969; Myers 1982: Neubauer 1974; Rauma 1984; Schmidt and Steury 1989), the strength of evidence in the case (Albonetti 1987; Feeney et al. 1983; Jacoby et al. 1982; Miller 1969; Nagel and Hagan 1983), and the culpability of the defendant (Albonetti 1987; Mather 1979; Miller 1969: Neubauer 1974; Schmidt and Steury 1989; Swiggert and Farrell 1976).[229]

As the passages above in s 2 make clear, the general problem with discretionary powers in the NPA does not lie with the ability to prosecute, but rather with the power *not* to prosecute. And although the questionable decision-making process of prosecutors is not unique to cases involving rape, my main argument is that prosecutor's discretion exercised in a deficient manner in rape cases is a violation of human rights law which is discussed in chapter 4.

I am very aware that each criminal case must have a reasonable chance of success before it can proceed with any criminal case. I am mindful that 'the Supreme Court of Appeal (SCA), for instance, held that the failure of the prosecution to exercise sensible discretion and decline to prosecute had led to a matter without any merit to be pursued to that court'.[230] Many other courts have similarly held the same. For example, the court in *National Director of Public Prosecutions*

---

[229] Spohn et al (note 111 above) 51.

[230] PG Du Toit & GM Ferreira 'Reasons for prosecutorial decisions.' (2015) 18(5) *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 1506, 1509. See *Macrae v State* (93/2013) [2014] ZASCA 37 paras 1, 30. The court held that the prosecutor, or their superior, '… should have exercised a sensible discretion and declined to prosecute. Had they done so, this case, which does no credit to the conservation officers and police involved or to the prosecution service that has pursued it to this court, would have been still born.' 'In a constitutional state such as South Africa, prosecutorial decisions have a direct bearing on the fundamental rights of individuals, insofar as crime very often simultaneously involves a violation of one or more of a victim's fundamental rights.'

v Zuma held that 'the prosecution will be wrongful if reasonable and probable grounds for the prosecution are absent'.[231] We are further reminded by Du Toit et al that 'a decision to prosecute or to discontinue a prosecution is a serious step that affects law enforcement agencies, suspects, victims, witnesses and the public at large, and must be undertaken with the utmost care'.[232] Regard must also be had to the rules of evidence since the general principle is that: 'the more serious the allegation or its consequences, the stronger must be the evidence before a court will find the allegation established'.[233] Notwithstanding these important factors, I argue that these must be balanced against the problems associated with discretionary power that is exercised in a defective manner and which impedes the constitutional rights of rape victims. It must be furthermore kept in mind that a way in which to combat the problem of rape is by encouraging women to report cases of rape because of confidence in the system. However, when any branch of the criminal justice system is ostensibly compromised or dysfunctional, women will avoid reporting incidents of rape and other sexual offences which will lead to the impunity of this serious crime.

It is thus important to strengthen the NPA's accounting mechanisms by limiting the prosecutor's discretionary powers specifically in cases of rape. I am confident about this approach having dealt with the difficulties that prosecutors face when they have little or no corroborative evidence in a rape case in the previous chapter. Therefore, I am not only vigilant to the burden of proof

---

[231] *National Director of Public Prosecutions v Zuma* 2009 2 SA 277 (SCA) para 37.

[232] Du Toit & Ferreira (note 230 above) 1515.

[233] Ibid. Du Toit & Ferreira cite *Gates v Gates* 1939 AD (150) 155 and *R(N) v Mental Health Review Tribunal (Northern Region)* [2006] QB 468 para 62.

that rests on the state, but I also note that prosecutors are fairly faced with additional problems. For example, it was found that prosecutors were very reluctant to work on cases of rape because working on cases of rape comes with immense pressure.[234] This is because prosecutors are required to sign performance contracts in which they commit to achieving a 69 percent conviction rate in sexual offences cases.[235] This pressure has instead encouraged prosecutors to cherry-pick cases they perceive or regard as 'winnable'.[236] A prosecutor will also be held accountable for taking forward a hopeless case. I agree that no prosecutor should pour energy into a hopeless case, I have argued in the previous chapter that certain discriminatory evidentiary obstacles influence prosecutors in their decision-making. These evidentiary requirements do not enhance prosecutors attitude towards cases because they present difficulties that cannot be rebutted by the state in court. For this reason, I suggested amendments to some of the rules of evidence to ease the burden of proof as detailed in chapter 2. In doing so, it is important to find the right balance between independence and accountability.

I argue that finding the right balance will ensure the just and effective functioning of the NPA, which I discuss next.

3. The importance of a limitation on the NPA's discretion for accountability

The NPA plays a crucial role in the criminal justice system because it is the only state organ that enjoys the right to prosecute any crime in terms of s 179 (2) of the Constitution and s 20 (1)(*a*) of

---

[234] Machisa et al (note 13 above) 109.

[235] Ibid.

[236] Ibid.

the NPA Act. The NPA's right to 'discontinue criminal proceedings' is, however, derived in terms of s 20 (1)(*c*) of the NPA Act, and not the Constitution. A limitation on the NPA's discretionary power may be crucial if that can improve the manner in which the NPA treats cases of rape. An improved NPA is crucial because the NPA is not just any state organ, it is a doorway to access to justice for all citizens who are victims of crime. The NPA is thus required to act diligently and competently to enhance the constitutional rights of citizens in the country.[237]

First, I will show in the following section that prosecutors are conferred additional discretionary power at the expense of rape complainants and their rights, and the challenges associated with that.

3.1 Prosecutors bear no duty to explain their decisions

The NPA adopted a policy as envisaged by the NPA Act.[238] This policy 'must be observed in the prosecution process and shall exercise such powers and perform such functions in respect of the prosecution policy,' as determined by the NPA Act or any other law. It aims to 'guide prosecutors in the way they should exercise their powers, carry out their duties and perform their functions,' and to ensure a transparent and fair prosecution process.[239] The NPA also adopted

---

[237] *Democratic Alliance v Acting National Director of Public Prosecutions* 2012 3 SA 486 (SCA) para 45. The court described the NPA as an 'institution integral to the rule of law and it is important that it acts in a manner consistent with the constitutional prescripts and within its powers.'

[238] Section 21 of the NPA Act.

[239] NPA 2014 http://www.npa.gov.za/ReadContent504.aspx 5 (hereafter referred to as NPA policy).

directives to set uniform norms and standards in prosecutorial practices.[240] According to the directives, any prosecutor 'who fails to comply with the directives will be dealt with according to the disciplinary procedures of the NPA.'[241]

But the NDPP's issuance of prosecution policies and guidance is not enough. The NPA policy omits the duty to provide reasons for prosecutorial decisions, which concerns me the most. I argue that such omission from the policy is unconstitutional. Insofar as rape cases are concerned, it is trite to say that rape bears very serious physical, emotional and psychological costs to women. It is therefore imperative for women to be furnished with reasons (when prosecutors decline matters) in order to protect their psychological integrity, among other rights.[242]

It must be kept in mind that a decision not to prosecute bears vastly different considerations as opposed to the decision to institute a prosecution, and unique circumstances exist as to why the NPA must furnish reasons to rape complaints. I note the dichotomy and debate regarding the reviewability of prosecutorial decisions, but I deal with this further below in s 3.2. For now, I discuss why furnishing reasons for prosecutorial decisions (mainly to decline) to complainants must thus be encouraged next.

---

[240] NPA Policy Directives (hereafter referred to as NPA policy directives). These directives are issued in terms of the requirements of s 66(2) of the CPA. In terms of s 66(4) of the Sexual Offences Act, 'these directives, and any new or amended directives, are required to be submitted to Parliament before publication in the Gazette.'

[241] Policy directives 6.

[242] Section 12 (2) of the Constitution.

3.1.1 The significance of furnishing reasons to rape complainants

A prosecutor furnishing reasons for their decision is important to the complainant for two grounds. First, reasons must offer an aggrieved complainant sound explanation or justification for action taken by the prosecutor.[243] Generally, a 'lack of evidence' or 'no prospects of a successful prosecution' are not considered reasons because reasons must be informative.[244] In terms of the NPA policy directives, A decision not to prosecute may be based on the following reasons:

> (a) The State would not be able to prove that the accused person had the necessary intention to commit the offence in question.
> (b) The State would not be able to disprove the defence of the accused person (e.g., self-defence, alibi, or criminal incapacity).
> (c) The complainant is a single witness. However, there are several defence witnesses who corroborate the version of the accused person.[245]

Second, the responsibility of providing reasons means that prosecutors will make better decisions that will enhance the administration of justice. According to Hoexter, providing reasons bears substantive benefits, for instance, officials may take a greater amount of care when he or she is

---

[243] Hoexter (note 222 above) 462.

[244] Ibid 461. 'Reasons are not reasons unless they are informative.' See *Kayobe v Minister for Home Affairs* 2010 (4) SA 327 (CC) para 63. The court held that reasons must be sufficient if the complainant is able to make out a reasonable substantial case for a review or an appeal. Du Toit and Ferreira (note 231 above) 1513-1514. Typical reasons for a decision not to prosecute may include that the state would not be able to prove that the accused had the necessary intention to commit the offence in question; that the state would not be able to disprove the defence of the accused; and that the complainant is a single witness, whereas there are several defence witnesses to corroborate the version of the accused person.

[245] NPA policy directive 19.

compelled to furnish reasons to avoid taking an arbitrary or unreasonable decision.[246] The scholar found further that, 'the presence of such a duty helps to concentrate the administrator's mind on what is relevant, and thus leads to more rational decision-making'.[247] Du Toit et al shared the same viewpoint, and the authors found that providing reasons 'may be of vital importance to maintaining confidence in the administration of criminal justice'.[248] The authors also warned that 'an adverse inference may be drawn' from a refusal to furnish reasons as held in *Judes v District Registrar of Mining Rights, Krugersdorp*.[249] It is discernible, therefore, that a prosecutor's failure to furnish reasons for their decision, particularly when declining a prosecution in a rape case, does not enhance confidence nor does it benefit the administration of justice. If a duty to provide reasons improves the quality of prosecutors' decision-making, it must be welcomed. I argue that this approach (providing reasons) is even more crucial in sexual offence cases. This is so since this research shows that prosecutors indeed take arbitrary and unreasonable decisions when concerned with cases of rape.[250]

By failing to provide reasons, the administration of justice is clearly eroded, and rape complainants rights are greatly compromised. But failing to provide reasons also manifestly limits the rights of rape complainants significantly, which is discussed next.

---

[246] Hoexter (note 222 above) 464.

[247] Ibid.

[248] Du Toit and Ferreira (note 230 above) 1514.

[249] *Judes v District Registrar of Mining Rights, Krugersdorp* 1970 TS (1046) para 1052.

[250] Spohn et al (note 111 above) 51.

3.1.2 The limitation to recourse for complainants

As it currently stands, rape complainants have very limited recourse following a prosecutor's decision to decline prosecution. There are two points of recourse available to complainants following a negative outcome. The first option is to make a representation.[251] The NPA policy directives describe a representation as follows

> Where a decision of a lower court prosecutor to prosecute or not to prosecute is the subject matter of a representation, the prosecutor must refer the representor to his or her immediate superior. If still dissatisfied, they should be directed to the DPP, before a final appeal is made to the National Director. Potential representors should, where possible, be advised accordingly.[252]

Once the internal process described above have been exhausted, if unsatisfied, a complainant may approach a competent court for relief. This is because reasons may be requested under the principle of legality, I discuss this further below in s 4. But to exercise these rights, a complainant must have adequate grounds to argue their case adequately. In other words, a complainant will be unable to frame their case for a review without the reasons of the decision-

---

[251] See s 22(2)(c), which is the counterpart of s 179(5)(d) of the Constitution and deals with the NDPP's review function. In terms of s 179(5)(d) of the Constitution:

'The National Director of Public Prosecutions —

. . .

