

**AMICUS CURIAE PARTICIPATION, GENDER EQUALITY AND THE SOUTH
AFRICAN CONSTITUTIONAL COURT**

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DECLARATION

I, _____, declare that this thesis is my own unaided work. It is submitted in fulfillment of the requirements of the degree of Doctor of Philosophy (PhD) 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.

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ABSTRACT:

This study is interested in questions of law and social change, with a particular focus on how litigation can be used strategically to change the law to benefit women. Given law's patriarchal nature, feminist litigators have often asked questions about whether, and how the law can be used to reflect women's experience and to improve women's lives. In this sense, the feminist project in law considers how feminist theory and methodology can be used in constructing legal arguments that seek the improvement of women's rights and gender equality.

The focal point of this study is *amicus curiae* participation and how this participation is employed by means of feminist litigation strategy so that it enhances rights-claiming and advances gender equality for women within the court system. I examine the way in which *amicus curiae* participation promotes litigation from a feminist and gendered viewpoint and validates the employment of feminist method to create effective arguments.

The main body of the dissertation is dedicated to a case analysis of the Constitutional Court's core gender jurisprudence and the *amici curiae* that have participated in these matters. The case discussions are divided into three categories: violence against women, women as part of cultural communities, and specific areas of vulnerability including prostitution and domestic partnerships (between heterosexual couples). The purpose of this analysis is to establish whether the *amici curiae* that have participated in these matters were able to influence judicial decisions, and how the *amici* used litigation to communicate a feminist and gendered viewpoint.

The study concludes that, whether the relevant *amici curiae* participation had a direct or indirect impact on judicial decisions or not, its importance lies in engaging the law from a feminist and gendered viewpoint to create awareness of gender inequality, how this inequality is entrenched in the legal system and how it might be remedied.

LIST OF ABBREVIATIONS

ANC	African National Congress
BLA	Black Administration Act 38 of 1927
CALS	Centre for Applied Legal Studies
CGE	Commission for Gender Equality
CONTRALESA	Congress of Traditional Leaders of South Africa
CSVR	Centre for the Study of Violence and Reconciliation
NMRW	National Movement of Rural Women
POWA	People Opposing Women Abuse
RCMA	Recognition of Customary Marriages Act 120 of 1998
SAHRC	South African Human Rights Commission
SALRC	South African Law Reform Commission
SAPS	South African Police Service
SCA	Supreme Court of Appeal
SWEAT	Sex Workers Education and Advocacy Task Force
TAC	Treatment Action Campaign
TLAC	Tshwaranang Legal Advocacy Centre
WLC	Women's Legal Centre

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CHAPTER 1

INTRODUCTION

This study is interested in questions of law and social change, with particular focus on how litigation can be used strategically to change the law to benefit women. Given law's patriarchal nature, feminist litigators have often asked questions about whether, and how, the law can be used to reflect women's experience and how to improve women's lives.¹ This study examines the feminist project in law and how it enables litigators to use feminist theory and methodology to construct legal arguments that seek to improve women's rights and gender equality.

Conaghan has questioned how feminist theory can be used by those engaged in concrete legal struggles and she believes that it is important to adopt a general feminist perspective instead of being bound by a specific theoretical approach:

'To adopt a feminist perspective is, first and foremost, to bring a gendered perception of legal and social arrangements to bear upon a largely gender neutral understanding of them. The object is to highlight the gendered assumptions embedded in such arrangements, assumptions too often rendered invisible by, among other things, the allegedly 'objective' analysis of traditional academia. Feminism thus presupposes that gender has a much greater structural and/or discursive significance than is commonly assumed, a significance which is ideologically but not practically diminished by its relative invisibility. In this sense, feminism purports to offer a better understanding of the social world by addressing aspects which have hitherto been ignored or misrepresented, while at the same time, countering the ideological effects to which such misrepresentations give rise.'²

This study will explore the importance of employing a feminist perspective in litigation and specifically how *amicus curiae* participation can and has contributed to the engagement of the law in enhancing women's lives.³

¹ Ruth Colker 'Feminist litigation: An oxymoron? A study of the briefs filed in *William L. Webster V. Reproductive Health Services*' (1990) 13 *Harv. Women's L.J.* 137; Naomi R. Cahn 'Defining feminist litigation' (1991) 14 *Harv. Women's L.J.* 1 at 2.

² Joanne Conaghan 'Reassessing the feminist theoretical project in law' (2000) 27 *Journal of Law and Society* 351 at 359 (footnotes omitted).

³ *Amicus curiae* is a Latin term and literally means friend of the court. Traditionally an *amicus curiae*, at the court's discretion, provided information on areas of law that the court regarded as complex. Take note that the singular, *amicus curiae*, refers to a single party, whilst the plural, *amici curiae*

As an introduction to the study, I explore the enabling role of law and litigation in effecting social change and the unique role of public interest litigation in contributing to this change. The first chapter explores the feminist project in law and establishes how feminist lawyers who rely on the Constitution's equality right have developed a substantive legal methodology in the adjudication of equality cases.⁴ This methodology is often employed through *amicus curiae* participation and focuses on the context and impact of an alleged rights violation and employs constitutional values and rights in its resolution.

Chapter two describes the history of *amicus curiae* participation and the relevance of this participation to influence judicial decision-making. The focus is on the *amici curiae*'s new-found role in the representation of public interest, specifically within the context of gender litigation, and on the usefulness of *amici curiae* participation in its representation of women's voices and the complexity of women's lives in litigation. In doing this, I attempt to show that *amicus curiae* participation, as part of litigation strategy, has the potential to assist courts in reaching decisions that would be more representative of women's lives and realities.

The main body of the thesis is dedicated to a case-based analysis of the Constitutional Court's core gender jurisprudence and the *amici curiae* that have participated in these matters. The case discussions are divided into three categories, namely: violence against women, women as part of cultural communities and specific areas of vulnerability including prostitution and domestic partnerships (between heterosexual couples). The purpose of this analysis is to establish whether the *amici curiae* that have participated in these matters were able to influence the judicial decisions that were reached in any way and how the *amici* used this litigation strategy to bring a feminist and gendered viewpoint across.

refers to more than one party. In chapter 2 of this study the purpose and relevance of *amicus curiae* participation will be analysed.

⁴ Section 9 of the Constitution of the Republic of South Africa, 1996 (hereinafter the Constitution).

1 FEMINISM, LAW AND SOCIAL CHANGE

1.1 Law and Change

It is important with the introduction of this study, to provide some insight into debates about law and social change, especially whether changing the content of law can have a positive impact on the lives of individuals and/or groups, and thus on society.

The question is often asked whether law can encourage social change, specifically, the way in which a society thinks and reacts. Socio-legal scholars have long debated the power of law to effect such change, and many conclude that it cannot since law, with all its complexity, is viewed as a separate entity, that prescribes to society, rather than an intrinsic part of society.⁵ In this sense, law is perceived as an instrument of state power, independent of other aspects of social regulation, and when viewed as such, law becomes a purely technical regulation that lacks any moral authority.⁶

On the other hand, scholars have argued that law is an expression of society's values and concerns and that it has the power, not only to set and alter rules, but also to change the way in which a society thinks and reacts.⁷ What is clear is that law's power is enticing and not something that should be underestimated. Pellat describes the power of law as follows:

'Law is quite clearly, an unlikely means of effecting fundamental social change. It is, after all, the law. Its primary purpose – as many legal theorists have pointed out and as is patently clear – is to sustain and maintain the status quo and not to promote alternatives. It is wrong to suggest, however, that law is simply a monolithic reflection of the social and political standard and that it therefore must speak the same language and carry the same vision and ethic as that promoted in the social and political spheres. To adopt the position there is no room in law for political manoeuvre whatsoever is to deny the very real impact that legal reform initiatives have had historically on the structure and fibre of social life.'⁸

⁵ Roger Cotterrell *The sociology of law: An introduction* (Butterworths 1992) 44; also see Brian Burch *The sociology of law: Critical approaches to social control* (Harcourt Brace Jovanovich 1992); Joel F. Handler *Social movements and the legal system: A theory of law reform and social change* (Academic Press 1978).

⁶ Cotterrell op cit note 5 at 45.

⁷ Thomas B. Stoddard 'Bleeding heart: Reflections on using the law to make social change' (1997) 72 *New York University Law Review* 967 at 971.

⁸ Anna S. Pellatt 'Equality rights litigation and social transformation: A consideration of the women's legal education and action fund's intervention in *Vriend v. R.*' (2000) 12 *CJWL* 117 at 120.

Stoddard, who supports the role of law in effecting change, confirms the ability of the law to alter and enforce rules, but emphasises its ability to effect social change that “transcends mere rulemaking and seeks, to improve society in fundamental and extra-legal ways” which he calls “culture shifting” change.⁹ Stoddard identifies five general goals that he described as the law’s “rule shifting” capacity, namely to set, alter and enforce specific rules.¹⁰ These include the power to create new rights and remedies for victims; to alter the conduct of government; to alter the conduct of citizens and private entities; to express a new moral ideal or standard; and to change cultural attitudes and patterns.¹¹

Most important to Stoddard, however, is the possibility of using the law to advance the rights and interests of people who are being mistreated by the law and enabling law’s “rule shifting capacity” to become “culture shifting”.¹² Stoddard refers to the implementation of the American Civil Rights Act of 1964 as an example of legal reform that was both “rule shifting” and able to initiate social change – therefore “culture shifting”.¹³ The Act enabled law’s rule shifting capacity, as it gave victims of racial discrimination new rights and remedies; it instructed government to promulgate and enforce new rules of conduct for itself; it altered the conduct of private entities and citizens; and it expressed a new moral standard.¹⁴ Although Stoddard acknowledges that it is difficult to measure actual social change and law’s culture shifting capacity, to him the change in racial interactions over time pointed at the Act’s social impact.¹⁵

From his analysis of the Civil Rights Act, Stoddard identifies four factors that should be engaged in order to harness law’s “rule shifting” capacity to become “culture shifting”. These include: a change that is very broad or profound; public awareness of that change; a general sense of legitimacy of the change; and overall continuous enforcement of the change.¹⁶ Stoddard mainly focuses on the power of legislation to engage social change, because the legislative process is more likely to

⁹ Stoddard op cit note 7 at 973.

¹⁰ Ibid 973.

¹¹ Ibid 980.

¹² Id.

¹³ Ibid 973.

¹⁴ Ibid 974.

¹⁵ Id.

¹⁶ Ibid 978; Nan D. Hunter ‘Lawyering for social justice’ (1997) 72 *New York Law Review* 1009 at 1019; includes a fifth dimension - public engagement beyond a small cadre of litigators or lobbyists.

promote public discussion and knowledge.¹⁷ However, he acknowledges the relevance and importance of litigation, specifically strategically planned litigation, to enable social change since it highlights problems and inequalities and forces government to face up to these factors that initiate the process of change.¹⁸

This study and the discussion that follows focus predominantly on the power and value of litigation to influence law's rule shifting capacity, but also considers the possibility of this influence to contribute to social and cultural change.

1.2 Litigation and Change

Similar to the general debates concerning law and social change, a diverse range of opinions have warned against the illusion that litigation could have a substantive impact on society.¹⁹ Whilst legal realists and critical legal scholars, have been sceptical about the ability of law and specifically litigation to "change society",²⁰ legal mobilisation scholars have been more optimistic about the potential of litigation to initiate, or play a role in, change.²¹

Legal realists have pointed to the disparities between formal litigation outcomes and the actual implementation of these outcomes. They believe that government input and/or legislation is necessary to effect "real" social change.²² They believe that social change activists would achieve more by interacting with government when policies are being formulated rather than to engage in litigation.²³ Supporting the legal realist position, some critical legal scholars have argued that litigation could weaken social movements, as a result of law's ideological bias that reinforces current and dominant social structures and hierarchies.²⁴ Both realists and

¹⁷ Stoddard op cit note 7 at 981.

¹⁸ Ibid 985.

¹⁹ Alan Hunt 'Rights and social movements: Counter-hegemonic strategies' in Michael McCann (ed) *Law and social movements* (Ashgate 2006) 309.

²⁰ For a discussion of the viewpoints of a legal realist see Gerald N. Rosenberg *The hollow hope: Can courts bring about social change?* (University of Chicago Press 1991); for the viewpoints of critical legal scholars see Peter Gabel 'The phenomenology of rights consciousness and the pact of the withdrawn selves' (1984) 62 *Texas Law Review* 1563 and Mark Kelman *A guide to critical legal studies* (Harvard University Press 1987).

²¹ Cheryl Holzmeyer 'Human rights in an era of neoliberal globalization: The Alien Tort Claims Act and grassroots mobilization in *Doe v. Unocal*' (2009) 43 *Law & Society Review* 271 at 273; also see J Klaaren, J Dugard & J Handmaker 'Public interest litigation in South Africa: A special issue introduction' (2011) 27 *SAJHR* 1.

²² Holzmeyer op cit note 21 at 273.

²³ Id.

²⁴ Id.

these critical legal scholars believe that litigation is not able to address actual social inequality and injustice.²⁵

At the other end of the spectrum, legal mobilisation scholars locate litigation within a wider struggle for change and focus on the indirect impact of litigation and not just judicial outcome.²⁶ In this sense indirect impact refers to spurring on or supporting movement-building efforts, generating public support for new rights claims, providing pressure to supplement political tactics and garnering media attention.²⁷ In his reference to the American civil rights movement, McCann also illustrates the importance of the indirect impact of litigation, as early school desegregation cases had little impact on white southern racial practices, but the court cases were highly instrumental in “raising expectations and catalyzing political commitment among Blacks for the civil rights cause.”²⁸ Legal mobilisation scholars acknowledge that judicial victories may fail to bring desired relief or immediate social change, but realise the potential that even unsuccessful or indeterminate court actions may generate important legal resources for broader political campaigns.²⁹

In the South African context, the *Minister of Health v Treatment Action Campaign* case is a good example where litigation was only used as a part of the Treatment Action Campaign’s (TAC’s) strategy to address government’s policy on the prevention of mother to child transmission of the HIV virus.³⁰ More important than the actual judgment itself was the political leverage and moral authority gained by it that the TAC subsequently used as a lobbying tool in the face of lagging government

²⁵ Id.

²⁶ Klaaren, Dugard & Handmaker op cit note 21 at 2; Michael W. McCann ‘Reform litigation on trial’ (1992) 17 *Law and Social Inquiry* 715 at 716.

²⁷ Michael W. McCann ‘Legal mobilization and social reform movements: Notes on theory and its application’ in Michael W. McCann (ed) *Law and Social Movements* (Ashgate 2006) 225 at 230. Also see Jackie Dugard & Malcolm Langford ‘Art or science? Synthesising lessons from public interest litigation and the dangers of legal determinism’ (2011) 27 *SAJHR* 39 at 55; Peter Houtzager & Lucie E. White ‘The long arc of pragmatic economic and social rights advocacy’ in Lucie E. White & Jeremy Perelman (eds) *Stones of Hope: How African activists reclaim human rights to challenge global poverty* (Stanford University Press 2011) 172.

²⁸ McCann ‘Legal mobilization and social reform movements’ op cit note 27 at 230.

²⁹ Id, Holzmeyer op cit note 21 at 275.

³⁰ *Minister of Health v Treatment Action Campaign (2)* 2002 (5) SA 721 (CC) (hereinafter the TAC case); William Forbath, Zacki Achmat, Geoff Budlender & Mark Heywood ‘Cultural transformation, deep institutional reform and ESR practice’ in Lucie E. White & Jeremy Perelman (eds) *Stones of Hope: How African activists reclaim human rights to challenge global poverty* (Stanford University Press 2011) 51 at 56.

implementation of the judgment.³¹ In this sense the judgment was used to promote pro-poor health policy changes and institutional reform well after the judgment was handed down.³²

What emerges from the work of legal mobilisation scholars is that law, and specifically litigation, is only a single stepping stone to social change. The key seems to be to devise a specific litigation strategy that would harness the power of law in such a way that it would create meaningful opportunities, despite the outcome of a court decision that could subsequently advance a certain social agenda.³³

In this respect, public interest litigation or so called “cause lawyering” is of importance and differs from traditional litigation. Whilst the latter is only concerned with the relevant client and the successful carrying out of an instruction,³⁴ the former is often used as a conscious strategy to influence social policy in fields such as health, environment, housing, land, education and gender.³⁵ Gloppen describes the importance and purpose of public interest litigation as follows:

‘The aim of public interest litigation is to transform the situation not only for the litigants but also for all those similarly situated: that is, to alter structured inequalities and power relations in our society in ways that reduce the weight of morally irrelevant circumstances, such as socio-economic status, gender, race, religion, or sexual orientation. Thus, the success of litigation should be judged not only in terms of how a case fares in court but also on whether the terms of the judgment are complied with. Even more important is the systemic impact – the broader effects on social policy, public discourses on social rights, and the development of jurisprudence.’³⁶

In reference to the practice of public interest litigation before the courts in South Africa, Marcus and Budlender have identified several factors which they regard as necessary for successful litigation in the public interest.³⁷ These include the proper organisation of clients; planned long-term strategy; co-ordination and information

³¹ Forbath, Achmat, Budlender & Heywood op cit note 30 at 68.

³² Ibid 56.

³³ Holzmeyer op cit note 21 at 274.

³⁴ Geoff Budlender ‘On practicing law’ in Hugh Corder (ed) *Essays on law and social practice in South Africa* (Juta 1988) 319 at 322.

³⁵ Siri Gloppen ‘Public interest litigation, social rights, and social policy’ in Anis A. Dani & Arjan de Haan (eds) *Inclusive states: Social policy and structural inequalities* (World Bank 2008) 343.

³⁶ Ibid 344 (footnotes omitted).

³⁷ Gilbert Marcus & Steven Budlender *A strategic evaluation of public interest litigation in South Africa* (Atlantic Philanthropies 2008).

sharing with other relevant organisations; timing; thorough research; the characterisation of cases; and follow up.³⁸ They argue, similar to the reasoning of Stoddard, that if this strategy is coupled with public information campaigns to achieve rights awareness; if persons are advised and assisted in claiming their rights and there is social mobilisation, public interest litigation could give rise to social change citing the *TAC* case as one of the examples.³⁹ Therefore, when litigating in the public interest, lawyers should not only be concerned with the initial outcome of a case, but also focus on the use of arguments that further certain goals, once a verdict has been given.

This study will primarily focus on the relevance and importance of litigation (specifically public interest litigation) to address gender inequality and possibly spur gendered social change. Here the focus will be on *amicus curiae* participation as public interest litigation strategy, and more specifically, as feminist litigation strategy, to claim rights and advance gender equality for women within the court system. The discussion that follows, explains the connections between law, rights assertion and the importance of social change in enhancing women's lives.

1.3 The Feminist Project in Law

The connection between law, rights assertion and social change is particularly relevant in relation to the promotion of gender equality, as law is regarded as an important arena where women's movements and feminist activists seek to change women's lives.⁴⁰

Because feminist legal thought engages with a wide range of perspectives and traditions that can be ascribed to a diversity of thought originating from different political, cultural and philosophical traditions, it is not easily characterised by any essential or fundamental principles.⁴¹ The aim of this study is not to explore the

³⁸ Ibid 119.

³⁹ Ibid 94.

⁴⁰ Sharyn Roach Anleu *Law and social change* (SAGE Publications 2000) 171.

⁴¹ Conaghan op cit note 2 at 357, she refers here to liberalism, socialism, Marxism influences by American critical legal studies, critical race theory, poststructuralism, postmodernism and psychoanalytic perspectives. Cynthia Grant Bowman & Elizabeth M. Schneider 'Feminist legal theory, feminist law making, and the legal profession' (1998) 67 *Fordham Law Review* 249 at 254; Gayle Binion 'Human rights: A feminist perspective' (1995) 17 *Human Rights Quarterly* 509 at 512.

For a discussion of the different feminist scholarly approaches see Karin van Marle & Elsje Bonthuys 'Feminist theories and concepts' in Elsje Bonthuys & Catherine Albertyn (eds) *Gender, law and justice*

different scholarly approaches to feminism nor advocate support for one specific approach, however, it does embrace a feminist project in law which does have certain common features that applies to feminist analysis without essentialising or denying its complexity and contestability.⁴² These features include:

'First, feminist legal scholars seek to highlight and explore the gendered content of law and to probe characterizations positing themselves as neutral and, more specifically, ungendered. Secondly, they are part of a cross-disciplinary feminist effort to challenge traditional understandings of the social, legal, cultural, and epistemological order by placing women, their individual and shared experiences, at the center of their scholarship. Thirdly, feminist legal scholars seek to track and expose law's implication in women's disadvantage with a view to bringing about transformative social and political change.'⁴³

Of importance to this study is the relationship between theory and practice, more specifically how the complexity of women's lives/experience is translated into legal claims.⁴⁴

Equal to the discussions on law and change and litigation and change discussed above, feminists have also questioned the utility of law and litigation as an instrument for voicing women's inequality, since most feminist scholars agree that the law as patriarchal creature is more likely to reproduce existing social and economic relations rather than change them.⁴⁵ Smart articulated certain problems when using rights (litigation) as part of a feminist strategy to achieve change.⁴⁶ According to her, the acquisition of rights in a given area may over-simplify complex power relations and the relevant rights might be appropriated by the more powerful party.⁴⁷ Rights claims are often countered by competing rights claims as litigation is centred on individuals, which erodes the intention of fighting for social good.⁴⁸

(Juta 2007) 15 at 17 and Catherine Albertyn 'Equality' in Elsje Bonthuys & Catherine Albertyn (eds) *Gender, law and justice* (Juta 2007) 82 at 83.

⁴² Conaghan op cit note 2 at 358.

⁴³ Ibid at 359.

⁴⁴ Elizabeth M. Schneider 'Particularity and generality: Challenges of feminist theory and practice in work on women-abuse' (1992) 67 *New York University Law Review* 520 at 521.

⁴⁵ Catherine Albertyn 'Defending and securing rights through law: Feminism, law and the courts in South Africa' (2005) 32 *Politikon* 217 at 220.

⁴⁶ Carol Smart *Feminism and the power of law* (Routledge 1989) 144.

⁴⁷ Id.

⁴⁸ Ibid 145.

However, law is still viewed as an important site of political struggle, despite its gendered disparity and it could “be harnessed in a positive way to improve women’s lives”.⁴⁹ Rights claims give women an important sense of collective identity, actively shape public discourse and are a source of empowerment.⁵⁰ The public nature of rights assertion is especially significant because of the often private nature of discrimination against women.⁵¹ Pellat describes the necessity of engaging law from a feminist standpoint as:

‘The problem from a feminist standpoint, is that law’s way of envisioning women’s reality, of translating the substance and circumstances of women’s lives, has tended to be dominated by the harsh exclusionary gender-based politics marking the social realm. Cultural myths and stereotypes about women and narrow, dualistic constructions of difference have dictated the way in which law has historically conceptualized and responded to women and women’s subordination. In order to make law conscious of, and responsive to, gender oppression in all its manifestations, it is necessary to challenge the signifying rules and conventions that denigrate and erase the difference that women represent and, at the same time, to find ways of re-working the discourse in order to represent who women are and what they experience in palpably real and full terms.’⁵²

It is clear that engagement with law, despite its inherent flaws, is an important feminist project, one that should be engaged specifically in addressing women’s subordination and inequality. What is important is to consider the implication of feminist theory, especially feminist legal method, for strategic litigation choices and the importance of judicial decisions for the feminist project in law.⁵³

Schneider argues that women centred litigation, equated to general public interest litigation while heeding the sentiments of legal mobilisation scholars, should not be employed as an individualistic strategy to achieve social change, but rather as part of a larger struggle to accurately reflect the realities of women’s lives.⁵⁴ With the understanding that, if litigation is to have any real impact, it should be viewed within

⁴⁹ Catherine Albertyn ‘Feminism and the law’ in Christopher Roederer & Darrel Moelendorf (eds) *Jurisprudence* (Juta 2004) 291 at 295.

⁵⁰ Roach op cit note 40 at 172.

⁵¹ *Id.*

⁵² Pellatt op cit note 8 at 121.

⁵³ Schneider op cit note 44 at 526.

⁵⁴ *Id.*; also see Judy Fudge ‘The public/private distinction: The possibilities of and the limits to the use of charter litigation to further feminist struggles’ (1987) 25 *Osgoode Hall Law Journal* 485 at 548.

a broader context of political opportunity and social mobilisation, then the actual role of courts and the implications of a judgment as vehicle for change, remains important.

As a result of law's patriarchal nature, one of the challenges faced by feminist litigators is how to make the law sensitive to women's experience and more specifically the strategy adopted when identifying to a court how the law affects women's lives.⁵⁵ I intend to focus on *amicus curiae* participation as a specific feminist litigation strategy to bring women's voices and experiences to court. Acting as *amicus curiae* and providing specific contextual evidence to the court, provide ways of thinking of the law, not in isolation, but in connection with the utilisation of the law as a vehicle for change.⁵⁶ The use of *amicus curiae* participation as part of litigation strategy, could enable feminist litigators to offer evidence of women's contexts and to challenge current constructs of the law, by providing alternate interpretation of rights; by proposing the development of current legal rules and in defending existing rights protections.⁵⁷

The focus of this study will be the briefs of relevant organisations that have participated as *amici curiae* in the South African Constitutional Court's gender matters, in order to establish whether their participation has influenced the relevant Court decisions in any way to more effectively represent the complexities of women's lives. However, it is firstly important to explore our constitutional commitment to equality, and how the notion of substantive equality has contributed to formulating a specific feminist litigation strategy.

⁵⁵ Sarah E. Burns 'Notes from the field: A reply to Professor Colker' (1990) 13 *Harv. Women's L.J.* 189 at 196.

⁵⁶ Ann C. Shalleck 'Feminist legal theory and the reading of *O'Brien v. Cunard*' (1992) 57 *Missouri Law Review* 371 at 387.

⁵⁷ Catherine Albertyn 'Law, gender and inequality in South Africa' (2011) 39 *Oxford Development Studies* 139 at 143.

2 A SUBSTANTIVE UNDERSTANDING OF THE RIGHT TO EQUALITY AND THE IMPORTANCE OF CONTEXT

The adoption of the South African Constitution and the acknowledgement of the principle of equality as one of its founding values, paved the way for unprecedented change concerning women's rights.⁵⁸ The Constitution has aptly been described as a transformative document,⁵⁹ and prohibits discrimination on a number of specific grounds which include gender, sex, pregnancy and marital status.⁶⁰

Legal feminists called for a substantive interpretation of the right to equality, one in which courts would assess equality claims in relation to women's lived inequalities which are rooted in deep social and economic differences.⁶¹ Such an interpretation requires attention to context and, in relation to gender equality, an understanding of the patriarchal nature of our society, the social and economic

⁵⁸ Sec 1 of the Constitution states that the Republic of South Africa is one, sovereign, democratic state founded on the values of *inter alia* human dignity, the achievement of equality and the advancement of human rights and freedoms. The favorable constitutional climate coupled with a strong women's movement allowed women to advocate for policies and laws that enshrined rights that benefited them. The first women-specific laws that were passed related to legalising abortion, the Choice of Termination of Pregnancy Act 92 of 1996; criminalising violence against women, the Prevention of Family Violence Act 133 of 1993 and the tightening up of regulations to ensure that defaulters on maintenance payments could be prosecuted, the now Maintenance Act 99 of 1998. For a discussion of the importance of the women's movement in the South African context see Shireen Hassim 'The gender pact and democratic consolidation: Institutionalizing gender equality in the South African state' (2003) 29 *Feminist Studies* 505; Shireen Hassim 'Voices, hierarchies and spaces: Reconfiguring the women's movement in democratic South Africa' (2005) 32 *Politikon* 175.

⁵⁹ Karl E. Klare 'Legal culture and transformative constitutionalism' (1998) 14 *SAJHR* 146; Cathi Albertyn & Beth Goldblatt 'Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality' (1998) 14 *SAJHR* 249; Justice Yvonne Mokgoro 'Constitutional claims for gender equality in South Africa: A judicial response' (2003) 67 *Albany Law Review* 565; Penelope E. Andrews 'Imagine all the women: Power, gender and the transformative possibilities of the South African Constitution' in Muno Ndalo & Margaret Grieco (eds) *Power, gender and social change in Africa* (2009) available at SSRN: <http://ssrn.com/abstract=1493500>.

⁶⁰ Sec 9 of the Constitution states '(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.'

⁶¹ Albertyn 'Equality' op cit note 41 at 82; Catherine Albertyn & Beth Goldblatt 'Equality' in Woolman, Roux, Klaaren, Stein, Chaskalson & Bishop (eds) *Constitutional Law of South Africa* (Juta, 2nd edition, Cape Town, 2008) 35-1 at 35-6.

disparities that exist which increase women's vulnerability to, for example, violence and the intersecting nature of inequalities.⁶²

For a substantive understanding of equality, the focus of a legal inquiry should also be on the impact of an act and on the nature of the harm created.⁶³ Albertyn and Goldblatt articulated the importance of a substantive understanding of the right to equality and how such an understanding would influence a court's considerations:

'A legal commitment to substantive equality thus requires a retreat from legal formalism. Importantly, the assessment of context and impact should be guided by the purpose of the right and its underlying values. While an analysis of the context in which the alleged violation occurs enhances a court's understanding of the legal claim, a clear exposition of the purpose of the right to equality, and of the constitutional values that underpin it, provide the court with crucial signposts to a decision most faithful to the Final Constitution.'⁶⁴

In its first judgment pertaining to unfair discrimination, the Constitutional Court recognised the importance of taking account of context, impact and disadvantage in furthering equality ideals.⁶⁵ In *Brink v Kitshoff*, the Court stated:

'Section 8 was adopted then in the recognition that discrimination against people who are members of disfavoured groups can lead to patterns of group disadvantage and harm. Such discrimination is unfair: it builds and entrenches inequality amongst different groups in our society. The drafters realised that it was necessary both to proscribe such forms of discrimination and to permit positive steps to redress the effects of such discrimination.'⁶⁶

In the expansion of its interpretation of substantive equality, the Court has given prominence to dignity as the value that largely defines the right to equality. This approach has been criticised since it creates the possibility of individualising claims that derogate from the "actual social and economic disadvantage and the systemic

⁶² Albertyn & Goldblatt 'Equality' op cit note 61 at 35-4.

⁶³ Ibid 35-7; Catherine Albertyn 'Substantive equality and transformation in South Africa' (2007) 23 *SAJHR* 253 at 259.

⁶⁴ Albertyn & Goldblatt 'Equality' op cit note 61 at 35-7 (footnotes omitted).

⁶⁵ Albertyn 'Substantive equality' op cit note 63 at 253; Albertyn & Goldblatt 'Equality' op cit note 61 at 35-8.

⁶⁶ *Brink v Kitshoff NO* 1996 (4) SA 197 (CC) para 42 (hereinafter *Brink*).

nature of inequality”.⁶⁷ However, the Constitutional Court’s interpretation of the right to equality has kept on evolving and certain judgments in fact show sensitivity to a contextual and systemic understanding of individual and group based inequalities.⁶⁸

In interpreting section 9 of the Constitution and in establishing a test for unfair discrimination, the Court has also embraced a substantive understanding of the right by focusing on the impact of discrimination on the complainant and his or her group, which requires the consideration of the position of the complainant in society and whether she/he has suffered from past patterns of disadvantage.⁶⁹ The manner in which a court engages with the notions of substantive equality, specifically context and impact, “is a key determinant of the outcome of a case and a crucial indicator of the achievement of substantive equality through law.”⁷⁰

Albertyn stresses the importance of bringing contextual evidence to court to support a substantive understanding of the right to equality in relation to promoting gender equality:

‘Firstly, the context of an alleged rights violation should be understood to include these intersecting social and economic inequalities – the particular complexity of

⁶⁷ Albertyn & Goldblatt ‘Equality’ op cit note 61 at 35-9; see for example the Court’s interpretation in *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC).

⁶⁸ Albertyn & Goldblatt ‘Equality’ op cit note 63 at 35-10 refers to the judgment in *Khosa v Minister of Social Development and Others; Mahlaule and Others v Minister of Social Development and Others* 2004 (6) SA 505 (CC).

⁶⁹ Albertyn ‘Substantive equality’ op cit note 63 at 259. The test for unfair discrimination in terms of sec 9 of the Constitution was laid down in *Harksen v Lane NO* 1998 (1) SA 300 (CC) (hereinafter *Harksen*). The Court divided the equality analysis into three distinct stages:

First, one needs to ask if the law/conduct differentiates between people or categories of people. If so, is there a rational connection between the differentiation and a legitimate government purpose? If not, then there is no violation of section 9(1). If it actually bears a rational connection, there is no violation of section 9(1), but it might nevertheless amount to discrimination.

Secondly, one needs to determine whether the discrimination amounts to unfair discrimination. Does the differentiation amount to discrimination? If it is based on a specified ground, that is, a ground listed in section 9(3), then, discrimination is established. If it is based on an unspecified ground, the applicant must prove the discrimination by showing that the differentiation is based on characteristics which have the potential to impair the fundamental dignity of persons as human beings or to affect them adversely in a comparably serious manner. Once discrimination is established, it needs to be established whether it is unfair. If the discrimination is based on specified ground, it is presumed to be unfair in terms of section 9(5). If the discrimination is based on an unspecified ground, then the unfairness will have to be established by the applicant. The test for unfairness focuses on the impact of discrimination on the applicant and others in the same situation.

Lastly if the discrimination is found to be unfair, it will have to be determined whether the provision under attack can be justified under sec 36 of the Constitution (the limitation clause); see Ian Currie & Johan De Waal *The Bill of Rights Handbook* (Juta, 6th edition, 2013) 216:

⁷⁰ Albertyn ‘Substantive equality’ op cit note 63 at 259.

women's lives. When (poor) women bring their claims to court, lawyers and judges need to understand this context: how gender inequality and poverty intersect, how gendered material conditions relate to gendered norms and social attitudes. This information needs to be introduced in court as part of the contextual analysis that is required in determining whether a right has been violated.'⁷¹

It is therefore crucial when bringing an equality claim, to provide a court with contextual evidence to make sure it is able to give a decision, conscious of its consequences and impact. This contextual evidence allows/enables feminist lawyers to frame the law from women's viewpoint and to suggest legal solutions that address women's subordination through law. Shalleck stresses the importance of properly contextualising issues from a feminist viewpoint and identifies key issues that feminist litigators should focus on:

'First, contextualizing involves focusing on the particularity and uniqueness of each situation by attending to the richness and complexity of detail found within it. Second, it relies upon the recognition of multiple perspectives for understanding any particular situation, both at the level of individual participants, as well as the communities those participants belong to, Third, contextualizing involves identifying the different norms, practices and values that the multiple communities have. Fourth, it acknowledges that the interests of individual participants and their communities might be different. Fifth, disparities in power among the participants and their communities are acknowledged. Sixth, it recognizes that individuals exist not in isolation, but in multiple relationships. Those relationships are important in understanding not only a particular event, but also in the structure of law. Seventh, it considers the ways that individuals exist within and in opposition to institutions. Eighth, it draws upon knowledge from other disciplines to help interpret the meaning of particular actions. Psychology, sociology, economics, literature, history may all be used.'⁷²

This study will focus on the role of *amici curiae* participation in the advancement of the feminist project in law by providing relevant contextual evidence to court and supporting a substantive understanding of the right to equality. The following section analyses the importance and relevance of focusing on *amicus curiae* participation as feminist litigation strategy geared towards change.