(d) may review a decision to prosecute or not to prosecute, after consulting the relevant Director of Public Prosecutions and after taking representations within a period specified by the National Director of Public Prosecutions, from the following:

(i) The accused person.

(ii) The complainant.

(iii) Any other person or party whom the National Director considers to be relevant.'

[252] NPA policy directives 18.

maker. Thus, it is fairly straightforward that failure to furnish a complainant with reasons at any level is irrational and arbitrary. It is irrational for a complainant to also make a representation or approach the court without the reasons of the decision-maker. For example, without reasons, a complainant will have inadequate grounds to make sound representations to the Senior Public Prosecutor (SPP) or the Director of Public Prosecutor (DPP). Equally so, without the reasons of the DPP, a complainant remains disadvantaged when approaching the NDPP with representations.

It is to this extent that I argue that insofar as cases of rape are concerned, the NPA policy must be amended to make it clear that prosecutors have a duty to both furnish rape complainants with comprehensive written reasons and inform complainants of the option to submit representations if unsatisfied with the outcome. A list of comprehensive written reasons should include but not limited to (i) whether or not there were discrepant accounts: this must include whether there were inconsistencies in the complainant's version, (ii) whether the state is of the opinion that the question of ulterior motive could be imputed to the complainant and (iii) whether 'state would not be able to disprove the defence of the accused person (e.g., self-defence, alibi, or criminal incapacity),' as indicated in the NPA policy directives. The giving of reasons as opposed to a general statement that the evidence did not permit a prosecution cannot cast doubt on the innocence of a person and therefore cannot violate the presumption of innocence because giving of reasons does not alter the decision to not prosecute. Finally, I am mindful that this problem, of course, is not unique to cases of rape, but cases of rape are very unique to other criminal cases in this regard. However, my argument for this approach in cases of rape is premised on the fact that a disproportionate number of rape victims are women, and women are categorized as previously

marginalised.[253] Women cannot easily access the court or even make a representation. It has been shown that even in our constitutional democracy, 'access to justice is exacerbated by gross inequalities'.[254] In considering the right to access to the courts, Dugard found that previously disadvantaged persons, which include women, must be given special consideration because they are usually both black and poor.[255] The scholar explained the meaning of access to justice means far more than physical access to the courts. According to Dugard, access to justice incorporates

> the ability to be effectively heard. In South Africa, the normal difficulties of accessing justice are exacerbated by gross inequalities, the high cost of legal services and the remoteness of the law from most people's lives. Such socio-economic adversity dictates the need for a comprehensive system of legal assistance for poor people, to allow their issues to be adequately articulated and to promote parity in the legal process. Without legal representation, already disadvantaged people are further disempowered when confronted with complex legal issues.[256]

Dugard's reasoning provides more grounds for the adoption of a gendered approach when dealing with sexual offences cases. The same regard must be had when remedying the NPA's failure to furnish reasons to rape complainants. Some may argue that the NPA policy directives

---

[253] Vetten et al (note 5 above) 36. A study by Vetten showed that black women account for 88.2 percent of cases, followed by coloured women at 4.7 percent and white women at 4.5 percent. Vetten et al, however, explained that victims' race does not follow the demographics of South Africa because 'there is an over-representation of Africans and an under-representation of other race groups'.

[254] J Dugard 'Courts and the poor in South Africa: A critique of systemic judicial failures to advance transformative justice' (2008) 24 *South African Journal on Human Rights* 214, 216. The scholar found that 'the first hurdle a poor person must overcome in any justice system is accessing that system.'

[255] Ibid.

[256] Ibid.

is sufficient insofar as it requires prosecutors to record the reason(s) for a matter's refusal to prosecute in the docket. These provisions, however, do not compel prosecutors to furnish reasons to affected parties, which in fact, is what is required. Instead, a prosecutor retains full authority to decide whether or not to 'entertain' a person bearing a legitimate interest.[257] Prosecutors are in actual fact granted additional discretion by these provisions.

In s 3.1 of this chapter, I noted the dichotomy and debate regarding the reviewability of prosecutorial decisions. I will go on to discuss how this dichotomy embodies further related challenges in cases of rape.

4. The administrative law dichotomy on reasons

Section 33 of the Constitution recognizes the right to receive reasons for administrative actions. However, the prosecution authority's decisions are not subject to the *Promotion of Administrative Justice Act* 3 of 2000 (PAJA), enacted to give effect to s 33.[258] An administrative action is not defined under PAJA as a decision to initiate or continue a prosecution.[259] Hoexter is of the view that the intention behind the exception 'was to confine review under the PAJA to decisions *not* to prosecute'.[260] I agree with this view, as does scholar Meerkotter.[261] The court in *National Director of Public Prosecutions and Others v Freedom Under Law* settled this issue

---

[257] Ibid.

[258] Section 6 of the *Promotion of Administrative Justice Act* 3 of 2000 (hereafter referred to as PAJA).

[259] Section 1(ff) of PAJA.

[260] Hoexter (note 222 above) 241-242.

[261] A Meerkotter 'The application of the Promotion of Administrative Justice Act 3 of 2000 to decisions not to prosecute' (2016) 27(3) *Stellenbosch Law Review* 599, 603.

when it considered the reviewability of decisions to withdraw a prosecution, and the allied issue of whether such decisions are reviewable under PAJA.[262] In determining this, Brandon AJ said the following

> what is called for, as I see it, is to focus on the policy considerations that underlie the exclusion of a decision to institute or continue to prosecute from the ambit of PAJA and to reflect on whether or not the same considerations of policy will apply to a decision not to prosecute or to discontinue a prosecution.[263]

Some of the important considerations that led to that exclusion included (i) decisions to prosecute are not immune from judicial review but the court must interfere with those decisions sparingly to (ii) safeguard the independence of the prosecuting authority by limiting the extent to which review of its decisions can be sought, considering that (iii) NPA is competent. It followed that the court found that considerations of policy can be no different concerning decisions *not* to prosecute or *to* discontinue a prosecution. Brandon AJ thus concluded that a decision to discontinue prosecution is of the same genus as a decision to prosecute because of policy considerations.[264] Brandon AJ held that: 'in the present context, I can find no reason of policy, principle or logic to distinguish between decisions of these two kinds.'[265] However, scholar Meerkotter disagreed with the court's ruling. Meerkotter put it:

---

[262] *National Director of Public Prosecutions and Others v Freedom Under Law* [2014] 4 All SA 147 (SCA) para 19 (hereafter referred to as *National Director of Public Prosecutions and Others v Freedom Under Law* case).

[263] Ibid 25.

[264] Ibid 27 (c).

[265] Ibid.

> Brand JA erred in failing to recognize the features, and outcomes, which distinguish decisions to prosecute from those not to. It seems to me that a decision not to prosecute is of a different, albeit related, genus and ought to be treated differently. Accordingly, it is possibly incorrect to suggest that the very same policy considerations apply to a decision not to prosecute as do to a decision to prosecute.[266]

Meerkotter stated that the decision not to prosecute, 'would have amounted to reviewable administrative action, but for the SCA's interpretation of the relevant exclusion in s 1(*ff*) of PAJA.'[267] At the present moment, all decisions by the NPA are not susceptible to review. The decisions only remain subject to what is known as a principle of legality.[268] As stated by Meerkotter, the fact that a decision not to prosecute remains subject to judicial review under the principle of legality does not cure the NPA's deficiency of not providing reasons. This is because 'the grounds of review under the principle of legality remain somewhat limited in comparison to those available under PAJA,' as stated by Meerkotter.[269]

That said, I wish to point out that these policy considerations are unjustifiable in rape cases. I discuss this briefly next.

4. A critique on Brandon AJ's reasoning on policy considerations and rape

---

[266] Meerkotter (note 261 above) 603.

[267] Ibid 602.

[268] *National Director of Public Prosecutions and Others v Freedom Under Law* (note 262 above) 28. The legality principle has by now become well-established in our law as an alternative pathway to judicial review where PAJA finds no application.

[269] Meerkotter (note 261 above) 608.

Brandon AJ's reasoning has the potential to bolster the prosecuting authority's indifference to the value in furnishing reasons for their decision-making. I argue that it is apparent that the NPA's failure to provide reasons could have been remedied by the legislation (PAJA), but for the SCA's judgement. But the exclusion of prosecutorial decisions from PAJA does not preclude the requirement that prosecutors furnish complainants with reasons for their decisions for several reasons.

First, a decision of a prosecutor bears grave and distinct consequences for complainants especially in cases of rape because it is a crime that bears very serious physical, emotional and psychological costs to women as stated above. Regard must thus be had to complainants of rape insofar as their constitutional rights to their psychological integrity and dignity is concerned.[270] The NPA policy directives similarly confirm that maximum protection must be afforded to victims, which I argue includes the duty to uphold the constitutional rights of complainants.[271] Regard must further be had to the very nature of PAJA and what it intends to achieve.[272] PAJA seeks to promote good governance and an efficient administration and to create a culture of accountability, in the public administration or the exercise of public power or the performance of a public function.[273]

---

[270] Section 12 (2) of the Constitution.

[271] NPA policy directives 70.

[272] The Preamble of PAJA.

[273] Ibid.

I argue that the legislation and the Constitution are incompatible if one were to read PAJA as excluding from its ambit decisions not to prosecute cases of rape. Therefore, it is necessary to interpret PAJA in a manner that is consistent with the Constitution, which speaks not only to the duties of the prosecution authorities but also to the right to equality and the right to freedom from violence, in both public and private places. If one would interpret PAJA from the lens of those two constitutional sections, then the interpretation of PAJA must be that only decisions *to* prosecute are excluded from the ambit of PAJA and *not* decisions to refrain from prosecuting.

On policy considerations, one can imagine that there would be a deluge of applications under PAJA to review a decision not to prosecute which would place a disproportionate burden on the NPA. A counterargument to this policy concern is that I am recommending (i) that reasons must be given for a decision not to prosecute, other than 'there's no evidence'; and (ii) this must be considered in cases of rape only because of the link between the seriousness of rape in the country and the radically disproportionate rate of prosecution.

The second point relates to the principle of legality. Simply put, reasons ought to be furnished under the principle of legality because it is a counterpart of PAJA.[274] Hoexter described the principle of legality as a 'safety-net for non-administrative action'.[275] Hoexter explained that the principle of legality was found to imply that those who exercise public power must act rationally, lawfully and within their powers, as held in *Fedsure Life Assurance Ltd and Others v Greater*

[274] Currie & van der Merwe *The Bill of Rights Handbook* (2013) 688.

[275] Ibid 690.

Johannesburg Transitional Metropolitan Council.[276] Its underlying constitutional foundation emanates from the following dictum by Ngcobo J

> The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution.[277]

The difficulty that is apparent concerning this principle is that a complainant would be required to approach a court to enforce this, which is undesirable. Thus, the question that arises is how can the principle of legality be incorporated as the practice of the NPA? To safeguard women from the burden of approaching the courts to enforce this right.

In *National Director of Public Prosecution* v *Freedom Under Law*, the court instructed the NPA to furnish reasons to the respondents. This ruling sets a barometer that should be translated into the practice of the NPA. It calls for an amendment of the NPA policy to include a provision that compels prosecutors to furnish rape complainants with comprehensive written reasons and to advise further on the right of a complainant to make a representation. I argue for an amendment

---

[276] *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1998 (12) BCLR 1458 (CC). C Hoexter 'The Bill of Rights Handbook' in Ian Currie & Johan de Waal (eds) T*he Bill of Rights Handbook* (2013) 643, 688.

[277] *National Director of Public Prosecutions and Others v Freedom Under Law* (note 262 above) 28. Brandon AJ citing *Affordable Medicines Trust & others v Minister of Health & Others* 2006 (3) SA 247 (CC) para 49.

to vindicate women's constitutional rights. This approach is also likely to impact the administration of justice positively, as shown above in s 3.1.1.

As it currently stands, I will note that the NPA continues to exert power in a defective manner which is a grave injustice to women. To remedy this, a limitation on the prosecutor's discretion is required urgently. In the following chapter, it will be shown that this discretion is also a major cause of attrition.

CHAPTER 4
PROSECUTORIAL ATTRITION

1. Introduction

In the previous chapter, I discussed the problem of prosecutorial discretion. In this chapter, I discuss rape case attrition as a result of prosecutorial discretion. I also examine whether impunity of rape amounts to a serious or gross human rights violation in terms of South Africa's international obligations. I explore the definition of 'serious' violation of human rights law during peace. Thereafter, I will unpack South Africa's domestic human rights obligations towards women and treaty-based rights that demand prosecution of cases of rape.

2. The stages of attrition

According to Artz and Smythe, 'at various stages within the criminal justice process cases simply 'drop out of the system' — a phenomenon known as 'case attrition''.[278] The first point of attrition occurs straight after the rape when the rape victim does not report the incident to the police; the extent of this attrition is unknown.[279] A victim may decide not to report the incident because of the fear of stigma or because of 'being too scared to continue and reconciling with or reaching a settlement with the suspect and/or his family; the inability of the victim to identify the suspect'.[280] The second point of attrition occurs as a result of police improper influence. The police do not exercise discretion, they may influence the course of the case unlawfully based on

[278] Artz & Smythe (note 5 above) 169.

[279] Smythe (note 19 above) 8. Grace et al (note 3 above) 1. The authors describe attrition as 'the process by which alleged offences never come to the attention of the criminal justice system through non-reporting – or because they are 'lost' or dropped as they go through the various stages from reporting to conviction.'

[280] Andersson & Mhatre (note 9 above) 18.

their prejudices. A complainant may report the rape incident(s) to the police, but the police officer act unlawfully upon interviewing the victim and thereupon refuse to open a case of rape for several reasons, including the lack of credibility of the victim, or lack of injury, for example.[281] The police may open a docket but fail to do investigations. The third stage of attrition occurs when a prosecutor declines to place the matter on the roll for prosecution – this is the stage I focus on. Attrition studies analysed in chapter 1 revealed that it is during this stage in the criminal justice system that many rape cases fall through the cracks.[282] This attrition may occur as a result of the suspect being undetected because the complainant is unable to identify the suspect, or the suspect has not been apprehended by the police. This attrition may also occur because the complainant decided to withdraw due to stigma or family pressure. A prosecutor may also dismiss a case *nolle prosequi* before an accused pleads to the charge — this is my focus.

In the following section, I discuss the specific problem of prosecutorial attrition in cases of rape in South Africa.

3. Attrition and prosecution of rape cases in South Africa

There are two (2) factors related to case attrition.[283] First, the criminal justice system exhibits various points of attrition as discussed above. Second, some cases are prone to attrition because of a number of factors. Concerning the latter, I already revealed in chapter 2 and 3 that the

[281] Ibid 19. Smythe (note 19 above) 8-11.

[282] Artz & Smythe (note 5 above) 172. Vetten et al (note 5 above) 1.

[283] Hester & Lilly (note 96 above) 177.

factors that ostensibly inform the prosecutors in their decision-making in cases of rape are discriminatory unlike in other criminal cases.[284] I revealed, furthermore, that the problem is circular because prosecutors are not only influenced but are challenged by discriminatory procedural obstacles.[285]

Regarding the former, there is no question that major attrition occurs in cases of rape in South Africa. An analysis of the literature in chapter 1 shows that the NPA prosecute less than 10 percent of reported rape cases average between 42 000 - 43 000 per annum.[286] Further, according to the president of South Africa, of more than 1 000 cases each day, only about 10 percent of cases are reported to the police.[287] This is a serious problem, but an even bigger problem is that many rape victims never get justice when they report cases to the police.[288] There is a high number of reported rape cases that simply do not make it to court.[289] The literature shows that

---

[284] Artz & Smythe (note 106 above) 260; Swemmer (note 18 above) 49; Artz & Smythe (note 5 above) 170-171; Machisa et al (note 13 above) 108; Machisa et al (note 13 above) 30; Swemmer (note 18 above) 49.

[285] Frohmann (note 32 above) 235. See Spears & Spohn (note 29 above) 520.

[286] See <swww.saps.org.za> 2011/2012: 47,068; 2012/2013: 48,408; 2013/2014: 45,349; 2014/2015: 43,195; 2015/2016: 41,503; 2016/2017: 39,828; 2017/2018: 40,035; 2018/2019: 41,583; 2019/2020: 42,289; 2020/2021: 36,330.

[287] Address by President Cyril Ramaphosa at the Joint Sitting of Parliament on the crisis of violence in South Africa National Assembly: <https://www.gov.za/speeches/address-president-cyril-ramaphosa-joint-sitting-parliament-crisis-violence-south-africa>

[288] Smythe (note 19 above) 23. 'nine out of ten reported cases are not prosecuted (and two out of three are not even referred to the prosecutor for a determination) we are faced with a massive systemic failure that needs to be understood.'

[289] Machisa et al (note 13 above) 14. For instance, 'prosecutors declined to prosecute 47.7 % of reported rape cases referred by the police.' Also see Vetten et al (note 5 above) 13 'half the cases in our

this problem is because of the major attrition that occurs during the prosecution stage.[290] I use the term prosecutorial attrition to describe this problem. This is the core of the thesis. The thesis posits that prosecutorial attrition or cases of rape in the South African criminal justice system occurs due to vast discretion that is exercised by prosecutors in a deficient manner in violation of women's human rights. Rising attrition rates are a huge concern because they undermine law reform efforts intended to improve the handling of sexual offences cases.[291]

Against this background, I am now led to the main enquiry of this thesis: Does the failure to prosecute cases of rape directly infringe on women's human rights? For example, how many women would attest that failure to prosecute their rape cases denied them access to justice, infringed their dignity, security of their person and protection against discrimination, as envisaged by the Constitution and international law? This thesis posits that prosecutorial attrition bears implications for both South Africa's domestic and international law.[292] I will now discuss these implications for South Africa next.

---

sample resulted in arrests; trials commenced in 17.3% of cases.' Also see Smythe (note 19 above) 2. 'Not every act of victimisation is prosecuted.'

[290] Artz & Smythe (note 5 above) 169.

[291] Vetten et al (note 5 above) 14. Artz & Smythe (note 5 above) 159.

[292] UN General Assembly, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power: resolution / adopted by the General Assembly, 29 November 1985, A/RES/40/34, <https://www.refworld.org/docid/3b00f2275b.htm>

4. South Africa's international obligations

Meyersfeld described international law as an institution designed to induce and guide states to remedy the deficiencies within their domestic legal systems.[293] The scholar explained that, although international law may be without the 'same force' as a state's domestic laws, the role of international law is 'constructed to change the way states and communities respond to violent behaviour, the way we react to a breach of rules, and, most importantly, the way we listen to a person's pain'.[294]

It is discernible therefore that South Africa, through its state actors and institutions, plays a direct role in giving effect to women's human rights.[295] It is trite, furthermore, to say that the crime of rape violates women's human rights. For example, international instruments regard rape as an affront to the right to life, equality, human dignity, freedom, and security of the person.[296] And

---

[293] Ibid 64.

[294] B Meyersfeld 'Domestic violence, health, and international law' (2008) 22 *Emory Int'l L. Rev.* 61, 62-64.

[295] B Meyersfeld 'Domesticating international standards: the direction of international human rights law in South Africa' (2013) 5(1) *Constitutional Court Review* 399, 414. 'At the very least, a state must give effect to its international obligations in a manner that is adequate and effective. To the extent that a state uses means that differ from established effective methodologies, such differences must be justified. This approach resonates with our own limitations clause jurisprudence that requires a prima facie violation of a fundamental right to be a reasonable and justifiable (but not perfect) abrogation of constitutional obligations.'

[296] UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13; Beijing Declaration and Platform for Action, Fourth World Conference on Women, 15 September 1995; and the African Charter on Human Rights and Peoples' Rights on the Rights of Women in Africa (1995).Committee on the Elimination of Discrimination against Women 11th Session (1992), 'General

because rape is a global phenomenon, it finds expression in various international and regional instruments, under the term GBV.

These international and regional instruments use the phrase 'discrimination against women' or 'violence against women' to elaborate on the definition of GBV. The United Nations (UN) defines violence against women and girls as 'any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether in public or private life'.[297] The Protocol to the African Charter on Human Rights and Peoples' Rights on the Rights of Women in Africa (1995) defines violence against women to mean

> all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peacetime and during situations of armed conflicts or war.[298]

Recommendation No 19 on violence against women Violence against Women as contained in Report of the Committee on the Elimination of Discrimination against Women' UN GAOR, 47th session, Supp No 38, UN Doc A/47/38 (1993).

[297] Article 1 of the United Nations Declaration on the Elimination of Violence Against Women, General Assembly resolution 48/104. Article 2 of The Declaration on the Elimination of Violence against Women, the first universal international instrument that provided a definition of violence against women, included rape and marital rape as forms of violence.

[298] Article 1 of the Protocol to the African Charter on Human Rights and Peoples' Rights on the Rights of Women in Africa (1995).

The meaning of discrimination against women under Article 1 of CEDAW includes GBV, despite this not being explicitly stated in the Article.[299] Article 1 mainly informs us that rape is 'violence directed against a woman because she is a woman,' or violence that 'affects women disproportionately'.[300] This demonstrates that the crime of rape is a gendered problem. Hence, it should come as no surprise that international law requires effective prosecution of rape, which South Africa must observe.[301] I will now discuss South Africa's responsibility in terms of international law.

---

[299] See UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendation No.19: Violence against women, 1992, <https://www.refworld.org/docid/54d920c54.html> General comments (6): "The Convention in article 1 defines discrimination against women. The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence." Article 1 of CEDAW defines discrimination against women as 'any distinction, exclusion or exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human right and fundamental freedoms in the political, economic, social, cultural, civil or any other field.'

[300] CEDAW General Recommendation No. 19.