⁷¹ Catherine Albertyn 'Gendered transformation in South African jurisprudence: Poor women and the Constitutional Court' (2011) 22 *Stell LR* 591 at 600.

⁷² Shalleck op cit note 56 at 387-388.

3 AMICUS CURIAE PARTICIPATION AS A STRATEGY FOR CHANGE

Litigation is an important vehicle for social change. Indeed, carefully structured litigation could have consequences which stretch far beyond the court and its decision.⁷³ Although this study does not intend to investigate the impact that litigation has on social change, it intends to explore the importance of strategic litigation, in representing women's lived realities to courts, which might influence the way in which a decision is reached and which could ultimately pave the way for future change.

In such a sense *amicus curiae* participation is important, as it allows participation in court by a range of people and represents interests that go well beyond those of the actual parties.⁷⁴ The purpose of this participation is to ensure that courts understand the point of view of those who will be affected by their decisions and although the *amici curiae* might not be party to the actual case, its participation recognises that the public have a legitimate interest in influencing the way in which law is made, which might impact on its legitimacy when influencing future change.⁷⁵

The different perspective that an *amicus curiae* brings to a matter provides for more informed decisions and might lead a court to decide a matter differently than it would have otherwise, conscious of its impact through the "multidimensional and anti-foundational representation of people's lives".⁷⁶ Ultimately, *amicus curiae* participation sensitises a court in its decision-making process and ensures that a court is better informed when making its decision.⁷⁷

As stated, one of the challenges faced by feminist litigators is how to make the law sensitive to women's experience, and specifically, the strategy required to identify to a court how the law affects women's lives. It is here that *amicus curiae*

⁷³ Budlender 'On practicing law' op cit note 34 at 323.

⁷⁴ The rules of the Constitutional Court, specifically rule 10, promulgated under Government Notice R1675 in Government Gazette 25726 of 31 October 2003; provide for *amicus curiae* participation and determine that any person interested in any matter before the Court may be admitted as *amicus curiae*. The Court specifically requires a description of the relevant interests and position to be adopted by the *amicus curiae* and an indication that the relevant submissions will be different from those of the other parties. See the detailed discussion of Rule 10 in chapter 2 below.

⁷⁵ Philip L. Bryden 'Public interest intervention in the courts' (1987) 66 *Canadian Bar Review* 490 at 513.

⁷⁶ Joanne Conaghan 'Intersectionality and UK equality initiatives' (2007) 23 *SAJHR* 317 at 322.

⁷⁷ Christina Murray 'Litigating in the public interest: Intervention and the *amicus curiae*' (1994) 10 *SAJHR* 240 at 250.

participation can play an important role in providing an avenue for feminist and gendered arguments to be heard by a court; to indicate to a court the impact that a particular decision might have on women, and to advocate for the necessary change through legal action. I intend to explore *amicus curiae* participation as a specific litigation strategy that could best represent the complexity of women's lives before a court, and in this specific instance the South African Constitutional Court.

I will focus on how these briefs have been and are being used to place the necessary gendered, social and economic context before a court and how through this evidence it is able to provide a specific or alternative rights interpretation; to contest established jurisprudence and to expand on and protect specific rights entitlements. The chosen case discussions will analyse the purpose and impact of the *amici curiae* briefs, in an attempt to establish whether they were able to present or better represent the complexities of women's lives to advance equality within the law. The structure of the thesis and case discussions is set out in the next section.

4 THESIS STRUCTURE⁷⁸

As mentioned, this introductory chapter has explored the enabling role of law and litigation in effecting social change and the unique role of public interest litigation in contributing to this change. It explored the feminist project in law and established how feminist lawyers relying on the Constitution's equality right have developed a substantive legal methodology in order to adjudicate equality cases.

Chapter two will examine the history of *amicus curiae* participation focusing on the public interest nature of these interventions. I proceed to identify the purpose of *amicus curiae* participation as public interest litigation strategy and the impact that this participation could have on judicial decision-making. The focus is on the way in which *amicus curiae* participation could bring women's lived realities and their voices to court and on the importance of feminist method in assisting to establish a gendered and feminist litigation strategy. The specific rule allowing for *amicus curiae* participation in the South African Constitutional Court is analysed.

Chapter three focuses on violence against women; women's voice and the efficacy of the criminal justice system. The chapter carefully constructs the purpose and impact of *amicus curiae* participation in key constitutional violence-related matters. The cases selected for discussion include:

- (a) *S v Baloyi*.⁷⁹ The case was a constitutional challenge to domestic violence legislation and the Court was faced with the complex task of establishing a balance between the State's constitutional duty to provide effective remedies against domestic violence, and its simultaneous obligation to respect constitutional fair trial rights. The Commission for Gender Equality (CGE) and the Minister of Justice participated as *amici curiae*.
- (b) *Carmichele v Minister of Safety and Security and Another*.⁸⁰ The case concerned the possible delictual liability of the State in failing to protect a woman from a brutal attack from a man with previous convictions who at the time of the attack was out on bail. The case was ground-breaking in the

⁷⁸ The research methodology for the study is set out in Annexure A.

⁷⁹ *S v Baloyi* 2000 (2) SA 425 (CC) (hereinafter *Baloyi*).

⁸⁰ *Carmichele v Minister of Safety and Security and Another* 2001 (4) SA 938 (CC) (hereinafter *Carmichele*).

establishment of the constitutional duty of all courts to develop the common law or customary law to promote the spirit, purport and objects of the Bill of Rights. The Centre for Applied Legal Studies (CALs) participated as *amicus curiae*. The State's delictual liability is observed in a series of cases decided after the *Carmichele* Constitutional Court decision, in order to confirm, both the State's duty to protect women from violence, and the importance of follow up *amici curiae* participation to build on the set positive precedent.

(c) *Masiya v Director of Public Prosecutions, Pretoria and Another*.⁸¹ The case questioned the existing common law definition of rape and considered its development to include the anal penetration of a victim irrespective of his/her gender. CALs and the Tshwaranang Legal Advocacy Centre (TLAC) participated as *amici curiae*.

(d) *S v Zuma*.⁸² The case concerned a high profile rape trial and concerns were raised regarding the treatment of the complainant in the case. TLAC, CALs and the Centre for the Study of Violence and Reconciliation (CSVr) attempted to participate as *amici curiae*. Although not a Constitutional Court decision, this was an interesting matter in terms of *amicus curiae* participation in criminal proceedings, which also has important implications for the structure of *amicus curiae* participation in general.

Chapter four focuses on women exercising their constitutional rights within customary law and discusses the intricacies of litigating on issues of culture and equality, and the role that *amicus curiae* participation has to play. The cases selected for discussion include:

⁸¹ *Masiya v Director of Public Prosecutions, Pretoria and Another* 2007 (5) SA 30 (CC) (hereinafter *Masiya*).

⁸² *S v Zuma* 2006 (2) SACR 191 (W) (hereinafter *Zuma*).

- (a) *Bhe and Others v Magistrate, Khayelitsha; Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another*.⁸³ Here the Court had to deal with the constitutional validity of section 23 of the Black Administration Act 38 of 1927 which regulated customary intestate succession, and the constitutionality of the rule of male primogeniture in this context. The CGE participated as *amicus curiae*.
- (b) *Shilubana and Others v Nwamitwa*.⁸⁴ Here the question was whether a community could develop its customs and traditions to appoint a woman as chief of their community; a position traditionally reserved for men, in line with the principle of primogeniture. The CGE and National Movement of Rural Women (NMRW) participated as *amici curiae*.
- (c) *Gumede v President of the Republic of South Africa*.⁸⁵ The case was concerned with the constitutional validity of certain provisions of the Recognition of Customary Marriages Act 120 of 1998, specifically in the sense that it discriminated on the grounds of gender and race. The Women's Legal Centre (WLC) participated as *amicus curiae*.
- (d) *MM v MN and Another*.⁸⁶ The case dealt with the recognition of the different wives' rights to equality and dignity in a polygynous customary marriage.⁸⁷ The question was whether consent was required from a first wife, when a husband decided to conclude a second or subsequent customary marriage, and what the consequences would be if no consent was obtained. The WLC, CGE and NMRW participated as *amici curiae*.

⁸³ *Bhe and Others v Magistrate, Khayelitsha, and Others; Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another* 2005 (1) SA 580 (CC) (hereinafter *Bhe*).

⁸⁴ *Shilubana and Others v Nwamitwa* 2009 (2) SA 66 (CC) (hereinafter *Shilubana*).

⁸⁵ *Gumede v President of the Republic of South Africa* 2009 (3) SA 152 (CC) (hereinafter *Gumede*).

⁸⁶ *MM v MN and Another* 2013 (4) SA 415 (CC) (hereinafter *MM v MN*).

⁸⁷ Polygyny is 'polygamy in which a man has more than one wife' as compared to polyandry which is 'polygamy in which a woman has more than one husband.'; see *MM v MN* op cit note 85 fn 1.

Chapter 5 identifies two specific areas, sex work and domestic life partnerships between heterosexual couples, as areas where women's vulnerability is particularly pertinent and where there has been considerable work done by organisations to address this vulnerability and to provide women with some protection and recourse when required. The cases discussed are:

- (a) *S v Jordan and Others*.⁸⁸ The case was concerned with the decriminalisation of prostitution and the constitutional validity of certain sections of the Sexual Offences Act 23 of 1957. The Sex Workers Education and Advocacy Task Force (SWEAT)⁸⁹ and the CGE participated as *amici curiae*.
- (b) *Volks NO v Robinson and Others*.⁹⁰ The case was concerned with extending the Maintenance of Surviving Spouse Act 27 of 1990, to provide for a domestic partner in a heterosexual relationship to claim maintenance under the Act. CALS participated as *amicus curiae*.

Chapter 6 concludes the study, addressing the findings under the relevant themes, focusing on the purpose of the *amici curiae*'s participation, their arguments and the impact they had on the judicial decisions reached. It considers the importance of *amicus curiae* participation in enhancing women's lives through the attainment or extension of rights and as platform for possibly influencing future legal change. Important recurrent themes are discussed to explore the importance of minority judgments; *amici* participation, democracy and voice; and the importance of drafting a proper *amicus curiae* brief. Lastly, future research possibilities are identified.

⁸⁸ *S v Jordan and Others* 2002 (6) SA 642 (CC) (hereinafter *Jordan*).

⁸⁹ The SWEAT brief was a collaborative brief between SWEAT, CALS and the Reproductive Health Research Unit (RHRU).

⁹⁰ *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC) (hereinafter *Volks*).

CHAPTER 2

1 *AMICUS CURIAE* BRIEFS WITHIN A CONSTITUTIONAL STATE

‘No longer a mere friend of the court, the amicus has become a lobbyist, an advocate, and most recently, the vindicator of the politically powerless.’¹

Amicus curiae participation has throughout the centuries been integral to the process of judicial deliberation. The *amici*’s role has evolved considerably and today it is acknowledged that *amici curiae* are active participants in litigation, in contrast to their historical role as being an impartial assistant to the judiciary.²

This chapter examines the history of *amicus curiae* participation and the relevance of this participation in influencing judicial decision-making. The focus is on the *amici*’s new-found role in representing public interest, specifically within the context of gender litigation, and on the usefulness of *amici curiae* participation in representing women’s voices and with regard to the complexity of women’s lives in litigation. In doing this, I attempt to show that *amicus curiae* participation, as part of litigation strategy, has the potential to assist courts to reach decisions that would better represent women’s lives and realities.

This potential will be explored from a South African perspective and in terms of the importance of *amicus curiae* participation in the Constitutional Court.

1.1 History of *Amicus Curiae* Participation: From Friendship to Advocacy

The *amicus curiae* is a well-established concept in legal history. Translated literally from Latin, the term means “friend of the court”, while the earliest example of this participation can be found in Roman law.³ In its most basic form, and at the court’s discretion, the *amicus curiae* provided information on areas of law that the court regarded as complex and beyond its expertise.⁴ From the outset it was clear that the *amicus curiae* was not a litigating party, but merely an assistant to the court.

¹ Michael K. Lowman ‘The litigating *amicus curiae*: When does the party begin after the friends leave’ (1992) 41 *American University Law Review* 1243 at 1245 (footnotes omitted).

² Samuel Krislov ‘The *amicus curiae* brief: From friendship to advocacy’ (1963) 72 *Yale Law Journal* 694; Lowman op cit note 1 at 1244.

³ George Williams ‘The *amicus curiae* and intervention in the high court of Australia: A comparative analysis’ (2000) 28 *Federal Law Review* 365 at 366.

⁴ Lowman op cit note 1 at 1248.

Participation by *amici curiae* became common in many jurisdictions, conforming to its traditional role as a disinterested bystander who, at the court's request or permission, informed the court on points of law.⁵ The value of this kind of intervention was obvious in times when factual material, such as law reports, was scarce and the *amici curiae* mainly assisted courts in avoiding error and ultimately served to maintain judicial honour and integrity.⁶

The common law adversarial system restricted *amici curiae* participation to a select few actions.⁷ It is only later, and mainly through developments in the American legal system, that courts gradually acknowledged that judicial proceedings might have repercussions beyond the immediate parties and that *amici curiae* participation could adequately represent third-party interests that were previously ignored under the adversarial system.⁸

The American legal system, although derived from the English system, has set the modern norm concerning the *amici's* role as an active participant in litigation, in contrast to its previous role as an impartial assistant to the judiciary.⁹ The complex federal structure of the United States of America, coupled with the court's acknowledgment of the power of judicial review, meant that many matters of national interest were litigated between private parties.¹⁰ The *amicus curiae* was one of the methods developed by the courts to include parties/institutions not involved at the outset of the litigation, but who had a direct and significant interest in the outcome of the case.¹¹ The new role fulfilled by *amici curiae* participation has been described as follows:

'This device represents the prime departure from the traditional adversary system of justice. No longer is the system characterized by its triangular-like structure with the contesting parties at the base and the court at the apex. If anything the structure would

⁵ Ernest Angell 'The *amicus curiae* American development of English institutions' (1967) 16 *International and Comparative Law Quarterly* 1017; Lowman op cit note 1 at 1248.

⁶ Christina Murray 'Litigating in the public interest: Intervention and the *amicus curiae*' (1994) 10 *SAJHR* 240 at 241; Lowman op cit note 1 at 1248.

⁷ Lowman op cit note 1 at 1249.

⁸ Id.

⁹ Krislov op cit note 2 at 694; Lowman op cit note 1 at 1244.

¹⁰ Murray op cit note 6 at 245.

¹¹ Id; In short, the American system allowed for two categories of intervention, the first being participation by governmental units which had a strong interest in the case and the second comprised of individuals or groups representing private interests, see Lowman op cit note 1 at 1258 and Krislov op cit note 2 in this regard.

more accurately be described as “multi-sided” since through the amicus technique, many more than just the immediate adversaries enter the judicial forum.’¹²

Despite the developing nature of *amici curiae* participation, and irrespective of the jurisdiction involved, there are still certain traditional common features with which they must comply. The *amicus curiae* is still not viewed as a litigating party and its participation is totally reliant on the discretion of the court.¹³ The *amicus* is generally not allowed to raise a new cause of action and is not allowed to repeat party arguments.¹⁴ The unique nature of *amici curiae* participation lies in the court’s expectation that it will bring a different perspective to the case than those already before it.¹⁵ By keeping to the above traditions, the new-found flexibility and versatility of these interventions still comply with the *amici*’s original purpose as being of assistance to the court.

The change from impartial assistant to more active participant has created the possibility of using these participations as a tactical instrument to influence judicial decision-making.¹⁶ Writing in the American context, Collins describes the influence that these applications might have on judicial decision-making:

‘By providing the justices with a plethora of information regarding the likely social consequences of a decision – at the same time advocating for a specific ideological outcome – the amici strengthen the arguments of the direct parties to litigation, buttressing the overall persuasiveness of a particular side of the debate. And although the justices pursue policy goals, they are also “legal thinkers”, which implies that they should be receptive to these goals of persuasion. As instruments of persuasive argumentation, it is expected that amicus briefs will lead the justices toward endorsing the “correct” policy outcome, within the constraints they face as ultimately legal decision makers.’¹⁷

¹² Lucius J. Barker ‘Third parties in litigation: A systemic view of judicial function’ (1967) 29 *The Journal of Politics* 41 at 52.

¹³ Zeldine O’Brien ‘The courts make a new friend? *Amicus curiae* jurisdiction in Ireland’ (2004) 7 *Trinity College Law Review* 5 at 26.

¹⁴ Ruben J. Garcia ‘A democratic theory of *amicus* advocacy’ (2008) 35 *Florida State University Law Review* 315 at 321.

¹⁵ Geoff Budlender ‘*Amicus curiae*’ in Woolman, Roux, Klaaren, Stein, Chaskalson & Bishop (eds) *Constitutional law of South Africa* (Juta, 2nd edition, 2008) 8-1.

¹⁶ Krislov op cit note 2 at 704.

¹⁷ Paul M. Collins ‘Lobbyists before the U.S. Supreme Court’ (2007) 60 *Political Research Quarterly* 55 at 58 (footnotes omitted).

In its most basic format, the *amicus curiae* still assists the court by presenting factual material considered necessary for rational decision-making.¹⁸ However, three additional purposes can be ascribed to *amici curiae* participation. Firstly, *amici* participation can be used to support litigating parties' contentions, where it devotes its brief to improving the main legal arguments of the party it supports.¹⁹ This it does by helping the party flesh out arguments it is forced to offer in summary form and to present arguments the party wants to put forth, but cannot do so itself.²⁰

Secondly, it can advance a particular legal position, that it has chosen independent from the party's contentions.²¹ This type of *amicus curiae* can be described as being "in the public interest"; as it moves beyond the issues specifically argued by the parties and provides the court with information fitting the *amicus's* preferences, or provides the court with information about the potential consequences of its decision.²² Providing assistance to the court is of secondary concern in this type of application and the purpose is to make sure that the court understands the point of view of those who will be affected by its decision and to ensure that those who will be affected feel that their voice has been heard.²³

Lastly, a combination of the above is possible where an *amicus curiae* in fact sides with one of the parties, but still advances its own specific interpretation. This type of intervention could also generally be described as being in the public interest as it attempts to alert the court to the wider societal impact of the decision by aligning itself with a specific party's contentions.

Thus far, I have advanced arguments in support of the new-found role of *amici curiae* participation within the judicial framework. However, some have cautioned against the use and ultimate purpose of *amici* participation and are

¹⁸ Barker op cit note 12 equates the *amicus curiae* brief to the so called Brandeis brief named after Louis D. Brandeis who presented the court with a host of social and economic data to assist the court in its decision-making process.

¹⁹ Paul M. Smith 'The sometimes troubled relationship between courts and their "friends"' (1998) 24 *Litigation* 24 at 26; James F. Spriggs & Paul J. Whalbeck '*Amicus curiae* and the role of information at the Supreme Court' (1997) 50 *Political Research Quarterly* 365.

²⁰ Bruce J. Ennis 'Effective *amicus* briefs' (1984) 33 *Catholic Law Review* 603 at 606.

²¹ Ibid 603; Budlender '*Amicus curiae*' op cit note 15 at 8-1.

²² Alixandra B. Yanus 'The judiciary as agenda setter: Explaining interest group participation in the courts' *Paper prepared for the 2009 annual meeting of the American Political Science Association, Toronto Canada, September 3-6, (2009)*; available at SSRN: <http://ssrn.com/abstract=1450883>; Collins 'Lobbyists before the U.S. Supreme Court' op cit note 17 at 58.

²³ Philip L. Bryden 'Public interest intervention in the courts' (1987) 66 *The Canadian Bar Review* 490 at 513.

concerned that they might be framed with a specific political ideal in mind, which could unduly politicise judicial decisions.²⁴ The court's function could also be shifted from judging to legislating, permitting political battles lost elsewhere, to be revisited in the courtroom.²⁵ Concern has also been expressed about the neutrality and fairness of the research presented to the court, as the research is not subjected to examination and cross-examination as it would be during the normal trial procedure, and it is argued that judges might not be equipped to see relevant flaws, as they would when dealing with legal arguments and materials.²⁶

Despite these criticisms, *amici curiae* participation have become essential in ensuring that courts are aware of the broader legal and policy ramifications of their decisions.²⁷ It is important to explore this new-found role of the *amici curiae* and the relevance and importance of public interest *amici* participation in relation to judicial decision-making.

²⁴ Mona Arshi & Colm O'Conneide 'Third-party interventions: The public interest reaffirmed' (2004) Spring *Public Law* 69 at 73.

²⁵ Sarah Hannett 'Third party intervention: In the public interest?' (2003) Spring *Public Law* 128.

²⁶ Smith op cit note 19 at 25.

²⁷ Paul M. Collins Jr. *Friends of the Supreme Court: Interest groups and judicial decision making* (Oxford University Press 2008) 3.

2 INTERVENING IN THE PUBLIC INTEREST

Here, I explore the importance of public interest *amici curiae* participation and the broader interests they represent, as well as reasons why public interest groups make use of the judicial system, the judicial impact of these interventions and their overall importance in a judicial setting.

Public interest law has been described as a focus “on the wider public interest rather than the more private interest of a particular individual”.²⁸ A public interest group can broadly be defined as a free standing voluntary organisation typically established to further a particular cause or simply to provide the poor with access to justice.²⁹

There are many reasons why public interest groups decide to litigate. Collins identifies five general, often interrelated, reasons why public interest groups choose litigation as a means to an end.³⁰ First, groups might turn to the courts when they lack access to alternative venues such as the executive. Secondly, there are certain unique benefits that can be ascribed to judicial decisions such as its precedent setting capacity, especially in relation to constitutional decisions.³¹ Third, litigation may be a means to protect gains won through other avenues, such as defending a specific piece of legislation.³² Fourth, groups “may seek out the judicial arena to counterbalance their opposition’s participation.”³³ Lastly, organisations may use the court system when their goals predispose them to litigate.³⁴

Most public interest groups choose not to enter the legal arena and concentrate their resources on engaging the executive and general advocacy. When they do decide to enter the legal arena, it is often not as a direct party to the litigation and the

²⁸ Geoff Budlender ‘On practicing law’ in Hugh Corder (ed) *Essays on law and social practice in South Africa* (Juta 1988) 319 at 322.

²⁹ Laura Beth Nielsen & Catherine R. Albiston ‘The organization of public interest practice: 1975-2004’ (2006) 84 *North Carolina Law Review* 1591.

³⁰ Collins ‘Friends of the Supreme Court’ op cit note 27 at 24.

³¹ Id.

³² Id.

³³ Id.

³⁴ South Africa’s Women’s Legal Centre (WLC) could be seen as an example. The WLC in its mission statement available at <http://www.wlce.co.za> (last accessed 25 October 2012) states that in order to fulfil their objectives they will free of charge litigate cases which advance women’s rights and are in the public interest and will attempt to produce briefs to assist courts in constitutional cases which concern women’s rights and gender equality.

method of participation differs.³⁵ They can set up a test case which usually rests on a constitutional issue. Here, organised interests would want to challenge legislation/policy or an individual could approach an organisation with the intention of challenging legislation or policy.³⁶ This method is not often used, as it is time consuming and requires a great deal of resources.³⁷ Public interest groups might also decide to sponsor a case brought by others. Here, an organisation will assist with costs and resources in exchange for using the case as a means of highlighting its own interests.³⁸ Again this is very expensive, and time consuming, and gives a group less leeway to structure a case.³⁹

Another method is described as *amicus curiae* participation. This type of participation is less costly and, as *amicus*, it might be able to introduce a new or alternative legal position and introduce sociological evidence to a court.⁴⁰ Given the low costs and flexibility associated with this form of participation, it is the clear choice for public interest groups when they decide to litigate as a non-party.⁴¹

Within the South African context, groups and organisations have been very receptive to utilising *amici curiae* participation as a cost effective and efficient method of representing public interests. Most cases serving before the Constitutional Court have groups participating as *amici curiae*, which indicates that this form of participation is seen as an important strategy in public interest litigation.

2.1 Judicial Impact of Public Interest Litigation and *Amici Curiae* Participation

A focal point of this study is analysing the impact that *amicus curiae* participation might have on judicial decision-making. This impact needs to be understood within the broader context and purpose of public interest litigation (as discussed in chapter one). The impact of litigation could be direct and/or indirect.

Direct impact refers to changing a law and/or policy, especially through the extension of rights, which has a direct impact on the applicant's lives.⁴² Indirect

³⁵ Collins 'Friends of the Supreme Court' op cit note 27 at 25.

³⁶ Id.

³⁷ Id.

³⁸ Ibid 26.

³⁹ Id.

⁴⁰ Ibid 27.

⁴¹ Id.

⁴² Jackie Dugard & Malcolm Langford 'Art or science? Synthesising lessons from public interest litigation and the dangers of legal determinism' (2011) 27 *SAJHR* 39 at 57; the Court decision in *Bhe*

impact is closely related to the view of legal mobilisation scholars who believe that litigation contributes to consciousness raising and political organising.⁴³ The indirect impact of a judgment could be multiple including political mobilisation around a particular issue; publicising an issue as method of communicating with the public; legitimising with the authority of law a particular struggle;⁴⁴ and/or influencing jurisprudence to facilitate future litigation, for example, setting new precedent in influencing the writing of *obiter dictum* statements or a minority judgment.⁴⁵

When participating as *amici curiae* one can, through contextual, technical or statistical information, propose a different interpretation regarding the application of a specific right; contest established jurisprudence or suggest a specific remedy option. With these purposes in mind, and considering the direct and/or indirect impact of judicial decisions, the *amici's* impact on judicial decision-making could also be described as direct and/or indirect.

Direct impact refers to instances when the *amici curiae's* arguments/interpretation and/or remedy is reflected in the main judgment.⁴⁶ Although persuading a court to decide a matter differently, is the ultimate prize for an *amicus curiae*, its indirect impact and role as judicial sensitizer should not be overlooked, specifically the possibility of influencing the way a matter is decided in future.

Songer & Reginald aptly capture the indirect impact that *amici curiae* participation might have on judicial decision-making.⁴⁷ Considering the importance of political mobilisation they state:

'They may hope to convince their own members that they are fighting the good fight even if they expect to lose; or, anticipating that the Court will support their group's position, they may want to be able to claim credit for a new policy. Amicus

and Others v Magistrate, Khayelitsha, and Others; Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another 2005 (1) SA 580 (CC) (hereinafter *Bhe*) could be used as example.

⁴³ Michael W. McCann 'Reform litigation on trial' (1992) 17 *Law and Social Inquiry* 715.

⁴⁴ *The Minister of Health v Treatment Action Campaign* (2) 2002 (5) SA 721 (CC) (hereinafter the *TAC* case) could be seen as an example here.

⁴⁵ Dugard & Langford op cit note 42 at 57.

⁴⁶ Andrea McAtee & Kevin T. McGuire 'Lawyers, Justices, and issue salience: When and how do legal arguments affect the U.S. Supreme Court?' (2007) 41 *Law & Society Review* 259 at 261.

⁴⁷ Donald R. Songer & Reginald S. Sheehan 'Interest group success in the courts: *Amicus* participation in the Supreme Court' (1993) 46 *Political Research Quarterly* 339.

participation may also provide a vehicle to generate publicity about a case that will help to mobilize opinion behind expected future group action in other forums.’⁴⁸

In considering indirect legal impact they state:

‘Groups may also file briefs in an attempt to shape long-term Court policy; even if they do not expect to influence the outcome of a present case, they may hope to plant ideas in the justices’ minds that will make them more receptive to groups’ arguments in future cases. Another possibility is that amicus briefs may influence the content of opinions even though they have little impact on the overall outcome.’⁴⁹

Based on the above discussion I devised a table to serve as an analytical framework, indicating both the direct and/or indirect impact of *amici curiae* participation. The framework is by no means exhaustive, but attempts to illustrate the impact of *amici curiae* participation keeping its purpose and relevance in mind.

DIRECT IMPACT	INDIRECT IMPACT
<ul style="list-style-type: none"> • Main/majority judgment reflecting the <i>amicus’s</i> arguments; rights interpretation; suggested remedy. • Change in law/policy as advocated for by <i>amici curiae</i>. 	<ul style="list-style-type: none"> • Influencing the writing of a minority judgment that could affect future decision-making. • Arguments / interpretation reflected in <i>obiter</i> statements. • Publicity. This could generate support for a specific cause; encourage public discourse. • Encouraging political mobilisation. • Initiating extra-judicial responses, for example, capturing the attention of government and the executive. • Influencing future jurisprudence.

Although much of the focus of this thesis is on the direct impact of *amicus curiae* participation, it is clear that the impact of *amicus curiae* participation is much broader than just the judgment. One should focus on its enabling potential and how this might

⁴⁸ Ibid 351.

⁴⁹ Id.

influence later decisions, impact on policy considerations, and raise awareness for a specific cause. The above analytical framework will be of particular importance in the subsequent chapters where I will be analysing the purpose, relevance and impact of *amici curiae* participation in the Constitutional Court's gender litigation.

3 GENDER LITIGATION AND *AMICI CURIAE* PARTICIPATION

Colker, poses the question whether one can be a feminist, and consistent with that perspective, make use of the courts and litigation.⁵⁰ According to her, we are often told the correct feminist position on a particular issue, but we are rarely told whether the way to achieve that position is through legal argumentation, and, if legal argumentation is appropriate, how to offer legal arguments from a feminist perspective.⁵¹ What is so called feminist litigation and what role can *amicus curiae* participation play within feminist litigation strategy? Pellat describes the relevance of a feminist voice in litigation:

'The problem, from a feminist standpoint, is that law's way of envisioning women's reality, of translating the substance and circumstances of women's lives, has tended to be dominated by the harsh exclusionary gender-based politics marking the social realm. Cultural myths and stereotypes about women and narrow, dualistic constructions of difference have dictated the way in which law has historically conceptualized and responded to women and women's subordination. In order to make law conscious of, and responsive, to gender oppression in all of its manifestations, it is necessary to challenge signifying rules and conventions that denigrate and erase the difference that women represent and, at the same time, to find ways of re-working the discourse in order to represent who women are and what they experience in palpably real and full terms.'⁵²

Pellat poses the question whether it is possible to counteract law's tendency to mirror social mores, values and perspectives through the legal process, which would possibly provide leeway and opportunities that could champion for change.⁵³

According to Conaghan, feminist litigation, first and foremost, could bring a gendered perception of legal and social arrangements to a largely gender-neutral way of thinking.⁵⁴ She argues that the object of feminist litigation is to highlight

⁵⁰ Ruth Colker 'Feminist Litigation: An oxymoron? – A study of the briefs filed in *William L. Webster V. Reproductive Health Services*' (1990) 13 *Harv. Women's L.J.* 137.

⁵¹ *Id.*

⁵² Anna S. Pellatt 'Equality Rights litigation in social transformation: A consideration of the women's legal education and actions fund's intervention in *Vriend v. R.*' (2000) 12 *CJWL* 117 at 121.

⁵³ *Id.*

⁵⁴ Joanne Conaghan 'Reassessing the feminist theoretical project in law' (2000) 27 *Journal of Law and Society* 351 at 359.

gendered assumptions that are too often rendered invisible by an apparently objective analysis of law:

'Feminism thus presupposes that gender has a much greater structural and/or discursive significance that is commonly assumed, a significance which is ideologically but not practically diminished by its relative invisibility. In this sense, feminism purports to offer a better understanding of the social world by addressing aspects which have hitherto been ignored or misrepresented, while, at the same time, countering the ideological effects to which such misperceptions give rise.'⁵⁵

One of the challenges faced by feminist litigators, and specifically those who work within the public interest sphere, is how to make the law sensitive to women's experiences and specifically the strategy involved in identifying to a court how the law affects women's lives.⁵⁶ As feminist lawyers, we try "to improve women's social and economic status; to reach those women most in need; and to enhance women's self-respect, power and ability to alter existing institutional arrangements."⁵⁷ But how should we go about doing this? The following discussion attempts to answer this question.

3.1 Strategically Litigating from a Feminist and Gendered Viewpoint

Legal interpretation in common law countries has a tendency to be formalistic, technical and rule bound, especially in South Africa when considering our apartheid history.⁵⁸ Justice Langa has described this approach to legal reasoning as:

'This formal reasoning prevents an inquiry into the true motivation for certain decisions and presents the law as neutral and objective when in reality it expresses a particular politics and enforces a singular conception of society.'⁵⁹

⁵⁵ Ibid 360 (footnotes omitted).

⁵⁶ Sarah E. Burns 'Notes from the field: A reply to Professor Colker' (1990) 13 *Harv. Women's L.J* 189 at 196.

⁵⁷ Deborah Rhode 'Feminist critical theories' (1990) 42 *Stan. L. Rev* 617 at 637.

⁵⁸ South Africa used to follow the doctrine of Parliamentary sovereignty which allowed Parliament to pass legislation that could not be challenged. See Ian Currie & Johan De Waal *The Bill of Rights Handbook* (Juta, 6th edition, 2013) 2 and I.M Rautenbach & E.F.J Malherbe *Constitutional Law* (Lexis Nexis, 5th edition, 2009) 52 for a discussion of the doctrine. Also see Karl E. Klare 'Legal culture and transformative constitutionalism' (1998) 14 *SAJHR* 146 at 168.

⁵⁹ Justice Pius Langa 'Transformative constitutionalism' (2006) 17 *Stell LR* 351 at 357.

Much of this formalistic reasoning is based on traditional legal method that relies on relevant and persuasive legal evidence to determine facts; and on set precedent to provide a framework for analysis which then should lead to a rational legal decision.⁶⁰ The feminist project in law challenges this traditional and formalistic legal method that is often employed by judicial decision makers.

Feminist litigators focus on the context and impact in which rights violations or denials occur and focus attention on the capability of law to represent multiple interpretations that should be taken into account when making a legal decision.⁶¹ However, the challenge lies in presenting these issues in such a way that it warrants judicial attention and here litigation strategy is the key.⁶² Mossman states that this is a tricky challenge and requires feminist to acknowledge the complexity of law, to recognise the relationship between law and social arrangements and to persist to seek justice in spite of law's preference to constrict issues that separate the legal from the social effectively, so creating different categories for law and justice.⁶³

The question that should then be asked is, how should we litigate to make the law conscious of feminist reasoning when we address women's inequality in society? Examining the place of feminism within the general context of legal method, Bartlett identified certain methods that could be used to place a feminist viewpoint before a court.⁶⁴ For Bartlett, being feminist and presenting a feminist voice means "owning up to the part one plays in a sexist society: it means taking responsibility – for the existence and for the transformation of "our gendered identity, our politics, and our choices."⁶⁵ Identifying methods or practices as feminist, locates them as "part of a larger, critical agenda originating in the experiences of gender subordination."⁶⁶

Writing about equality and gendered transformation within South African jurisprudence, Albertyn states that gendered opportunities through legal action may be presented in different ways and have multiple outcomes.⁶⁷ These could take the form of general legal rights and remedies that, when properly utilised, could affect

⁶⁰ Mary Jane Mossman 'Feminism and legal method: The difference it makes' (1987) 3 *Wisconsin Women's Law Journal* 147 at 153.