[301] UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III). <https://www.refworld.org/docid/3ae6b3712c.html.> The Universal Declaration of Human Rights declares the right to security of every person, the right to protection against discrimination, and equal protection of the law. See Art 2(b) of CEDAW. Beijing Declaration and Platform for Action, Fourth World Conference on Women, 15 September 1995. The Beijing Declaration and Platform for Action (the Beijing Platform of Action), echoes CEDAW, which South Africa is a signatory to. For

4.1. State Responsibility

South Africa ratified several treaties which obligate nation-states to comply with International Human Rights Law (IHRL).[302] As a result, South Africa bears the affirmative duty to prevent violations, including the affirmative duty to ensure that state organs investigate, prosecute, and punish perpetrators effectively.[303] According to Roht-Arriaza, three (3) different types of clauses in modem multilateral human rights treaties provide support for a state's obligation to investigate and punish perpetrators of human rights violations.[304] Roht-Arriaza states

> First, criminal law treaties specify the obligation of states to prosecute and punish perpetrators of acts defined as crimes under international law. Second, the 'ensure and respect' provision common to many treaties has been interpreted, by at least one court, to impose affirmative obligations on states to investigate and prosecute. Finally, the right to a

---

example, in see C*armichele* (note 58 above) 45 referring to Osman v United Kingdom 29 EEHR 245 para 305.

[302] Through ratification of a treaty, South Africa agrees to be bound by the treaty and its obligations. Some of the treaties include: CEDAW - Convention on the Elimination of All Forms of Discrimination against Women, ratified: 15 Dec 1995; CESCR - International Covenant on Economic, Social and Cultural Rights, ratified: 12 Jan 2015; CRC - Convention on the Rights of the Child, ratified: 16 Jun 1995; CRPD - Convention on the Rights of Persons with Disabilities, ratified: 30 Nov 2007.

[303] N Roht-Arriaza 'State responsibility to investigate and prosecute grave human rights violations in international law' (1990) 78 *Calif. L. Rev* 449, 462. See R Cook 'State Responsibility for Violations of Women's Human Rights' (1994) 7 *Harv. Hum. Rts. J.* 125, 147; M Robert & P Simons 'Responsibility beyond borders: state responsibility for extraterritorial violations by corporations of international human rights law' (2007) 70 (4) *The Modern Law Review*, 598, 618; DM Chirwa 'The doctrine of state responsibility as a potential means of holding private actors accountable for human rights' (2004) 5 *Melb. J. Int'l L.* 1, 3.

[304] Ibid.

> remedy included in many human rights instruments provides a strong basis for inferring an obligation to investigate and prosecute.[305]

South Africa, furthermore, has a direct responsibility to actively ensure its harmonised legal compliance to the international treaty obligations through competent public institutions.[306] Special Rapporteur Theo van Boven explained international law state responsibility as arising from an internationally wrongful act of a state. An internationally wrongful act includes the following elements: '(a) conduct consisting of an action or omission that is attributable to the State under international law, and (b) conduct that constitutes a breach of an international obligation of the State'.[307] According to Article 1 of the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts: 'Every internationally wrongful act of the State entails the internationally responsibility of that state.'[308] Thus, a state incurs direct state responsibility of a primary rule when it breaches a treaty obligation, such as

---

[305] Ibid.

[306] Ibid. 'It is generally accepted by authoritative opinion that States do not only have the duty to respect internationally recognized human rights but also the duty to ensure these rights, which may imply an obligation to ensure compliance with international obligations by private persons and an obligation to prevent violations.' Also see; Meyersfeld (note 295 above) 411. Meyersfeld said that 'where a state's international obligation is owed to its citizens, those citizens may invoke the principles of state responsibility to compel states to remedy their breach of the duties in question.'

[307] UN Sub-Commission on the Promotion and Protection of Human Rights, Study concerning the right to restitution, compensation, and rehabilitation for victims of gross violations of human rights and fundamental freedoms: final report / submitted by Theo van Boven, Special Rapporteur., 2 July 1993, E/CN.4/Sub.2/1993/8 <https://www.refworld.org/docid/3b00f4400.html> para 40.

[308] Article 1 of the International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, <https://www.refworld.org/docid/3ddb8f804.html>

CEDAW. South African can neither absolve itself from this responsibility by delegation. For example, in *O'Keeffe v Ireland*, the European Court of Human Rights held the following in a case of sexual violation of a young girl at the time during her school years at the hands of her school principle: '... a state cannot absolve itself from its obligations... by delegating those duties to private bodies or individuals'.[309] The Court held further that a state bears a 'positive obligation to protect' without 'an excessive burden' imposed upon it, and that 'measures, at least, should provide effective protection in particular that of children and vulnerable persons'.[310]

Finally, another international standard that compels South Africa to act against rape prosecution failure is known as 'due diligence' which I briefly discuss next.[311]

4.2 The international principle of 'due diligence'

This is a concept first established in *Velásquez Rodríguez v Honduras*, wherein it was held that

> a state has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within

---

[309] *O'Keeffe v Ireland*: ECHR 28 Jan 2014 para 150 (hereafter referred to as *O'Keeffe* case).

[310] Ibid.

[311] Ve*lásquez Rodríguez v Honduras Case, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988), Inter-American Court of Human Rights (IACrtHR), 29 July 1988,* <https://www.refworld.org/cases,IACRTHR,40279a9e4.html> The IACrtHR held that 'an illegal act which violates human rights, and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.'

its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.[312]

Cook rejects and 'condemns' the framework that fails to hold the state accountable even for those violations that are the result of a systematic failure on the part of the state, for example, Roht-Arriaza states that a state is responsible at all times, it would not matter if the responsible governmental organ or official has violated domestic law or overstepped the bounds of authority, and even if the identity of the individual perpetrator is unknown or if the perpetrator is not a government agent. The government violates international so long as it exhibits a lack of diligence in preventing or responding to the violation.[313] And when the CEDAW General Recommendation No. 28 adopted this concept, it noted that states parties have a due diligence obligation 'to prevent, investigate, prosecute and punish acts of gender-based violence'.[314] The notion of 'due diligence', according to Ertürk, 'provides a yardstick to determine whether a state has met or failed to meet its obligations in combating violence against women'.[315] It is a notion

---

[312] Ibid 174. The Court in the Ve*lásquez Rodríguez v Honduras Case* held that, '…the State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.'

[313] C Romany 'State responsibility goes private: a feminist critique of the public/private distinction in international human rights law' in BB Lockwood (ed) Human Rights of Women (2012) 85, 85, Roht-Arriaza (note 304 above) 471.

[314] CEDAW, General recommendation No. 28 on the core obligations of States parties under Article 2 of the CEDAW. The CEDAW General Recommendation No. 28 para 19.

[315] UN Commission on Human Rights, *Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences on the Due Diligence Standard as a Tool for the Elimination of Violence against Women*, 20 January 2006, E/CN.4/2006/61, <https://www.refworld.org/docid/45377afb0.html> para 14.

bearing both a negative and positive obligation. The former is a duty to respect a certain right. [316] The latter is a duty to take reasonable measures.[317] But Meyersfeld warned that the standard of due diligence was 'amorphous and difficult to measure'.[318] The esteemed author explained the difficulty as follows

> Traditionally, the test asks whether 'a more active and more efficient course of procedure might have been pursued.' This test is similar to the standard negligence test: would a reasonable actor, in that situation, have taken steps that could have changed a harmful outcome? The Convention's provisions concretize this standard but, on their own, do not give much insight into the content of the due diligence obligation.[319]

---

[316] The Ve*lásquez Rodríguez v Honduras Case* (note 311 above) 165. The Court held that 'the first obligation assumed by the States Parties under Article 1(1) is 'to respect the rights and freedoms' recognized by the Convention. The exercise of public authority has certain limits which derive from the fact that human rights are inherent attributes of human dignity and are, therefore, superior to the power of the State.

[317] Ibid 166. 'The second obligation of the States Parties is to 'ensure' the free and full exercise of the rights recognized by the Convention to every person subject to its jurisdiction. This obligation implies the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible, attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.'

[318] B Meyersfeld 'Introductory note to the Council of Europe Convention on preventing and Combating Violence against women and domestic violence' (2012) 51 *Int'l Legal Materials* 106, 107. See MT Kamminga 'Due Diligence: A Useful Tool to Combat Violence against Women?.' *Forthcoming in* I. Westendorp (ed.) *The Women's Convention Turned* (2020).

[319] Meyersfeld (note 318 above) 107.

The standard of due diligence is indeed quite vague, but I note that it simply calls for a state to take reasonable preventative and punitive measures. I am satisfied that the standard or test of reasonableness is well-established in South African common law.[320] In *Government of the Republic of South Africa v Grootboom* it was held, for example, that reasonableness must be understood in the context of the Bill of Rights as a whole and for measures to be reasonable, those measures 'cannot leave out of account the degree and extent of the denial of the right they endeavour to realise'.[321]

I note that a similar principle related to the standard of due diligence was adopted in *Glenister v President of the Republic of South Africa and Others*, when the Constitutional Court held that s 7(2) of the Constitution, read together with s 8(1) along with the constitutional obligations of the security services in s 205 and as well as s 231, imposed a positive obligation on 'the state and its organs to provide appropriate protection to everyone through laws and structures designed to afford such protection'.[322] That said, I will now discuss the level of competency expected of South Africa in terms of the international standard.

---

[320] *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) (hereafter referred to as Grootboom case); *Minister of Health v Treatment Action Campaign* (No 1) 2002 5 SA 703 (CC) and *Affordable Medicines Trust v Minister of Health of RSA* 2006 3 SA 247 (CC).

[321] *Grootboom* (note 320 above) 44.

[322] *Glenister v President of the Republic of South Africa and Others* (with the Helen Suzman Foundation as amicus curiae) [2011] ZACC 6, 2011 (3) SA 347 (CC) para 181.

5. International standard of prosecutorial competency and South Africa's obligations

The mere establishment of a prosecuting authority is not enough for international law compliance.[323] A prosecuting authority must be competent and effective for a state to lay claim to international compliance.[324] In theory , the NPA policy observes the United Nations Guidelines on the Role of Prosecutors (UNGRP) as required by the NPA Act.[325] The UNGRP were formulated to assist member states to ensure and promote effective, impartial, and fair prosecutors in criminal proceedings and should be adopted by Governments within the framework of their national legislation and practice.[326] In terms of Article 2 (b) of the UNGRP, states shall ensure that

> Prosecutors have appropriate education and training and should be made aware of the ideals and ethical duties of their office, of the constitutional and statutory protections for the rights

---

[323] *Grootboom* (note 320 above) para 42. Yacoob J held that 'the state is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the executive. These policies and programmes must be reasonable both in their conception and their implementation. The formulation of a programme is only the first stage in meeting the state's obligations. The programme must also be reasonably implemented. An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the state's rights obligations.'

[324] A Cassese 'On the current trends towards criminal prosecution and punishment of breaches of international humanitarian law' (1998) 9 (1) *European Journal of International Law* 2,17.

[325] NPA policy 3.

[326] Guidelines on the Role of Prosecutors Adopted by the Eighth United Nations Congress on the Prevention

of Crime and the Treatment of Offenders, Havana, Cuba (27 August to 7 September 1990).

> of the suspect and the victim, and of human rights and fundamental freedoms recognized by national and international law.[327]

Article 2 (b) thus requires the state to ensure two (2) things from a state: (i) prosecutor training, (ii) protection of complainants' domestic rights and human rights as recognised by international law.