⁶¹ Mary Jane Mossman 'Feminism and the law: Challenges and choices' (1998) 10 *CJWL* 1 at 3.

⁶² *Ibid* 13.

⁶³ *Id.*

⁶⁴ Katharine T. Bartlett 'Feminist legal methods' (1990) 103 *Harvard Law Review* 829 at 831.

⁶⁵ *Ibid* 833.

⁶⁶ *Ibid* 834.

⁶⁷ Catherine Albertyn 'Gendered transformation in South African jurisprudence: Poor women and the Constitutional Court' (2011) 22 *Stell LR* 591 at 597.

the lives of those most in need, or the stance could be more normative “restating the values and norms that shape social and economic inequalities”, or it could politicise a particular issue with a range of outcomes.⁶⁸ Gendered and feminist arguments could therefore be presented to a court in multiple ways.⁶⁹

In this context, the three feminist methods identified by Bartlett, which include the “women question”, “feminist practical reasoning” and “consciousness-raising”, provide a starting point in the decision on how to litigate from a feminist and gendered viewpoint. The first method described as the “women question”, represents how the substance of law is often used to suppress the perspectives of women and other excluded groups.⁷⁰

‘Once adopted as a method, asking the woman question is a method of critique as integral to legal analysis as determining the precedential value of a case, stating the facts, or applying law to facts. “Doing law” as a feminist means looking beneath the surface of law to identify the gender implications of rules and the assumptions underlying them and insisting upon applications of rules that do not perpetuate women’s subordination.’⁷¹

Through the “women question” one would ask how existing legal standards and concepts might disadvantage women.⁷² Here, certain questions would become relevant, such as, have women been left out of consideration? If it is so, in what way? How might this be corrected? and, what difference would this make?⁷³ The women question is intended to reveal “how the position of women reflects the organisation of society rather than the inherent characteristics of women.”⁷⁴ Without these questions, differences associated with women would be taken for granted, justifying unequal treatment.⁷⁵ Focusing attention on the “women question” does not mean that a decision should be reached that favours women, but that there should

⁶⁸ Id.

⁶⁹ This links with the discussion of Collins op cit note 27 why public interest groups decide to litigate and the options available to them.

⁷⁰ Bartlett op cit note 64 at 836.

⁷¹ Ibid 843.

⁷² Ibid 837.

⁷³ Id.

⁷⁴ Ibid 843.

⁷⁵ Id.

be an awareness of “gender bias” and a decision should be defensible in light of this “bias”.⁷⁶

The second method refers to “feminist practical reasoning” which seeks to identify perspectives not represented in the dominant culture.⁷⁷ Bartlett captures the essence of this method by stating:

‘Feminist rationality acknowledges greater diversity in human experiences and the value of taking into account competing or inconsistent claims. It openly reveals its positional partiality by stating explicitly which moral and political choices underlie that partiality, and recognises its own implications for the distribution and exercise of power. Feminist rationality also strives to integrate emotive and intellectual elements and to open the possibilities of new situations rather than limit them with prescribed categories of analysis.’⁷⁸

This method’s impact resides in revealing insights about gender exclusion within existing legal rules and principles.⁷⁹ Mostly, feminists do this by providing contextual evidence to expose that which would otherwise go unnoticed and unaddressed.⁸⁰ In the case discussions that follow in the subsequent chapters, we see this method being employed to advocate for the development of the common law and for the extension of rights protection and to strengthen existing protection.⁸¹

The third method, “consciousness-raising” complements the above two methods and provides a platform for women’s voices to be heard. Bartlett describes this as an “interactive and collaborative process of articulating one’s experiences and

⁷⁶ Ibid 846; Bartlett further at 848 takes note that the question could be widely framed to avoid essentialist tendencies including questions such as what assumptions are made by law? What assumptions are made about those whom it affects? Whose point of view do these assumptions reflect? Whose interests are invisible or peripheral? How might excluded viewpoints be identified and taken into account? The women question therefore requires great sensitivity to multiple, invisible forms of exclusion faced by a multitude of women.

⁷⁷ Bartlett op cit note 64 at 855.

⁷⁸ Ibid 858 (footnotes omitted).

⁷⁹ Id.

⁸⁰ Ibid 862-863.

⁸¹ See specifically the cases of *Carmichele v Minister of Safety and Security and Another* 2001 (4) SA 938 (CC) (hereinafter *Carmichele*); *Masiya v Director of Public Prosecutions, Pretoria and Another* 2007 (5) SA 30 (CC) (hereinafter *Masiya*); *S v Jordan* 2002 (6) SA 642 (CC) (hereinafter *Jordan*); *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC) (hereinafter *Volks*); *Bhe* op cit note 42; *S v Zuma* 2006 (2) SACR 191 (W) (hereinafter *Zuma*); *Gumede v President of the Republic of South Africa* 2009 (3) SA 152 (CC) (hereinafter *Gumede*); and *MM v MN and Another* 2013 (4) SA 415 (CC) (hereinafter *MM v MN*).

making meaning of them with others who also articulate experiences.”⁸² In litigation this can be particularly relevant in deposing to affidavits or supporting affidavits to share a particular experience with the court, and public at large, ultimately politicising the personal.⁸³

By using these methods Bartlett envisages that feminists would be able to challenge assumptions about women that underlie several laws and they would be able to demonstrate that laws based upon these assumptions are not rational and neutral, but irrational and discriminatory and in need of remedial action.⁸⁴ To me, the three methods discussed by Bartlett are important when considering litigation strategy and, coupled with *amicus curiae* participation, could be the ideal starting point from which to introduce feminist arguments, that are aimed at addressing societal hierarchies and the subordination of women into otherwise neutral legal doctrine. By participating as *amicus curiae*, the “women question” allows us to consider the gendered impact of law, whilst “feminist practical reasoning” coupled with the method of “consciousness-raising”, allow us to bring contextual evidence to court that reflects women’s lived realities and voice, that highlight inequalities.

Feminist engagement with the law, whether the intended purpose is to provide context, interpret a right or advocate for a specific outcome, is nuanced and complex. *Amici curiae* are in a unique position to assist courts in deciding matters conscious of the impact it might have on the women involved. When hearing a matter, courts are often focused on the characteristics and circumstances of the individual applicant before them, despite the fact that a decision based on these individual characteristics might have broader implications for a specific group.⁸⁵ An *amicus curiae* is not bound to a specific party or factual scenario and is in an ideal position to represent broader interests.⁸⁶ This participation might shift the focus of a court to the complex and intersectional nature of a claim, although the case before it may be individualistic and narrowly defined.⁸⁷

⁸² Bartlett op cit note 64 at 863.

⁸³ Ibid 864.

⁸⁴ Ibid 869.

⁸⁵ Marius Pieterse ‘Finding for the applicant? Individual equality plaintiffs and group-based disadvantage’ (2008) 24 *SAJHR* 397 at 398.

⁸⁶ Harriet Samuels ‘Feminist activism, third party interventions and the courts’ (2005) 13 *Feminist Legal Studies* 15 at 25.

⁸⁷ Pieterse op cit note 85 at 405.

This study aims to analyse the nature of the arguments presented and the responsiveness of courts to feminist and gendered arguments, as presented or expanded upon by *amici curiae*. The most obvious way to measure the responsiveness of courts to *amici curiae* arguments is to measure, in accordance with the analytical table discussed above, the impact of *amici curiae* participation on judicial decision-making. In considering impact, one has to focus on both direct and indirect influences. Referring to direct impact one would question if the court paid attention to arguments presented by the *amici* and if this is reflected in the decision and whether the law/legal provisions were reinterpreted or expanded in accordance with these arguments, that ultimately directly impact on the applicant and those similarly situated.⁸⁸ In considering indirect impact, one would question how the *amici curiae*'s arguments influenced future decision-making or policy outcomes; was it able to politicise specific grievances or further organisational goals?

Amicus curiae participation has the potential to introduce feminist method to a court and to enable a court to make a decision within a gendered and feminist framework ensuring a more substantive outcome. It is possible, through the analysis of *amicus curiae* participation in gender matters, to gain some insight about the process of attempting to secure change through legal action.⁸⁹ An analysis of specific decisions and *amici curiae* participation are called for to determine their impact in relation to the furthering of a feminist agenda in law. Before the case analysis is undertaken, it is necessary to establish the relevance and role of *amicus curiae* participation within the South African legal order, specifically the Constitutional Court.

⁸⁸ F.L. Morton & Avril Allen 'Feminists and the courts measuring success in interest group litigation in Canada' (2001) 34 *Canadian Journal of Political Science* 55 at 64.

⁸⁹ Pellatt op cit note 52 at 119.

4 THE RELEVANCE OF *AMICI CURIAE* PARTICIPATION IN THE SOUTH AFRICAN CONSTITUTIONAL COURT

4.1 *Amicus Curiae* Participation in the New Constitutional Order

Although not unknown in South African law, *amicus curiae* participation was previously restricted to the English common law understanding of primarily assisting the court, or a litigating party, with regard to a specific legal requirement.⁹⁰ The Constitution of South Africa entrenched a new constitutional democratic order in which the principle of participatory democracy was firmly established.⁹¹ This allowed the voices of those who have been traditionally excluded to be heard and provided for a dialogue between citizens and those they elected. It also required the State to take positive steps to ensure that citizens could exercise their rights of democratic participation.⁹² The Constitution, entrenched a broad concept of standing allowing a group of people to bring an action that alleges an infringement of the Bill of Rights. Previously a prospective litigant had to be personally affected by an alleged wrong,

⁹⁰ The common law position regarding *amicus curiae* participation was confirmed in *Connock's (SA) Motor Co Ltd v Pretorius* 1939 TPD 355 at 357 where the court stated:

'So far as concerns the position of *amicus curiae*, I have looked into the matter and I find the definition of the term is to be found in several legal dictionaries, such as *Sweet and Bouvier* and *Whorton*. They all speak of an *amicus curiae* as a bystander – someone who is present in Court and not concerned with the matter in hand, who may be counsel or may not. He is a person who, if he observes the judge is in doubt about something, or likely to fall into error through failure to recollect a fact of which he ought to take cognizance, such as a legal decision or a statute, asks leave to come to his assistance and to mention it, and thus helps the judge by pointing out what appears to be in danger of being overlooked. But the point is also made that it is not the function of an *amicus curiae* to seek to undertake the management of a cause....I think we should be laying down a dangerous precedent if we were to allow intervention of this kind.'

Murray op cit note 6 at 242 identified certain categories of *amici curiae* participation allowed for before the Constitution of the Republic of South Africa came into effect in 1996 (hereinafter the Constitution) including: 1) A lawyer appointed in terms of section 304(3) of the Criminal Procedure Act 51 of 1977 to argue a case on review; 2) a member of the Attorney-General's staff who appears for a complainant in a maintenance case which is taken on appeal if the person does not have his/her own legal representation or wishes to appear in person; 3) an advocate who presents the case of an administrative body when decisions are taken on review; 4) representation for a Bar Council or the Law Society in a matter concerning the profession; 5) a court requesting representation for an unrepresented defendant or respondent in a matter involving complex points of law.

⁹¹ Sec 57(1)(b) of the Constitution recognises the importance of participation in the law making process and states that the National Assembly may make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement. Sec 70(1)(b) & 116(1)(b) contains similar provisions in respect of the National Council of Provinces and the provincial legislatures.

⁹² Henk Botha 'Representing the poor: Law, poverty and democracy' (2011) 22 *Stell LR* 521 at 522; Ian Currie & Johan de Waal *The Bill of Rights handbook* (Juta, 5th edition, 2005) 15.

but now a prospective litigant needs only to demonstrate, with reference to the listed categories in the Constitution, that there is sufficient interest in obtaining the remedy sought.⁹³

This favourable constitutional climate and the establishment of the Constitutional Court as the highest court in all constitutional matters, played an important role in establishing and developing the new-found role of *amici curiae*.⁹⁴ The Constitutional Court was the first to adopt specific rules that regulated *amicus curiae* participation and has set the benchmark for *amicus* participation, remaining the preferred court in which to lodge these applications.⁹⁵ An analysis of the relevant

⁹³ Currie & de Waal op cit note 92 at 83-84; Sec 38 of the Constitution states that:

‘anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach the court are:

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interest of its members.’

⁹⁴ Sec 167(3)(a) of the Constitution states:

The Constitutional Court is the highest court in all constitutional matters.’

The Constitutional Court is first and foremost an appellate court hearing constitutional appeals. It only has non-appellate jurisdiction in three areas: Firstly, in terms of sec 167(5) of the Constitution, the Constitutional Court has to confirm any order of invalidity of an act of parliament, a provincial act or conduct of the President made by the Supreme Court of Appeal, a High Court, or a court of similar status before that order will have any force. Secondly, in terms of sec 167(4) certain matters fall within the exclusive jurisdiction of the Constitutional Court and only it may:

- (a) decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state;
- (b) decide on the constitutionality of any parliamentary or provincial Bill, but may do so only in circumstances anticipated in Chapter 4 or 6;
- (c) decide that Parliament or the President has failed to comply with a constitutional duty; or
- (d) certify a provincial constitution in terms of section 144.

Lastly, sec 167(6)(a) empowers the Constitutional Court to function as a court of first instance by allowing direct access when it is in the interest of justice to do so and with leave of the Court.

⁹⁵ According to Budlender ‘*Amicus curiae*’ op cit note 15 at 4 the Constitutional Court was the first to introduce a rule which made provision for the participation of *amici curiae* and which regulated this participation. The rules adopted by other courts are based on the model established by the Constitutional Court and use similar concepts. See rule 10 of the Constitutional Court promulgated under Government Notice R1675 in Government Gazette 25726 (31 October 2003) (hereinafter rule 10 of the Constitutional Court Rules); rule 16A of the Uniform Court Rules first promulgated under Government Notice 315 in Government Gazette 19834 (12 March 1999); rule 16 of the Supreme Court of Appeal Rules first promulgated under Government Notice 1523 in Government Gazette 19507 (27 November 1998); rule 7 of the Labour Court Rules first promulgated under Government Notice 1665 in Government Gazette 17495 (14 October 1996); rule 7 of the Labour Appeal Court Rules first promulgated under Government Notice 1666 in Government Gazette 17495 (14 October 1996); rule 14 of the Land Claims Court Rules first promulgated under Government Notice 300 in Government Gazette 17804 (21 February 1997).

Constitutional Court rule is called for to establish the function and relevance of *amicus curiae* participation.

4.2 Rule 10 of the Constitutional Court

Rule 10 of the Constitutional Court specifies that admission as *amicus curiae* lies solely within the discretion of the Court. Although the text of the rule suggests that admission as *amicus curiae* can be sought with the consent of the parties, or via the permission of the Chief Justice,⁹⁶ the Court has unequivocally stated that the Court's permission is the only requirement pertaining to admission, irrespective of the consent obtained by the parties.⁹⁷ In the *Institute for Security Studies: In re Basson* case, the Court analysed the rule regarding *amicus curiae* participation and provided clarity for all subsequent applications.⁹⁸ In this case, the Court stressed that in exercising its discretion whether to allow a person or organisation to act as *amicus curiae*, it would consider whether the submissions were relevant and useful to the Court and, most importantly, different from those of the other parties.⁹⁹

This is very relevant, as an *amicus curiae* does not have the right to raise a new cause of action, and is limited to the record of appeal, unless the new material is, in accordance with rule 31, common cause or otherwise incontrovertible or is of an official, scientific, technical or statistical nature and capable of easy verification.¹⁰⁰ If an *amicus* relies on new material, the material should be of such a nature that it does not lead to a serious factual dispute and typically should consist of statistical

⁹⁶ See rule 10(1) and 10(4) of the Constitutional Court Rules op cit note 95.

⁹⁷ *Institute for Security Studies: In re S v Basson* 2006 (6) SA 195 (CC) para 6 (hereinafter *Institute for Security Studies: In re Basson*); Budlender 'Amicus curiae' op cit note 15 at 8-8.

⁹⁸ *Institute for Security Studies: In re Basson* op cit note 97; the judgment dealt with the application for admission as *amicus curiae* by the Institute for Security Studies. The respondent declined the necessary consent to act as *amicus*, upon which the Institute applied to the Court for admission as *amicus curiae*.

⁹⁹ *Institute for Security Studies: In re Basson* op cit note 97 para 7.

¹⁰⁰ Budlender 'Amicus curiae' op cit note 15 at 8-11; Rule 31 of the Constitutional Court Rules op cit note 95 states:

'(1) Any party to any proceedings before the Court and an *amicus curiae* properly admitted by the Court in any proceedings shall be entitled, in documents lodged with the Registrar in terms of these rules, to canvass factual material that is relevant to the determination of the issues before the Court and that does not specifically appear on the record: Provided that such facts are—

- (a) common cause or otherwise incontrovertible; or
- (b) are of an official, scientific, technical or statistical nature capable of easy verification.

(2) All other parties shall be entitled, within the time allowed by these rules for responding to such document, to admit, deny, controvert or elaborate upon such facts to the extent necessary and appropriate for a proper decision by the Court.'

information from reliable sources, articles from learned journals, reports from government or other official bodies, and empirical data relevant to the matter.¹⁰¹ The Court has followed a strict approach to the type of evidence allowed and has stated:

'The role of an amicus is to draw the attention of the court to the relevant matters of law and fact to which attention would not otherwise be drawn. In return for the privilege of participating in proceedings without having to qualify as a party, an amicus has a special duty to the court. That duty is to provide cogent and helpful submissions that assist the court. The amicus must not repeat arguments already made but must raise new contentions; and generally these new contentions must be raised on the data already before the court. Ordinarily it is inappropriate for an amicus to try and introduce new contentions based on fresh evidence.'¹⁰²

According to Budlender, the restrictions placed on an *amicus curiae* by the Court rules are not necessarily steadfast and the Court has discretion to permit an *amicus* to adduce additional evidence outside the ambit of rule 31.¹⁰³ In a recent decision related to the interpretation of whether Rule 16A of the Uniform Court Rules¹⁰⁴ allowed for new evidence to be introduced by an *amicus curiae*, the Court found that the uniform rule provided for a great deal of discretion, and that allowing an *amicus* to adduce statistical evidence in an important public interest matter, would best promote the spirit, purport and objects of the Bill of Rights.¹⁰⁵ The admissibility of new evidence should be determined in accordance with whether it is in the interest of justice to do so, and on a case-by-case basis.¹⁰⁶

Rule 10 indicates that proper planning and drafting of an *amicus curiae* brief is essential. An organisation or person that wishes to enter as *amicus curiae* should

¹⁰¹ Budlender '*Amicus curiae*' op cit note 15 at 8-11.

¹⁰² *In Re: Certain Amicus Curiae Applications: Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 713 (CC) para 5.

¹⁰³ Whether the submission of new evidence will be permitted will depend on what is just and expedient in terms of rule 32(2) of the Constitutional Court Rules op cit note 95. Budlender '*Amicus curiae*' op cit note 15 at 8-12 sets out the factors that a court should take into account in allowing new factual material as: '(a) the delay caused by giving the other parties an opportunity to respond to the new evidence; (b) the Constitutional Court's reluctance to deal with evidential material without having the benefit of the views of another court; (c) the cogency of the evidence; and (d) the importance of the evidence to the matters which the Court has to decide.'

¹⁰⁴ The Uniform Court Rules op cit note 95 above.

¹⁰⁵ *Children's Institute v Presiding Officer of the Children's Court, District of Krugersdorp and Others* 2013 (1) BCLR 1 (CC) para 27.

¹⁰⁶ *Ibid* para 32.

write to the relevant parties as soon as possible to obtain their consent.¹⁰⁷ The request letter should give the parties some knowledge of the relevant case that the *amicus* would like to bring in order to ensure a good relationship with the parties, and possibly to strengthen an application to the Chief Justice for admission, if the parties refuse consent.¹⁰⁸ The application for admission should be carefully drafted and provide a summary of the written submissions to be advanced, as it is not necessarily easy to assess the relevance of arguments from the supporting affidavit or letter requesting consent.¹⁰⁹ Although the rules state that an *amicus curiae* shall not present oral argument, in practice, a person admitted as *amicus* is usually permitted, on application, to present oral argument to the Court.¹¹⁰

The role that *amicus curiae* participation has played in the Constitutional Court has evolved, since the Court has developed its jurisprudence and familiarity with the use of these participations. In its first case,¹¹¹ the Court, keeping to the traditional role of the *amicus curiae*, invited certain groups to participate.¹¹² Later, in *Hoffman v South African Airways*,¹¹³ the Court stated:

'An *amicus curiae* assists the Court by furnishing information or argument regarding questions of law or fact. An *amicus* is not a party to litigation, but believes that the Court's decision may affect its interest. The *amicus* differs from an intervening party, who has a direct interest in the outcome of the litigation and is therefore permitted to participate as a party to the matter. An *amicus* joins proceedings, as its name suggests, as a friend of the Court. It is unlike a party to litigation who is forced into the litigation and thus compelled to incur costs. It joins in the proceedings to assist the Court because of its expertise on or interest in the matter before the Court. It chooses the side it wishes to join unless requested by the Court to urge a particular position.'¹¹⁴

Although the Court's direct references to the role of *amici curiae* are in keeping with its more traditional role, the rules of the Court and *amici* that have appeared before

¹⁰⁷ Jonathan Klaaren 'Becoming friendly with the Constitutional Court: An interpretation of the Court's *amicus curiae* rules' (1995) 11 *SAJHR* 499 at 502.

¹⁰⁸ *Ibid* 103.

¹⁰⁹ *Institute for Security Studies: In re Basson* op cit note 97 at para 10.

¹¹⁰ See rule 10(8) of the Constitutional Court Rules op cit note 95.

¹¹¹ *S v Makwanyane* 1995 (3) SA 391 (CC). The case concerned whether the death penalty infringed certain rights in the Bill of Rights.

¹¹² Budlender '*Amicus curiae*' op cit note 15 at 8-3.

¹¹³ *Hoffman v South African Airways* 2001 (1) SA 1 (CC).

¹¹⁴ *Ibid* para 63.

the Court, are in most instances not traditional - an interested person/organisation that chooses at its own initiative to intervene in the proceedings, to advance a particular legal position of its choice.¹¹⁵ In gender related matters heard by the Court, *amici curiae* participation has played a significant and important role in shaping the purpose and impact of these participations in South African law.

4.3 *Amici Curiae* Participation and the Constitutional Court's Gender Jurisprudence

In post-apartheid South-Africa, the women's movement adopted a two-pronged strategy to achieve gender equality.¹¹⁶ The first concern was policy development and law reform through the executive and parliament, but as the pace of law reform slowed down, attention shifted to the courts as a possible vehicle to implement the desired change.¹¹⁷ The Constitutional Court was targeted to test arguments and attempt reform, as the Court gives effect to the rights enshrined in the Constitution, of which the right to equality is central. This Court, operating within the new constitutional dispensation, was also perceived to be more progressive and more receptive to gendered arguments.¹¹⁸ The Constitutional Court also makes the final decision in considering whether legislation is constitutional and its decisions are therefore the ultimate authority on a particular topic.¹¹⁹

Feminists called for a substantive approach to equality and welcomed the Court's acceptance of this approach in constitutional interpretation.¹²⁰ The support for a substantive approach enabled feminist method to be employed in legal reasoning, which allowed for an understanding of inequality within its social and historic context;

¹¹⁵ See rule 10(1) of the Constitutional Court Rules *op cit* note 95; Budlender '*Amicus curiae*' *op cit* note 15 at 8-2.

¹¹⁶ Shireen Hassim 'Voices, hierarchies and spaces: Reconfiguring the women's movement in democratic South Africa' (2005) 32 *Politikon* 175; Shireen Hassim 'The gender pact and democratic consolidation: Institutionalizing gender equality in the South African State' (2003) 29 *Feminist Studies* 505.

¹¹⁷ Catherine Albertyn 'Defending and securing rights through law: Feminism, law and the courts in South Africa' (2005) 32 *Politikon* 217 at 222. See the first women-specific laws, chapter 1 fn 57.

¹¹⁸ Elsje Bonthuys 'Institutional openness and resistance to feminist arguments: The example of the South African Constitutional Court' (2008) 20 *CJWL* 1 at 3; Jackie Dugard 'Court of first instance: Towards a pro-poor jurisdiction for the South African Constitutional Court' (2006) 22 *SAJHR* 261.

¹¹⁹ See sec 167(5) of the Constitution.

¹²⁰ See section 2 chapter 1; Catherine Albertyn 'Substantive equality and transformation in South Africa' (2007) 23 *SAJHR* 253.

a focus on difference and attention to the purpose of the rights and the underlying values supported by the Constitution.¹²¹

With the Court's apparent support for a substantive and feminist inspired interpretation of equality, it was hoped that there would be a greater degree of openness to feminist arguments in the Court.¹²² Despite the Court's interpretation of the right as being substantive, and some decisions reflecting feminist thought, certain cases decided by the Court "used a formalistic a-contextual reasoning" and "refused to acknowledge the interaction between legal rules on the one hand and socio-economic conditions and stereotypes on the other hand".¹²³

In several of the gender cases brought before the Constitutional Court, *amicus curiae* applications were filed and a range of women's and public interest organisations were allowed to make submissions to the Court. The important question is whether *amici curiae* participation had any influence on the decisions reached by the Court or whether these briefs were able to sensitise the Court in its subsequent decisions. It is important to analyse whether women's litigation strategies have been successful in properly contextualising claims, interpreting rights and constructing remedies, and whether and how, these strategies should be constructed to adequately represent the complexity of different women's situations and interests.¹²⁴

Litigation strategy, specifically *amicus curiae* participation as strategy is the key in attempting to give feminist content to rights by using feminist methods and outcomes and so expand traditional concepts of them.¹²⁵ The subsequent chapters will focus on certain key decisions of the Constitutional Court and the *amici curiae* that participated in these matters, to establish the purpose of these briefs and whether they were able to better represent the complexities of women's lives to advance gender equality for women within the court system. The contextual and factual background of the cases will be discussed, including the contentions of each

¹²¹ Catherine Albertyn 'Substantive equality' op cit note 120 at 257; Catherine Albertyn 'Equality' in Elsje Bonthuys & Catherine Albertyn (eds) *Gender, law and justice* (Juta 2007) 82 at 92-93.

¹²² Beth Goldblatt 'The right to social security – Addressing women's poverty and disadvantage' (2009) 25 *SAJHR* 442 at 449; Bonthuys op cit note 118 at 3.

¹²³ Bonthuys op cit note 118 at 4; specifically the judgments of *Volks* op cit note 81 *Jordan* op cit note 81 comes to mind.

¹²⁴ Radha Jhappan 'Introduction: Feminist adventures in law' in Radha Jhappan (ed) *Women's legal strategies in Canada* (University of Toronto Press 2002) 28.

¹²⁵ Goldblatt op cit note 122 at 449.

of the parties, followed by the arguments of the *amicus curiae*. The Court's decision will be analysed in relation to the *amicus curiae* participation, and finally, the purpose and impact of the *amicus* participation will be established. The ultimate purpose of the case analysis will be to establish the purpose and impact of *amici curiae* participation in gender litigation matters and to question whether they were able to present a feminist and/or gendered perspective to court which influenced the decision reached or shaped subsequent law.

4.4 The Participating *Amici Curiae*

Before starting with the case analysis, it is important to provide a short background on the institutions and organisations that regularly participate as *amici curiae* in the Constitutional Court's gender cases, in order to understand their participation in relation to their organisational goals. Participation is well represented by constitutional bodies, university and legal entities, non-governmental organisations and civil society representatives, all with the objective of engaging the law to change women's lives.

4.4.1 The Centre for Applied Legal Studies (CALS)

CALS was founded in 1978 as an applied research centre within the faculty of law at the University of the Witwatersrand.¹²⁶ The organisation conducts research and engages in advocacy, litigation and training for the promotion and protection of human rights in South Africa.¹²⁷ The Gender Research Project of CALS focuses on questions of women's human rights, sex and gender equality, with particular focus on the promotion of equality for disadvantaged groups of women.¹²⁸

CALS participated as *amicus curiae* in *Carmichele*, *Volks* and as part of combined briefs in *Zuma*, *Masiya* and *Jordan*.

¹²⁶ Information obtained from http://www.wits.ac.za/academic/clm/law/cals/abpoutus/16860/our_history.html (last accessed on 15 August 2013).

¹²⁷ *Amicus curiae* notice of motion, supporting affidavit deposited to by Shereen Winifred Mills, case number: CCT 48/00 para 3.1.

¹²⁸ *Id.*

4.4.2 The Centre for the Study of Violence and Reconciliation (CSVSR)

The CSVSR is an independent non-profit organisation that carries out research and interventions around issues relating to violence and reconciliation in South Africa.¹²⁹ One of the goals of the CSVSR's gender-based violence programme is advocating about policy and laws, to prevent gender-based violence and to protect the rights of victims of gender-based violence.¹³⁰ The CSVSR participated as *amicus curiae* in a combined brief in the *Zuma* matter.

4.4.3 The Commission for Gender Equality (CGE)

The CGE is a specific constitutional body established to promote respect for gender equality and aid its protection and attainment.¹³¹ It is an independent institution subject only to the Constitution and the law, and has the power to monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality.¹³²

To understand the CGE's litigation strategy and its participation as *amicus curiae* it should be noted that the CGE, from its inception, has been plagued by structural and strategic tensions. There were differences of opinion whether its identity should be feminist, as opposed to implementing a general gender framework.¹³³ The CGE moved toward a more general framework and focused on poor rural women, despite its broad mandate, which created tension in achieving a balance between the practical needs of people living in poverty, as opposed to a more specific strategic focus, challenging gender power relations.¹³⁴ This lack of clear strategy coupled with internal personal politics, derogated much of the CGE's work and its research has often been described as weak, with research reports that reflect a simplistic understanding of gender inequality.¹³⁵

¹²⁹ Notice of motion in the joint application of TLAC, CALS & CSVSR to be admitted as *amici curiae*, affidavit deposed to by Lisa-Anne Mae Vetten, case number: SS321/05.

¹³⁰ Information obtained from <http://www.csvr.org.za/index.php/programmes/gender-based-violence.html> (last accessed 14 Augustus 2013).

¹³¹ Sec 181 & 187 of the Constitution.

¹³² Sec 181(2) & 187(2) of the Constitution. The mandate and further regulations pertaining to the CGE is set out in the Commission for Gender Equality Act 39 of 1996.

¹³³ Amanda Gouws 'The state of the national gender machinery: Structural problems and personal politics' in Sakhela Buhlungu, Johan Daniel, Roger Southall & Jessica Lutchman (eds) *State of the nation: South Africa 2005-2006* (HSRC Press 2006) 143 at 152.

¹³⁴ Sheila Meintjies 'Gender equality by design: The case of South Africa's Commission on Gender Equality' (2005) 32 *Politikon* 259 at 270; Gay W. Seidman 'Institutional dilemma: Representation versus mobilization in the South African Gender Commission' (2003) 29 *Feminist Studies* 541.

¹³⁵ Meintjies op cit note 134 at 271.

The CGE participated as *amicus curiae* in *S v Baloyi*,¹³⁶ and in *Jordan*. It played an important role in relation to women and customary law, consistent with its focus on poor rural women when it participated as *amicus curiae* in *Bhe, Shilubana and Others v Nwamitwa*¹³⁷ and *MM v MN*.

4.4.4 The National Movement of Rural Women (NMRW)

The NMRW is a national membership organisation that serves the interests of rural women.¹³⁸ It was established to create a network where rural women could gather, discuss their problems and take action and its main objective is the empowerment of rural women.¹³⁹ The NMRW participated as *amicus curiae* in *Shilubana* and in a combined brief in the *MM v MN* matter.

4.4.5 The Sex Workers Education and Advocacy Taskforce (SWEAT)

SWEAT is a non-governmental service organisation that focuses on the health and wellbeing of sex workers.¹⁴⁰ SWEAT actively works towards the empowerment of sex workers, the decriminalisation of adult commercial sex work and equal access to police-, legal-, health-, and social welfare services, fair and safe working conditions and the promotion of safer sex work practices.¹⁴¹ SWEAT participated as *amicus curiae* in the *Jordan* matter.

4.4.6 The Tshwaranang Legal Advocacy Centre (TLAC)

TLAC is a non-profit organisation that promotes and defends the rights of women to be free from violence and to have access to adequate services.¹⁴² A key objective in achieving its goals is litigation to ensure that the State enforces its laws and policies in addressing violence.¹⁴³ TLAC participated as *amicus curiae* in combined briefs in *Zuma and Masiya*.

¹³⁶ *S v Baloyi* 2000 (2) SA 425 (CC).

¹³⁷ *Shilubana and Others v Nwamitwa* 2009 (2) SA 66 (CC) (hereinafter *Shilubana*).

¹³⁸ Information obtained from http://www.nmrw.org/?page_id=2 (last accessed 14 August 2013).

¹³⁹ Application for admission as *amicus curiae* of the NMRW, affidavit deposited to by Likhapha Mbatha, case number: CCT 03/07 para 4.

¹⁴⁰ Information obtained from <http://www.sweat.org.za/index.php/about-sweat> (last accessed on 14 August 2013).

¹⁴¹ Notice of motion to be admitted as *amici curiae*, SWEAT brief, affidavit deposited to by Jayne Arnott, case number: CCT 31/01 para 11.

¹⁴² Information obtained from <http://www.tlac.org.za/about/> (last accessed 14 August 2013).

¹⁴³ *Id.*

4.4.7 The Women's Legal Centre (WLC)

The WLC is a non-profit, independently funded law centre that seeks to achieve equality for women in South Africa through litigation.¹⁴⁴ Its litigation strategy is outcomes based and a case will be taken on if it has the potential to benefit a substantial group of women in the overturning of discriminatory legislation; creating new jurisprudence or extending existing jurisprudence and creating the possibility of positive orders that would enforce women's human rights.¹⁴⁵ The WLC focuses on issues relating to violence against women, fair access to resources in relationships, access to land and housing, access to fair labour practices and women's access to health care.¹⁴⁶

The WLC participated as *amicus curiae* in *Gumede* and in *MM v MN*. It represented Bhe and was an applicant in the *Bhe* case as well as in *Volks* where it represented Robinson and acted as an applicant.