On prosecutor training, a lack of trained specialist prosecutors is a problem that can erode the administration of justice in South Africa. Machisa et al found that prosecutors were also very reluctant to work on cases of rape.[328] This is because working on cases of rape comes with immense pressure. For example, prosecutors are required to sign performance contracts in which they commit to achieving a 69 percent conviction rate in sexual offences cases.[329] And because sexual offences cases are difficult to prosecute and securing a conviction is slim, it is very unattractive for any prosecutor, but it also causes prosecutor's to only choose to prosecute 'winnable' cases.[330] Currie and de Waal state that s 34 of the Constitution imposes a duty on the state to ensure that prosecutors are competently trained.[331] This implies that a failure to train prosecutors in South Africa will violate both the Constitution and Article 2 of the UNGRP.

---

[327] Ibid Article 2.

[328] Machisa et al (note 13 above) 109.

[329] Ibid.

[330] Ibid.

[331] Currie & de Waal (note 274 above) 711.

On the protection of complainants domestic and human rights, I have already revealed in chapter 2 that prosecutorial attrition in cases of rape is due to discrimination against women whose versions do not fit into the category of 'classic rape' or 'real rape' which is a violation of Article 1 of CEDAW.[332] This discrimination neither improves the state's commitment to eradicate sexual violence.[333] I have also already revealed in chapter 2 that the NPA is unjustly burdened by discriminatory procedural obstacles that influence their discretion in violation of the CEDAW General Recommendation No. 33 requiring a prosecuting authority to be free from stereotyping and the application of discriminatory procedural and evidentiary rules.[334] I argue that rape prosecution failure in South Africa based on discriminatory grounds is unjust, furthermore, since the duty of a prosecutor is to assist the court to ascertain the truth and not necessarily to procure a conviction.[335] Therefore, it is both unreasonable and unlawful that the NPA compel prosecutors

---

[332] Frohmann (note 32 above) 235. For example, Frohmann found that prosecutors rely on stereotypes about what constitutes 'genuine victims' and appropriate behavior. E Stanko (note above) 170. Stanko similarly found that the character and credibility of the victim were a key factor in determining prosecutorial strategies.

[333] *van Eeden v Minister of Safety and Security* (note 59 above) 13. The court succinctly explained that 'freedom from violence is recognised as fundamental to the equal enjoyment of human rights and fundamental freedoms (S v Baloyi 2000 (2) SA 425 (CC) para 13. Sec 12(1)(c) requires the State to protect individuals, both by refraining from such invasions itself and by taking active steps to prevent violation of the right. The subsection places a positive duty on the State to protect everyone from violent crime. See Combrinck (note 47 above) 683; M Pieterse 'The Right to Be Free from Public or Private Violence After Carmichele.' *S. African LJ* (2002) 27, 29.

[334] Article 23 of the CEDAW Recommendation 33.

[335] The NPA Policy 4. 'The prosecutors primary function is to assist the court in arriving at a just verdict.' In *S v Jija and Other* 1991 (2) SA 52 (E) Erasmus J said the following: 'A prosecutor stands in a special relation to the court. His paramount duty is not to procure a conviction but to assist the court in ascertaining the truth,' para 68. See *S v Sithole and Others*; 2012 (1) SACR 586 (KZD)

to sign performance contracts in which they commit to achieving a 69 percent conviction rate in sexual offences cases.[336] The court in *Macrae and Another v S* was clear that the duty of prosecutors 'is not to secure a conviction at all costs or to defend convictions once obtained. Their duty is to see that, so far as possible, justice is done.'[337] This general principle was set many years ago.[338] Prosecutors, however, do not follow this general principle - Muntingh et al call it a 'truism'.[339] Accordingly, I argue that South Africa does not comply with international law's standards for prosecutorial competence, in particular; Article 2 (b) of UNGRP. South African prosecutors in cases of rape do not protect the constitutional and statutory rights of complainants and of human rights and fundamental freedoms recognized by national and international law as envisaged by Article 2 (b).

In the following section, I deal with the question of whether the failure to prosecute amounts to a 'serious' violation of women's human rights in the following section.

---

prosecutors serve as the gate keepers of the system. Not only do they evaluate the conduct of the police and the strength of the State's case, but they also actively present the case to the court and represent the interests of the society throughout the proceedings,' at para 7. See, *S v Sithole and Others*; 2012 (1) SACR 586 (KZD) 'Prosecutors have a public duty to place all relevant facts before a court,' para 6.

[336] Machisa et al (note 13 above) 109.

[337] *Macrae and Another v S*; 2014 (2) SACR 215 (SCA) para 28.

[338] *S* v *Fani and Others* 1994 (3) SA 619 (E) para 621I-J. The court held that 'the object of criminal proceedings in our law has never been to secure a conviction at all costs. The duty of the prosecution is to present all the facts in an objective and fair manner so as to place the court in a position to arrive at the truth.'

[339] Muntingh et al (note 205 above) 9.

6. Does failure to prosecute rape amount to a serious violation of human rights?

Protected rules of International Humanitarian Law (IHL) are firmly secured in the international legal order, as opposed to provisions under IHRL.[340] For example, there is clarity on what constitutes a 'serious' crime in IHL, while the elements which compose a 'serious' violation in IHRL remains unclear. Article 1 of the Rome Statute states that it shall have the power to exercise its jurisdiction over persons for the most 'serious' crimes of international concern. Article 5 identifies (a) the crime of genocide; (b) crimes against humanity; (c) war crimes; (d) the crime of aggression as the most 'serious' crimes of concern to the international community as a whole.[341]

On the other hand, there is no authoritative definition for the term 'serious violation of human rights'.[342] Karimova states that the term 'serious violations of human rights law' appeared first in the Chairman's Draft Treaty Text after the First Preparatory Committee in July 2010.[343] The

---

[340] M Quiroga *The Battle of Human Rights, Gross, Systematic Violations and the Inter-American System* (1988) 10.

[341] UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6, <https://www.refworld.org/docid/3ae6b3a84.html>

[342] Quiroga (note 340 above) 7. See REDRESS, Committee of Experts on Impunity (DH-I): Draft Guidelines of the Committee of Ministers of the Council of Europe on Eradicating Impunity for Serious Human Rights Violations September 2010, <https://www.refworld.org/docid/4c989fa52.html>

[343] T Karimova 'What amounts to 'a serious violation of international human rights law'? An analysis of practice and expert opinion for the purpose of the 2013 Arms Trade Treaty' 2014 *Geneva Academy of International Humanitarian Law and Human Rights* 1,11. See Chairman's Draft Paper, Second Preparatory Committee, 28 February 2011; Chairman's Draft Paper, 3 March 2011; Chairman's

term ‘gross violation of human rights law’ is also not clearly defined.[344] The term ‘gross violation’ of human rights is used interchangeably with the terms ‘grave’, ‘serious’, ‘systematic’, ‘flagrant’, and ‘massive’ to refer to a violation of the same gravity.[345] These terms appear to have the same meaning.[346] According to Professor van Boven, it appears that the word ‘gross’ qualifies the term ‘violations’ and indicates the serious character of the violations but that the word ‘gross’ is also related to the type of human right that is being violated.’[347]

According to Quiroga, serious violations of human rights are worthy of the concern of the international community, because: ‘it is precisely in this kind of situation that international scrutiny and action may bear its best fruits since individuals caught in a pattern of gross violations of human rights have few or no means at all to defend themselves against these violations at the national level.’[348] It is to ensure that governments are held accountable for violations of human rights perpetrated with direct or indirect help of state apparatus.[349]

Draft Arms Trade Treaty, Third Preparatory Committee, 14 July 2011.’ <http://armstradetreaty.blogspot.ch/>

[344] Van Boven (note 307 above) 8.

[345] Karimova (note 343 above) 30.

[346] A Doulah & S Mirshahbiz ‘An Analysis of the Security Council Procedures in Managing Severe Violations of the International Human Rights’ (2016) 9 *Journal of Politics and Law* 33, 35.

[347] Boven (note 307 above) 8.

[348] Ibid.

[349] Quiroga (note 340 above) 1.

Quiroga, however, criticizes international mechanisms established to deal with isolated instances of human rights violations as unsuitable to deal with gross violations constituting a pattern.[350] This is similar to the dichotomy between public and private created by international law that has been much criticized as analyzed in s 3.4 of chapter 1.[351] This dichotomy differs very slightly, in that the main rationale behind this dichotomy is that only violations by the state or state actors are recognized in terms of international law as opposed to individual acts that violate human rights. Obviously, both of these dichotomies are problematic, but I am more concerned with serious violations that are systematically committed by the state through its actors, as Quiroga describes them. Next, I attempt to determine whether rape prosecution failure in South Africa amounts to a serious human rights violation.

6.1 The criterion and determination

To determine if an act committed during peace amounts to a 'serious' human rights violation, the general criteria include: (a) the type and character of the violation, (b) the quantum of the violation, and (c) the qualitative test.[352] According to Tardu, 'serious violations cannot easily involve a single victim — several breaches occur and spread over a period — an element of planning or sustained will on the part of the perpetrator must be present — the violation must inherently have an inhuman and degrading character'.[353] On whether the gravity of a given violation amounts to a 'violation' of human rights, one has to consider (a) 'the character of the

---

[350] Ibid 2.

[351] MacKinnon (note 67 above) 204.

[352] Karimova (note 343 above) 15-17.

[353] ME Tardu 'United Nations response to Gross Violations of Human Rights: The 1503 Procedure' (1980) 20 *Santa Clara Law Review* 583ff.

obligation breached', which derives from a peremptory norm of general international law; and (b) 'the intensity of the breach'.[354]

It is against this backdrop that I claim that the failure to prosecute cases of rape based on discriminating views is a serious violation of human rights.

First, I have already revealed that the NPA prosecute less than 10% of reported cases of rape due to the deficient manner in which they exercise their discretion. Bearing in mind also that the number of reported cases of rapes in South Africa is at a significant scale, one of the highest in the world. The South African Police Service (SAPS) data show that reported cases of rape are usually above the region of 42, 000. SAPS reported that 12,218 people were raped in the final quarter of 2020 (between October and December), an increase of 5 percent from the previous quarter.[355] This alone indicates that the problem of rape and I argue, the failure to prosecute is widespread and systemic, therefore, demonstrating a clear pattern. For example, according to UN Special Rapporteur, Ms. Dubravka Šimonović rape 'remains one of the most widespread crimes,

---

[354] This is according to the International Law Commission (ILC)'s commentary on Article 40 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts. International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, <https://www.refworld.org/docid/3ddb8f804.html.>

[355] See <www.timeslive.co.za> Crime stats: murder and rape increased in past three months (timeslive.co.za).

with the majority of perpetrators enjoying impunity and the majority of women victims not reporting.'[356]

I must also point out that it is also a violation that targets women disproportionately and failure to prosecute cases of rape does not involve a single victim. This meets a great portion of Tardu's criterion of what constitutes serious violation of human rights mentioned above. But to take it further, whether an element of planning *or* sustained will on the part of the perpetrator which must be present is also met — I argue that is the case. Perhaps not planning, but certainly sustained will considering that the issue of impunity of rape due to failure to investigate and prosecute has been an issue of debate for many decades but nothing has changed.[357] It can also be said that the failure to prosecute cases of rape, and not the crime of rape alone is inherently degrading and a violation of human dignity.