¹⁴⁴ Information obtained from <http://www.wlce.co.za/> (last accessed 15 August 2013).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

CHAPTER 3

1 VIOLENCE AGAINST WOMEN, WOMEN'S VOICE AND THE EFFICACY OF THE CRIMINAL JUSTICE SYSTEM

In post-apartheid South Africa, feminists have actively engaged the legal system to address gender-based violence.¹ Women's organisations strongly lobbied for the inclusion of rights that protect women's bodily and psychological integrity in the 1996 Constitution, which led to the achievement of a series of rights that protected women against violence, as well as their right to reproductive decision-making, security and control over their bodies.² During the early stages of democracy, important legislative and policy gains occurred concerning bodily autonomy and protection from gendered based violence; this entrenched a legal framework for the enforcement of the constitutionally protected rights.³

However, the levels of violence against women remain alarmingly high, and confronts us with the contradiction of having a progressive constitutional and legislative framework that supposedly protects women against violence on the one end with on the other end of the continuum, seemingly unyielding levels of violence

¹ Lillian Artz & Dee Smythe 'Feminism vs. the State?: A decade of sexual offences law reform in South Africa' (2007) *Agenda* 6 at 8.

² Catherine Albertyn, Lillian Artz, Helene Combrinck, Shereen Mills & Lorraine Wolhuter 'Women's freedom and security of the person' in Elsje Bonthuys & Catherine Albertyn (eds) *Gender, law and justice* (Juta 2007) 295 at 297. Sec 12 of the Constitution of the Republic of South Africa, 1996 (hereinafter the Constitution) reads:

'(1) Everyone has the right to freedom and security of the person, which includes the right:

- (a) not to be deprived of freedom arbitrarily or without just cause;
- (b) not to be detained without trial;
- (c) to be free from all forms of violence from either public or private sources;
- (d) not to be tortured in any way; and
- (e) not to be treated or punished in a cruel, inhuman or degrading way.

(2) Everyone has the right to bodily and psychological integrity, which includes the right

- (a) to make decisions concerning reproduction;
- (b) to security in and control over their body, and
- (c) not to be subjected to medical or scientific experiments without their informed consent.'

³ Some of the early legislative gains include the promulgation of the Choice on Termination of Pregnancy Act 92 of 1996; the Prevention of Family Violence Act 133 of 1993 (hereinafter the Prevention of Family Violence Act); the Domestic Violence Act 116 of 1998 (hereinafter the Domestic Violence Act); the Criminal Law Amendment Act 105 of 1997 and the Employment Equity Act 55 of 1998.

that are perpetrated.⁴ This has led to questions about the efficacy of the legal framework that has been implemented to curb violence against women.⁵

Feminists have long viewed the criminal justice system - the system that women access to gain protection from or recourse against violence - as the ultimate gendered institution, often reinforcing “deeply sexist assumptions about women, their sexual and social identities and their relation to the social (male) world”.⁶ The harmful reproduction of certain notions of masculinity and femininity, especially prevalent in sexual violence matters, not only affects those caught up in the criminal justice system but reinforces social conceptions of appropriate gender behaviour.⁷ One can therefore say that the criminal justice system, the very source of protection against violence for women, often reinforces violent behaviour by serving to maintain a patriarchal social order.⁸

‘These images of women produced in and through the law have powerful ideological and social significance. Law is, among other things, an authoritative language or form

⁴ Statistics provided by the South African Police Service (SAPS) puts the combined reported rape and sexual assault figures at 54 126 for 2008/2009; 55 097 for 2009/2010; 56 272 for 2010/2011. Locating these crimes within the general framework a total of 191 842 crimes against women older than 18 years were reported during the 2010/2011 period including murder, attempted murder, sexual offences and assault. Statistics obtained from SAPS Crime Report 2010-2011 available at <http://www.saps.gov.za> (last accessed 4 December 2012).

The 2012/2013 crime statistics as discussed and interpreted by the Women’s Legal Centre (WLC) places the number of reported sexual offences at 66 196 see <http://www.wlc.co.za> (last accessed 4 November 2013).

Also see Helene Combrinck ‘The dark side of the rainbow: Violence against women in South Africa after ten years of democracy’ (2005) *Acta Juridica* 171; Dee Smythe ‘Moving beyond 30 years of Anglo American rape law reforms: Legal representations for victims of sexual offences’ (2005) 18 *SACJ* 167.

⁵ Lloyd Vogelmann & Gillian Eagle ‘Overcoming endemic violence against women in South Africa’ (1991) 18 *Social Justice* 209.

⁶ Artz & Smythe ‘Feminism vs. the State?’ op cit note 1 at 8.

⁷ According to Janice Du Mont & Deborah Parnis ‘Judging women: The pernicious effects of rape mythology’ (1999) 19 *Canadian Women Studies* 102 common held myths concerning rape includes: ‘women mean “yes” when they say “no”’; women are “asking for it” when they wear provocative clothes, go to bars alone, or simply walk down the street at night; only virgins can be raped; women are vengeful, bitter creatures “out to get men”; if a woman says “yes” once, there is no reason to believe her “no” the next time; women who “tease” men deserve to be raped; a woman who goes to the home of a man on the first date implies she is willing to have sex; women cry rape to cover up an illegitimate pregnancy; a man is justified in forcing sex on a woman who makes him sexually excited; a man is entitled to sex if he buys a woman dinner; [and] women derive pleasure from victimisation.’ Also see in this regard Donald Nicholson’s ‘Criminal law and feminism’ in Donald Nicholson’s & Lois Bibbings (eds) *Feminist perspectives on criminal law* (Cavendish Publishing 2000) 1 at 14; Artz & Smythe ‘Feminism vs. the State?’ op cit note 1 at 7.

⁸ Vogelmann & Eagle op cit note 5 at 213.

of discourse. It has a potent ability to shape popular and authoritative understanding of situations. The laws, institutions and ideologies of the criminal justice system are particularly powerful in their ability to define appropriate 'feminine' behaviour, morality and roles, especially those concerned with women's sexuality and reproduction. In this way, certain images are affirmed at the same time as others are censured through criminalisation, marginalisation and the silencing of alternative accounts of social reality.'⁹

With this contradiction in mind, feminists have used the law as a site of struggle to address legal rules, doctrines and principles that reflect the stereotypes and myths that have contributed to entrenching a culture of violent behaviour.¹⁰ The law, specifically criminal law, is seen as an important site of struggle "in shifting, or at least acknowledging inequalities" that entrench gender-based violence.¹¹ The importance of engaging the legal system, from a feminist viewpoint, in violence issues has been described as follows:

'Perhaps feminist jurisprudence – as a theoretical framework for changing women's social realities of violence – can provide a starting point from which the state, the law and society can be viewed as both exercising power which sometimes nullifies women and their experiences with violence as well as serving an instrumental function of protection and one that is intrinsically symbolic. At the very least, our continued participation in the law reform process can expose the state and the criminal justice system which upholds largely masculinist interpretations of justice. It may also have the potential to address some seemingly intractable questions about women's engagement with the law.'¹²

Feminist methods and strategies have played an important role in addressing this supposed contradiction and the central focus has been that of placing women's actual experience of violence before courts, in an attempt to redefine the gendered construction of the criminal justice system and women's rights to be free from violence.¹³ In the Constitutional Court, women have defended attacks on progressive

⁹ Cathi Albertyn 'The discriminatory and gendered nature of the law and institutions of criminal justice' in Saras Jagwanth, Pamela-Jane Schwikkard & Brenda Grant (eds) *Women and the law* (HSRC Publishers 1994) 15 at 20.

¹⁰ Lillian Artz & Dee 'Introduction: Should we consent?' in Lillian Artz & Dee Smythe (eds) *Should we consent? Rape law reform in South Africa* (Juta 2008) 1 at 13; Nicholson's op cit note 7 at 14.

¹¹ Artz & Smythe 'Introduction: Should we consent?' op cit note 10 at 15.

¹² Ibid 14. Smythe

¹³ Ibid 16.

laws and have attempted to extend protection against violence under common and statutory law,¹⁴ and in the High Courts women continue to struggle to address a prejudicial criminal justice system.¹⁵ Most importantly, the *amici curiae* participating in these matters have contributed to highlighting the way in which the law sustains inequality and violence against women, whilst at the same time providing protection and empowering women in different ways.¹⁶

An important question is how *amici curiae* participation has influenced the reasoning of the Constitutional Court in the relevant matters and how it enabled women's voices to be heard. The case analysis that follows carefully formulates the usefulness of *amici curiae* participation in violence matters through a consideration of certain pertinent questions like: Does the *amici* employ a specific feminist strategy or method? Does the Court interpret and use the evidence and arguments of the *amici curiae* and how have the relevant cases created a platform to lobby for change concerning violence against women?

¹⁴ *S v Baloyi* 2000 (2) SA 425 (CC) (hereinafter *Baloyi*); *Carmichele v Minister of Safety and Security and Another* 2001 (4) SA 938 (CC) (hereinafter *Carmichele*); *Masiya v Director of Public Prosecutions, Pretoria and Another* 2007 (5) SA 30 (CC) (hereinafter *Masiya*).

¹⁵ See *S v Zuma* 2006 (2) SACR 191 (W) (hereinafter *Zuma*); although not a Constitutional Court matter an important matter concerning *amicus curiae* participation in criminal proceedings concerning sexual violence.

¹⁶ Artz & Smythe 'Introduction: Should we consent?' op cit note 10 at 18.

2 CASE DISCUSSIONS

2.1 Defending Legislative Gains: *S v Baloyi (Commission for Gender Equality (CGE) and Minister of Justice as amici curiae)*.

2.1.1 Contextual and factual background

In 1993, the Prevention of Family Violence Act was enacted to provide women with their first accessible legal remedy against domestic violence.¹⁷ Women's organisations criticised government for the implementation of the Act as they argued that the legislative process was undertaken without consultation and discussion and therefore did not accurately reflect women's needs.¹⁸ However, the Act did make a difference, by introducing an interdict system which enabled an abused woman to seek protection from a judge or magistrate.¹⁹ In terms of the Act, a suspended warrant of arrest would be issued with the interdict which, if breached, allowed a woman to present herself to a police station calling the warrant of arrest into operation.²⁰

The Act, specifically section 3(5), raised important questions of tensions between women's rights to be protected from violence and men's rights as accused persons, as the section seemingly created a reverse onus of proof that required the violator of the interdict to prove his innocence.²¹ Although the supposed reverse

¹⁷ Albertyn, Artz, Combrinck, Mills & Wolhuter op cit note 2 at 322.

¹⁸ Sheila Meintjies 'The politics of engagement: Women transforming the policy process – Domestic violence legislation in South Africa' in Anne Marie Goetz & Shireen Hassim (eds) *No shortcuts to power: African women in politics and policy making* (Zed Books 2003) 140 at 149.

¹⁹ Ibid 150.

²⁰ See sec 2 of the Prevention of Family Violence Act; Joanne Fedler 'Lawyering domestic violence through the Prevention of Family Violence Act 1993 – An evaluation after a year in operation' (1995) 112 SALJ 231 at 233.

²¹ Sec 3(5) of the Prevention of Family Violence Act states:

'The provisions of the Criminal Procedure Act 51 of 1977, relating to the procedure which shall be followed in respect of an enquiry referred to in s 170 of that Act, shall apply mutatis mutandis in respect of an enquiry under ss (4).

Sec 170 of the Criminal Procedure Act 51 of 1977 states:

'(1) An accused at criminal proceedings who is not in custody and who has not been released on bail, and who fails to appear at the place and on the date and at the time to which such proceedings may be adjourned or who fails to remain in attendance at such proceedings as so adjourned, shall be guilty of an offence and liable to the punishment prescribed under ss (2).

(2) The court may, if satisfied that an accused referred to in ss (1) has failed to appear at the place and on the date and at the time to which the proceedings in question were adjourned or has failed to remain in attendance at such proceedings as so adjourned, issue a warrant for his arrest and, when

onus could be seen to negatively impact on a person's right to be presumed innocent and to have his/her guilt proved beyond a reasonable doubt by the State,²² it was seen as a fair restriction, considering a victim's and specifically women's, urgent need for protection from harm and imminent violence.²³

Important lessons in defending legislative gains could be gained from the Canadian experience where the fair trial rights of men were used in early Charter litigation to discredit progressive legal gains made by women. In *R v Seaboyer; R v Gayme* two male accused successfully relied on their fair trial rights to challenge certain sections of the Canadian criminal code, which protected women who testified as the primary witnesses in a rape trial against questions regarding her past sexual history.²⁴ The case resulted in the voiding of legislation which was of specific benefit to women and alerted South African feminists to the importance of defending progressive legislative gains, despite the possibility that a case might be lost, as the risk of not engaging the law when such claims are made would trivialise and marginalise women's rights and advances.²⁵

In the *Baloyi* case, the complainant, a wife of an army officer obtained an interdict in terms of the Act against her husband (Baloyi) who was ordered not to assault her or her child, and not to prevent them from entering or leaving the marital home.²⁶ Baloyi ignored the interdict and assaulted the complainant after which he

he is brought before the court, in a summary manner enquire into his failure so to appear or so to remain in attendance and, **unless the accused satisfies the court that his failure was not due to fault on his part**, convict him of the offence referred to in ss (1) and sentence him to a fine not exceeding R300 or to imprisonment for a period not exceeding three months.' (emphasis added); see Penelope Andrews 'The Constitutional Court provides succor for victims of domestic violence – *S v Baloyi*' (2000) 16 *SAJHR* 337 for a discussion of the case.

²² Sec 35(3)(h) of the Constitution provides for a presumption of innocence in that 'every accused person has a right to a fair trial, which includes the right to be presumed innocent, to remain silent, and not to testify during the proceedings'.

²³ Lisa Vetten 'Addressing domestic violence in South Africa: Reflections on strategy and practice' (2005) expert paper for the UN division for the Advancement of Women delivered 17-20 May 2005, Vienna Austria.

²⁴ *R v Seaboyer; R v Gayme* (1991) 48 O.A.C. 81 (S.C.C.) (hereinafter the *Seaboyer* case). See Elizabeth A. Sheehy 'Feminist argumentation before the Supreme Court of Canada in *R. v. Seaboyer; R. v. Gayme*: The sound of one hand clapping' (1991) 18 *Melbourne University Law Review* 450 and Elizabeth A. Sheehy 'Legal responses to violence against women in Canada' (1999) 19 *Canadian Woman Studies* 62 for a discussion of the case.

²⁵ Margaret Denike 'Sexual violence and "Fundamental Justice": On the failure of equality reforms to criminal proceedings' (2000) 20 *Canadian Woman Studies* 151.

²⁶ *Baloyi* op cit note 14 para 3.

was arrested.²⁷ He proceeded to challenge the relevant sections of the Act, as he believed it breached his constitutionally protected fair trial rights.²⁸

The High Court found in favour of Baloyi which order had to be confirmed by the Constitutional Court. The Constitutional Court was faced with the complex task of establishing a balance between the State's constitutional duty to provide effective remedies against domestic violence, and its simultaneous obligation to respect constitutional fair trial rights.²⁹ To assist it with its task the Court invited *amici curiae* to participate.³⁰ The CGE and the Minister of Justice responded and joined the case.

2.1.2 The amici curiae

The CGE had special interest in the matter, as its powers and functions included the monitoring and evaluating of legislation that impacted on gender equality, including South Africa's compliance with international conventions concerning gender equality.³¹ For the CGE it was important to ensure that victims of domestic violence were adequately protected.³² The Minister of Justice's purpose in participating was to publicly confirm the government's commitment in addressing gender-based violence.

The Commission for Gender Equality:

The CGE's main focus was to interpret section 3(5) of the Act, which imported from the Criminal Procedure Act a summary enquiry that required the accused to satisfy the court, that his failure to comply with the interdict was not due to his own fault. According to the CGE there were four possible interpretations to the section.

First, section 3(5) could be interpreted not to relate to the substantive enquiry into the breach of an interdict, but merely to regulate what takes place if a person who is not in custody or on bail, fails to appear at the time or place to which a family violence enquiry has been adjourned.³³ Secondly, the section could be interpreted to

²⁷ Id; Andrews op cit note 21 at 339.

²⁸ *Baloyi* op cit note 14 paras 3-8.

²⁹ Ibid para 3.

³⁰ Directions of the Constitutional Court dated 27 August 1999, case number: CCT 29/1999.

³¹ Sec 11 of the Commission on Gender Equality Act 39 of 1996; Written submissions of the CGE, as drafted by Gilbert Marcus (SC), Matthew Chaskalson & Aneesa Kalla, case number: CCT 29/1999 para 1.3.

³² Written submissions of the CGE op cit note 31 para 1.4.

³³ Ibid para 2.3.1.

import from the Criminal Procedure Act the provisions of a summary enquiry and not a reverse onus.³⁴ Thirdly, it could be interpreted to import a reverse onus requiring the respondent to show a lack of wilfulness in breaching the interdict, once the breach has been proved.³⁵ Lastly, it could import a reverse onus to disprove both the alleged breach of the interdict and the wilfulness of that breach.³⁶

The CGE supported the second scenario and argued that section 3(5) only imported the provisions for a summary enquiry from the Criminal Procedure Act and confirmed the purpose of the Prevention of Family Violence Act by stating:

'Section 3 of the Act provides for a species of contempt proceedings specifically designed to compel compliance with a family violence interdict. In this context, provision for a summary enquiry is essential. If breaches of a family violence interdict could be addressed only through the ordinary machinery of a criminal trial, the Act would defeat its own purpose: it would not afford any speedy protection to an applicant with a family violence interdict in her favour.'³⁷

The CGE mentioned, in not much detail, the need for special measures to protect women against violence and focused on South Africa's international obligations to eliminate violence against women.³⁸ For the CGE, the primary purpose of the Act was not penal, but to create preventative measures in situations where the parties are in close proximity and where there is a threat of on-going violence.³⁹

The Minister of Justice:

In contrast to the CGE, the Minister argued that section 3(5) indeed created a reverse onus that was unconstitutional but that the breach was justifiable in terms of section 36 of the Constitution, specifically considering the nature of domestic violence and the need for special measures to protect women against violence.⁴⁰ The Minister's arguments lacked detail and substance and were more symbolic of its commitment to address violence against women.

³⁴ Ibid para 2.3.2.

³⁵ Ibid para 2.3.3.

³⁶ Ibid para 2.3.4.

³⁷ Ibid para 3.7.

³⁸ Ibid paras 4.4-4.9.

³⁹ Ibid para 4.12.

⁴⁰ Written submissions of the Minister of Justice, as drafted by H.J Fabricius (SC) & S Lebala, case number: CCT 29/1999 para 18.

2.1.3 Decision by the Constitutional Court

The Court, with Sachs J writing the judgment, declined to confirm the order of the High Court and upheld the legislation, demonstrating sensitivity to the social context of domestic violence and its gendered nature by stating:

‘All crime has harsh effects on society. What distinguishes domestic violence is its hidden, repetitive character and its immeasurable ripple effects on our society and, in particular, on family life. It cuts across class, race, culture and geography and is all the more pernicious because it is so often concealed and so frequently goes unpunished. In my view, domestic violence compels constitutional concern in yet another respect. To the extent that it is systemic, pervasive and overwhelmingly gender specific, domestic violence both reflects and reinforces patriarchal domination, and does so in a particularly brutal form.’⁴¹

The judgment was victim-centred, detailing the effects of domestic violence on its victims and stressing the State’s responsibility in terms of the Constitution.⁴² The Court stressed the private nature of domestic violence and noted that the procedures provided for in the Act were tailored to address the complex private nature of domestic violence.⁴³ Sachs J further relied on feminist scholarship in pointing to the unique character of domestic violence and the need for appropriate remedies to address its prevalence (through the interdict).⁴⁴

The Court supported the CGE’s interpretation of section 3(5) of the Act in that the section only imported the summary procedure of section 170 of the Criminal Procedure Act and not a reverse onus.⁴⁵ Accordingly the Court argued that this interpretation best supports the States obligation in terms of section 12 of the Constitution and most appropriately balances the complainant’s right to protection and the right of the accused to a fair trial.⁴⁶

⁴¹ *Baloyi* op cit note 14 paras 11-12 (footnotes omitted).

⁴² *Ibid* para 11; Andrews op cit note 21 at 340.

⁴³ *Baloyi* op cit note 14 paras 16-19 and 33.

⁴⁴ *Ibid* para 16; the Court specifically referred to an academic article by Jennifer Nedelsky ‘Violence against women: Challenges to the liberal state and relational feminism’ in Ian Shapiro & Russel Hardin (eds) *Political order* (New York University Press 1998) 454 and to the article by Fedler op cit note 20.

⁴⁵ *Baloyi* op cit note 14 para 25.

⁴⁶ *Ibid* para 33.

2.1.4 Purpose and impact of the *amici curiae* submissions

Both the *amici curiae* in this instance focused on interpreting section 3(5) of the Prevention of Family Violence Act, stressing the need for special measures to protect women against violence. However, both the *amici's* arguments lacked contextual depth, which might be ascribed to the fact that it was one of the first *amici curiae* interventions in a gender matter before the Constitutional Court, with the *amici* still uncertain as to its strategy, or it could be ascribed to the defensive nature of the brief, defending a specific piece of legislation where an interpretative stance of the relevant sections could have been perceived to be the best strategy.

Justice Sachs, using the *amici's* arguments as background, skilfully contextualised the problem, delivering a progressive judgment that recognised the interaction between legal rules and social stereotypes that expanded on the arguments of the *amici curiae*.⁴⁷ The Court specifically relied on the CGE's interpretation of section 3(5), and also drew on its arguments in relation to the social context of domestic violence and the importance of the legislation in light of our international obligations.⁴⁸

Combrinck captures the importance of the *Baloyi* judgment by stating:

'The significance of the judgment lies firstly in its unequivocal identification of the constitutional obligation resting on the state to deal effectively with domestic violence through the enactment of appropriate legislation. Secondly, the recognition that domestic violence is a concern from the perspective of gender equality (in addition to violating the right to freedom and security of the person) is an important one. Thirdly, Sachs J clearly demonstrates how the constitutional imperatives are amplified by the standards set in international human rights law.'⁴⁹

Baloyi, with assistance of the *amici curiae* (all be it limited), set positive precedent for future litigation in relation to violence against women. In most of the case

⁴⁷ Andrews op cit note 21 at 339.

⁴⁸ The Court in *Baloyi* took account of the CGE's arguments concerning the range of possible interpretations of sec 3(5) of the Prevention of Family Violence Act - see the written submissions of the CGE op cit note 31 para 3 as referred to in *Baloyi* op cit note 14 paras 24-29; the social context of domestic violence - see the written submissions of the CGE op cit note 31 para 4.3 - 4.5 as referred to in *Baloyi* op cit note 14 para 11-13; the international obligations of South Africa - see the written submissions of the CGE op cit note 31 para 4.6-4.9 as referred to in *Baloyi* op cit note 14 para 13.

⁴⁹ Combrinck 'The dark side of the rainbow' op cit note 4 at 176 (footnotes omitted).

discussions that follow, the parties or the Court, referred to *Baloyi* and specifically the section quoted above by Sachs J that refers to the gendered nature of domestic violence.⁵⁰ This sets strong legal precedent by which future cases are judged, and the positive rhetoric serves as a reminder to the Court that violence against women both reflects and reinforces patriarchal domination.⁵¹

⁵⁰ For example see: *Carmichele* op cit note 14 where the Court refers to the applicant's reliance on the judgment in relation to its argument that it would encourage the police and prosecuting authorities to act positively to prevent violent attacks against women; *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 (SCA) para 13 (hereinafter *Van Eeden*) where the Court, in referring to *Baloyi*, states that freedom from violence is recognised as fundamental to the equal enjoyment of human rights and fundamental freedoms; *Masiya* op cit note 14 para 36 fn 80, where the Court quoting the dicta in *Baloyi*, states that rape, like domestic violence, is 'systemic, pervasive and overwhelmingly gender-specific.....[and] reflects and reinforces patriarchal domination, and does so in a particularly brutal form.'

⁵¹ *Baloyi* op cit note 14 paras 11- 12. It should be noted that a similar matter with almost identical facts were again heard by the Court in *Omar v Government of the Republic of South Africa* 2006 (2) SA 289 (CC) under the Domestic Violence Act which replaced the Prevention of Family Violence Act. The CGE was also admitted as *amicus curiae* and played an important role in highlighting the gendered dynamics of domestic violence and the context in which it usually takes place. The *Omar* judgment relied heavily on the decision in *Baloyi* and highlighted the prevalence of domestic violence, the scant protection by the criminal justice system and the negative impact domestic violence had on the women concerned. The CGE in *Omar* provided the Court with more contextual evidence, relating to the prevalence of domestic violence in South Africa, the gendered nature and effects of abuse, as well as the lack of effective support structures available to abused women.

2.2 State Liability and Violence Against Women: *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies (CALS) as amicus curiae).*

2.2.1 Contextual and factual background

The State is constitutionally obliged to respect, protect, promote and fulfil the rights in the Bill of Rights, particularly in section 12(1)(c) the right of women to have their safety and security protected.⁵² This imposes a positive duty on the State to protect individuals against violence by the implementation of legislative measures that target violence and through the conduct of law enforcement agencies in the criminal justice system.⁵³

The *Carmichele* case originated under the Interim Constitution which did not have an explicit counterpart to section 12(1)(c) of the Final Constitution.⁵⁴ Nevertheless, the case sets an important precedent in the development of the law of delict to acknowledge the State's positive duty to protect women against violence.⁵⁵

Carmichele was brutally attacked by Coetzee, who had previously been convicted on charges of housebreaking and indecent assault. At the time of the attack Coetzee was out on bail on a charge of rape. At his first court appearance for the rape charge, Coetzee was granted unconditional bail, in spite of a previous conviction for indecent assault.⁵⁶ The police and prosecutor did not oppose bail, in spite of being aware of his previous conviction. Coetzee subsequently attacked *Carmichele*.

⁵² Sec 7(2) of the Constitution states:

'The state must respect, protect and fulfil the rights in the Bill of Rights' sec 12(1)(c) states:

'Everyone has the right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources.'

⁵³ Ian Currie & Johan de Waal *The Bill of Rights handbook* (Juta, 6th edition, 2013) 282; Marius Pieterse 'The right to be free from public or private violence after *Carmichele*' (2002) 119 *SALJ* 27 at 29.

⁵⁴ Sec 11 of the Interim Constitution of the Republic of South Africa, 1993 (hereinafter the Interim Constitution) states:

(1) Every person shall have the right to freedom and security of the person, which shall include the right not to be detained without trial.

(2) No person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment.

⁵⁵ Currie & De Waal op cit note 53.

⁵⁶ *Carmichele* op cit note 14 as discussed by Combrinck 'The dark side of the rainbow' op cit note 4 at 177.

Carmichele instituted proceedings in the High Court against the State for damages, and claimed that the police and public prosecutors negligently failed to comply with the legal duty they owed her - to take steps to prevent her assailant from causing her harm (the so called delictual duty of care).⁵⁷

The High Court found that there was no evidence upon which it could reasonably be found that the State had acted wrongfully and granted an order of absolution from the instance.⁵⁸ Carmichele appealed to the Supreme Court of Appeal (SCA), where the appeal was dismissed on similar grounds, upon which she approached the Constitutional Court.

2.2.2 Carmichele's arguments

Carmichele argued that the High Court and SCA did not apply the relevant provisions of the Constitution in determining whether a legal duty existed to protect her, and stated that a constitutional obligation rested on all courts to develop the common law with due regard to the spirit, purport and objects of the Bill of Rights.⁵⁹ She argued that the legal relationship between women, the police and prosecutors was a special one and that women particularly relied on these institutions to protect them against violence and sexual assault.⁶⁰ She referred to the fact that the SCA should have considered previous decisions by the Constitutional Court and itself, which highlighted the disadvantaged position and vulnerability of women towards sexual violence.⁶¹

According to Carmichele, the release on bail of her assailant and the subsequent attack on her, create fear of attack (by a similar offender) amongst women which increases the apprehension and insecurity which constantly diminishes the quality and enjoyment of women's lives, and entrenches existing patterns of disadvantage.⁶² She contended that, in failing to take account of these arguments, the High Court and the SCA did not comply with their obligation to

⁵⁷ *Carmichele* op cit note 14 para 3.

⁵⁸ *Id.*

⁵⁹ *Ibid* para 28; Carmichele relied on sec 8 the right to equality; sec 9 the right to life, sec 10 the right to human dignity, sec 11 the right to freedom and security of the person and sec 13 the right to privacy of the Interim Constitution.

⁶⁰ Applicant's notice of application for special leave to appeal, supporting affidavit deposed to by Alix Jean Carmichele, case number: CCT 48/00 para 10.

⁶¹ *Ibid* para 12; Carmichele specifically referred to the judgments of *Brink v Kitshoff* NO 1996 (4) SA 197 (CC); *S v Chapman* 1997 (3) 341 (SCA) and *Baloyi* op cit note 14 .

⁶² Applicant's notice of application for special leave to appeal op cit note 60 para 12.

promote the spirit, purport and objects of the Bill of Rights, by giving effect to the rights enshrined therein.⁶³

2.2.3 The *amicus curiae*

CALS entered as *amicus curiae* in support of Carmichele, to provide the Court with the relevant contextual evidence pertaining to violence against women, and to offer arguments about the need to develop the common law to acknowledge the State's positive duty in this regard.⁶⁴ For CALS, participation as *amicus curiae* posed some difficult questions. How do you challenge a core principle of the law of delict while focusing on the gendered dimensions of the case?⁶⁵ CALS was also concerned about the two tier jurisdiction system created by the Interim Constitution, which made the Constitutional Court the court of final instance in constitutional matters and the SCA, the court of final instance in all other matters, specifically those dealing with common law disputes.⁶⁶ CALS was not certain that the SCA would be receptive to their arguments.⁶⁷

CALS wanted to focus the Court's attention on the vulnerability of women to violent crime and the link between gender violence and gender inequality. For CALS such an understanding would be crucial in promoting the notion of substantive equality.⁶⁸ In its submissions to the Court, CALS framed the relevant constitutional duty owed by the State from a gendered perspective:

'The police and the prosecuting authority bear a particular duty to protect the equality, dignity, personal security and freedom of all women against sexual violence and the threat of sexual violence and especially those whose vulnerability to sexual violence is aggravated by circumstances known to those authorities. It is of course the duty of these authorities to protect all members of the community against violent crime. They bear an enhanced duty to protect women against the sexual violence precisely because of the particular vulnerability and exposure of women to sexual violence and the impact of sexual violence upon every facet of their lives. This enhanced duty of

⁶³ Ibid para 14.

⁶⁴ *Amicus curiae* notice of motion, supporting affidavit deposed to by Shereen Winifred Mills, case number: CCT48/00 para 3.1

⁶⁵ Interview with Shereen Mills, CALS (20 November 2012).

⁶⁶ Sec 98 & 101 of the Interim Constitution; also see Currie & De Waal op cit note 53 for a discussion of the relevant jurisdictions of the courts under the Interim Constitution.

⁶⁷ Interview with Shereen Mills op cit note 65.

⁶⁸ *Amicus curiae* notice of motion op cit note 64 para 6.3.4.

protection is necessary to ensure that women enjoy “the equal protection of the laws” promised by section 8(1) of the interim Constitution. In this context, “equal concern and respect” for women requires the state to give greater care and attention to the protection of women against sexual violence. This is consistent with the substantive conception of equality embraced by the Constitution and acknowledged and applied by this Court.’⁶⁹

Ultimately, for CALS, if the common law was to be developed in line with the purport, spirit and objects of the Bill of Rights, it would mean “doing so in a way which counters women’s characteristic vulnerability to sexual violence and fortifies their claim” against the protection from violence.⁷⁰

The application for admission as *amicus curiae* and submissions were carefully structured to address the substantive issues before the Court, but also cleverly directed the Court to a possible interpretation that considered the vulnerability of women in society, specifically in relation to gendered violence.

2.2.4 Decision by the Constitutional Court

The *Carmichele* judgment is one of the most important judgments in our constitutional jurisprudence, as it firmly broke the two tier system of jurisdiction with the SCA as the chosen court to adjudicate on matters concerning common law, placing all law under the scrutiny of the Constitution and, where necessary its development to comply with Constitutional norms.⁷¹ Another important aspect of the judgment was the acknowledgment that there is a positive duty on the State to comply with certain rights in the Bill of Rights.⁷²

The Constitutional Court clearly stated that in terms of section 39 of the Final Constitution there was an obligation on all courts to develop the common law to promote the spirit, purport and objects of the Bill of Rights.⁷³ The Court identified a

⁶⁹ Written submissions of the *amicus curiae*, as drafted by Janet Kentridge, Shereen Mills & Catherine Albertyn, case number: CCT 48/00 para 17 (footnotes omitted).

⁷⁰ *Ibid* para 18.

⁷¹ Currie & De Waal op cit note 53.

⁷² *Ibid* 282.

⁷³ *Carmichele* op cit note 14 paras 32-41; sec 39 of the Constitution states:

‘(1) When interpreting the Bill of Rights, a court, tribunal or forum-

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

(b) must consider international law;

(c) may consider foreign law.

two stage process to establish if development was required. First, it needed to be determined whether the existing common law, with regard to section 39(2), should be developed and if yes, the second requirement is concerned with how such a development should take place to meet the section 39(2) objectives.⁷⁴ In this instance the law of delict, had to be “replaced or supplemented and enriched by the appropriate norms of the objective value system embodied in the Constitution.”⁷⁵ However, the Constitutional Court argued that it, as a Court of last instance, did not have the benefit of any assistance of the High Court or SCA in considering the wrongfulness element of delictual liability for an omission, and that it was not the ideal forum to undertake such a development:

‘The proper development of the common law under s 39(2) requires close and sensitive interaction between, on the one hand, the High Courts and the Supreme Court of Appeal which have particular expertise and experience in this area of the law and, on the other hand, this Court. Not only must the common law be developed in a way which meets the s 39(2) objectives, but it must be done in a way most appropriate for the development of the common law within its own paradigm’.⁷⁶

In reference to the rights to life, dignity and freedom and security of the person, the Court acknowledged that these rights could not only be enforced negatively, but that positive enforcement was required.⁷⁷ Although the United States of America and United Kingdom placed restrictions on the positive enforcement of constitutional rights, our Constitution allows for a different approach and interpretation.⁷⁸ This positive duty had to be considered in developing the law of delict in order to “cast the net of unlawfulness wider because constitutional obligations are now placed on the State to respect, protect and promote and fulfil the rights in the Bill of Rights and, in particular, the right of women to have their safety and security protected.”⁷⁹

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred common law, customary law or legislation, to the extent that they are consistent with the Bill.’

⁷⁴ *Carmichele* op cit note 14 para 40.

⁷⁵ *Ibid* para 56.

⁷⁶ *Ibid* para 55.

⁷⁷ *Ibid* para 44.

⁷⁸ *Ibid* paras 44-49.

⁷⁹ *Ibid* para 57; *Currie & De Waal* op cit note 53 at 282.

The Court acknowledged the gendered arguments of Carmichele and CALS. It considered the powers and functions of the police and found that a positive obligation rested on the police to protect women against violence.⁸⁰ Here, the Court directly quoted the *amicus's* submissions and stated:

“As it was put by the counsel of the *amicus curiae*: ‘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.’”⁸¹

Ultimately, the Court found that the case had sufficient merit and that the complex legal issues required careful consideration and it referred the matter back to the High Court to consider the relevant facts and legal issues.⁸²

From the above, it is clear that the Court’s main concern was sending the message to all high courts that they were obliged to take account of section 39(2) of the Constitution and to develop the common law when needed.⁸³ The gendered arguments of Carmichele and CALS were not its main concern, and did not have a significant impact on the legal decision. However, by referring to these arguments, the Court indicated their importance and to an extent considered the gendered implications of violence. The Court clearly suggested that the violence in our society created a special relationship between law-enforcing authorities and women, and that there was a duty on these institutions to prevent violence, specifically sexual violence.⁸⁴ This legal duty will not lead to delictual liability in every instance, but it requires law-enforcement authorities to be aware of this duty and not to act in contravention thereof.⁸⁵

⁸⁰ *Carmichele* op cit note 14 para 62.

⁸¹ *Id* (footnotes omitted).

⁸² *Ibid* para 81-83.

⁸³ For different opinions on the relevant judgment see Pieterse op cit note 53; Johan Van der Walt ‘Horizontal application of fundamental rights and the threshold of the law in view of the *Carmichele* saga’ (2003) 19 *SAJHR* 517; Anton Fagan ‘Reconsidering *Carmichele*’ (2008) 125 *SALJ* 659.

⁸⁴ Johan Van der Walt ‘A special relationship with women: *Carmichele v Minister of Safety and Security and Minister of Justice and Constitutional Development* 2001 1 SA 489 (SCA); CCT 48/00’ (2002) *TSAR* 148 at 155.

⁸⁵ *Id*.

2.2.5 Purpose and impact of the amicus curiae submissions

Although the women's rights arguments in *Carmichele* were not central to the Court's decision, the arguments pushed the Court to stress the need to develop the common law in line with constitutional rights, drawing its attention to the fact that the law also needs to be developed to take account of women's rights.⁸⁶ The fact that the Court referred to CALS's arguments by directly quoting from their submissions, is a positive indication that the Court considered the brief to have value.⁸⁷

CALS wanted to focus the Court's attention on the importance of taking account of the gendered nature of violent crime. These arguments provided a gender-sensitive context that the Court took account of, although the final outcome was not solely gender-based. The *Carmichele* judgment "resulted in considerable development of the normative framework relating to state responsibility to prevent acts of violence against women."⁸⁸ The judgment enhanced the ability of courts to respond to the experiences of women, specifically in relation to delictual claims against the State and it is important to follow the trail of cases after the Constitutional Court's decision in *Carmichele*, to establish whether the positive duty of the State to protect women from violence was confirmed, as well as the development of this obligation in subsequent decisions.⁸⁹

2.2.6 Developments after the Constitutional Court's decision in Carmichele

The Constitutional Court's decision in *Carmichele* was welcomed since it confirmed the positive duty that the State had to protect individuals, including women from violence and the possibility of accountability if they failed to do so. Particularly relevant is the impact that the judgment could have on the police service, as the police's response to victims of gender-based violence has been problematic.⁹⁰

⁸⁶ Catherine Albertyn 'Defending and securing rights through law: Feminism, law and the courts in South Africa' (2005) 32 *Politikon* 217 at 232.

⁸⁷ Joseph D. Kearney & Thomas W. Merrill 'The influence of *amicus curiae* briefs on the Supreme Court' (2000) 148 *University of Pennsylvania Law Review* 745 at 811.

⁸⁸ Combrinck 'The dark side of the rainbow' op cit note 4 at 176.

⁸⁹ Albertyn 'Defending and securing rights through law' op cit note 86 at 232.

⁹⁰ Albertyn, Artz, Combrinck, Mills & Wolhuter op cit note 2 at 308; Dee Smythe & Samantha Waterhouse 'Policing sexual offences: Policies, practices and potential pitfalls' in Lillian Artz & Dee Smythe (eds) *Should we consent: Rape law reform in South Africa* (Juta 2008) 198.

The police have been described as the “gatekeepers” to the criminal justice system because they are the first point of entry for victims of violence, deciding the seriousness of a complaint, a decision which is often influenced by patriarchal and sexist beliefs.⁹¹ This is especially relevant to sexual violence as research has shown that the police’s response to victims of rape is often associated by prevalent rape myths and stereotypes, and the notion that women easily lie about rape, especially if no signs of violence is present.⁹²

It is important to follow the trail of cases decided after the Constitutional Court’s judgment in *Carmichele* in order to establish whether the gendered arguments of Carmichele and CALS were followed in later judgments, and how they assisted in creating a positive framework and precedent concerning State and police protection from violence.

2.2.6.1 Carmichele’s second High Court decision⁹³

The Constitutional Court’s referral of the *Carmichele* matter back to the High Court, unequivocally identified the issues to be: whether the police/prosecutors were under a legal duty to protect Carmichele, whether that duty was negligently breached, and whether the law of delict should be developed, in light of the Constitution, to afford her the right to claim damages from the State.⁹⁴ Surprisingly, the gender arguments that featured quite prominently in the Constitutional Court were diluted and for the most part absent in the High Court decision. There was no *amicus curiae* participation in this trial which might indicate the absence of any gendered arguments or at the least an awareness of these arguments.

Carmichele’s counsel argued that the constitutional duty imposed on the State, and particularly the State’s duty to protect women against violence, required the court to revisit the wrongfulness test in order to determine whether the State owed the plaintiff a legal duty to protect her against violence.⁹⁵ Except for this meagre statement, no other gendered arguments nor the dicta established in the Constitutional Court decision, were referred to. Despite this, the High Court found

⁹¹ Smythe & Waterhouse op cit note 90 at 198.

⁹² Ibid 199; also see the discussion of rape myths in fn 7 above.

⁹³ *Carmichele v Minister of Safety and Security and Another* 2003 (2) SA 656 (C) (hereinafter *Carmichele High Court*).

⁹⁴ Justice Daylin Chetty ‘The perspective of a high court judge’ (2004) 121 *SALJ* 493.

⁹⁵ *Carmichele High Court* op cit note 93 paras 31-32.

that certain officials indeed owed the plaintiff a legal duty to protect her against the risk of violence and that they had negligently failed to do so. The State was held liable for delictual damages, a decision which it later appealed.

2.2.6.2 Minister of Safety and Security v Van Duivenboden⁹⁶

The Constitutional and High Court decisions in *Carmichele* were followed by *Van Duivenboden* in the SCA. In this case Brooks shot and killed his wife and daughter and wounded his neighbour, Van Duivenboden, during a domestic dispute. Van Duivenboden sought to recover damages from the Minister of Safety and Security for the injuries he suffered. He argued that the police were aware of Brooks's violent behaviour and that they should have confiscated his firearm in light of previous incidences.

There was no *amicus curiae* participation in *Van Duivenboden* and the court, on its own accord, confirmed the State's positive duty to protect individuals from violence. It stated:

'[i]t must also be kept in mind that in the constitutional dispensation of this country the State (acting through its appointed officials) is not always free to remain passive. The State is obliged by the terms of s 7 of the 1996 Constitution not only to respect but also to 'protect, promote and fulfil the rights in the Bill of Rights' and s 2 demands that the obligations imposed by the Constitution must be fulfilled. As pointed out in *Carmichele* our Constitution points in the opposite direction to the due process clause of the United States Constitution, which was held in *De Shaney v Winnibago County Department of Social Services* not to impose affirmative duties upon the State. While private citizens might be entitled to remain passive when the constitutional rights of other citizens are under threat, and while there might be no similar constitutional imperatives in other jurisdictions, in this country the State has a positive constitutional duty to act in the protection of the rights in the Bill of Rights. The very existence of that duty necessarily implies accountability and s 41(1) furthermore provides expressly that all spheres of government and all organs of State within such spheres must provide government that is not only effective, transparent and coherent, but also government that is accountable (which was one of the principles that was drawn from the interim Constitution).'⁹⁷

⁹⁶ *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) (hereinafter *Van Duivenboden*).

⁹⁷ *Ibid* para 20 (footnotes omitted).

The SCA found that the test for wrongfulness should now be informed by the norms and values embodied in the Constitution, and that these norms included a positive duty that rested on the State to act to protect rights in the Bill of Rights.⁹⁸ Ultimately, where the constitutionally protected rights to human dignity, life and security of the person are in peril, the State, represented by its officials, has a constitutional duty to protect them and when they fail to do so could be held liable.⁹⁹

Van Duivenboden thus positively reinforced the dicta of *Carmichele* and in no uncertain terms established the State's duty to take appropriate action to prevent violence.

2.2.6.3 *Van Eeden v Minister of Safety and Security*

Carmichele and *Van Duivenboden* were followed by *Van Eeden*. In this case a young woman was violently raped by a dangerous known criminal and serial rapist, who had escaped from police custody. Van Eeden instituted an action for delictual damages against the State, claiming that members of the police owed her a legal duty to take reasonable steps to prevent the prisoner from escaping and causing her harm and that the State negligently failed to comply with this duty.¹⁰⁰

The Women's Legal Centre (WLC) participated as *amicus curiae* and supplemented Van Eeden's arguments ensuring that the SCA were aware and took account of the precedent set in *Baloyi* and *Carmichele* that concerned the gendered nature of violent crime.

The SCA found that the law of delict was subject to the rights in the Bill of Rights and had to be given content in light of these imperatives and further, that section 12(1)(c) of the Constitution placed a positive duty on the State to protect everyone from violent crime.¹⁰¹ Consequently, Van Eeden's delictual claim against the State succeeded. Citing *Baloyi* and *Carmichele*, the SCA explicitly acknowledged the State's obligations, in terms of international law, to protect women against violent crime and acknowledged the gendered nature of violent crime:

⁹⁸ *Van Duivenboden* op cit note 96 as interpreted by Combrinck 'The dark side of the rainbow' op cit note 4 180.

⁹⁹ *Van Duivenboden* op cit note 96 para 22.

¹⁰⁰ *Van Eeden* op cit note 50 para 3.

¹⁰¹ *Ibid* paras 12-13. Sec 12(1)(c) states: 'Everyone has the right to freedom and security of the person, which includes the right – to be free from all forms of violence from either public or private sources.'

'The Constitutional Court has held in *Baloyi* and *Carmichele* that the State is, furthermore, obliged under international law to protect women against violent crime and against gender discrimination inherent in violence against women. This obligation was imposed on the State by s 39(1)(b) of the Constitution, read with the preamble to the *Universal Declaration of Human Rights*; art 4(d) of the *Declaration on the Elimination of Violence Against Women* and art 2 of the *Convention on the Elimination of All Forms of Discrimination against Women*.'¹⁰²

2.2.6.4 *Carmichele's final SCA decision*¹⁰³

When the *Carmichele* matter finally came before the SCA, the legal landscape concerning delictual liability of the State had developed considerably in light of the *Van Duivenboden* and *Van Eeden* decisions.¹⁰⁴ The State's appeal was thus dismissed, as the SCA found that there was no reason to depart from the general principle which established that the State would be held liable for its failure to comply with its constitutional duty to protect a person that required protection.

Interestingly, there was no reference to or acknowledgement in the judgment of the gendered nature of violent crime, rather the SCA made a somewhat gender-neutral statement:

'This aspect may have bearing on some remarks in *Carmichele (CC)* paragraphs 29 and 62 and in *Carmichele (CPD)* paragraph 30. Both emphasised, quite rightly, the special constitutional duty of the State to protect women against violent crime in general and sexual abuse in particular. But this should not be seen as implying that the State's liability in a case such as this is necessarily determined by or dependant on the sex of the victim or the nature of or motive behind the assault.'¹⁰⁵

In light of the *Van Duivenboden* and *Van Eeden* decisions, the court's interpretation could have expanded the duty to include everyone and thus employed gender-neutral reasoning. However, participation by an *amicus curiae* could have ensured that the Court still took account of the importance of protecting women from violence in considering its gender-based nature.

¹⁰² *Van Eeden* op cit note 50 para 15 (footnotes omitted).

¹⁰³ *Minister of Safety and Security and Another v Carmichele* 2004 (2) BCLR 133 (SCA) (hereinafter *Carmichele SCA*).

¹⁰⁴ Combrinck 'The dark side of the rainbow' op cit note 4 at 182.

¹⁰⁵ *Carmichele SCA* op cit note 103 para 42.

2.2.6.5 *K v Minister of Safety and Security*¹⁰⁶

The *K* judgment differed slightly from the above cases in that it dealt with the vicarious liability of the State. In *K* the question was whether the Minister of Safety and Security could be held vicariously liable for a rape committed by policemen whilst in full uniform and on duty. With *K* being represented by the WLC, the Court was well aware of the State's ensuing responsibilities, because of cases such as *Baloyi* and *Carmichele* and separate *amicus curiae* participation was not required.

The Court found that, against the backdrop of the Constitution, and in particular the constitutional rights of *K* and the constitutional obligations of the State, the connection between the conduct of the policemen and their employment was sufficiently close to render the State liable.¹⁰⁷

The Court referred to the importance of protecting *K*'s rights to security of the person, dignity, privacy and most importantly her right to substantive equality, which lead the Court to quote the dicta in *Carmichele*'s Constitutional Court judgment, referring to the *amicus*'s argument regarding the gendered nature of violent crime.¹⁰⁸

The judgment was welcomed after the SCA's judgment in *Carmichele*, indicating that the Constitutional Court was at least developing its gender-sensitive jurisprudence concerning violence against women as well as its legal approach to substantive equality in understanding the specific context of violent crime toward women and the need to address it.¹⁰⁹

2.2.6.6 *F v Minister of Safety and Security*¹¹⁰

Very similar to *K*, the case of *F* was concerned with the vicarious liability of the Minister for damages, arising from a brutal rape of a thirteen year old girl by a policeman who was on standby duty.¹¹¹ Relying on the dicta in *K*, the High Court found that there was a sufficiently strong link between the actions of the police officer and his employer - the police - to justify the imposition of vicarious liability.¹¹² The

¹⁰⁶ *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) (hereinafter *K*).

¹⁰⁷ *Ibid* para 53.

¹⁰⁸ *Ibid* para 18.

¹⁰⁹ Catherine Albertyn 'Substantive equality and transformation in South Africa' (2007) 23 *SAJHR* 253 at 258.

¹¹⁰ *F v Minister of Safety and Security and Others* 2012 (1) SA 536 (CC) (hereinafter *F*).

¹¹¹ *Ibid* para 1.

¹¹² *Ibid* para 18.

decision of the High Court was overturned by the SCA and *F* approached the Constitutional Court.

The Constitutional Court focused on the vulnerability of women and children to sexual violence and the fact that this violence entrenched patriarchal structures that jeopardized women's freedom and self-determination, substantiating this statement with reference to the *K* and *Carmichele* judgment.¹¹³

The Court was assisted by the Institute for Security Studies, the Institute for Accountability in Southern Africa Trust and the WLC as *amici curiae*. The WLC highlighted the specific constitutional rights of the victim and expanded on the law of vicarious liability in light of the above mentioned developed precedent.

The Court found that common law rules, such as vicarious liability, had to be applied through constitutional norms, norms that had to ensure that the fundamental rights of women and children were respected and held the Minister vicariously liable:

'It follows more that the State, through its foremost agency against crime, the police service, bears the primary responsibility to protect women and children against this prevalent plague of violent crimes. Courts, too, are bound by the Bill of Rights. When they perform their function, it is their duty to ensure that the fundamental rights of women and girl-children in particular are not made hollow by actual or threatened sexual violence. They must acknowledge the policy-drenched nature of the common-law rules of vicarious liability, that it is the courts that have in the past fashioned and favoured them, and that now the rules must be applied through the prism of constitutional norms.'¹¹⁴

From the above case discussions it is clear that, since the initial Constitutional Court decision in *Carmichele*, the law pertaining to the State's duties to protect women against violence has grown considerably and most cases show a positive trend in acknowledging the unique gendered nature of violent crime in a South African context.¹¹⁵ The gender-sensitive precedent set by the Constitutional Court in *Carmichele* definitely found resonance in subsequent decisions and these decisions indicate the importance of participation by women's organisations and *amicus curiae* in order to build on and to protect this precedent.

¹¹³ Ibid para 56 and fn 40 of the judgment.

¹¹⁴ Ibid para 57.

¹¹⁵ Combrinck 'The dark side of the rainbow' op cit note 4 at 185.

The approach followed in *Carmichele*'s Constitutional Court decision was stronger in subsequent matters that were supported by *amicus curiae* or where the applicants were represented by a women's organisation than in those that were not.¹¹⁶ This indicates the need for *amici curiae* to build on already established precedent to "remind" courts of an approach followed and the importance of defending and strengthening the existing protection afforded to women.

This established precedent has had a positive impact on the legal fight against violence against women. Although not addressing the pervasive social acceptance of violence against women, it does acknowledge that women have the right to be protected from violence by the State, and that if the State fails to comply with this duty that it could be held liable. By infusing delictual claims with constitutional norms, *Carmichele* has set a new standard for police behaviour towards women.¹¹⁷

¹¹⁶ See *Van Eeden* op cit note 50; *K* op cit note 106 and *F* op cit note 110.

¹¹⁷ *Albertyn, Artz, Combrinck, Mills & Wolhuter* op cit note 2 at 335.

2.3 Extending the Common Law Definition of Rape: *Masiya v Director of Public Prosecutions, Pretoria and Another (CALS and Tshwaranang Legal Advocacy Centre (TLAC) as amici curiae).*

2.3.1 Contextual and factual background

For many years activists have advocated for the creation of new laws, policies and practices in relation to the treatment of rape survivors and punishment of sexual offenders.¹¹⁸ A focal point has been to develop the definition of rape to eradicate its archaic and patriarchal character and to acknowledge rape as a form of sexual violence that violates the dignity and autonomy of a person.¹¹⁹ The requirement of vaginal penetration was one of the identified problem areas as it sexualised the crime instead of focusing on the use of violence in order to preserve male control and power, and further entrenched hierarchical gender relations.¹²⁰

The law reform process that addressed the definition of rape was a particularly long and cumbersome project. In 1998, the South African Law Reform Commission (SALRC) was tasked with investigating sexual offences by and against children, which mandate was later extended to include sexual offences committed against adults, with the aim of drafting a Sexual Offences Bill.¹²¹ The Sexual Offences Bill proposed a gender-neutral definition with no distinction between the different forms of penetrative assault. It also removed the reference to consent, replacing it with a concept of coercive circumstances.¹²² However, the 2003 version of the Bill tabled before Cabinet, dramatically departed from the SALRC proposals, especially with regard to the removal of consent from the definition.¹²³ Civil society actively lobbied against the implementation of the Bill in its suggested form, but after

¹¹⁸ Artz & Smythe 'Introduction: Should we consent?' op cit note 10 at 1.

¹¹⁹ Rape as common law crime was defined as the intentional, unlawful sexual intercourse with a female without her consent; Nikki Naylor 'The politics of a definition' in Lillian Artz & Dee Smythe (eds) *Should we consent? Rape law reform in South Africa* (Juta 2008) 22.

¹²⁰ Ibid 23.

¹²¹ Romi Fuller 'Bureaucracy versus democratisation: The promulgation of the criminal law (sexual offences and related matters) amendment bill' (CSVR 2007); also see the discussion paper of the SALRC the South African Law Reform Commission *Sexual offences: The substantive law: Discussion Paper 85* Project 107 (1999).

¹²² Artz & Smythe 'Introduction: Should we consent?' op cit note 10 at 6.

¹²³ Id; see the Criminal Law (Sexual Offences and Related Matters) Amendment Bill, Bill Number B50d-2003.

national elections in 2004, rape law reform appeared to fall off the legislative agenda.¹²⁴

When the *Masiya* matter came before the Constitutional Court, TLAC and CALS, saw an opportunity to use the court system as a public forum to voice their dissatisfaction with the delay in the legislative revision of the Sexual Offences Bill and the lack of participation allowed for by interested groups.¹²⁵ The case also provided an opportunity to start to develop the rape definition through litigation and to test the boundaries of the legal system in terms of how far it would go in extending and reconceptualising the definition.¹²⁶

Masiya was brought before a regional court on a charge of rape. It was alleged that he raped a nine year old girl but during the trial it was established that the complainant was penetrated anally.¹²⁷ The State applied that he had to be convicted of indecent assault, a competent verdict on a charge of rape. However, the regional court and later the High Court found him guilty of rape, stating that the common law definition was unconstitutional and should be extended to include the anal penetration of a victim irrespective of gender.¹²⁸

The Constitutional Court was asked to confirm the judgment of the High Court, in particular its development of the common law definition of rape and the consequent changes to the Criminal Procedure Act 51 of 1977 and the Criminal Law Amendment Act 105 of 1997, and to consider Masiya's appeal against the High Court judgment.¹²⁹

¹²⁴ Artz & Smythe 'Introduction: Should we consent?' op cit note 10 at 7.

¹²⁵ Interview Lisa Vetten, TLAC (14 December 2012).

¹²⁶ Id.

¹²⁷ *Masiya* op cit note 14 para 6.

¹²⁸ *Masiya* op cit note 14 as discussed by Elsje Bonthuys 'Institutional openness and resistance to feminist arguments' (2008) 20 *CJWL* 1 at 15.

¹²⁹ *Masiya* op cit note 14 as discussed by Stu Woolman 'The amazing vanishing Bill of Rights' (2007) 124 *SALJ* 762 at 766.

2.3.2 The parties

Masiya focused on his fair trial rights, specifically the principle of legality provided for in the Constitution.¹³⁰ He stressed the importance of the separation of powers doctrine, in light of the already proposed Sexual Offences Bill and argued that the common law definition of rape was neither archaic nor discriminatory and that it specifically protected women from rape:

'We submit that the definition of rape and the punitive consequences that follow upon the perpetration of that crime, reflect an age old expression of society's fundamental regard for the sanctity, respect and honour of the physical core of womanhood. Women incidentally enjoy special protection by the Constitution. The unique aspect of rape, pertaining only to women, expresses simply what is still, in the most liberal mind, an urge to protect the very cradle of life itself and stems from an ethical, religious and biological perspective of mankind at large that this is the origin of human existence, most intricately linked to the ethical sphere of romantic love. Women and society in general are entitled to the utmost protection against violation of that part of the woman's physique that in the view of mankind in its broadest sense transcends mere biological existence or the privacy of the individual involved.'¹³¹

This perspective reflected exactly what feminists and organisations had worked towards countering. By focusing on the sex of the particular victim and ensuing social stereotypes,¹³² the crime is sexualised thereby ignoring the actual reasons and implications of rape, by portraying women as the classical victim.¹³³ MacKinnon stresses that rape is perpetrated against those with less social power and that its intricate power relations should be understood:

¹³⁰ Masiya referred to sec 35(3)(l) and (n) of the Constitution which states:

'Every accused person has a right to a fair trial, which includes the right – (l) not to be convicted of an act or omission that was not an offence under either national or international law at the time it was committed or omitted; (n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing.'; written submissions of the applicant, as drafted by P.J.J De Jager (SC) & J Bauer, case number: CCT 54/06 para 2.3;

¹³¹ Written submissions of the applicant op cit note 130 para 11.

¹³² Colleen Hall 'Rape: The politics of definition' (1988) 105 *SALJ* 67 at 72 describes these stereotypes as: 'Male sexuality is linked to aggression, forcefulness and initiative, and female sexuality is constructed as passive and receptive. These sexual 'scripts' for normal sexuality cast men in the role of predators and prime women for the role of victims.' (footnotes omitted); According to Judith A. Howard 'The "normal" victim: The effects of gender stereotypes on reactions to victims' (1984) 47 *Social Psychology Quarterly* 270 at 273, women are for example seen as weak, vulnerable, influenceable, submissive, irrational and excitable.

¹³³ Catharine A. Mackinnon *Women's lives, men's laws* (Harvard University Press 2005) 241.

'The gendered inferiority attributed to sexual victims, and used to target them, and the gendered superiority attached to sexual prowess, along with the erotization of subordination and dominance, are socially imbricated with established and inculcated notions of masculinity and femininity respectively. A prominent observable regularity is that men more often perpetrate, women are more often victimized. Even more of the variance is explained by the observation that sexual atrocities are inflicted on those who have less social power by those who have more, among whom gender is the most significant cleavage of stratification.'¹³⁴

In reference to the South African context, Artz & Combrinck describe the common misperception of rape as reflected in our criminal justice system:

'There is a popular tendency to place human sexual behaviour on a continuum, with seduction on the one end and rape on the other, with varying degrees of sexual overtures, persuasion and coercion and the threat of physical force in between. This construction allows society to perceive rape as 'sex gone wrong' and allows one to overlook the fact that rape and sex do not belong on the same continuum at all. It also allows one to overlook the force or coercion that is essentially what the criminal law claims to be punishing.'¹³⁵

The emphasis on penile and vaginal penetration was seen to reinforce the perception that rape is about sex and not violence, and was thus considered to be a starting point in the reconceptualisation of the crime.¹³⁶

2.3.3 *The amici curiae*

CALS, and TLAC, applied for admission as *amici curiae* to address the gendered and discriminatory nature of the current rape definition.¹³⁷

In their substantive submissions, the *amici curiae* provided the Court with information regarding the historical development of the definition. They focused on the gendered nature of the definition in early Roman and English law where women were viewed as possessions and a certain value was attached to their chastity -

¹³⁴ Id.

¹³⁵ Lillian Artz & Helene Combrinck "A wall of words": Redefining the offence of rape in South African law' (2003) *Acta Juridica* 72 at 80 (footnotes omitted).

¹³⁶ Ibid at 84.

¹³⁷ Notice of application to intervene as *amicus curiae*, founding affidavit deposed to by Shereen Winifred Mills, case number: CCT 54/06 para 12.

therefore the focus on vaginal penetration.¹³⁸ For the *amici* a contrary understanding of rape that would focus on the specific power relations at play and not solely the mode of penetration was necessary:

‘Once rape is properly understood as an act of power by which a man asserts his power over a woman the distinction between anal penetration and vaginal rape is meaningless. Regardless of what orifice of a female is penetrated, the man has achieved his goal, which is to exert power over the female.’¹³⁹

The *amici curiae* further argued that the definition did not reflect the experiences of sexual assault of men and boys, which reinforced the conception that rape was an act of sexuality rather than an act of force and coercion.¹⁴⁰ In light of these contentions, the *amici* argued that the definition was unconstitutional as it infringed the rights of both men and women to equality and dignity.¹⁴¹

In referring to the principle of legality, the *amici curiae* argued that the case merely involved a reinterpretation of the existing elements of the crime of rape and did not involve the declaration of previously lawful conduct to be unlawful.¹⁴² The *amici* provided the Court with a comparative perspective on the development of the definition of rape in foreign jurisdictions focusing on developments in the United Kingdom, Canada, Australia and the United States of America.¹⁴³

2.3.4 Decision by the Constitutional Court

The judgment, delivered by Nkabinde J, is difficult to follow and is a peculiar combination of the *amici curiae* and Masiya’s arguments.¹⁴⁴

In considering the constitutionality of the definition, the Court discussed the historical evolution of the definition as the *amici curiae* did in its submissions.¹⁴⁵ The Court maintained that the definition was not discriminatory, as it criminalised conduct

¹³⁸ Written submissions of the *amici curiae*, as drafted by Kameshni Pillay, case number: CCT 54/06 paras 31-36.

¹³⁹ Ibid para 43.

¹⁴⁰ Ibid para 39-42.

¹⁴¹ Ibid para 45.

¹⁴² Ibid para 57.

¹⁴³ Ibid paras 27-35.

¹⁴⁴ Moseneke DCJ, Kondile J, Madala J, Mokgoro J, O’Regan J, Van der Westhuizen J, Yacoob J and Van Heerden AJ concurred.

¹⁴⁵ *Masiya* op cit note 14 paras 20-24 in relation to the written submissions of the *amici curiae* op cit note 138 paras 31-36.

that was morally and socially unacceptable and that it was not necessary to consider the *amici's* arguments that viewing women as victims would enforce patriarchal interests in women's sexuality.¹⁴⁶ For the Court, it would be counterproductive to invalidate the definition for under-inclusivity and the question should rather be the possible extension of the definition to include both male and female penetration to promote the spirit, purport and objects of the Bill of Rights.¹⁴⁷ The Court justified the gender specific focus of the definition by stating:

'The evolution of our understanding of rape has gone hand in hand with women's agitation for the recognition of their legal personhood and right to equal protection. To this end, women in South Africa and the rest of the world have mobilised against the patriarchal assumption that underlay the traditional definition of rape. They have focused attention on the unique violence visited upon women. Much of this activism focused on creating support systems for women, such as rape crisis centres and abuse shelters; and also on the process whereby rape is investigated and prosecuted. It is now widely accepted that sexual violence and rape not only offend the privacy and dignity of women but also reflect the unequal power relations between men and women in our society.'¹⁴⁸

Although not clearly stated, I think that the Court tried to support a more radical feminist approach that concentrated on women's subordination as a possible justification of the need for a gender specific definition.¹⁴⁹ However, the Court failed to acknowledge that power or control could be exercised irrespective of the gender of the victim.¹⁵⁰

The Court found it was not desirable to extend the definition to reflect gender-neutral standards and deferred this responsibility to Parliament.¹⁵¹ Here it repeated Masiya's arguments that it was not unconstitutional to have a gender-specific

¹⁴⁶ *Masiya* op cit note 14 para 27. In fn 51 the Court stated:

'Some protagonists of women's rights, however, argue that the focus on the woman only as the victim of rape still perpetuates patriarchal interests in controlling a woman's sexuality. It is not necessary to consider that argument for the purpose of this case.' See Bonthuys's interpretation of this statement 'Institutional openness and resistance to feminist arguments' op cit note 128 at 19.

¹⁴⁷ *Masiya* op cit note 14 para 27.

¹⁴⁸ *Ibid* para 28.

¹⁴⁹ See Catharine A. Mackinnon 'Feminism, marxism, method, and the State: Toward feminist jurisprudence' (1983) 8 *Signs* 635 for a discussion of the radical feminist approach toward rape law.

¹⁵⁰ Written submissions on behalf of the *amici curiae* op cit note 138 para 41.

¹⁵¹ *Masiya* op cit note 14 paras 28-30.

definition and that women needed special protection.¹⁵² This inadvertently reinforced the stereotypes of victimhood which the *amici curiae* attempted to bring to the Court's attention. These stereotypes ignored the intricate power relations at play in a rape scenario.¹⁵³ The Court here confirmed its use of traditional legal method, where it is a mere interpreter of law, ignoring the broader analysis of context necessary for its development and disregarding its impact on rape survivors.¹⁵⁴

Although not extending the definition to include gender-neutral terms, the Court extended the definition to include female anal penetration by a penis with the specific intention of protecting women as a traditionally vulnerable and disadvantaged group.¹⁵⁵ The definition was developed prospectively so as not to infringe the principle of legality.¹⁵⁶

The minority judgment by Langa CJ (with Sachs J concurring), addressed some of the shortcomings of the main judgment. The minority believed that the developments should have included the anal rape of men and supported the arguments of the *amici curiae* without directly referring to it by stating:

'To my mind the problem is not about males and females: it is about altering our understanding of why rape is prohibited. There are two elements to this: first that rape is about dignity and power and second, that anal rape is equivalent to vaginal rape.'¹⁵⁷

It is important that the minority acknowledged that a gender specific definition might entrench the vulnerable position of women in society, by perpetuating the stereotype of women's vulnerability which enforces cycles of abuse and degradation.¹⁵⁸ According to the minority, male rape is equally associated with a need for male gender-supremacy, as men who are raped are most often equally vulnerable (young boys, prisoners and homosexuals).¹⁵⁹ The fact that men lack a vagina does and should not make the crime less gender-based.¹⁶⁰

¹⁵² Ibid para 30.

¹⁵³ Ibid para 36.

¹⁵⁴ Mary Jane Mossman 'Feminism and the law: Challenges and choices' (1998) 10 *CJWL* 1 at 5; see the discussion of traditional legal method in chapter 2.

¹⁵⁵ *Masiya* op cit note 14 para 39.

¹⁵⁶ Ibid para 51.

¹⁵⁷ Ibid para 77.

¹⁵⁸ Ibid para 85.

¹⁵⁹ Ibid para 86.

¹⁶⁰ Id.

The majority judgment of the Court was justifiably criticised by many legal scholars.¹⁶¹ The Court failed to recognise that legal rules played a role in perpetuating harmful stereotypes.¹⁶² Although the majority hinted at the importance of gender domination in rape, they ended up focusing on the sex of the victim “ignoring the fully gender implications of rape”.¹⁶³ Bonthuys ascribes this to the Court’s failure to understand the intersecting nature of gender, sex and sexual orientation:

‘As a result of the failure to appreciate the intersection of gender and sexual orientation issues in male rape, the judgment reiterates and strengthens the very stereotypes of female and male sexuality – that women can only be passive victims and that men can only be perpetrators – which form the basis of violent, sexual aggressive masculinity. The argument is not that the court should not have recognised that most victims of rape are women but that, in failing to see the similarities between male and female rape victims, it did not go far enough and ended up reinforcing, rather than transcending, gendered stereotypes of sexuality.’¹⁶⁴

Sexual violence is fuelled by social hierarchy “inflicted on those who have less social power by those who have more”.¹⁶⁵ The Constitutional Court failed to recognise this fully. The *amici curiae* wanted to alert the Court to this reality, but its arguments were inverted to support the Court and criminal justice system’s own understanding and interpretation of rape. Although the judgment was inclusionary in extending the definition to include the anal penetration of women, it did not address the social conditions that create and perpetuate systemic inequalities.¹⁶⁶ It could have done this by adopting the arguments of the *amici curiae* that took into account the

¹⁶¹ See for example C.R. Snyman ‘Extending the scope of rape – A dangerous precedent’ (2007) 124 SALJ 677; Kelly Phelps ‘A dangerous precedent indeed – A response to C.R. Snyman’s note on *Masiya*’ (2008) 125 SALJ 648; Kelly Phelps and Sha’ista Kazee ‘The Constitutional Court gets anal about rape – gender neutrality and the principle of legality in *Masiya v DPP*’ (2007) 20 SACJ 341; Solomon A. Dersso ‘The role of courts in the development of the common law under s 39(2): *Masiya v Director of Public Prosecutions Pretoria (The State) and Another* CCT Case 54/06 (10 May 2007)’ (2007) 23 SAJHR 373; Bonthuys ‘Institutional openness and resistance to feminist arguments’ op cit note 128; Woolman op cit note 129.

¹⁶² Bonthuys ‘Institutional openness and resistance to feminist arguments’ op cit note 128 at 19.

¹⁶³ Elsje Bonthuys ‘Putting gender into the definition of rape or taking it out?’ (2008) 16 *Feminist Legal Studies* 249 at 257.

¹⁶⁴ Bonthuys ‘Institutional openness and resistance to feminist arguments’ op cit note 128 at 28.

¹⁶⁵ MacKinnon ‘Women’s lives, men’s laws’ op cit note 133 at 240.