Second, a serious violation of human rights can only be committed by the state through its actors. Therefore, the action of prosecutors is attributable to the state. In other words, when prosecutors discriminate against women, it is the state that discriminates against women, which is a clear violation of CEDAW. I argue that such discrimination considering the scale in the failure to prosecute rape cases, amounts to systematic discrimination. I have already indicated above that

---

[356] D Šimonović 'Report of the Special Rapporteur on violence against women, its causes and consequences: Rape as a grave, systematic and widespread human rights violation, a crime and a manifestation of gender-based violence against women and girls, and its prevention' on 19/04/2021 at the 47th session of the Human Rights Commission A/HRC/47/26 at para 8. See A/HRC/47/26 and Addendum A/HRC/47/26/Add.1 - A framework for legislation on rape (model rape law).

[357] Ibid at para 13.

the state bears the affirmative duty to act responsibly and with due diligence in order to comply with international law, which is a threshold that South Africa fails to reach.[358]

Finally, it is trite to say that rape or sexual abuse is recognized as torture and degrading treatment within the context of IHRL.[359] The phrase 'torture or inhumane and degrading treatment,' is drawn from international and regional instruments, and regional courts, such as the European Court of Human Rights have employed this phrase to qualify rape as a violation of human rights. In the Grand Chamber of the European Court of Human Rights in *M.C. v Bulgaria*, the Court held that the concept of human dignity is closely linked with the prohibition of degrading treatment. The *ICTY* itself, in defining rape as a form of torture in the Mucic trial, relied extensively on the jurisprudence of the European Court of Human Rights.[360] The court in *O'Keeffe v Ireland*, held that sexual abuse was 'undisputedly' torture because of its 'gravely invasive nature and consequent on the deep wounds that it inflicts on the psyche'.[361] In *Aydin v Turkey* the Court held that it was is 'satisfied that the accumulation of acts of physical and

---

[358] Article 2 (a-b) of the Draft Articles on Responsibility of States for Internationally Wrongful Acts.

[359] *O'Keeffe* (note 309 above) 14. See CA Mackinnon (note 67 above) 66 and D Šimonović (note 356 above) paras 9 and 20. Šimonović states that 'international human rights law has taken progressive steps in framing rape as a human rights violation through three main conceptual avenues: (a) as a specific form of genderbased violence against women and girls under the women's anti-discrimination framework; (b) as torture under the torture framework; and (c) as other human rights violations…' the Special Rapporteur further states that 'both the Committee against Torture and the Human Rights Committee have recognized rape as torture *citing* Committee against Torture, general comment No. 2 (2007); Human Rights Committee, general comment No. 28 (2000).

[360] Bulgaria case (note 71 above) 150.

[361] *O'Keeffe* (note 309 above) 14.

mental violence inflicted on the applicant and especially cruel act of rape to which she was subjected amounted to torture in breach of Article 3 of the Convention'.[362]

In this context, the Court in *O'Keeffe v Ireland* explained the responsibility of the state as follows

> The Court reiterates that Article 3 enshrines one of the most fundamental values of a democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment. The obligation on High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken in conjunction with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals. This positive obligation to protect is to be interpreted in such a way as not to impose an excessive burden on the authorities, bearing in mind, in particular, the unpredictability of human conduct and operational choices which must be made in terms of priorities and resources.[363]

In conclusion, therefore, I would like to point out that South Africa fails to effectively prosecute cases of rape, which is a contravention of national obligations. A very important point is also that rape victims have very little recourse if their cases are not tried in a court of law, as explained in s 3 of chapter 3. In other words, there are no safeguards in place commensurate with the risk faced by women when confronted by a prosecutor with discriminatory views. In terms of its international obligations, South Africa must take reasonable steps to prevent this kind of mistreatment and neglect. This more so in light of the Inter-American Court upholding the principle of equality and stating that 'non-discrimination belongs to *jus cogens* because the

---

[362] *Aydin v Turkey*, 1997-VI E UR . C T. H.R. . 1866 para 85.

[363] *O'Keeffe* (note 309 above) 144.

whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all law.[364]

Furthermore, South African recognises that certain norms, such as torture, are peremptory.[365] Additionally, there are certain rights from which states can never derogate and systematically discriminating against women can never be justified. It is crucial to note that unabated prosecutorial attrition has significant legal and security implications that extend far beyond the cases of the victims who are not heard by a court of law. An example is the risk of impunity.[366] The UN Guidelines on Eradicating Impunity for Serious Human Rights Violations guides states on the problem and risk of impunity in respect of serious human rights violations.[367] These Guidelines define impunity as arising where those responsible for acts that amount to serious human rights violations are not brought to account. The Guidelines explain, furthermore, that impunity is caused or facilitated notably by the lack of diligent reaction of institutions or state agents to serious human rights violations. It provides that states must combat impunity as a matter of justice for the victims, as a deterrent concerning future human rights violations and to uphold the rule of law and public trust in the justice system. Therefore, prosecutorial attrition

---

[364] *ADVISORY OPINION OC-18/03, "Juridical Condition and Rights of Undocumented Migrants"*, OC-18/03, Inter-American Court of Human Rights (IACrtHR), 17 September 2003, <https://www.refworld.org/cases,IACRTHR,4f59d1352.html>

[365] J Dugard, M du Plessis, T Maluwa & D Tladi *Dugard's International Law A South African Perspective* (2018) 50.

[366] Smythe (note 19 above) 78.

[367] *Guidelines on Eradicating Impunity for Serious Human Rights Violations* Directorate General of Human Rights and Rule of Law Council of Europe Strasbourg (2011) <www.coe.int/justice>

bears implications for nations that have formally incorporated public international law in their internal systems.[368] Sections 39 and 231-233 of the Constitution compel South Africa to comply with international law. South Africa must comply with the standards set in international law because there is a constitutional obligation on all organs of state, including the NPA, to do so. The Constitutional Court in *S v Makwanyane* held that 'public international law would include non-binding as well as binding law' and elucidated that 'these may both be used under the section as tools of interpretation', and the Constitutional Court further held the following

> International agreements and customary international law accordingly provide a framework within which the Bill of Rights can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights, and, in appropriate cases, reports of specialised agencies such as the International Labour Organisation, may provide guidance as to the correct interpretation of particular provisions of the Bill of Rights.[369]

With that said, the following paragraphs will be dedicated to concluding this research.

---

[368] Section 39 (1)(b) of the Constitution. court, tribunal, or forum must consider international law; and when interpreting the Bill of Rights. Sections 231-235 of the Constitution. Also see, *S v Makwanyane and Another* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) para 35.

[369] Ibid.

CONCLUSION

The problem of rape is more complex than it appears. This is not to say that it has not been highlighted before. South African scholarship on rape is extensive. However, the problem of rape in South Africa is distinct from other forms of GBV, for several reasons. For example, the scourge of rape is distinct from that of femicide, which is similarly a national crisis in South Africa. But in cases of rape, the majority of rape victims who have reported to the police are denied the right to access justice every day, mainly because discriminatory and unconstitutional decision-making by state actors (prosecutors) as discussed in chapter 2. The high rape case attrition levels for which prosecutors are responsible indicate further that the problem of rape is multifaceted – the problem is twofold. First, the problem is widespread: this is indicated by the high number of reported cases, on average 42 000 - 43 000 cases per annum. Second, the state's failure to prosecute cases significantly reduces the effort to combat rape in general but promotes the impunity of rape instead. The state's failure to investigate and prosecute cases of rape is not merely a violation of a complainant's constitutional rights. South Africa, as a state, violates its international obligation when it fails to effectively investigate and prosecute cases of rape. This violation of international law implies that the problem of rape (the high levels of rape and the failure to investigate and prosecute cases) is a problem of the state (South Africa) and not the NPA's problem per se. From another perspective, the problem of rape in South Africa is graver since the country embarked upon vast criminal law reforms and other anti-rape strategies intended to address rapes and other sexual crimes differently from other categories of crimes, as shown in chapter 3. For instance, there has been no law reform (legislation) to combat femicide. Nor has there been extensive development of the jurisprudence (common law) to abolish evidential requirements that make it difficult to prosecute femicide cases. Put differently, unlike

in cases of rape, the South African government has not embarked on integrated and multisectoral governmental measures to curb femicide. Yet for cases of rape, several anti-rape strategies and measures were adopted and implemented dating back over two decades. But despite all these efforts, rape continues to be a problem. Of course, these anti-rape strategies and measures are not without blemish. It must be kept in mind that even if one accepts that the roll-out of TTCs and Sexual Offences Courts have enjoyed individual success, it has not yielded the desired result, which is to decrease the number of rape cases. In other words, increased post-rape care (TTCs), and purported increased conviction rates (Sexual Offences Courts) are small victories that have not translated to a decrease in the number of rape cases. Nor has the advent of the Sexual Offences Act been effective. It is catastrophic that most rape victims receive post-rape care but are then denied access to justice. It may well be redundant to even consider whether the effectiveness of Sexual Offences Courts contributes to the fight against rape, because most cases of rape do not even make it to those courts. The NPA prosecutes less than 10 percent of reported rape cases, which are between 42 000 - 43 000 annually. It is inaccurate to argue that the purported high conviction rate in the Sexual Offences Courts indicates success in combating the scourge of rape, or that it speaks to its effectiveness when studies reveal that the majority of cases are not even heard in court. The effectiveness of Sexual Offences Courts can only be established when the majority of cases are brought before the court. In spite of attempts to improve criminal justice or the criminal law system, the number of cases has failed to decline or be dealt with more efficiently. These measures adopted by the government have not been able to address attrition in the criminal justice system. There has been no direct effort to reduce rape case attrition in South Africa. It is also not to say attrition does not occur in other criminal offences, the difference with cases of rape is the reasons for attrition is due to discriminatory and

unconstitutional reasons and reasoning (discretion). The attrition of rape cases is also widespread and systematic and embodying a gross violation of IHRL. Notwithstanding this, the greatest concern regarding the problem of rape in South Africa is that it affects children, toddlers and even infants significantly. These are victims who are usually violated in spaces meant to be safe, such as their homes. The research shows that children are violated by their fathers, uncles, and guardians (acquaintance rape). To this extent, this thesis showed that focus must be placed on other underlying factors such as the type of rape that plagues South Africa and the complexities it presents when attempting to end the scourge. This thesis showed that acquaintance rape is the most prevalent rape and the most difficult rape to prosecute. Although outrage over rape was a result of the exceptionally high number of recorded cases of rape in South Africa, which attracted both domestic and international condemnation, it is not to say that the number of reported femicide cases, for instance, are insignificant. However, South Africa is ranked first among the countries with the highest number of rape cases in the world and continues to record the highest number of rape cases in the world even today. It was against this backdrop that the government undertook to implement and adopt various measures to address sexual offences, as stated above, a process yet to be undertaken by the government to address femicide, for example.

The difficulty now apparent is that, despite the state's intervention, government policy does not address prosecutorial discrimination and the impact of such discrimination (such as high attrition rates). This is unabated discrimination resulting from discretion that is exercised in a manner inconsistent with the Constitution and IHRL. It is apparent that none of the measures alluded to above address prosecutorial discrimination effectively, nor do they provide for accountability mechanisms. All the measures meant to strengthen criminal sanctions and regulation of state

actors in the criminal justice system have, in essence, failed. The NPA is a crucial state actor within the criminal justice system requiring repairing. First, in the manner in which it manages rape cases and, second, prosecution of the same. The problem of rape is more pervasive than we may think and requires stringent and radical measures such as the amendment of the NPA Act to limit prosecutorial discretion.