¹⁶⁶ Bonthuys ‘Putting gender into the definition of rape or taking it out?’ op cit note 163 at 259.

contextual evidence that considers the power relations associated with rape and thus accurately reflects the actual impact of rape on its victims.

2.3.5 Purpose and impact of the *amici curiae* submissions

The *amici curiae* wanted to present the Court with the gendered and social context of rape and to focus renewed attention on the development of the definition in light of Parliament's delay in enacting the Sexual Offences Bill.

The use of the *amici curiae* brief was distorted as the Court relied on their general and introductory arguments, but reverted to Masiya's arguments concerning content and context. The Court's reasoning for wanting to focus on women as the overwhelming victims of rape, and therefore the need for a gender specific crime, is understandable and defensible but badly articulated and argued.

Dersso describes the majority's reasoning as "reductionist and partial", and from reading the relevant Court documents one wonders whether it could be, in addition to employing traditional legal method, a misrepresentation of the relevant parties pleadings that lead to such a constrained interpretation.¹⁶⁷ My interpretation, after reading the relevant pleadings and judgment is that it could be partly assigned to a reworked "cut and paste" job from the parties' submissions where the Court relied on several arguments of the parties but without any substantial analysis that lead to peculiar conclusions.

Although the *amici curiae* were disappointed with the decision in relation to extending the definition of rape, Masiya provided women's organisations with an opportunity to voice their dissatisfaction with the legislative process concerning the enactment of the Sexual Offences Bill.¹⁶⁸ The court case put pressure on the Minister of Justice and Constitutional Development, as he had to depose to an affidavit regarding the status of the Bill and, although the affidavit did not provide any answers as to when the Bill would be finalised, it granted women's organisations the opportunity to engage with the Minister in a public forum.¹⁶⁹ The Court, as vocal as it could be on the subject, expressed concern with the delayed implementation of the

¹⁶⁷ Dersso op cit note 161 at 381.

¹⁶⁸ Interview Lisa Vetten op cit note 125.

¹⁶⁹ Second respondent's affidavit, deposed to by Lawrence Garth Scott Bassett, case number: CCT 54/06.

Bill.¹⁷⁰ Shortly after the *Masiya* judgment (10 May 2007) the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, the rephrased Sexual Offences Bill, was implemented (13 December 2007).

In this sense *Masiya* provided a platform for concerned organisations to pressurise government to engage with the public regarding the status of an important piece of legislation and also highlights the importance of the indirect impact of *amici curiae* participation.¹⁷¹

¹⁷⁰ Specifically the Court stated:

'The Court, while not unmindful of the fact that the 2003 Bill is before Parliament, cannot delay, defer or refuse to deal with an extension of the definition when the facts before it demand such an extension and when it is clearly in the public interest to do so. A further delay in or suspension of the extension of the current definition will constitute an injustice upon survivors of non-consensual anal penetration such as the nine-year-old complainant in this case.'; *Masiya* op cit note 14 para 44.

¹⁷¹ See the second respondent's affidavit op cit note 169.

2.4 Sexual Violence and *Amicus Curiae* Participation in Criminal Proceedings: *S v Zuma* (attempted amici curiae intervention by TLAC, CALS and the Centre for the Study of Violence and Reconciliation (CSVR)).

2.4.1 Contextual and factual background

The *Zuma* trial needs to be viewed against the backdrop of one of the most “fractious periods of internal struggle in the history of the African National Congress (ANC) over the ideological direction and leadership of the movement.”¹⁷² When a charge of rape was laid against Zuma, he was in the midst of a succession battle over the leadership of the ANC and possible presidency of the country. Zuma’s supporters was of the opinion that the rape charge was a political ploy to discredit him and used the trial as a platform to draw attention to the failings of the new democracy and the leadership of then President Thabo Mbeki.¹⁷³

It is clear from the ensuing trial that a woman who decides to lay a charge of rape still faces insurmountable challenges.¹⁷⁴ The complainant, Khwezi, and Zuma were family friends and during an overnight visit to Zuma’s home Khwezi was allegedly raped.¹⁷⁵ Zuma pleaded not guilty to the charge, admitting that he and Khwezi had sex, but claiming that the intercourse was consensual.

Supporters for both Zuma and Khwezi gathered outside the courthouse which resulted in an extremely hostile and often violent environment that required a strong police presence.¹⁷⁶ Zuma’s supporters were dressed in traditional Zulu clothing and sported banners and T-shirts with slogans such as ‘burn the bitch’, ‘100% Zuluboy’ and ‘Zuma for President’.¹⁷⁷

¹⁷² Shireen Hassim ‘Democracy’s shadows: Sexual rights and gender politics in the rape trial of Jacob Zuma’ (2009) 68 *African Studies* 57 at 58.

¹⁷³ Vasu Reddy & Cheryl Potgieter ‘Real men stand up for the truth: Discursive meanings in the Jacob Zuma rape trial’ (2006) 24 *Southern African Linguistics and Applied Language Studies* 511 at 513; Hassim op cit note 172 at 59.

¹⁷⁴ Helene Combrinck ‘Claims and entitlements or smoke and mirrors? Victims’ rights in the sexual offences act’ in Lillian Artz & Dee Smythe (eds) *Should we consent? Rape law reform in South Africa* (Juta 2008) 262.

¹⁷⁵ *Zuma* op cit note 15 facts as portrayed in the headnote.

¹⁷⁶ Hassim op cit note 172 at 59; also see Mmatshilo Motsei *The kanga and the kangaroo court: Reflections of the rape trial of Jacob Zuma* (Jacana Media 2007) for a general discussion of the trial.

¹⁷⁷ Hassim op cit note 172 at 59.

The One-in-Nine Campaign was established to support Khwezi and all women who spoke out about rape and sexual violence.¹⁷⁸ Its banners highlighted women's constitutional rights; the need to pass the Sexual Offences Bill and the ineffectiveness of the criminal justice system in protecting rape victims and it provided a public platform, considering the amount of media attention garnered, to address issues that have long plagued women's organisations who work in this area.¹⁷⁹

Inside the courtroom, the main question was whether there had been consent to the sexual intercourse.¹⁸⁰ After Khwezi's evidence, Zuma's defence team brought an application to cross-examine Khwezi on her past sexual history and to lead evidence in connection therewith.¹⁸¹ The High Court granted the request stating it

¹⁷⁸ A report of the Medical Research Council showed that only one out of every nine rape survivors spoke out about rape and sexual violence – resulting in the name One-in-Nine adopted by its founders People Opposing Women Abuse (POWA). For a discussion of the One-in-Nine campaign see Suzanne Leclerc-Madlala "Come rape us!" The everyday trauma of sexual violence in South Africa' in Dovile Budryte, Lisa M. Vaughn & Natalya T. Riegg (eds) *Feminist conversations: Women, trauma, and empowerment in post-transitional societies* (University Press of America 2009) 63 at 68; Meghan Cooper 'Preventing the gendered reproduction of citizenship: The role of social movements in South Africa' (2011) 19 *Gender & Development* 357.

¹⁷⁹ Hassim op cit note 172 at 59.

¹⁸⁰ *Zuma* op cit note 15 facts as portrayed in headnote.

¹⁸¹ *Ibid* p 198; the application was brought in terms of sec 227 of the Criminal Procedure Act 51 of 1977 which states:

'(1) Evidence as to the character of an accused or as to the character of any person against or in connection with whom a sexual offence as contemplated in the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, is alleged to have been committed, shall, subject to the provisions of subsection (2), be admissible or inadmissible if such evidence would have been admissible or inadmissible on the 30th day of May, 1961.

(2) No evidence as to any previous sexual experience or conduct of any person against or in connection with whom a sexual offence is alleged to have been committed, other than evidence relating to sexual experience or conduct in respect of the offence which is being tried, shall be adduced, and no evidence or question in cross examination regarding such sexual experience or conduct, shall be put to such person, the accused or any other witness at the proceedings pending before the court unless-

(a) the court has, on application by any party to the proceedings, granted leave to adduce such evidence or to put such question; or

(b) such evidence has been introduced by the prosecution.

(3) Before an application for leave contemplated in subsection (2)(a) is heard, the court may direct that any person, including the complainant, whose presence is not necessary may not be present at the proceedings.

(4) The court shall, subject to subsection (6), grant the application referred to in subsection (2)(a) only if satisfied that such evidence or questioning is relevant to the proceedings pending before the court.

(5) In determining whether evidence or questioning as contemplated in this section is relevant to the proceedings pending before the court, the court shall take into account whether such evidence or questioning-

would give reasons for its decision at a later time.¹⁸² Zuma's defence team proceeded to lead evidence regarding Khwezi's childhood during which time she was sexually abused, and also later in her life where she made allegations of rape against certain individuals.¹⁸³ Most of the evidence lead was accepted by the High Court as relevant.¹⁸⁴

The *Zuma* trial was a particularly difficult case for women's rights activists as the case questioned whether ongoing advocacy for rape law reform had any effect.¹⁸⁵ The admission of evidence regarding Khwezi's past sexual history and her cross-examination in this regard were particularly worrisome and served to publicise and reinforce several rape stereotypes (women should forcefully resist; if a complainant does not conform to traditional sex norms she might be the sexual deviant; rape is about sex and not intricate power relations exercised in a violent manner).¹⁸⁶

It was after the closing of the State's case that the *amici curiae* lodged an application to intervene with the intention to lead expert evidence in the matter and to present written and oral argument regarding certain issues.¹⁸⁷ They thought it was important to provide the High Court with evidence that would explain Kwezi's behaviour and that would attempt a balance between her and Zuma's constitutional

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- (a) is in the interests of justice, with due regard to the accused's right to a fair trial;
 - (b) is in the interests of society in encouraging the reporting of sexual offences;
 - (c) relates to a specific instance of sexual activity relevant to a fact in issue;
 - (d) is likely to rebut evidence previously adduced by the prosecution;
 - (e) is fundamental to the accused's defence;
 - (f) is not substantially outweighed by its potential prejudice to the complainant's personal dignity and right to privacy; or
 - (g) is likely to explain the presence of semen or the source of pregnancy or disease or any injury to the complainant, where it is relevant to a fact in issue.
- (6) The court shall not grant an application referred to in subsection (2)(a) if, in its opinion, such evidence or questioning is sought to be adduced to support an inference that by reason of the sexual nature of the complainant's experience or conduct, the complainant-
- (a) is more likely to have consented to the offence being tried; or
 - (b) is less worthy of belief.
- (7) The court shall provide reasons for granting or refusing an application in terms of subsection (2)(a), which reasons shall be entered in the record of the proceedings.'

¹⁸² See *Zuma* op cit note 15 pages 198-204 for the reasons provided in the final judgment.

¹⁸³ *Zuma* op cit note 15 p 220.

¹⁸⁴ *Id.*

¹⁸⁵ Combrinck 'Claims and entitlements or smoke and mirrors' op cit note 174 at 262.

¹⁸⁶ David P. Bryden & Sonja Lengnick 'Rape in the criminal justice system' (1997) 87 *The Journal of Criminal Law and Criminology* 1194.

¹⁸⁷ Notice of motion in the joint application of TLAC, CALS & CSVR to be admitted as *amici curiae*, founding affidavit deposed to by Liesl Gertholtz, case number: SS321/05.

rights. The High Court refused the *amici's* application for admission, arguing that it was ill-conceived and not necessary. The High Court proceeded to adopt certain universal assumptions about women's agency and voice.¹⁸⁸ The fact that Khwezi did not exhibit a "normal response" to the rape, in other words physically resisting and immediately reporting the incident, lead to the conclusion that she was lying about the rape and that the sex was consensual.¹⁸⁹

2.4.2 The *amici curiae*

The *amici curiae* were uncertain whether their participation would be wise as a result of the politically charged atmosphere and the possibility that their involvement could be misconstrued as a publicity stunt.¹⁹⁰ However, after seeing how Khwezi was treated in and outside the courtroom, and the extent to which every possible rape stereotype was being brought to the fore, the *amici curiae* was of the opinion that its participation was required to address these common stereotypes and to support Khwezi.¹⁹¹ There was also considerable external pressure on the participating organisations to intervene, considering the manner in which the trial was run.¹⁹² The final decision to intervene led to a division amongst women's organisations working in the area, as some thought that the *amici* could do little to assist, and that they would not be able to influence the court when considering the patriarchal nature of the criminal justice system.¹⁹³

The organisations, after their decision to enter as *amici curiae*, were faced with a difficult strategic choice on how they were going to frame their arguments to balance the individual and broader issues of the case.¹⁹⁴ In their application for admission they stated that they intervened not only in their own interests, but in the interest of the community, which included women and children who were victims of sexual violence or who could be victims; and on behalf of women and children who as a result of the criminal justice system were unable or afraid to prosecute their

¹⁸⁸ Steven Robins 'Sexual politics and the Zuma rape trial' (2008) 34 *Journal of Southern African Studies* 411 at 424.

¹⁸⁹ *Id.*; specifically see *Zuma* op cit note 15 p 216-218 for the judge's interpretation of Khwezi's response to the alleged rape.

¹⁹⁰ Interview Lisa Vetten op cit note 125.

¹⁹¹ *Id.*

¹⁹² Interview Catherine Albertyn, CALS, (29 January 2013).

¹⁹³ Interview Lisa Vetten op cit note 125.

¹⁹⁴ *Id.*

cases and, in the public interest, in order to promote the protection and development of the rights to equality, dignity and privacy for complainants in sexual offence cases.¹⁹⁵ The *amici curiae* argued that the case raised important constitutional issues that went to the heart of the enjoyment of women's constitutional rights and that their participation would:

'enable substantive issues of social and legal significance to be properly ventilated in the interest of a fair trial and will also ensure utilisation of common law processes in a manner consistent with the constitutional principles;'¹⁹⁶

The *amici curiae* maintained that the social context evidence that they would bring would place the High Court in a better position to make a decision "confident of its social consequences".¹⁹⁷ The expert evidence was tailored to Khwezi's specific circumstances and focused on the effects of childhood sexual abuse and the power dynamics associated with a personal relationship as the one Kwezi and Zuma had.¹⁹⁸ The *amici* also wanted to provide a comparative perspective on the promotion of constitutional values within trial proceedings.¹⁹⁹ Although the *amici* wrote to the parties to gain their permission/support to enter as *amici curiae*, all the parties refused their support.

2.4.3 Decision by the High Court

The High Court rejected the admission of the *amici curiae* on two main grounds. Firstly, it found that the proposed expert evidence would delay the matter unnecessarily and that a delay would have a profound negative effect on Khwezi as she most probably will have to be recalled as a witness.²⁰⁰ Secondly, the High Court regarded the expert evidence provided by the State as sufficient and found that the *amici curiae* could not bring anything new that could be of assistance.²⁰¹

¹⁹⁵ Notice of motion in the joint application of TLAC, CALS & CSVR op cit note 187 para 12.

¹⁹⁶ Ibid para 14.

¹⁹⁷ Ibid para 14.7.

¹⁹⁸ Ibid para 16.

¹⁹⁹ Ibid para 17.

²⁰⁰ Unreported judgment delivered by Van der Merwe J in *S v Zuma* case number: SS321/05 (27 March 2006).

²⁰¹ Ibid p 699.

2.4.4 Purpose and impact of the amici curiae submissions

The *amici curiae* made a strategic decision to construct the brief around Khwezi, as counsel advised that criminal courts were more receptive to a person with a face and name than broader social context.²⁰² The individualised nature of the brief turned out to be problematic and the submissions were seen as supplementing the State's evidence rather than being of assistance to the court.²⁰³ According to Brickhill, the *amici curiae* participation in *Zuma* failed, as it threatened the bilateral adversarial nature of criminal trials.²⁰⁴ In hindsight, the choice to focus on Khwezi might not have been the best one, but it seemed viable at the time, specifically considering the way in which she was treated in and outside the courtroom.

A further problem was the impression that the *amici curiae* saw the judge as a lay person regarding the intricacies of rape law and that they were the only ones able to assist him in this regard. The *amici*, in its submissions stated:

'I respectfully aver that the submissions to be made by Tshwaranang will assist the Court in that the rape of a woman is unlikely to be an issue within the general knowledge or experience of judicial officers. Rape has frequently been described as a crime that seldom sees the light of day, let alone comes under the scrutiny of our courts. Rape victims or rape survivors have usually endured their experience in silence, and the particular and somewhat unique character and features of rape have long gone unstudied;'²⁰⁵

The tone and way in which the brief was drafted was understandable in a sense, as the amount of attention drawn and publicity surrounding the case created a hostile, oppositional environment in which it was difficult to distance oneself from the particular factual scenario. However, one can deduce an attitude of resentment from the judge towards the *amici curiae* in his final judgment where he stated:

'A disconcerting aspect of this trial is the fact that all and sundry were prepared to, and apparently claimed the right to, comment on my decision in terms of s 227 of the Act, even before they knew the bases on which and the reasons why leave was granted to cross-examine the complainant on her past sexual experience, and to lead evidence

²⁰² Interview Lisa Vetten op cit note 125.

²⁰³ Jason Brickhill 'The intervention of *amici curiae* in criminal matters: *S v Zuma* and *S v Basson* considered' (2006) 123 SALJ 391 at 396.

²⁰⁴ Ibid 398.

²⁰⁵ Notice of motion in the joint application of TLAC, CALS & CSVR op cit note 187 para 14.4.

concerning aspects of that past. People commented on the ruling without having been in Court or knowing anything about the contents of the application, or the provisions of s 227 of the Act.²⁰⁶

And further:

‘This case is, in my judgment, a good illustration why pressure groups and individuals should not jump to conclusions and express criticism before having heard all the evidence. At the time when I allowed the complainant to be cross-examined on her sexual history, and evidence to be led in that respect, I was fully aware of what was contained in Hully’s affidavit. I realised that there was at least a possibility that, at the end of the case, it could be said that a false accusation of rape was made against the accused. Instead of waiting, some people stated categorically that rape victims, would as a result of this case, be hesitant to report an incident of rape because of the treatment the complainant received, apparently also from this Court.’²⁰⁷

It is clear that the judge viewed the *amici’s* submissions and planned participation as a personal attack on his judicial integrity and that the purpose of the participation was misconstrued. The court would most certainly have benefited from the proposed *amici curiae* participation and contextual evidence it planned to bring. As Robins stated:

‘A close reading of the Zuma judgment suggests that the Judge uncritically accepted gender stereotypes about rape victims and Zuma’s version of ‘traditional’ Zulu masculinity. While the Judge accepted Zuma’s essentialist rendition of ‘Zulu masculinity’ he did not unpack the way in which the gendered power relations between accused and complainant were culturally construed; instead he opted for a thoroughly decontextualised and standardised conception of the ‘rape victim.’²⁰⁸

According to Robins the court should have considered the possibility that the relationship between Zuma and Khwezi could have been culturally and politically structured in such a way as “to make it extremely difficult for the latter to reject or resist the sexual advances and demands of the accused.”²⁰⁹

²⁰⁶ *Zuma* op cit note 15 p 198.

²⁰⁷ *Ibid* p 222-223.

²⁰⁸ Robins op cit note 188 at 423.

²⁰⁹ *Ibid* 424.

Towards the end of the *amici's* submissions they stated that they would have liked to provide the High Court with an analysis of the constitutional rights of complainants in sexual offences cases, which would have required and attempted a balance between the fair trial rights of the accused and the constitutional rights of the complainant/s.²¹⁰ This point is of specific interest and could have been the new and relevant issue that the court was looking for, had the judge not interpreted the participation to be an attack on his judicial integrity.

The fact that the brief was rejected by all the parties concerned, and in this specific instance also the prosecution, could not have been in the *amici's* favour when the High Court considered the application. Although consent is not a requirement for admission, as admission solely lies with the discretion of the court, a brief supported by the parties is more likely to be supported by the court. Brickhill advises against *amicus curiae* participation in criminal matters stating that the unique nature of these proceedings should be considered and that organisations should rather focus on prosecutorial support by contacting the State and offering assistance in compiling expert evidence on their behalf.²¹¹ The *amici curiae* participation and the way in which it was framed in *Zuma* was unfortunate, but it raised important issues that potential *amici* should note.

The way in which an *amicus curiae* brief, especially the application for admission, is framed is of utmost importance. *Amici curiae* should play at their traditional role as “friend of the court” and should carefully structure subsequent submissions to objectively frame the relevant context and issues it would like to draw to the court’s attention. The key is to frame controversial arguments/ideas in such a way that it would be accepted by a court, possibly influencing the way in which a decision is reached or the way in which a decision is reached in future.

The hostilities outside the High Court and extensive media coverage polarised the public (and court) to such a degree that there was little room for thoughtful debate around the actual issues on the historical and cultural constructions of sexual agency and the conditions of sexual consent.²¹² The *amici curiae* was also lambasted in the press for being mere publicity hounds, which negatively impacted

²¹⁰ Notice of motion in the joint application of TLAC, CALS & CSVR op cit note 187 para 20.5.

²¹¹ Brickhill op cit note 203 at 397.

²¹² Reddy & Potgieter op cit note 173 at 513; Hassim op cit note 172 at 73.

public perception and support for the actual purpose of the brief and the *amici's* planned participation.²¹³

However, the criminal justice system continues to be an important arena where women's activists contest for women's voices to be heard. Although the adversarial nature of the criminal justice system limits the role of *amicus curiae* participation, it does not mean that there is no role to be played by *amici curiae* in criminal matters. The *Zuma* matter was not the ideal matter to test the waters and another matter, less politicised and publicly hostile, might be able to establish a role for *amici curiae* participation within the criminal justice system, especially in the balancing of rights.

²¹³ Mathatha Tsedu *Rapport Newspaper*, 2 April 2006.

3 CONCLUDING REMARKS

‘Women who work with law have learned that while legal change may not always make social change, sometimes it helps, and law *unchanged* can make social change impossible.’²¹⁴

Women and organisations, working in the field of gender-based violence, have engaged the law and criminal justice system to defend legislative gains, extend legal protection and expose discriminatory practices and structural inadequacies.²¹⁵ As part of this strategy, *amici curiae* participation has been vital in developing legal arguments that challenged gendered “assumptions and perspectives underlying legal rules, terms and concepts.”²¹⁶

These legal challenges and *amici curiae* participation were aided by the employment of feminist research and feminist method and a key strategy has been to place women’s experience before the courts in an attempt to re-define their experience and their right to be free from violence.²¹⁷ By asking the “women question”, the *amici curiae* have been able to focus attention on women and their specific experience relating to violence.²¹⁸ The need to justify protection was explored (*Baloyi*); questions were asked such as, why women were not afforded protection (*Carmichele*) and why protection should be extended (*Masiya*) and how one’s position as a woman reinforced harmful perceptions (*Zuma*). “Feminist practical reasoning” featured prominently and the *amici curiae* focused on placing contextual evidence before the Court that highlighted women’s experience and exclusion within the legal system. The *amici’s* participation in *Masiya* and *Zuma* created opportunities for feminist activists to educate the public and legislators about the nature and extent of sexual violence to which some South African women are subjected and to call for the enactment of the Sexual Offences Bill.²¹⁹

²¹⁴ MacKinnon ‘Women’s lives, men’s laws’ op cit note 133 at 103.

²¹⁵ Artz & Smythe ‘Introduction: Should we consent’ op cite 10 at 13.

²¹⁶ Albertyn ‘The discriminatory and gendered nature of the law and institutions of criminal justice’ op cit note 9 at 23.

²¹⁷ Ibid 15.

²¹⁸ See feminist method as discussed by Katharine T. Bartlett ‘Feminist legal methods’ (1990) 103 *Harvard Law Review* 829 in chapter 2.

²¹⁹ Artz & Smythe ‘Feminism vs. the State?’ op cit note 1 at 8

The *amici curiae* participation in the cases described could be viewed as successful and unsuccessful on many levels. It is clear from the above case discussions that the Constitutional Court was generally receptive to the gendered arguments brought by the parties and *amici*, and that the Court did not shy away from extending protection to women.

Baloyi contributed to an understanding of domestic violence in its broader social context and set a positive precedent for future litigation, stressing the importance of the consideration of the indirect impact of *amicus curiae* participation and its role as judicial sensitizer, which could possibly influence the way in which a matter is decided in future.

The *Carmichele* judgment entrenched the importance of all courts to take account of the rights enshrined in the Constitution when interpreting the common law and, in this specific instance, the law of delict. Although the judgment was not solely gender-based, the arguments brought by the applicant and *amici curiae* set a solid precedent in reference to police behaviour and the response of the criminal justice system to victims of violence, specifically gender-based violence.

Although the decisions in *Masiya* and *Zuma* were not the outcome intended by the *amici curiae*, their participation had important indirect implications in spurring on the enactment of the much advocated and desired Sexual Offences Bill.²²⁰ After the highly publicised *Zuma* trial in 2006, followed by *Masiya* in 2007, renewed attention was focused on the Sexual Offences Bill and shortly after *Masiya* the Bill was enacted. Here the *amici curiae* successfully used litigation as public platform to place the necessary pressure on Government to promulgate the promised legislation.

The reasoning of the Court in *Carmichele* and *Masiya* is interesting, as it mostly generalised the nature of violence against women without explicitly recognising the social and gendered intricacies involved in gender-based violence, specifically sexual violence. What is evident from the current high levels of violence, and specifically sexual violence against women, is that explicit recognition of the power relations at work in South African society is required and warranted in a shift or at least in acknowledgement of inequalities.²²¹ The Court's reasoning in *Masiya*

²²⁰ The Criminal Law (Sexual Offences and Related Matters) Amendment Bill op cit note 123.

²²¹ Artz & Smythe 'Introduction: Should we consent' op cit note 10 at 15.

also encouraged the notion that women are perpetual victims in need of special protection which further entrenches their subordination and inequality in society.²²²

These are points that should have possibly been elaborated on in the *Masiya* and *Carmichele amici curiae* briefs and should be taken into account for future *amici curiae* briefs, ensuring that the relevant evidence is presented to courts to note.

The most important purpose of the *amici curiae* participation in these matters, is their engagement with the legal system. Artz and Smythe describe this in relation to law reform. I regard it to be equally applicable to litigation:

'Engaging in law reform, and in that process, making statements about the reality of women's lives and their engagement with the law, gives conversations about the law some depth. It creates oppositional positions and even raises ambiguities about the law, which is more than non-engagement with the law and legal systems would do. The feminist project on the law is deeply challenging and imperfect, but the fact that women are negotiating a system – one that was historically exclusionary and systemically discriminating – can be considered an essential tread in our efforts to address sexual violence and the attainment of equality more generally.'²²³

The *amici curiae* that participated in these matters contributed to the development of strong precedents that acknowledged the gendered nature of violent crime and set new standards for police behaviour towards victims of violent crimes.

²²² Albertyn, Artz, Combrinck, Mills & Wolhuter op cit note 2 at 307.

²²³ Ibid 20.

CHAPTER 4

1 WOMEN AS PART OF CULTURAL COMMUNITIES: GENDER *versus* CULTURE?

The place of customary law in our new constitutional dispensation had been the subject of much debate. During the negotiations for the Interim Constitution, one of the key debates was whether customary law, was going to be expressly recognised as part of South African law.¹ Within this debate, a particularly complicated and controversial issue arose, as to whether the right to participate in one's culture could be reconciled with the equality principle, a key feature of the new Constitution. The conflict was especially complex as customary law, like most legal systems, had a very strong patriarchal foundation.²

The Congress of Traditional Leaders of South Africa (CONTRALESA) objected to the proposed equality provision, stating that in terms of their culture they did not support equality for women.³ CONTRALESA argued that customary law should not be subject to the Bill of Rights, a standpoint that was vehemently opposed by all women delegates at the negotiations and rural women's organisations.⁴ These women argued that all women should be protected by the Bill of Rights, with the equality guarantee included, as its exclusion would be detrimental to the most oppressed and marginalised group - rural women.⁵

The outcome recognised customary law as part of South African law subject to the Bill of Rights. Whilst the Interim Constitution contained a right to participate in

¹ Customary law means the customs and practices observed among the indigenous African people of South Africa which form part of the culture of those people.

See sec 8 & 31 of the Interim Constitution of the Republic of South Africa, 1993 (hereinafter the Interim Constitution); Felicity Kaganas & Christina Murray 'The contest between culture and gender equality under South Africa's interim Constitution' (1994) 21 *Journal of Law and Society* 409; Thandabantu Nhlapo 'African customary law in the Interim Constitution' in Sandra Liebenberg (ed) *The Constitution of South Africa from a gender perspective* (Community Law Centre UWC 1995) 157; Wieland Lehnert 'The role of the courts in the conflict between African customary law and human rights' (2005) 21 *SAJHR* 241.

² T.W. Bennett 'The equality clause and customary law' (1994) 10 *SAJHR* 122 at 123; Elsje Bonthuys 'Accommodating gender, race, culture and religion outside legal subjectivity' (2002) 18 *SAJHR* 41.

³ Catherine Albertyn 'Women and the transition to democracy in South Africa' (1994) *Acta Juridica* 39 at 57.

⁴ Kaganas & Murray op cit note 1 at 411; Albertyn 'Women and the transition to democracy in South Africa' op cit note 3 at 57.

⁵ Albertyn 'Women and the transition to democracy in South Africa' op cit note 3 at 59.

one's own culture, it also guaranteed gender equality. Although women were successful in ensuring that customary law was subject to the equality guarantee, the exact nature of the relationship between culture and equality was left open to interpretation. The right to equality could possibly trump the right to culture, but it also allowed for an integrated approach where cultural rules and practices could be harmonised with the constitutional values, including equality.⁶

The Final Constitution, much the same as the Interim Constitution, recognised customary law as part of South African law subject to the Constitution.⁷ The Bill of Rights provided for freedom of religion, belief and opinion, as well as the right to use one's language and to participate in one's cultural life, but no one exercising these rights could do so in a manner that was inconsistent with any provision of the Bill of Rights.⁸ The Final Constitution further provided for the right of cultural, religious and linguistic communities to practise and enjoy their relevant culture, again not in a manner that was inconsistent with any rights in the Bill of Rights.⁹ As with the Interim Constitution, the Final Constitution recognised the right to equality.¹⁰

Law reform and litigation had an important role to play in addressing the potential conflict between customary law and the Bill of Rights. Customary law was codified in the Black Administration Act 38 of 1927 (BLA) entrenching and extending the subordination of women under customary law.¹¹ The official and written sources of customary law were "tainted by their association with colonialism and apartheid, and much of the law had been allowed to drift into stagnant backwater."¹² This was

⁶ Catherine Albertyn & Likhapha Mbatha 'Customary law reform in the new South Africa' in S.J.R. Cummings, H van Dam & M Valk (eds) *Gender, citizenship and governance: A global sourcebook* (KIT Publishers 2004) 51 at 52.

⁷ Sec 211 of the Constitution of the Republic of South Africa, 1996 (hereinafter the Constitution) provides:

'(1) The institution, status and the role of traditional leadership, according to customary law, are recognised, subject to the Constitution.

(2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.

(3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.'

⁸ Sec 15 and 30 of the Constitution.

⁹ Sec 31 of the Constitution.

¹⁰ Sec 9 of the Constitution.

¹¹ See for example sec 11(3)(b) of the BLA that relegated customary wives as minors for purposes of contractual capacity and standing.

¹² T.W Bennett 'Re-introducing African customary law to the South African legal system' (2009) 57 *The American Journal of Comparative Law* 1 at 3.

intensified when the apartheid government transferred legislative powers to the independent states, renouncing its responsibility in reforming customary law.¹³ The independent legislatures who took over were controlled by conservative chiefs who had little interest in disturbing their power structures which led to an encoded traditional and very much patriarchal version of customary law.¹⁴

The Recognition of Customary Marriages Act 120 of 1998 (RCMA) was one of the first steps taken to reform customary law. The main goal of the Act is to remedy gender and racial inequality entrenched in official customary law and the “perceived injustices of the unwritten patriarchal system of customary law” in relation to customary marriages.¹⁵ With not many other legislative initiatives reformists soon turned to the courts.¹⁶ However, to litigate on a customary matter meant that the actual content of custom had to be established. There was strong support that only the law as it was lived by its people should be heeded.¹⁷ This came to be known as “living” customary law as opposed to the codified and outdated sources available to courts, mainly through the BLA, known as “official” customary law. The problem with living customary law is that it is drawn from modern social practice and would be difficult to ascertain, thus in conflict with the courts’ need of legal certainty.¹⁸ Therefore, when a woman brings a matter to court claiming that a customary/cultural rule infringes her right to equality, the courts will be tasked with establishing the specific rule and finding a suitable remedy between two potentially conflicting value systems.

Equivalent to the divergent views in the recognition of customary law within an equality framework, feminists had diverged in the specific strategy to be followed in the litigation of these matters. Some feminists have chosen to focus on a rights-based approach that relies on the rights to equality and dignity to prove that an

¹³ Id; the independent states were known as Transkei, Bophuthatswana, Venda and Ciskei;

¹⁴ Bennett ‘Re-introducing African customary law to the South African legal system’ op cit note 12 at 4.

¹⁵ Jan Bekker & Gardiol van Niekerk ‘*Gumede v President of the Republic of South Africa*: Harmonisation, or the creation of new marriage laws in South Africa’ (2009) 24 *SAPL* 206 at 207.

¹⁶ Bennett ‘Re-introducing African customary law to the South African legal system’ op cit note 12 at 4; Bennett refers here to the planned reform of customary succession that, despite a South African Law Commission discussion paper, was not acted on; see the South African Law Reform Commission *Customary Law of Succession Discussion Paper* 93 Project 90 (2000) in this regard.

¹⁷ Bennett ‘Re-introducing African customary law to the South African legal system’ op cit note 12 at 2.

¹⁸ Ibid 9.

infringement has occurred and that supports an ensuing constitutionally prescribed remedy.¹⁹ Others have called for the application of rules of living customary law, provided it does not violate the Bill of Rights, and, where needed, its development.²⁰ Mbatha describes this custom-based process as, first, identifying the cultural value to be protected, then ascertaining the different ways in which community members protect the cultural value and, finally, looking into the constitutionality of these practices to craft a unique remedy dependent on the relevant custom.²¹ This underlying tension in approach is reflected in the litigation strategy of the *amici curiae* in the discussed cases and is indicative of the complex nature of litigating customary law matters within an equality framework.

Although the right to culture and right to equality have sometimes been viewed as being in direct conflict with each other, Bronstein prefers to describe the tension as one of intra-cultural conflict:

'When a woman comes to court to argue about her status, she does not dislodge herself from her culture. She does not transcend her culture and find herself in the realm of Western values. Her identity is not suddenly transformed. Rather, an internal cultural dispute is brought to an alternative tribunal to be heard. The fight is no longer between culture and equality. Rather it is between two different interest groups battling to retain/change power relations within their very culture – a culture which is constantly evolving.'²²

An important departure point is therefore to acknowledge that rights to culture and equality are not oppositional but rather interrelated, a complexity that courts need to understand without feeling that it has to make a choice between different competitive rights.²³ The particular customary rule, as lived, needs to be understood, as well as the social context of the relevant women. This requires knowledge "of the actual reality of people's lives, their place within the community and the power, resources

¹⁹ Sibongile Ndashe 'Human rights, gender and culture - A deliberate confusion' (2005) *Agenda* 36; Devina N. Perumal 'Harmonising cultural and equality rights under customary law – some reflections on *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC)' (2010) *Agenda* 101.

²⁰ Likhapha Mbatha 'Reforming the customary law of succession' (2002) 18 *SAJHR* 259; Chuma Himonga 'The advancement of African women's rights in the first decade of democracy in South Africa: The reform of the customary law of marriage and succession' (2005) *Acta Juridica* 82.

²¹ Mbatha 'Reforming the customary law of succession' op cit note 20 at 284.

²² Victoria Bronstein 'Reconceptualising the customary law debate in South Africa' (1998) 14 *SAJHR* 388 at 403.

²³ Susan Moller Okin 'Feminism and multiculturalism: Some tensions' (1998) 108 *Ethics* 661 at 666.

and interests implicated by the dispute.”²⁴ Courts should see claims based on the right to equality and culture as an opportunity to introduce constitutional norms to an area that has been deprived of these inputs for a long time.²⁵

Within the current constructs of customary law and the need to take account of living customary law, *amicus curiae* participation is particularly relevant in the provision of an important avenue through which the actual reality of women’s lives’ and customs could be placed before a court. Albertyn states:

‘Claims of culture, gender and diversity – controversial and contested as they are – emphasise the need for multiple voices and multiple sites of engagement. The context of the claim needs to be clearly understood, competing narratives of culture aired, the interpretation and application of values made public and debated.’²⁶

Different *amici curiae* are in a position to represent these multiple voices and to contextualise a claim. The case analysis that follows focuses on women exercising their constitutional rights within a customary framework and discusses the intricacies of the right to culture and equality, and the importance of *amicus curiae* participation within this framework.

²⁴ Catherine Albertyn ‘The stubborn persistence of patriarchy?’ Gender equality and cultural diversity in South Africa’ (2009) 2 *Constitutional Court Review* 165 at 184; also see Aninka Claasens & Sindiso Mnisi ‘Rural women redefining land rights in the context of living customary law’ (2009) 25 *SAJHR* 491 at 492.

²⁵ Lisa Fishbayn ‘Litigating the right to culture: Family law in the new South Africa’ (1999) 13 *International Journal of Law, Policy and the Family* 147 at 150.

²⁶ Albertyn ‘The stubborn persistence of patriarchy’ op cit note 24 at 196.

2 CASE DISCUSSIONS

2.1 Women and the Customary Law of Inheritance: *Bhe and Others v Magistrate, Khayelitsha, and Others; Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another (Commission for Gender Equality (CGE) as amicus curiae)*.²⁷

2.1.1 Contextual and factual background

The women to whom customary law applies are African and most often live in rural areas.²⁸ African rural women are especially vulnerable to poverty and a particular concern has been how this vulnerability has been exacerbated through discriminatory customary practices concerning access to property and inheritance.²⁹ In terms of the customary law of succession, the devolution of an estate followed a male lineage (also known as primogeniture) and traditionally the heir was responsible for the control and administration of family property.³⁰ The heir stepped into the shoes of the deceased and carried with him the responsibility of looking after the deceased's family, especially a wife and children.³¹

However, evidence showed that the traditional role of the heir was no longer adhered to, this left women and children in a particularly vulnerable position, as male family members laid claim to family property without discharging their duties as heirs.³² This often led to the eviction of the wife and children from the family home, as the husband's family refused to acknowledge the marriage.³³

²⁷ *Bhe and Others v Magistrate, Khayelitsha, and Others; Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another* 2005 (1) SA 580 (CC) (hereinafter *Bhe*).

²⁸ Likhapha Mbatha, Najma Moosa & Elsje Bonthuys 'Culture and religion' in Elsje Bonthuys & Catherine Albertyn (eds) *Gender, law and justice* (Juta 2007) 158 at 162.

²⁹ Brigitte Clark & Beth Goldblatt 'Gender and family law' in Elsje Bonthuys & Catherine Albertyn (eds) *Gender, law and justice* (Juta 2007) 195 at 198.

³⁰ *Mthembu v Letsela and Another* 2000 (3) SA 867 (SCA) (hereinafter *Mthembu v Letsela*) para 8 explains the rule of male primogeniture in that in a monogamous family, the eldest son of the family head is the heir. If the eldest son does not survive his father, then his (the eldest son's) eldest male descendant is the heir. If there is no surviving male descendant in the line of the deceased's eldest son, then an heir is sought in the line of the second, third and further sons. If the deceased is not survived by any male descendants, his father succeeds him. If his father also does not survive him, an heir is sought in the father's male descendants related to him through the male line; also see Mbatha 'Reforming the customary law of succession' op cit note 20 at 260 for a discussion of the rule.

³¹ Mbatha 'Reforming the customary law of succession' op cit note 20 at 260.

³² Mbatha, Moosa & Bonthuys op cit note 28 at 190.

The codification of the traditional customary concept of male primogeniture in the BLA, and its regulations, prescribed that black estates should be regulated by black law and custom, as opposed to all other estates that were regulated by the Intestate Succession Act 81 of 1987 (hereinafter the Intestate Succession Act). By failing to reflect the impact of social and economic changes concerning inheritance and property ownership, codified customary law increased women's vulnerability and it was evident that change was required.³⁴

In 1998, the South African Law Reform Commission (SALRC) initiated the reform process and published an issue paper on the topic.³⁵ However, before the consultation process had been completed, a Bill was tabled before Parliament that suggested the replacement of the customary law of succession with the Intestate Succession Act.³⁶ Traditional leaders strongly objected to the proposed Bill and argued that it merely imported a western value system.³⁷ The Bill was withdrawn and the topic returned to the SALRC, who proceeded with the publication of a discussion paper on the topic.³⁸ Shortly before the discussion paper appeared in 2000, public interest litigation was initiated on the topic.³⁹

In *Mthembu v Letsela* the applicant challenged the validity of the customary law rule of primogeniture in that it prevented African women from inheriting intestate.⁴⁰ The Supreme Court of Appeal (SCA) found the customary law of succession and the rule of male primogeniture to be valid as a result of the ensuing duty that the heir inherits. The judgment was disappointing and Bennett described the outcome as an application of a generic brand of customary law without asking which specific system of customary law was at issue and the case did not address the changing circumstances of communities and the reality on the ground.⁴¹

³³ Id.

³⁴ Mbatha 'Reforming the customary law of succession' op cit note 20 at 264.

³⁵ South African Law Reform Commission *Harmonisation of the common law and indigenous law (Draft issue paper on succession) Issue Paper 12 Project 108 (1998)*; T.W Bennett *Customary law in South Africa* (Juta 2004) 359.

³⁶ Bennett *Customary law in South Africa* op cit note 35 at 359.

³⁷ Himonga op cit note 20 at 98.

³⁸ South African Law Reform Commission *Customary Law of Succession Discussion Paper 93* op cit note 16; Bennett *Customary law in South Africa* op cit note 35 at 359.

³⁹ Bennett *Customary law in South Africa* op cit note 35 at 359.

⁴⁰ *Mthembu v Letsela* op cit note 30 paras 1-7.

⁴¹ Bennett 'Re-introducing African customary law to the South African legal system' op cit note 12 at 12.

Shortly after the *Mthembu v Letsela* decision, another matter concerning the customary law of succession was heard by the Constitutional Court. In *Moseneke v The Master*, the Court addressed questions that related to the administration of customary estates.⁴² In terms of the BLA, when a person died intestate his estate was administered by a magistrate.⁴³ All other estates and black estates where a will was present, was administered by the Master of the High Court. Moseneke's family believed that the provisions unfairly discriminated on the grounds of race and that all black estates should, as white estates were, be administered in terms of the Administration of Estates Act 66 of 1965.⁴⁴ Although the case did not concern the rights of women specifically, or gender discrimination per se, the Women's Legal Centre (WLC), acting as *amicus curiae*, contended that in the case of intestate succession of Africans, race, gender and culture interacted in a way which discriminated directly and indirectly against African widows.⁴⁵ The WLC supported the invalidation of the relevant sections of the BLA, as the procedure that was provided for in the Administration of Estates Act, was far more protective of the rights of African women.⁴⁶ The submissions of the WLC did not focus on providing contextual evidence, but were strategic in confirming its support for the equal treatment of women in customary law thus laying the groundwork for future possible participations.

The Court found that the section was unconstitutional and, subject to a period of two years, granted to Parliament to review the customary law of succession, found that African families could exercise a choice in having their estates administered by either the Master or a magistrate.⁴⁷

With a changing landscape in reference to the customary law of succession, *Bhe*, a consolidated matter, presented another chance to challenge the rule of male primogeniture concerning the customary law of succession. After the death of Bhe's husband, a magistrate appointed the deceased's father as administrator of the estate, as he was the only heir in terms of the application of the rule of

⁴² *Moseneke and Others v The Master and Another* 2001 (2) SA 18 (CC) (hereinafter *Moseneke v The Master*).

⁴³ Sec 23(7)(a) of the Black Administration Act 38 of 1927; *Moseneke v The Master* op cit note 42 para 4.

⁴⁴ *Moseneke v The Master* op cit note 42 para 7.

⁴⁵ Himonga op cit note 20 at 95; *Moseneke v The Master* op cit note 42 para 17.

⁴⁶ *Moseneke v The Master* op cit note 42 para 17.

⁴⁷ *Ibid* para 27.

primogeniture.⁴⁸ The deceased's father wanted to sell the property that Bhe and her daughters lived in to cover the funeral costs, in effect leaving them homeless.⁴⁹ Bhe (represented by the WLC) challenged the relevant provisions of the BLA and regulations and acted on behalf of her two minor daughters whom she believed were the sole heirs to her husband's estate.⁵⁰ The High Court found that the provisions of the BLA and regulations were unconstitutional, and the matter was directed to the Constitutional Court for confirmation.

The *Shibi* matter also concerned a confirmation order. Shibi was not entitled to inherit from her brother's estate in terms of an application of the principle of primogeniture and the only heirs were two cousins who, upon their appointment as administrators, squandered most of the inheritance.⁵¹ Shibi challenged the decision of the magistrate in appointing the cousins as administrators, upon which the High Court gave a similar finding as in Bhe by declaring Shibi the sole heir and awarding damages against the two cousins.⁵²

In the Constitutional Court the South African Human Rights Commission (SAHRC) and WLC (who also acted for Bhe) were joined as a third party in promoting the protection and attainment of the right to equality acting in the public interest.⁵³ They argued that section 23 of the BLA was in its entirety unconstitutional and was concerned about the amount of time government was taking in legislating on the topic, taking in consideration a drawn-out SALRC process.⁵⁴ The CGE

⁴⁸ *Bhe* op cit note 27 paras 11–19. It should be noted that there was a factual dispute in the High Court concerning whether Bhe was married to the deceased. Bhe argued that lobolo was never paid and that a valid customary marriage was never entered into, whilst the deceased's father argued that lobolo was indeed paid. According to Bhe, her children was also considered illegitimate, which led to a further discriminatory barrier, as extra-marital children were seen to belong to their mother's family where they would qualify as heirs and, even then, only after all the legitimate children have been considered in line with the principle of primogeniture. The Cape High Court approached the matter on the premise that lobolo was paid and that a marriage existed, however the Constitutional Court did not make this premise.

⁴⁹ *Bhe* op cit note 27 para 17.

⁵⁰ *Ibid* para 9-10.

⁵¹ *Ibid* para 21.

⁵² *Id.*

⁵³ Notice of motion for a declaratory order SAHRC & WLC, founding affidavits deposed to by Narandran Jody Kollapen & Michelle O' Sullivan, in the High Court of South Africa, Transvaal Provincial Division para 28.

⁵⁴ *Ibid*; see the South African Law Reform Commission *Customary Law of Succession Discussion Paper* 93 op cit note 16.

applied for admission as *amicus curiae* and argued that in terms and in fulfilment of their constitutional mandate,⁵⁵ they should be allowed to participate as *amicus*.⁵⁶

The factual scenario of all three matters led the Court to two main questions: firstly, the constitutional validity of section 23 of the BLA, and secondly, the constitutional validity of the rule of male primogeniture in the context of the customary law of succession.⁵⁷

From the outset, the matter was of great importance to feminist litigators, as it presented an opportunity to dissect the relationship between culture and equality and a positive outcome would have a significant impact on all women who are subject to the application of customary law.⁵⁸ However, the case was also contested amongst feminist litigators, especially in terms of the applicable remedy, as the WLC supported a stringent rights-based approach and the CGE, as *amicus curiae*, an approach located in customary law and its development.

2.1.2 The parties

The parties provided the context within which the principle of male primogeniture had to be interpreted.

Bhe set out the history of, and need for, the principle of primogeniture. She focused on modern urban families that no longer adhered to traditional practice with heirs, today, simply acquiring property.⁵⁹ According to *Bhe*, despite the change in practice, courts still applied official customary law that ignored living custom, a position that needed to change.⁶⁰ *Bhe* applied the discrimination test laid down in *Harksen v Lane*,⁶¹ and suggested that the rule differentiated along the lines of gender, sex, age, birth, social origin and race.⁶² She specifically referred to the

⁵⁵ Sec 181 and 187 of the Constitution

⁵⁶ Notice of motion application to be admitted as *amicus curiae*, founding affidavit deposed to by Joyce Piliso-Seroke, case number: CCT 49/03.

⁵⁷ *Bhe* op cit note 27 para 3.

⁵⁸ Catherine Albertyn 'Defending and securing rights through law: Feminism, law and the courts in South Africa' (2005) 32 *Politikon* 217 at 231.

⁵⁹ Written submissions of *Bhe*, as drafted by Wim Trengove (SC), Ron Paschke & Susannah Cowen, case number: CCT 49/03 para 34.

⁶⁰ *Ibid* para 43.

⁶¹ *Harksen v Lane* NO 1998 (1) SA 300 (CC); see the tests as discussed in chapter 1 fn 68.

⁶² Written submissions of *Bhe* op cit note 59 para 32.

vulnerable position of African women in society and how the current application of primogeniture had a negative impact on the women and children involved.⁶³

Shibi supported Bhe's submissions and focused on discrimination based on age, as succession was not only determined by sex and gender, but the eldest was entitled to succeed to the exclusion of all others.⁶⁴

The SAHRC and WLC challenged the constitutionality of section 23 of the BLA on the grounds that all women, other than women married to a black person in terms of customary law, were entitled to inherit and to have direct control over the property of a deceased.⁶⁵ According to them, this distinction blatantly discriminated on the grounds of race and gender.⁶⁶

2.1.3 The *amicus curiae*

The CGE was admitted as *amicus curiae* to provide the Court with expert affidavits on the relevance of cultural practices on the African continent, with the focus being on South African intestate succession.⁶⁷ However, because of the late filing of their submissions, no affidavits were actually provided and the CGE chose to focus on the relevant remedy.⁶⁸

The CGE argued that, if the orders in *Bhe* and *Shibi* were confirmed, black estates would be governed by the Intestate Succession Act, which could not effectively deal with all the issues of succession and inheritance under customary law, especially considering polygynous unions.⁶⁹ The CGE suggested an alternate remedy in that the rule of primogeniture could be remedied:

'[b]y a proper application of the principles of Living Customary Law in respect of succession and inheritance on a case by case basis, thereby ensuring the development of customary law.'⁷⁰

⁶³ Ibid paras 58-61.

⁶⁴ Written submissions of *Shibi*, as drafted by Vincent Maleka (SC) & Kameshni Pillay, case number: CCT 69/03 para 22-23.

⁶⁵ Notice of motion for a declaratory order SAHRC & WLC op cit note 53 para 28.

⁶⁶ Id.

⁶⁷ Notice of motion application to be admitted as *amicus curiae*, op cit note 56 para 8.

⁶⁸ Notice of motion application by the *amicus curiae* for condonation of non-compliance with directions, affidavit deposed to by Joyce Piliso- Seroke, case number: CCT 49/03 para 3.

⁶⁹ Written submissions of the *amicus curiae*, as drafted by P.M Mtshaulana & Karrison Pillay, case number: CCT 49/03 para 13.

⁷⁰ Ibid para 13.2.

The CGE indicated that the proposed remedy would be an interim measure awaiting proper legislative change.⁷¹ In support of the proposed remedy, they provided a detailed analysis, supported by scholarly publications, on the distinction between what is known as “official” and “living” customary law.

The CGE argued that the Court should enforce living customary law and that current social practice allowed for women and girl children to inherit, thus recognising individual ownership of property.⁷² In giving effect to sections 30, 31 and 211(3) of the Constitution, living customary law had to be applied by the courts, but if a court, for whatever reason, still applied official customary law, they were obliged to develop this in light of section 39(2) of the Constitution to take account of the living version.⁷³ The CGE’s arguments are aptly summarised in the following paragraph:

‘It is our submission that the rule of primogeniture under official customary law is discriminatory and in contravention of the Constitution. However, we contend that an abandonment of the rule does not necessitate a complete overhaul of a system, that carries with it several other benefits for women living under Customary Law in South Africa and its substitution by a system that is so different and foreign to those that practice Customary law. As already stated, we submit, that the positive aspects of customary law for women and children may remain intact if the principles underpinning living customary law are in fact applied.’⁷⁴

Accordingly, the question of when customary law should be applied should be left to the discretion of the courts awaiting the finalisation of law reform.⁷⁵

2.1.4 Decision by the Constitutional Court

The Court first confirmed the importance of customary law within the South African legal system and stressed that it should not be viewed as a separate and inferior system.⁷⁶ The Court provided a short analysis of the constitutional rights implicated and concluded that section 23 of the BLA was “manifestly discriminatory and in breach of section 9(3) of our Constitution”, and that the breach could not be

⁷¹ Ibid para 13.3.

⁷² Ibid paras 19-47.

⁷³ Ibid para 71.

⁷⁴ Ibid para 95.

⁷⁵ Ibid para 99.

⁷⁶ *Bhe* op cit note 27 para 42.

justified.⁷⁷ The Court moved on to establish the constitutionality of the principle of primogeniture and set out its history and relevance, much as the applicants had in their submissions.⁷⁸

The Court found that the rules of succession in customary law had not been given the space to adapt to the changing social conditions of a modern urban society, which supported the *amicus's* contentions in this regard.⁷⁹ The Court acknowledged the interplay between official and living customary law, but noted that the problem with living customary law was that the adoptions were “*ad hoc* and not uniform.”⁸⁰ The Court found that the principle of male primogeniture discriminated against women:

‘The exclusion of women from inheritance on the grounds of gender is a clear violation of section 9(3) of the Constitution. It is a form of discrimination that entrenches past patterns of disadvantage among a vulnerable group, exacerbated by old notions of patriarchy and male domination incompatible with the guarantee of equality under this constitutional order.’⁸¹

The Court then turned to the question of an appropriate remedy, contested by the *amicus curiae*, and according to the Court the most difficult part of the case.⁸² The Court rejected the *amicus's* proposed remedy and found against the development of the current rule in terms of practices of living law, as there was insufficient evidence and material available, to enable the Court to develop the rule properly.⁸³ In addition, the Court found that direct action was required to safeguard the identified rights and acknowledged that the legislature was in the best position to do this and that its order was to be viewed as a temporary measure.⁸⁴ The order provided that all estates previously governed by section 23 of the BLA were now governed by section

⁷⁷ Ibid paras 68-73.

⁷⁸ Ibid paras 75-80 in relation to the written submissions of *Bhe* op cit note 59 paras 31-38.

⁷⁹ *Bhe* op cit note 27 para 82.

⁸⁰ Ibid para 87.

⁸¹ Ibid para 91.

⁸² Ibid para 101.

⁸³ Ibid para 109.

⁸⁴ Ibid paras 113-115. The Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009 has subsequently been enacted and modifies the customary law of succession as to provide for the devolution of property in terms of the law of intestate succession and further clarifies certain matters relating to the law of succession and the law of property in relation to persons subject to customary law.

1 of the Intestate Succession Act and made specific provision for spouses in polygynous unions.⁸⁵

Justice Ngcobo dissented from the majority in relation to the applicable remedy. His judgment clearly reflected support for the remedy proposed by the CGE, in that the rule of male primogeniture should be developed, in order to bring it in line with the Constitution.⁸⁶ He focused on the development of the rule in other African jurisdictions that considered the position of women in the context of succession.⁸⁷ Accordingly, he found that the rule needed to be developed to bring it in line with the Constitution, by simply removing the reference to male so as to allow an eldest daughter to succeed as well.⁸⁸ In line with the *amicus curiae*, he concluded that it should have been applied “in the concrete setting and social conditions presented by each particular case.”⁸⁹

2.1.5 Purpose and impact of the *amicus curiae* submissions

The judgment in *Bhe* was welcomed by scholars and many were of the opinion that it was a strong affirmation of gender equality in a customary framework.⁹⁰

‘Again the positive end for women was a result of the application of substantive equality: historical and contextual analysis, the interrogation of the private sphere, a

⁸⁵ *Bhe* op cit note 27 para 136. The Court specifically with regards to polygynous unions stated: ‘In the application of ss 1(1)(c)(i) and 1(4)(f) of the Intestate Succession Act 81 of 1987 to the estate of a deceased person who is survived by more than one spouse:

(a) A child's share in relation to the intestate estate of the deceased, shall be calculated by dividing the monetary value of the estate by a number equal to the number of the children of the deceased who have either survived or predeceased such deceased person but are survived by their descendants, plus the number of spouses who have survived such deceased;

(b) each surviving spouse shall inherit a child's share of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed from time to time by the Minister for Justice and Constitutional Development by notice in the Gazette, whichever is the greater; and

(c) notwithstanding the provisions of sub-para (b) above, where the assets in the estate are not sufficient to provide each spouse with the amount fixed by the Minister, the estate shall be equally divided between the surviving spouses.’

⁸⁶ *Bhe* op cit note 27 para 139.

⁸⁷ Ibid paras 192-208. He specifically focused on jurisprudence from Nigeria, Zimbabwe, Tanzania, and Ghana.

⁸⁸ *Bhe* op cit note 27 para 222.

⁸⁹ Ibid para 236.

⁹⁰ See Christa Rautenbach, Willemien du Plessis & Gerrit Pienaar ‘Is primogeniture extinct like the dodo, or is there any prospect of it rising from the ashes? Comments on the evolution of customary succession laws in South Africa’ (2006) 22 *SAJHR* 99; Narnia Bohler-Muller ‘The story of an African value’ (2005) 5 *SAPR* 266.

concern with impact and a willingness to confirm the application of constitutional norms in the private sphere as well as to find a remedy rather than defer to the parliamentary process. Most significantly, the judgment has both normative value in setting the terms of the relationship between custom and gender equality, and practical value in extending inheritance rights to all women married in customary law.⁹¹

Others argued that although *Bhe* protected women from gender-based discrimination, it failed to acknowledge the unique living nature of customary law and the necessity of its development, supporting the *amicus's* arguments and minority judgment.⁹²

The CGE's focus on remedy could be ascribed to the well-drafted and complete arguments presented by *Bhe* in combination with the arguments presented by the SAHRC and WLC. From the pleadings and submissions, one can see that the relevant parties worked closely together in constructing the arguments and the two applications complemented each other perfectly. This could be ascribed to the fact that the WLC acted for *Bhe*, and as applicant in the SAHRC case, and the relevant counsels worked closely together in the construction of the arguments to present a strong and well thought out case.

Although there was little leeway to provide further contextual evidence, the *amicus curiae* in fact provided a different and important angle by focusing on the relevant remedy and the importance of recognising and giving effect to living custom, ensuring the development of customary law as an equal legal system. The *amicus curiae* rejected the approach generally followed by courts namely to merely replace customary law with legislative and common law prescripts in an attempt at its reformation.⁹³ The CGE's submissions had a clear influence on the Court's reasoning as the Court acknowledged the importance of living custom, although it questioned how this was to be established, but it specifically provided for polygynous unions in its remedy.⁹⁴

The CGE's approach, supported by feminists such as Himonga and Mbatha, could be described as an egalitarian approach to customary law and a way in which customary law could rightfully be seen to be a part of South African law without

⁹¹ Albertyn 'Defending and securing rights through law' op cit note 58 at 231.

⁹² Himonga op cit note 20; Mbatha 'Reforming the customary law of succession' op cit note 20.

⁹³ Himonga op cit note 20 at 83.

⁹⁴ See fn 85 above.

equating it with general civil law. Justice Ncgobo in the minority judgment encapsulates this approach by stating:

'It seems to me therefore that the answer lies somewhere other than in the application of the Intestate Succession Act only. It lies in flexibility and willingness to examine the applicability of indigenous law in the concrete setting of social conditions presented by each particular case. It lies in accommodating different systems of law in order to ensure that the most vulnerable are treated fairly. The choice of law mechanism must be informed by the need to: (a) Respect the right of communities to observe cultures and customs which they hold dear; (b) preserve indigenous law subject to the Constitution; and (c) protects vulnerable members of the family. Indigenous law is part of our law. It must therefore be respected and accorded a place in our legal system. It must not be allowed to stagnate as in the past or disappear.'⁹⁵

The *amicus's* arguments raised an important debate as to the purpose of the acknowledgement of living customary law if courts are not able/willing to apply it and as to the future of customary law within the South African legal framework.

The Court's wariness with regard to the content of living customary law also focuses renewed attention on the purpose and use of *amicus curiae* briefs, as an *amicus* is ideally placed to provide a court with evidence regarding a particular practice or culture and could in future play an important role in customary law disputes. The *amicus's* focus on the remedy was unique here and indicated that it was not only concerned with influencing the Court's arguments but specifically in the construction of a remedy and equitable outcome, that would best serve the interests of all the women concerned.

⁹⁵ *Bhe* op cit note 27 para 236.

2.2 A Woman as Chief: *Shilubana and Others v Nwamitwa* (CGE and National Movement of Rural Women (NMRW) as amici curiae).⁹⁶

2.2.1 Contextual and factual background

Traditional leadership was and is a particularly contested area of customary law. As discussed, traditional leaders were opposed to subjecting customary law to the Constitution, especially the equality provision, as they claimed they were defending a traditional way of life that did not regard the sexes as equals, and to do otherwise would degenerate custom, replacing it with western values.⁹⁷ However, the real concern at the time appeared to be the possibility of women challenging the accession to chieftainship, as was clear from a newspaper interview with a chief:

'my fear is that my son can be successfully challenged for my throne by my daughter, because the Bill says that all forms of discrimination – and it is emphatic on gender – should not be permitted. So now my daughter, who is the first born, can take my son to court and I have no doubt that my son would come second.'⁹⁸

The *Shilubana* case concerned a woman claiming the chieftaincy of a community, a position traditionally only reserved for men in line with the principle of primogeniture.⁹⁹ However, it was not simply a question of relying on the equality provision of the Constitution, as traditional leaders initially feared, but whether a community could develop its customs and traditions in order to appoint a woman as chief of their community.

Shilubana had not been allowed to succeed her father as chief in the pre-democratic era and the succession fell upon another male relative. The community, at a later stage, conferred the chieftainship on Shilubana and in their resolution noted that the appointment was made specifically to uphold the equality guarantee provided for in the Constitution.¹⁰⁰ Nwamitwa, challenged the appointment of

⁹⁶ *Shilubana and Others v Nwamitwa* 2009 (2) SA 66 (CC) (hereinafter *Shilubana*).

⁹⁷ Albertyn 'Women and the transition to democracy in South Africa' op cit note 3 at 57.

⁹⁸ Interview with Chief Nonkonyana *Saturday Star* (21 Augsut 1993) as quoted by Albertyn 'Women and the transition to democracy in South Africa' op cit note 3 at 58, fn 76.

⁹⁹ *Shilubana* op cit note 96 paras 1-2.

¹⁰⁰ *Ibid* para 4.

Shilubana as chief. According to him, he was the rightful heir to the chieftainship in terms of customary law and the application of the principle of primogeniture.¹⁰¹

The importance of the case, and arguments presented by all the parties, including the *amici curiae*, is the way in which it fosters our constitutional ideals of participation and recognition of divergent voices. *Shilubana* also confirmed the importance of recognising and giving effect to the living nature of customary law and the power of communities to amend their customs and traditions to reflect change.¹⁰²

2.2.2 The parties

Given the contested and controversial nature of the case, the Court issued directives on the issues it wanted the parties to address and invited the Commission on Traditional Leadership Disputes and Claims, CONTRALESA, the CGE and the National House of Traditional Leaders to enter as *amici curiae*.¹⁰³ The Court wanted the parties to consider:

- ‘(a) Does the Royal family have the authority to develop the customs and traditions of the Valoyi community so as to outlaw gender discrimination in the succession to traditional leadership?’**
- (b) In the course of developing the customs and the traditions of a community, does the Royal Family have the authority to restore the position of traditional leadership to the house from which it was removed by reason of gender discrimination even if this discrimination occurred prior to the coming into operation of the Constitution?’**
- (c) Are the provisions of the Traditional Leadership and Governance Framework Act, 2003 applicable to these proceedings?’**
- (d) If the provisions of the Traditional Leadership and Governance Framework Act, 2003 are applicable, is the dispute relating to the restoration of traditional leadership the kind of dispute that ought to be dealt with by the Commission as required by Section 21(1)(b) read with section 21(1)(b) of the Traditional Leadership and Governance Framework Act, 2003?’¹⁰⁴**

The discussion that follows, focuses only on the arguments regarding the relationship between gender and customary law.

¹⁰¹ Ibid para 7.

¹⁰² Albertyn ‘The stubborn persistence of patriarchy’ op cit note 24 at 168.

¹⁰³ Directions of the Constitutional Court dated 28 February 2007, case number: CCT 3/07.

¹⁰⁴ Id.

Shilubana stressed the importance of taking into account the living nature of customary law that recognised and acknowledged continual changes within a community.¹⁰⁵ She further argued that foreign nations, who had monarchies or traditional leaderships, had adapted their practices in relation to accession and allowed females to accede.¹⁰⁶ Accordingly, she maintained that there was no reason why a traditional community could not make its own decision in relation to its practices, except where the rule or practice would be inconsistent with the Constitution, which in this particular situation it was not.¹⁰⁷

Nwamitwa argued that the discrimination that ensued from the principle of primogeniture was fair and that the royal family did not have the authority to declare Shilubana chief.¹⁰⁸

2.2.3 The *amici curiae*

In responding to the directions issued by the Court, the CGE, the NMRW, and CONTRALESA applied for admission as *amici curiae* and were subsequently allowed to participate.

The Commission for Gender Equality:

In terms of its constitutional and legislative mandate and consistent with its focus on poor rural women, the CGE argued that it was ideally placed to assist the Court, as the matter raised important issues pertaining to the right to equality and customary law.¹⁰⁹ The CGE supported Shilubana and the application of living customary law, especially considering the historical context in which women had been excluded from political and juridical positions due to patriarchal norms, and the fact that the community itself decided to develop its customs to bring it in line with the Constitution.¹¹⁰ The CGE maintained that in these instances courts should defer, as

¹⁰⁵ Written submissions of the applicant, as drafted by Semenya (SC), Dlwathi and Mayet, case number: CCT 3/07 para 6.10.

¹⁰⁶ Ibid para 8; Shilubana specifically referred to Norway, the Netherlands, Britain, Denmark, Sweden and Japan.

¹⁰⁷ *Shilubana* op cit note 96 para 12.9.

¹⁰⁸ Ibid para 31.

¹⁰⁹ See the discussion of the CGE in chapter 2 above; application for admission as *amicus curiae* of the CGE, affidavit deposed to by Notemba Joyce Piliso-Seroke, case number: CCT 03/07 para 10-11.

¹¹⁰ Application for admission as *amicus curiae* of the CGE op cit note 109 para 16.3.

far as possible, to the customary authorities who themselves took the decision to develop their custom and practices to bring them in line with the Constitution.¹¹¹

The CGE indicated that the matter did not need to be decided solely in terms of customary law and the recognition of a lived rule. As the practice of male primogeniture was also inherently discriminatory, the matter could be decided simply by declaring the practice unconstitutional in terms of section 9(3) of the Constitution.¹¹²

The National Movement of Rural Women:

The NWRW also stressed the flexible nature of customary law, but provided a different perspective to the Court. It argued that the appointment of Shilubana as chief was the community practising its actual lived custom and not a development thereof, and that this practice had to be respected by the courts.¹¹³

The NMRW provided several examples of the appointment of women as traditional leaders at times when it suited the needs and circumstances of a community.¹¹⁴ The appointment of Shilubana as chief was thus consistent with the inherent nature of living customary law and did not reflect a need for developing it.¹¹⁵

The NMRW further argued that, if the Court found that a development of customary law did take place, it was done in terms of section 9(2) of the Constitution that shielded the decision from a challenge by Nwamitwa.¹¹⁶

The Congress of Traditional Leaders of South Africa:

CONTRALESA supported the use of the principle of male primogeniture as fair discrimination. According to it, not only women were possibly discriminated against but also younger brothers, elder brothers born out of wedlock and in communities where a maternal line was followed.¹¹⁷ They rejected the submissions advanced by

¹¹¹ Written submissions of the CGE, as drafted by Kameshni Pillay, case number: CCT 03/07 para 9.

¹¹² Ibid paras 50-55.

¹¹³ Written submissions of the NMRW, as drafted by Geoff Budlender & Richard Moultrie, case number: CCT 03/07 para 6.

¹¹⁴ Ibid para 6.2.4; see the examples provided for in paras 25-38.

¹¹⁵ Ibid para 6.2.5.

¹¹⁶ Ibid para 59; Section 9(2) of the Constitution states:

‘Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.’

¹¹⁷ Written submissions of CONTRALESA, case number: CCT 03/07 para 41.

the other *amici curiae* and supported a decision that would uphold the norms and values of traditional communities, refusing an application of what they described as western norms and values to African people.¹¹⁸

2.2.4 Decision by the Constitutional Court

What is noticeable about the judgment is the extent to which the Court referred to the arguments presented by the *amici curiae*. The Court summarised the arguments made by each *amicus* before it proceeded with a discussion of the relevant issues.¹¹⁹ The Court then considered what the proper approach should be to determine a rule of customary law and found that it would be necessary to consider the traditions of the specific community, taking into account the living nature of customary law.¹²⁰ The Court (similar to *Bhe*) stressed its difficulty in pinpointing living custom and noted that evidence in this regard was crucial.¹²¹ For the Court, a fine balance had to be sought between the acknowledgement of the flexible nature of customary law and the need for legal certainty, respect for vested rights and the protection of constitutional rights.¹²²

The Court again provided a lengthy discussion of the arguments presented by the NMRW,¹²³ and stated that they were indeed “attractive and persuasive”, but as Shilubana had argued, that there was a development of customary law, it was necessary to address the development of the rule.¹²⁴ Accordingly, the Court found that the community’s actions represented a development of customary law and that the contemporary practice of the community reflected a valid legal change which resulted in Shilubana’s appointment as chief.¹²⁵ Consequently, the appeal was upheld.