BIBLIOGRAPHY

Journal Articles

Andersson N & Mhatre S 'Do Unto Others – and Pay the Price: Combating Sexual Violence in the South of Johannesburg' (2003) 3 *SA Crime Quarterly* 5-9.

Artz L & Smythe D 'Case Attrition in Rape cases: A Comparative Analysis' (2007) 20(3) *South African Journal of Criminal Justice* 158-181.

Artz L & Smythe D 'Feminism vs. the state?: A decade of sexual offences law reform in South Africa' (2007) 21(74) *Agenda* 6-18.

Bekink M 'Defeating the anomaly of the cautionary rule and children's testimony-S v Haupt 2018 (1) SACR 12 (GP)' (2018) 51(2) *De Jure Law Journal* 318-338.

Borges AM, Banyard VL & Moynihan MM 'Clarifying consent: Primary prevention of sexual assault on a college campus' (2008) 36(1-2) *Journal of Prevention & Intervention in the Community* 75-88.

Buiten D & Naidoo K 'Framing the problem of rape in South Africa: Gender, race, class and state histories' (2016) 64 (4) *Current Sociology* 535-550.

Cassese A 'On the current trends towards criminal prosecution and punishment of breaches of international humanitarian law' (1998) 9 (1) *European Journal of International Law* 2-17.

Chinkin C 'A critic of the public/private dimension' (1993) (10)2 *European Journal of International Law* 387-395.

Chirwa DM 'The doctrine of state responsibility as a potential means of holding private actors accountable for human rights' (2004) 5 *Melb. J. Int'l L.* 1-36.

Combrinck H 'Positive State Duties to Protect Women from Violence: Recent South African Developments' (1998) 20 *Human Rights Quarterly* 666-690.

Cook R 'Women's International Human Rights Law: The Way Forward' (1993) 15 *Human Rights Quarterly* 230.

Dominic C 'The international responsibility of states for breach of multilateral obligations' (1999) 10(2) *European Journal of International Law* 353-363.

Dugard J 'Courts and the poor in South Africa: A critique of systemic judicial failures to advance transformative justice' (2008) 24 *South African Journal on Human Rights* 214-238.

Du Toit PG & Ferreira GM 'Reasons for prosecutorial decisions' (2015) 18(5) *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 1506-1526.

Du Mont J, Miller KL & Myhr TL 'The role of 'real rape' and 'real victim' stereotypes in the police reporting practices of sexually assaulted women' (2003) 9(4) *Violence Against Women* 466-486.

Doulah A & Mirshahbiz S 'An Analysis of the Security Council Procedures in Managing Severe Violations of the International Human Rights' (2016) 9 *Journal of Politics and Law Journal of Politics and Law* 33-43.

Eagle K 'International Human Rights and Feminism: When Discourse's Meet' (1992) 13 *MICH. J. INT'L.*

Fitzgerald J 'The Attrition of Sexual Offences from the New South Wales Criminal Justice System' (2006) 92 *Crime and Justice Bulletin* 1-12.

Frazier PA & Haney B 'Sexual assault cases in the legal system: Police, prosecutor, and victim perspectives' (1996) 20(6) *Law and Human Behavior* 607-628.

Frank DJ, Hardinge T & Wosick-Correa K 'The global dimensions of rape-law reform: A cross-national study of policy outcomes' (2009) 72(2) *American Sociological Review* 272-290.

Frohmann L 'Discrediting victims' allegations of sexual assault: Prosecutorial accounts of case rejections' (1991) 38(2) *Social Problems* 213-226.

Galvin J & Polk K 'Attrition in case processing: is rape unique?' (1983) 20 (1) *Journal of Research and Delinquency* 126-154.

Gottfredson MR & Hindelang MJ 'A study of the Behavior of Law' (1979) 44 (1) *American Sociological* Review 3-18.

Gray C 'Peacekeeping and enforcement action in Africa: The role of Europe and the obligations of multilateralism' (2005) 31 (S1) *Review of International Studies* 207-223.

Hester M & Lilley S 'Rape investigation and attrition in acquaintance, domestic violence and historical rape cases' (2017) 14 (2) *Journal of investigative psychology and offender profiling* 175-188.

Jewkes R, Sikweyiya Y, Morrell R & Dunkle K 'Gender Inequitable Masculinity and Sexual Entitlement in Rape Perpetration South Africa: Findings of a Cross Sectional Study' (2011) 6(12) *PloS one 5* e29590.

Karimova T ‘What amounts to ‘a serious violation of international human rights law’? An analysis of practice and expert opinion for the purpose of the 2013 Arms Trade Treaty’ *2014 Geneva Academy of International Humanitarian Law and Human Rights* 1-43.

Kersetter W ‘Gateway to justice: Police and prosecutorial response to sexual assaults against women’ (1990) 81 *Journal of Criminal Law and Criminology* 287-313.

Krug EG, Mercy JA, Dahlberg LL & Zwi AB ‘The world report on violence and health’ (2000) 36 (9339) *The lancet* 1083-1088

Lauderdale H ‘The Admissibility of Expert Testimony on Rape Trauma Syndrome’ (1984) 75(4) *The Journal of Criminal Law and Criminology* 1366-1416.

Lea SJ & US Steve ‘Attrition in rape cases: Developing a profile and identifying relevant factors’ (2003) 43(3*) British Journal of Criminology* 583-599.

Lonsway KA ‘Preventing acquaintance rape through education: What do we know?’ (1996) 20(2) *Psychology of Women Quarterly* 229-265.

Mackinnon CA ‘Crimes of war, crimes of peace’ (1993) 4 *UCLA Women’s LJ* 59-86.

Meerkotter A ‘The application of the Promotion of Administrative Justice Act 3 of 2000 to decisions not to prosecute’ (2016) 27(3) *Stellenbosch Law Review* 509-609.

Meyersfeld B ‘Domesticating international standards: the direction of international human rights law in South Africa’ (2013) 5(1) *Constitutional Court Review* 399-416.

Meyersfeld B ‘Domestic violence, health, and international law’ (2008) 22 *Emory Int'l L. Rev* 61-112.

Meyersfeld B ‘Introductory note to the Council of Europe Convention on preventing and Combating Violence against women and domestic violence’ (2012) 51 *Int'l Legal Materials* 106-132.

Moore C ‘Women and domestic violence: the public/private dichotomy in international law’ (2003) 7(4) *The International Journal of Human Rights* 93-128.

Moreland S ‘Taking About Rape-and Why it Matters: Adjudicating rape in the Western Cape High Court’ (2014) 47 *South African Crime Quarterly* 5-15.

Muntingh L, Redpath J & Petersen K, ‘An Assessment of the National Prosecuting Authority: A Controversial Past and Recommendations for the Future’ 2017 *Africa Criminal Justice Reform* 1-44.

Naidoo K ‘Rape in South Africa-a call to action’ (2013) 10(3) SAMJ: *South African Medical Journal* 210-211.

Polk K ‘A Comparative Analysis of Attrition of Rape Cases’ (1985) 25(3) *The British Journal of Criminology* 280-284.

Polk K ‘Rape reform and criminal justice processing’ (1985) 31(2) *The British Journal of Criminology* 191-205.

Romany C ‘Women as aliens: a feminist critique of the private/public distinction in international human rights law’ (1993) 6 *Har. Hum. Rts*. J 87-126.

Roht-Arriaza N ‘State responsibility to investigate and prosecute grave human rights violations in international law’ (1990) 78 *Calif. L. Rev* 449-514.

Sachariew K ‘State Responsibility for Multilateral Treaty Violations: Identifying the ‘Injured State ‘and its Legal Status’ (1988) *35*(3) *Netherlands international law review* 273-289.

Spears JW & Spohn CC ‘The Effect of Evidence Factors and Victim Characteristics on Prosecutors’ Charging Decisions in Sexual Assault Cases’ (1997) 14(3) *Justice Quarterly* 501-524.

Stanko E ‘The Impact of Victim Assessment on Prosecutor’s Screening Decisions: The Case of the New York Country District Attorney’s Office’ (1988) 16 *Criminal Justice Law and Politics* 225-240.

Swemmer S ‘Justice denied? Prosecutors and presiding officers' reliance on evidence of previous sexual history in South African rape trials’ (2020) 69 *South African Crime Quarterly* 45-56.

Schwikkard ‘Backwards to the cautionary rule: S v Van der Ross 2002 (2) SACR 362 (C)’ (2003) 19(2) *South African Journal on Human Rights* 256-262.

Schwikkard PJ ‘Sexual Offences-The Questionable Cautionary Rule’ (1993) 110 *S. African LJ* 46-49.

Tardu ME ‘United Nations response to Gross Violations of Human Rights: The 1503 Procedure’ (1980) 20 *Santa Clara Law Review* 599.

Vetten L ‘New crimes and old procedures can the new sexual offences bill deliver on its promises?’ (2007) 22 SA *Crime Quarterly* 21-25.

Viljoen F ‘Removing Insult from Injury: Reviewing the Cautionary Rule in Rape Trials’ 1992 *JS Afr. L* 743-748.

Walker SP & Louw DA 'The Bloemfontein Court for Sexual Offences: Perceptions of its functioning from the perspective of victims, their families and the professionals involved' (2004) 17(3) *SACJ* 289-303.

Wolf L 'The Unsuccessful Constitutional Transition of the NPA' (2013) 71 *The Journal of the Helen Suzman Foundation* 20-26.

Wright R 'A note of the attrition of rape cases' (1984) 24 *British Journal of Criminology* 399-400.

Zemanek K 'New Trends in the Enforcement of erga omnes Obligations' (2000)4 *Max Planck Yearbook of United Nations Law* 1-52.

Chapters in books

Chambers G & Millar A 'Proving sexual assault: Prosecuting the offender or persecuting the victim?' in P Carlen & A Worrall (eds) *Gender, Crime & Justice* (1987).

Combrinck H 'Rape law reform in Africa: 'More of the same' or new opportunities?' in C McGlynn & VE Munro (eds) Rethinking Rape Law (2010).

Copelon R 'Gendered war crimes: Reconceptualizing Rape in Time of War' Women's Rights, Human Rights: International Feminist Perspectives' in R Peters (ed) Women's Rights, Human Rights: International Feminist Perspectives (1995).

Daly K & Bouhours B 'Rape and attrition in the legal process: A comparative analysis of five countries' in M Tonry (ed) *Crime and justice: An annual review of research* (2010).

Gallinetti J & Kassan D 'Children and Sexual Offences' in L Arts & D Smythe (eds) *Should we consent* (2008).

Hoexter C 'The Bill of Rights Handbook' in Ian Currie & Johan de Waal (eds) T*he Bill of Rights Handbook* (2018).

Kamminga MT 'Due Diligence: A Useful Tool to Combat Violence against Women?.' Forthcoming in I Westendorp (ed.) *The Women's Convention Turned* (2020).

Romany C 'State responsibility goes private: a feminist critique of the public/private distinction in international human rights law' in BB Lockwood (ed) Human Rights of Women (2012).

Schwikkard PJ ‘Getting Somewhere Slowly — The Revision Of A Few Evidence Rules’ in L Artz and D Smythe (eds) *Should we consent* (2008).

Smythe D & Waterhouse S ‘Policing Sexual Offences: Policies, Practices and Potential Pitfalls’ in L Artz & D Smythe (eds) *Should we consent* (2008).

Vetten L ‘Paradox and policy: addressing rape in post-apartheid South Africa’ in N Westmarland & G Gangoli (eds) *International approaches to rape* (2001).

Yonina Hoffman-Wanderer ‘Sentencing and Management of Sexual Offenders’ in L Artz & D Smythe (eds) *Should we consent* (2008).

Books

Adler Z *Rape on Trial (*1987).

Clapham A *Human Rights in the Public Sphere* (1993).

Currie & van der Merwe *The Bill of Rights Handbook* (2013).

Dugard J, du Plessis M, Maluwa T & Tladi D Dugard’s *International Law a South African Perspective* (2018).

Estrich S Real Rape: *How the legal System Victimizes Women who say No* (1987).

Grace S, Lloyd C & Smith L *Rape: From Recording to Conviction* (1992).

Harris J & S Grace S A *Question of Evidence?: Investigating and Prosecuting rape in the 1990s* (1999).

Hoexter C Administrative Law in South Africa (2012).

La Free G Rape and Criminal Justice: The Social Construction of Sexual Assault1989).

Lees S & Gregory J Rape and Sexual Assault: A Study of Attrition (1993).

Meyersfeld B Domestic violence and international law (2010).

Schwikkard & van der Merwe *Principles of Evidence* (2015).

Smythe D *Rape Unresolved: Policing sexual offences in South Africa* (2015).

Quiroga M *The Battle of Human Rights, Gross, Systematic Violations and the Inter-American System* (1988) 10.

Zeffert DT & Paizes AP *The South African Law of Evidence* (2009).

South African legislation

The Constitution of the Republic of South Africa, 1996.

Sexual Offences and Related Matters Amendment Act 32 of 2007.

National Prosecuting Authority Act 32 of 1998.

Promotion of Administrative Justice Act 3 of 2000.

Criminal Procedure Act 51 of 1977.

Treaties and international and regional instruments and documents and resolutions

The Beijing Declaration and Platform for Action, Fourth World Conference on Women, 15 September 1995.

The Protocol to the African Charter on Human Rights and Peoples' Rights on the Rights of Women in Africa (1995).

The United Nations Declaration on the Elimination of Violence Against Women, General Assembly resolution 48/104.

UN General Assembly, Convention on the Elimination of All forms of Discrimination against Women, 18 December 1979, A /RES/34/180.

UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III). https://www.refworld.org/docid/3ae6b3712c.html.

UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998.

UN Guidelines on the Role of Prosecutors Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba (27 August to 7 September 1990).

UN General Assembly, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power: resolution / adopted by the General Assembly, 29 November 1985, A/RES/40/34, <https://www.refworld.org/docid/3b00f2275b.html >

The Committee on the Elimination of Discrimination against Women 11th Session (1992), 'General Recommendation No 19 on violence against women Violence against Women as contained in Report of the Committee on the Elimination of Discrimination against Women' UN GAOR, 47th session, Supp No 38, UN Doc A/47/38 (1993).

The International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1.

N Sub-Commission on the Promotion and Protection of Human Rights, Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms: final report / submitted by Theo van Boven, Special Rapporteur., 2 July 1993, E/CN.4/Sub.2/1993/8.

UN Commission on Human Rights, Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences on the Due Diligence Standard as a Tool for the Elimination of Violence against Women, 20 January 2006, E/CN.4/2006/61.

R Coomaraswamy 'Report on the mission of the Special Rapporteur to South Africa on the issue of rape in the community' United Nations Economic and Social Council Report. UN Document <E/CN.4/1997/47/Add.3>

Inter-American Commission on Human Rights, Report no. 54/01, Case 12.051, Maria da Penha Maia Fernandes (Brazil), (16 April 2001).

South African case law

Affordable Medicines Trust v Minister of Health of RSA 2006 3 SA 247 (CC).

Abrahams v S (A491/2010) [2011] ZAWCHC.

B C v S (A8/2020) [2020] ZAFSHC 180.

Carmichele v Minister of Safety and Security 2001 (10) BCLR 995 (CC).

Cele v State [2016] 2 All SA 75 (KZP).

Dawood v Minister of Home Affairs 2000 3 SA 936 (CC).

D*emocratic Alliance and Others v Acting National Director of Public Prosecutions and Others* 2012 (6) BCLR 613 (SCA).

Democratic Alliance v Acting National Director of Public Prosecutions 2012 3 SA 486 (SCA).

Director of Public Prosecutions, North Gauteng v Thabethe 2011 (2) SACR 567 (SCA).

Ex Parte Chairperson of the Constitutional Assembly: in re certification of the Constitution of the Republic of South Africa 1996 [1996] (10) BCLR 1253 (CC).

Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others 1998 (12) BCLR 1458 (CC).

Freedom Under Law v National Director of Public Prosecutions 2014 1 SA 254 (GNP).

Glenister v President of the Republic of South Africa and Others (with the Helen Suzman Foundation as amicus curiae) 2011 (3) SA 347 (CC).

Government of the Republic of South Africa and Others v Grootboom and Others 2000 (11) BCLR 1169.

H v S (A400/2012).

Judes v District Registrar of Mining Rights, Krugersdorp 1970 TS 1046.

Kayobe v Minister for Home Affairs 2010 (4) SA 327 (CC)

Kaunda & Others v President of the Republic of South Africa 2004 (10) BCLR 1009 (CC).

K v Minister of Safety and Security 2005 8 BLLR 749 (CC).

Macrae and Another v S 2014 (2) SACR 215 (SCA).

Masiya v Director of Public Prosecutions Pretoria (The State) and Another 9 2007 (5) SA 30 (CC).

Minister of Health v Treatment Action Campaign (No 1) 2002 5 SA 703 (CC).

M S v S (CA40/2017) [2019] ZANWHC.

M v S 2020 (1) SACR 241 (WCC).

National Director of Public Prosecutions v Freedom Under Law (67/14) [2014] ZASCA 58.

National Director of Public Prosecutions v Zuma [2009] 2 All SA 243 (SCA).

National Director of Public Prosecutions v Zuma (2009) 2 SA 277 (SCA).

Rail Commuters Action Group & Others v Transnet Limited t/a Metro-Rail 2005 (4) BCLR 301 (CC).

R M v S (A158/2018) [2019] ZAGPJHC.

R(N) v Mental Health Review Tribunal (Northern Region) [2006] QB 468.

Southern African Litigation Centre and Another v National Director of Public Prosecutions and Others [2012] 3 All SA 198 (GNP).

S v Abrahams 2002 (1) SACR 116 (SCA).

S v Abrahams 2001 (2) SACR 358 (C).

S v Baloyi (Minister of Justice Intervening) 2000 (1) BCLR 86 (CC).

S v Baloyi & Others 2000 (2) SA 425 (CC).

S v Basson [2004] (6) BCLR 620 (CC).

S v D 1992 (1) SA 513 1992 (1) SACR 143 (Nm).

S v Fani and Others 1994 (3) SA 619 (E).

S v Gentle (317/2003) [2005] ZASCA.

S v Hanekom (A304/10) 2011 (1) SACR 430 (WCC).

R v Henry and Manning (1969) 53 Cr App (R) 150.

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

S v Jansen 1999 (2) SACR 368 (C).

S v Jija and Other 1991 (2) SA 52 (E).

S v M 1992 (2) SACR 188 (W) 272.

S v Magagula SHB21/2013.

S v Mahomotsa 2002 (2) SACR 435 (SCA).

S v Matyityi 2011 (1) SACR 40 (SCA).

S v Mvamvu 2005 (1) SACR 54 (SCA).

S v PB (A356/2017) [2017] ZAWCHC 163.

R v Riekert 1954 (4) SA 254 (SWA).

S v S (CA40/2017) [2019] ZANWHC 2 (25 January 2019).

S v Sauls and Others 1981 (3) SA 172 (A) 180.

S v Sithole and Others 2012 (1) SACR 586 (KZD).

S v Trainor 2003 (1) SACR 35 SA 41 (b).

S v Tshotshoza (2010) 2 SACR 274 (GNP).

S v Vilakazi 2009 (1) SACR 552 (SCA).

Tshabalala v S; Ntuli v S 2020 (5) SA 1 (CC)

van Eeden v Minister of Safety and Security 2002 4 All SA 346 (SCA).

Y v S (537/2018) [2020] ZASCA 42.

Foreign case law

Aydin v Turkey 1997-VI E UR . C T. H.R. . 1866.

Bain v The Queen (1992) 87 DLR (4th) 449.

Boucher v The Queen (1954) 110 CCC 263.

R v Brown [1997] UKHL 33; [1997] 3 All ER 769 (HL).

S.B. Shahane v State of Maharashtra AIR 1995 SC 1628.

Imbler v Pachtman, District Attorney [1976] USSC 26; 424 US 409, 423 (1976).

MC v Bulgaria 2003-XII E UR. C T. H.R. 1., appl. no. 39272/98, decision of Dec. 4, 2003.

O'Keeffe v Ireland ECHR (Application no. 35810/09) 28 January 2014.

*R v Hall (*1979) 28 ALR 107.

Gates v Gates 1939 AD 150;

Velásquez Rodríguez v Honduras Case, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988), Inter-American Court of Human Rights (IACrtHR) (29 July 1988).

Miscellaneous reports and studies

Barberton C & A Grieve 'An Investigation Into The Cost, Management And Ways Of Improving The Thuthuzela System' 2005 Cornerstone Economic Research.

Department of Justice and Constitutional Development Annual Report Implementation of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007) In the 2017/2018 financial year.

Fisher BS, Cullen FT, and Turner MG, 'The sexual victimization of college women. Research report' 2000 Washington, DC: Department of Justice.

Heath A, Artz L, Odayan M & Gihwala H 'Improving Case Outcomes for Sexual Offences Cases Project: Pilot Study on Sexual Offences Courts. Cape Town, South Africa' 2018 Gender Health and Justice Research Unit 1-206.

Machisa M, Jina R, Labuschagne G, Vetten L, Loots L, Swemmer S, Meyersfeld B & Jewkes R 'Rape Justice in South Africa: A Retrospective Study of The Investigation, Prosecution and Adjudication of Reported Rape Cases From 2012' 2017 Gender and Health Research Unit, South African Medical Research Council 1-124.

Ministerial Advisory Task Team on the Adjudication of Sexual Offence Matters (MATTSO) 'Report On The Re-Establishment Of Sexual Offences Courts' (2013).

Pithey B, Artz L, Combrinck H & Naylor N 'Legal Aspects of Rape in South Africa' 1999 Discussion Document.

South African Law Reform Commission (SALRC) Project 107 Discussion Paper 85 (1999).

South African Law Reform Commission Project 45 Women and Sexual Offences in South Africa (1985).

Spohn C, Beichner D, Davis Frenzel E & Holleran D 'Prosecutors' charging decisions in sexual assault cases: A multi-site study, final report' 2002 Washington DC: National Institute of Justice.

Redpath J 'Failing to prosecute? Assessing the state of the National Prosecuting Authority in South Africa' 2012 Institute for Security Studies 1-108.

Vetten L, Jewkes R, Sigsworth R, Christofides N, Loots L & Dunseith O 'Tracking Rape Case Attrition in Gauteng: The Police Investigation Stage' 2008 Tshwaranang Legal Advocacy Centre 1-66.

Vetten L 'It sucks/It's a wonderful service: Post-rape care and the micro-politics of institutions' 2015 Johannesburg: Shukumisa Campaign and ActionAid South Africa 1-55.