¹¹⁸ Ibid paras 11-12.

¹¹⁹ *Shilubana* op cit note 96 paras 33-40.

¹²⁰ Ibid paras 44-45.

¹²¹ Ibid para 46.

¹²² Ibid para 47.

¹²³ Ibid paras 61-64.

¹²⁴ Ibid paras 65-66.

¹²⁵ Ibid para 86.

2.2.5 Purpose and impact of the *amici curiae* submissions

It is clear from the judgment and amount of references to the *amici curiae*'s arguments that their participation had a substantial influence on the Court's reasoning.¹²⁶ The *Shilubana* facts, and the possibility of allowing women to become chiefs, resounded back to the Interim Constitution negotiations and the Court was very aware of the competitive views and the need to involve all the interested parties to ensure an equitable outcome, hence the invitation to participate as *amici curiae*. The Court presented a detailed summary of the *amici*'s arguments and throughout the judgment made reference to these arguments, showing particular interest in the arguments presented by the NMRW.¹²⁷ This attention to the *amici*'s arguments adds legitimacy and authority to the Court's judgment as it allows for the voices of those affected by its judgment to be heard, and in this instance, especially the voice of rural women.

Shilubana focused on equality as a value and how this value could and did influence a community's norms and practices rather than a claim based on unfair discrimination.¹²⁸ The Court's approach thus diffused possible tension between traditional leaders and women, as it was not a question whether the right to equality trumped the right to cultural practice, but rather whether a community is allowed to develop a customary rule to bring it in line with the Constitution.

This approach was supported by the *amici curiae*, especially the NMRW who referred to the application of actual lived custom and whose approach resonated with feminists who have called for an application of rules of living customary law and the operation of these rules within a constitutional framework.¹²⁹

Suggesting a more rights-based approach, the CGE attempted to shift the focus of the Court to gender discrimination.¹³⁰ Perumal describes the Court's failure

¹²⁶ For a discussion of the judgment and different viewpoints see Nomthandazo Ntlama "'Equality" misplaced in the development of the customary law of succession: Lessons from *Shilubana v Nwamitwa* 2009 2 SA 66 (CC)' (2009) 20 *Stell LR* 333; Obeng Mireku 'Customary law and the promotion of gender equality: An appraisal of the *Shilubana* decision' (2010) 10 *African Human Rights Law Journal* 515.

¹²⁷ *Shilubana* op cit note 96 paras 17-18, 33-40, 51, 61-66 and 87; for a discussion of the relevance and importance of the NMRW arguments see Drucilla Cornell 'The significance of the living customary law for an understanding of law: Does custom allow for a woman to be Hosi?' (2009) 2 *Constitutional Court Review* 395.

¹²⁸ Albertyn 'The stubborn persistence of patriarchy' op cit note 24 at 183.

¹²⁹ Himonga op cit note 20; Mbatha 'Reforming the customary law of succession' op cit note 20.

¹³⁰ Written submissions of the CGE op cit note 111 paras 48-55.

to engage directly with gender discrimination as a missed opportunity to ease the tension between cultural and gender equality rights and the loss of an opportunity to strengthen already set precedent that could have sent a clear message that:

'rules and practices that unfairly discriminate against women by relegating them to positions of subservience, dependence and lack of choice, should/ will not survive constitutional scrutiny.'¹³¹

Although a valid argument, and an argument followed by the Court in *Bhe*, one should view *Shilubana* within historical context and the balance that is necessary to give effect to the right to equality and, in the same breath, allow for the operation of customary law. When litigating in matters where a rule of customary law and the right to equality is at issue, one needs to respect the existence of customary law and the women who function within these systems and acknowledge that it is not always viable, for example, to question chieftainship as an inherent patriarchal structure, but rather to focus on achievable gains such as infusing current practices with constitutional values.¹³² The Court was also more open to these arguments as they extensively referred to the arguments presented by the NMRW, as opposed to those of the CGE. The judgment had a positive impact in that it found that a woman could be the chief of her community and indirectly affirmed the importance of gender equality within a customary framework.

Although the arguments of the *amici curiae* played an important role in the Court's deliberation process, it decided to abide by the parties', and specifically Shilubana's arguments, choosing safe ground, rather than the NMRW arguments that would have far reaching implications with regard to the understanding of the nature of customary law and the use of section 9(2) of the Constitution. The *amici curiae* in *Shilubana* were able to represent a multiplicity of voices and are testament that *amici curiae* participation:

'[c]an assert rights for vulnerable and marginalised members of a community in a manner that affirms both gender equality and cultural diversity, permitting the development and incorporation of constitutional and communal values.'¹³³

¹³¹ Perumal op cit note 19 at 108.

¹³² Interview Susannah Cowen, Legal Counsel *Shilubana* (29 November 2012).

¹³³ Alibertyn 'The stubborn persistence of patriarchy' op cit note 24 at 178.

2.3 A Constitutional Challenge to the Recognition of Customary Marriages Act: *Gumede v President of the Republic of South Africa (WLC as amicus curiae)*.¹³⁴

2.3.1 Contextual and factual background

The most significant and systematic reform of customary law after the advent of democracy was the enactment of the RCMA.¹³⁵ The Act was the first comprehensive piece of legislation to address gender and racial inequality concerning customary marriages.¹³⁶

Since the implementation of the Act, one of the areas of concern was the different proprietary consequences of marriages provided for reliant on when a customary marriage came into existence.¹³⁷ All customary marriages concluded after the commencement of the Act (15 November 2000) would be a marriage in community of property and loss.¹³⁸ The proprietary regimes of all marriages concluded before the commencement of the Act would be governed by customary law.¹³⁹

Gumede argued that these provisions discriminated unfairly against her on the grounds of race and gender.¹⁴⁰ Gumede was married in terms of customary law, well before the RCMA. When she sought a divorce from her husband she found that she was not entitled to any of the property that accrued during the marriage, as the customary law, specifically the KwaZulu Act on the Code of Zulu law 16 of 1985 and the Natal Code of Zulu law, determined that a husband, as head of a family, would be the sole owner of all family property.¹⁴¹

2.3.2 The parties

Gumede recognised that the main purpose of the RCMA was to protect women against discriminatory practices, hence the provision that allowed customary marriages, concluded after the RCMA, to be in community of property. However, for

¹³⁴ *Gumede v President of the Republic of South Africa* 2009 (3) SA 152 (CC) (hereinafter *Gumede*).

¹³⁵ Mbatha, Moosa & Bonthuys op cit note 28 at 161.

¹³⁶ Bekker & Van Niekerk op cit note 15 at 207.

¹³⁷ Likhapha Mbatha 'Reflection on the rights created by the Recognition of Customary Marriages Act' (2005) *Agenda* 42 at 43.

¹³⁸ Sec 7(2) of the RCMA; *Gumede* op cit note 134 para 10.

¹³⁹ Sec 7(1) of the RCMA.

¹⁴⁰ *Gumede* op cit note 134 para 1.

¹⁴¹ Natal Code of Zulu Law published in Proc R151 of 1987, Government Gazette No 10966; *Gumede* op cit note 134 para 11.

marriages concluded before the Act, discrimination could still be possible in terms of the applicable rules of customary law, thus rendering the protection afforded by the Act under-inclusive.¹⁴² She relied on the precedent set in *Bhe* that embraced the living nature of customary law and acknowledged that women could hold property, but stressed that the Natal codes, as official customary law, were incompatible with the Constitution, as they excluded women from benefiting from the matrimonial property scheme of the RCMA, the latter which applied to all marriages after its implementation.¹⁴³

Government, on the other hand, rejected her arguments and argued that the RCMA allowed for the application of the Divorce Act 70 of 1979 (hereinafter the Divorce Act), which sufficiently catered for women in Gumede's situation as it permitted a divorce court to order the transfer of property to the other spouse if it was just and equitable to do so.¹⁴⁴ It claimed that the matter differed from *Bhe* as the legislature had attempted to resolve the conflicts between the Bill of Rights and customary law through the RCMA, whereas in *Bhe* no legislative steps were taken.¹⁴⁵ Accordingly, government argued that the protection granted by the RCMA was sufficient and that the Constitution obliged courts to apply customary law when it was applicable.¹⁴⁶

In response Gumede argued that she would bear an unfair onus in having to persuade the divorce court that she was entitled to the marital property. She pointed to the fact that most customary wives did not have the resources to approach a court and to persuade it to make a fair distribution order.¹⁴⁷

¹⁴² Written submissions of the applicant, as drafted by Geoff Budlender, case number: CCT 50/08 para 4.

¹⁴³ Ibid paras 32-40.

¹⁴⁴ Sec 8(4)(a) of the RCMA provides that a court granting a decree for the dissolution of a customary marriage has the powers contemplated in sections 7, 8 and 9 of the Divorce Act and section 24(1) of the Matrimonial Property Act 88 of 1984; written submissions of the respondent, as drafted by V Soni (SC), case number: CCT 50/08 para 4.

¹⁴⁵ Written submissions of the respondent op cit note 144 para 81.

¹⁴⁶ *Gumede* op cit note 134 para 12.

¹⁴⁷ Written submissions of the applicant op cit note 142 paras 61-63.

2.3.3 *The amicus curiae*

The WLC applied to be admitted as *amicus curiae* since it had for several years dealt with the impact of customary law on the lives of women and children. It stressed its participation in *Bhe*, and maintained that in light of this history it was well placed to make submissions that would assist the Court in its deliberation process.¹⁴⁸

For the WLC, it was important for the Court to understand the disadvantaged position of the women to whom the RCMA applied, as it was of the opinion that Gumede did not sufficiently highlight this vulnerability, since she focused mainly on the ensuing unfair discrimination. The WLC focused on the group of women to whom the RCMA applied (mostly African women living in rural areas) and stressed that these women were marginalised and vulnerable and had been “historically and systematically subjected to discrimination on various and intersecting grounds.”¹⁴⁹

The WLC referred to several international and African regional human rights instruments, and indicated that the discrimination allowed by the RCMA was unfair.¹⁵⁰ Its main contention is summarised in the following statement:

‘To say to women in pre-Act marriages, these being black, mainly rural women who will tend to be older, that all other people (whether married under civil law or new customary marriages) deserve the protection of the Constitution and the right to equality, but they do not, fundamentally violate their dignity.’¹⁵¹

The WLC argued that the Court had to be mindful of the changing circumstances of migrant labour and urbanisation that had led to the disintegration of the extended family and subsequent extended support systems. These circumstances left women vulnerable to eviction and homelessness upon divorce.¹⁵² This vulnerability was

¹⁴⁸ Notice of motion to be admitted as *amicus curiae*, founding affidavit deposed to by Noluthando Ntlokwana, case number: CCT: 50/08 paras 9-18.

¹⁴⁹ Written submissions of the *amicus curiae*, as drafted by Susannah Cowen & Nobahle Mangcu-Lockwood, case number: CCT 50/08 para10.

¹⁵⁰ *Ibid* paras 21-35. Specifically they relied on sec 18 of the *African Charter on Human and Peoples Rights* (1981); sec 23 of the *International Covenant on Civil and Political Rights* (1966); sec 16 of the *Convention on the Elimination of Discrimination Against Women* (CEDAW) (1979); the *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa* (2003) and the *SADC Protocol on Gender and Development* (2008).

¹⁵¹ Written submissions of the *amicus curiae* op cit note 149 para 19.

¹⁵² *Id.*

much worse for older women who were further disadvantaged by apartheid due to restrictions on their education and freedom of movement.¹⁵³

Similar to the *amicus curiae* in *Bhe*, the WLC focused on the remedy it thought the Court should provide in order to protect as many women as possible. Its argument was that a workable remedy should consider the women who found themselves in polygynous unions:

'We were hoping the court would go further than it needed to and extend the remedy to women in polygynous marriages, or comment on their position obiter, which sets the scene for further law reform or litigation. This is because many women in South Africa are not in monogamous marriages. The law needs to develop in such a way as to ensure the equal treatment of women in polygynous marriages, and cases where there is both a civil and customary marriage, where there is a domestic partnership and a marriage (either customary or civil). In this regards, an expression that women are entitled to statutory remedies that are just and equitable would benefit many women.'¹⁵⁴

The remedy suggested by the WLC required property acquired by the parties to be held in community of property until a second marriage was concluded. Property acquired after a second or subsequent marriage, was to be divided in proportion to the respective contributions (both monetary and non-monetary) of the spouses to the respective marriages, in a manner that was deemed just and equitable by a court, taking into account the factors referred to in section 7(7) of the RCMA.¹⁵⁵

¹⁵³ *Id.*

¹⁵⁴ Interview Jennifer Williams, WLC (14 March 2013).

¹⁵⁵ Written submissions of the *amicus curiae* op cit note 149 para 54; sec 7(7) of the RCMA states: 'When considering the application in terms of subsection 6-

(a) the court must-

(i) in the case of a marriage which is in community of property or which is subject to the accrual system-

(aa) terminate the matrimonial property system which is applicable to the marriage; and

(bb) effect a division of the matrimonial property;

(ii) ensure an equitable distribution of the property; and

(iii) take into account all the relevant circumstances of the family groups which would be affected if the application is granted;

(b) the court may-

(i) allow further amendments to the terms of the contract;

(ii) grant the order subject to any condition it may deem just; or

(iii) refuse the application if in its opinion the interests of any of the parties involved would not be sufficiently safeguarded by means of the proposed contract.

2.3.4 Decision by the Constitutional Court

The Court approached the matter in terms of section 9 of the Constitution, as the parties did not call for the development of custom and as the RCMA was enacted to bring customary law in line with the Constitution.¹⁵⁶ The Court probably might have thought that preceding cases such as *Bhe* and *Shilubana* have dealt with the need to acknowledge the living nature of customary law, and that there was no need to repeat the relevant findings of those decisions. Therefore, the only question before the Court was whether the differentiation in terms of the RCMA resulted in unfair discrimination.

The Court found that the relevant provisions discriminated on the grounds of gender, as they discriminated between a husband and wife, as only wives were subjected to the unequal proprietary distribution, and, between different classes of women, as only “old” marriages were subjected to the proprietary consequences in terms of the codes.¹⁵⁷

The Court hinted at the arguments of the WLC and the relevant context stating “that the marital property system renders women extremely vulnerable by not only denuding them of their dignity but also rendering them poor and dependent.”¹⁵⁸ The Court rejected the argument that section 8(4) of the RCMA provided sufficient protection, as it would not always be cost effective to approach a court and the provision did not address the discrimination a party suffered during the course of a marriage.¹⁵⁹ Accordingly, the Court found the relevant provisions of the RCMA invalid as it discriminated on the grounds of gender.¹⁶⁰ The Court ordered that all customary marriages would be marriages in community of property and limited its retrospectivity to not affect marriages that had already been terminated.

The Court acknowledged the usefulness of the WLC’s submissions, with regards to the relevant international and regional instruments, and the vulnerability and position of the class of women affected by the RCMA. However, it found that its arguments in relation to pre-act polygynous unions should not form part of its decision and that, at most, the judgment could draw the attention of the legislature to

¹⁵⁶ *Gumede* op cit note 134 para 1 and 30.

¹⁵⁷ *Ibid* para 34.

¹⁵⁸ *Ibid* para 36.

¹⁵⁹ *Ibid* paras 41-45.

¹⁶⁰ *Ibid* para 49.

cure the possible *lacuna*.¹⁶¹ The proprietary consequences of polygynous unions would be regulated by customary law until Parliament intervened.¹⁶²

2.3.5 Purpose and impact of the *amicus curiae* submissions

Litigating in matters that pertain to custom and gender equality became much easier after the decisions in *Bhe* and *Shilubana*. Both decisions established the importance of, and adherence to, the principle of equality within a customary and cultural framework and paved the way for considering the importance and relevance of living customary law. With clear precedent, Gumede was able to directly challenge the official rules of customary law as unconstitutional, focusing mainly on the relevant discrimination, with the WLC who decided to enter as *amicus curiae* to assist the Court in focusing on the specific group of women. The WLC also decided to focus on a particularly vulnerable group within the general grouping, this being women in pre-act polygynous marriages.

The Court implemented an equality analysis and briefly acknowledged the vulnerability of women within customary marriages subjected to the Natal codes and the subsequent distinction in terms of the RCMA.¹⁶³ The Court specifically referred to the arguments presented by the WLC in three separate instances. First at the start of the judgment confirming their admission and their support for Gumede, secondly in a short summarising of their arguments, and thirdly, after the order which stated its reasons for not adopting the proposed remedy of the WLC in relation to pre-act polygynous marriages.¹⁶⁴

It could be argued that the WLC expected a positive response by the Court after its decision in *Bhe*, especially as *Bhe* in fact provided a remedy for women in polygynous marriages. The Court's response to the WLC's suggested relief was a disappointment, as it was willing in *Bhe* to extend the protection of the Intestate Succession Act to women in polygynous unions, a remedy argued for by the *amicus curiae* in that matter, but rather formalistically, in *Gumede*, left the matter for Parliament to consider.

¹⁶¹ Ibid para 55.

¹⁶² Id.

¹⁶³ Ibid para 36.

¹⁶⁴ Ibid see paras 5, 14, 55 and 56 respectively.

The Court might have been over-cautious in this regard not wanting to rock the boat by engaging in arguments with regard to polygyny as the constitutionality and acceptability of the custom have increasingly become an issue of debate in society.

When one reads the judgment it becomes clear that the contextual evidence presented by the WLC, which was absent in Gumede's pleadings with its focus on discrimination, assisted the Court in acknowledging the vulnerability of women in customary marriages. The Court focused on the patriarchal nature of the relevant Natal codes and the need for those entrenched values to change within a constitutional framework.¹⁶⁵ However, it is regrettable that the Court did not adopt the remedy as proposed by the WLC. The contention could be that the Court did not want to, on its own accord, change a democratically implemented piece of legislation which was highly regarded deeming this Parliament's responsibility:

'The Recognition Act was assented to and took effect well within our new constitutional dispensation. It represents a belated but welcome and ambitious legislative effort to remedy the historical humiliation and exclusion meted out to spouses in marriages which were entered into in accordance with the law and culture of the indigenous African people of this country. Past courts and legislation accorded marriages under indigenous law no more than a scant recognition under the lowly rubric of customary 'unions'.¹⁶⁶

This is where *Gumede* differs from *Bhe*, as *Bhe* dealt with colonial apartheid legislation which the Court did not hesitate to declare unconstitutional. *Gumede* set an important precedent concerning the equal treatment of wives in customary marriages, a precedent that was especially followed in the Court's next judgment concerning customary law.¹⁶⁷

¹⁶⁵ Ibid para 17.

¹⁶⁶ Ibid para 16 (footnotes omitted).

¹⁶⁷ See the *MM v MN and Another* 2013 (4) SA 415 (CC) (hereinafter *MM v MN*) judgment para 77 discussed below where the Court referred to the *Gumede* judgment in stressing the equal status and capacity of spouses.

2.4 Competing Narratives of Equality - Polygyny and Consent: *MM v MN* and *Another* (WLC; CGE and NMRW as amici curiae).

2.4.1 Contextual and factual background

When the RCMA was drafted, a contentious issue was the recognition of polygynous marriages, since it has been viewed as a patriarchal institution which provided men with access “to the sexual and reproductive and other services of several women, while wives in polygynous marriages have to share the material and emotional benefits provided by a single man.”¹⁶⁸ Research indicated that many women were against its legal recognition, with their main concerns relating to economic and tenure security when a husband entered into another marriage.¹⁶⁹ However, non-recognition was not really an option, as many women were in polygynous marriages and continued to enter into them for a range of reasons.¹⁷⁰

Feminists and organisations that worked in the area did not want the practice to be declared discriminatory and unconstitutional, but wanted to work towards incremental change and rights protection in order to find a balance between the respect of the rights to culture and to equality:

‘If we reject some institutions and label others as valid and acceptable, we fall into the trap of assuming that institutions essentially and intrinsically determine the justness of the practices within them. Just as we must recognise that western monogamous marriage does not guarantee equality, we cannot assume that polygamy inevitably leads to oppression.’¹⁷¹

A compromise was reached with the drafting of the RCMA as it extended protection to women and children that found themselves in these unions.¹⁷² The compromise was the serial division of estates that required a husband, who wanted to enter into a

¹⁶⁸ Mbatha, Moosa & Bonthuys op cit note 28 at 178; also see Bronstein op cit note 22 at 408; Felicity Kaganas & Christina Murray ‘Law, women and the family: The question of polygyny in a new South Africa’ (1991) *Acta Juridica* 116; Penelope E. Andrews ‘Who’s afraid of polygamy? Exploring the boundaries of family, equality and custom in South Africa’ (2009) 11 *Utah Law Review* 351.

¹⁶⁹ Albertyn & Mbatha ‘Customary law in the new South Africa’ op cit note 6 at 52.

¹⁷⁰ Mbatha, Moosa & Bonthuys op cit note 28 at 178.

¹⁷¹ Christina Murray ‘Is polygamy wrong?’ (1994) 10 *Agenda* 37 at 39.

¹⁷² Albertyn & Mbatha ‘Customary law in the new South Africa’ op cit note 6 at 54.

further customary marriage, to make an application to a court to approve a written contract that regulated the future matrimonial property systems of the marriages.¹⁷³

However, there were still many uncertainties, as the RCMA did not provide for the equal treatment of wives in polygynous marriages.¹⁷⁴ This was especially relevant with regard to consent, as the Act only required consent of the parties to the marriage and it was uncertain if consent of existing wives were required for the conclusion of a subsequent marriage.¹⁷⁵ The *MM v MN* matter came to focus on this specific issue, whether the consent of a first wife was necessary for the conclusion of a subsequent customary marriage and whether compliance with section 7(6) of the RCMA was a requirement for the validity of a subsequent customary marriage. The case raised interesting questions with regard to the equal treatment of wives versus equal treatment between husband and wife.

Mayelane, the first wife, was married to her husband in 1984 in terms of customary law. Upon her husband's death in February 2009, Mayelane approached the Department of Home Affairs to register her marriage for the administration of her husband's estate. She was informed that another wife, Ngwenyama, who allegedly entered into a customary marriage with her husband in 2008, had also applied for the registration of a marriage with her husband.¹⁷⁶ Both the wives disputed the validity of the other's marriage.

Mayelane applied to the High Court for an order to declare her customary marriage valid and Ngwenyama's null and void, on the basis that she did not consent to the second marriage, as required in Xitsonga custom.¹⁷⁷ The High Court granted both orders and determined the matter by interpreting and applying section 7(6) of

¹⁷³ Sec 7(6) of the RCMA specifically states:

'A husband in a customary marriage who wishes to enter into a further customary marriage with another woman after the commencement of this Act must make an application to the court to approve a written contract which will regulate the future matrimonial property system of his marriages.'

¹⁷⁴ Mbatha, Moosa & Bonthuys op cit note 28 at 179.

¹⁷⁵ Ibid; Sec 3 of the RCMA sets the requirements for a valid customary marriage and states:

'(1) For a customary marriage entered into after the commencement of this Act to be valid –

(a) The prospective spouses-

(ii) must be above the age of 18 years; and

(ii) must both consent to be married to each other under customary law; and

(b) the marriage must be negotiated and entered into or celebrated in accordance with customary law.'

¹⁷⁶ Facts as provided in the SCA judgment *MN v MM and Another* 2012 (4) SA 527 (SCA) paras 3-4.

¹⁷⁷ *MM v MN* op cit note 167 para 4.

the RCMA and not considering the consent issue.¹⁷⁸ The High Court interpreted the section to be peremptory, in that, if a husband failed to obtain court approval of a document that would regulate the proprietary consequences of the marriages then a subsequent marriage would be void.¹⁷⁹ Ngwenyama appealed the decision.

The SCA found that section 7(6) did not regulate the validity of a customary marriage but only its proprietary consequences.¹⁸⁰ The SCA confirmed the order of the High Court but also overturned the invalidity in relation to Ngwenyama's marriage. Mayelana appealed the latter part of the SCA decision to the Constitutional Court.

For the Constitutional Court, unlike the High Court and SCA, who only judged the matter according to an interpretation of section 7(6), the consent issue was crucial in adjudicating the matter and it issued directives requesting the parties to consider:

'(i) whether it was necessary for the applicant to lodge a cross-appeal to the Supreme Court of Appeal in view of the fact that she was the successful party in the High Court proceedings.

(ii) If no cross-appeal was necessary:

(a) whether the contrary finding of the Supreme Court of Appeal raises an issue that confers jurisdiction on this Court to determine the application for leave to appeal and, if leave is granted, the appeal;

(b) whether it is a requirement for the validity of a second or subsequent customary marriage that the consent of the wife of the first customary marriage had to be obtained; and, if so;

(c) whether the High Court should have found that the necessary consent was obtained.'¹⁸¹

It was only after all the parties filed their submissions, and the Court had benefit off all the arguments, that it again issued a set of directives that hinted towards the fact that it planned to ground its decision in the particular custom. The second set of directives requested:

¹⁷⁸ Ibid para 5.

¹⁷⁹ Ibid para 6.

¹⁸⁰ Id.

¹⁸¹ Directions of the Constitutional Court, dated 1 August 2012, case number: CCT 57/12.

‘1. The parties and the amici are invited to file statements by way of affidavit or affirmation on the issues described in paragraph 2 below. The statements must be lodged by 22 March 2013.

2. The above statements must address the following questions:

(i) under Tsonga customary law, is the consent of a first wife a requirement for the validity of a subsequent customary marriage entered into by that first wife’s husband;

(ii) if so –

(a) What are the requirements, if any, regarding the manner and form of the consent; and

(b) What are the consequences, if any, of the failure to procure the first wife’s consent or of any defects in relation to the manner or form of the consent?

3. The above sworn statements must have due regard to and adequately reflect authoritative sources of customary law, which sources may include writers on customary law, case law, testimony from traditional leaders and other expert evidence.¹⁸²

2.4.2 *The amici curiae*

The WLC and the CGE, together with the NMRW, applied to be admitted as *amici curiae* in the Constitutional Court. The WLC participated as *amicus curiae* in the SCA and argued that it could make a valuable contribution to the Constitutional Court specifically considering its litigation and *amici curiae* participation history in customary matters.¹⁸³

The CGE and NMRW, in a combined brief, maintained their interest in the matter as being that the promotion of the right to gender equality is fundamental to the CGE’s constitutional mandate and that the NMRW, as an advocacy organisation for women’s independent land, housing, inheritance and property rights, is directly in touch with women in rural communities who live in terms of customary law.¹⁸⁴

The Women’s Legal Centre:

The WLC focused on establishing equality between the different wives with regard to their lived realities and vulnerability as a group.¹⁸⁵ The WLC supported the SCA’s

¹⁸² Directions of the Constitutional Court, dated 25 February 2013, case number: CCT 57/12.

¹⁸³ Written submissions of the WLC, as drafted by Susannah Cowen & Nomzamo Mji, case number: CCT 57/12.

¹⁸⁴ Notice of motion to be admitted as *amici curiae* of the CGE and NMRW, affidavit deposed to by Mfanozelwe Shoji, case number: CCT 57/12 paras 15-16.

¹⁸⁵ Notice of motion to be admitted as *amicus curiae* of the WLC, affidavit deposed to by Jennifer Lynn Williams, case number: CCT 57/12 para 4.

decision and was critical of the Constitutional Court's decision to focus on consent.¹⁸⁶ Before the Court issued its second set of directives, the WLC argued in its submissions, that the issue of consent was an issue of custom, and that there was not sufficient information before the Court to establish or develop the applicable customary rules.¹⁸⁷

The WLC further argued that it was not just the existence of a consent requirement that had to be established under customary law, but also the "contours of a consent requirement".¹⁸⁸ This would mean that the Court would have to view consent within the context that women do not have an equal bargaining position in relationships, as well as a range of other questions such as, what does consent mean; express consent or would tacit consent suffice?; what must the consent relate to?; is consent to polygyny enough or must it relate to a particular individual and her family?; should consent be given at the time of the subsequent marriage or could it be procured earlier?¹⁸⁹ The WLC argued that even if the Constitutional Court were to remit the matter back to the High Court to establish custom, it would not yield great certainty for women and would be a very slow process in securing rights protection for all the women concerned.¹⁹⁰

For the WLC, one of the most important questions was what the consequences of a subsequent marriage would be if it was concluded without the necessary consent. Would the marriage be void from the start or would it be a ground for nullification of the marriage, and then, what patrimonial consequences would follow?¹⁹¹

The WLC attempted to construct a remedy that would best protect all the parties in the relevant circumstances. They argued that the appropriate route would be to treat marriages without consent as voidable rather than void.¹⁹² A second marriage would thus be voidable once knowledge of this marriage comes to light, and it would be voidable from the date of a court's order.¹⁹³ They conceded that it might violate the rights of women in second marriages, but that at least it would not

¹⁸⁶ Ibid para 34.

¹⁸⁷ Written submissions of the WLC op cit note 183 para 35.

¹⁸⁸ Id.

¹⁸⁹ Ibid para 35.1.

¹⁹⁰ Ibid para 38.

¹⁹¹ Ibid para 35.2.

¹⁹² Ibid para 51.

¹⁹³ Id.

be invalid from the start.¹⁹⁴ Furthermore, that if (as it was in this case) the knowledge of a subsequent marriage only came to light when a husband died, the second marriage would continue to be valid, but that it did not mean that the first wife was without recourse as the Master would have a discretion and the right to refer a relevant dispute to a magistrate or traditional leader.¹⁹⁵

After the Court issued its second set of directives and it was clear that it planned to ground its decision within the particular custom, the WLC filed an expert affidavit by an elder and advisor to traditional leaders.¹⁹⁶ Mr Mayimele stated that a first wife may be informed of a subsequent decision but that the husband makes the decision to marry again.¹⁹⁷

The Commission for Gender Equality and the National Movement of Rural Women:

The CGE and NMRW believed that the questions that had to be answered revolved around the establishment of specific rules of living custom and allowing these to be applied, and if necessary, developed, to bring them in line with the Constitution. They argued that customary law should only be developed once a court had a clear understanding of the content of the custom it intended to develop and that the matter should therefore be remitted to the High Court to re-consider the relevant custom.¹⁹⁸

In response to the Court's second directives, the CGE and NMRW filled a range of affidavits, in which they directly consulted with members of the Xitsonga community. These affidavits described the law and practices that relate to polygyny in that culture.¹⁹⁹ In contrast to the evidence provided by the WLC, all the affidavits confirmed that consent was a requirement in the conclusion of subsequent marriage in Xitsonga custom.²⁰⁰

¹⁹⁴ Ibid para 52.

¹⁹⁵ Ibid para 54. In this regard they referred to section 5 of the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009.

¹⁹⁶ Affidavit of Hlanganani Hamilton Mayimele filed on behalf of the WLC, case number: CCT 57/12.

¹⁹⁷ *MM v MN* op cit note 167 para 56.

¹⁹⁸ Written submissions of the CGE & NMRW, as drafted by Tembeka Ngcukaitobi & Michael Bishop, case number: CCT 57/12 para 10.2.

¹⁹⁹ The affidavits included affidavits by Mbhazima Surprise Bungeni; Mamaila Rikhotso; Mkhathshane Daniel Shiranda and Khazamula Isaac Nkanyani. They also commissioned an expert, Dr Mabalana Mhlaba to provide his opinion on the issues raised by the Court; see the filling sheet of the CGE & NMRW in response to the Court's directions dated 25 February 2013, case number: CCT 57/12.

²⁰⁰ See the Court's summary of the affidavit evidence in *MM v MN* op cit note 167 paras 55-59.

2.4.3 Decision of the Constitutional Court

With the Court's directives, it was clear that the case dealt with the manner in which the content of customary law should be established and if found necessary, developed, to give effect to the rights in the Bill of Rights.²⁰¹ The decision in *MM v MN* is an important follow-up on the *Bhe* and *Shilubana* decisions, where the Court, although it acknowledged the importance of the living nature of customary law, expressed its concern in establishing its content.²⁰²

The Court confirmed the SCA's decision that the RCMA did not prescribe any consent requirements for a valid second or subsequent customary marriage, and followed the NMRW's arguments that it was necessary to determine the content of custom in this case, which justified its call for further evidence in this regard.²⁰³

The Court greatly relied on the affidavits filed by the *amici curiae*, especially those of the CGE and NMRW, in establishing whether Xitsonga custom prescribed consent.²⁰⁴ As most of the affidavits indeed required consent of the first wife, the Court accepted the evidence with regard to the different opinions, as nuance and accommodation, rather than contradiction.²⁰⁵

The Court then proceeded to consider the relevant evidence within the constitutional framework of equality and dignity.²⁰⁶ Unlike the WLC, who focused on equality between the different wives and their equal treatment, the Court focused on equality between husband and wife:

'Are the first wife's rights to equality and human dignity compatible with allowing her husband to marry another woman without her consent? We think not. The potential for infringement of the dignity and equality rights of wives in polygynous marriages is undoubtedly present. First, it must be acknowledged that "even in idyllic pre-colonial communities, group interests were framed in favour of men and often to the grave disadvantage of women and children." While we must accord customary law the

²⁰¹ The majority judgment was delivered by Froneman J, Khampepe J and Skweyiya J with Moseneke DCJ, Cameron J and Yacoob J concurring; *MM v MN* op cit note 167 para 1.

²⁰² *Bhe* op cit note 27 para 87; *Shilubana* op cit note 96 para 36.

²⁰³ *MM v MN* op cit note 167 para 45; notice of motion to be admitted as *amici curiae* of the CGE & NMRW op cit note 184 para 35.12.

²⁰⁴ *MM v MN* op cit note 167 para 18. The Court specifically stated:

'The *amici* provided invaluable submissions throughout the proceedings before this Court. In particular, the *amici's* submissions in response to this Court's request for further information regarding Xitsonga customary law have been crucial to the outcome of this case.'

²⁰⁵ *MM v MN* op cit note 167 paras 54-61.

²⁰⁶ *Ibid* paras 62-69.

respect it deserves, we cannot shy away from our obligation to ensure that it develops in accordance with the normative framework of the Constitution. Second, where subsequent customary marriages are entered into without the consent of the first wife, she is unable to consider or protect her own position. She cannot take an informed decision on her personal life, her sexual or reproductive health, or on the possibly adverse proprietary consequences of a subsequent customary marriage. Any notion of the first wife's equality with her husband would be completely undermined if he were able to introduce a new marriage partner to their domestic life without her consent.²⁰⁷

Despite finding that Xitsonga custom in fact required consent, the Court found that the particular custom nevertheless should be developed in light of the principles of equality and dignity in order to unequivocally require consent.²⁰⁸ Ngwenyama's marriage was found to be null and void, and to protect parties in existing customary marriages, the requirement was to be prospective and made known to the public through the Houses of Traditional Leaders and the Minister of Home Affairs.²⁰⁹

Zondo J and Jafta J (with Mogoeng J and Nkabinde J concurring) in separate minority judgments criticised the majority, specifically in relation to the issuing of the second set of directives and the call for further evidence.²¹⁰

2.4.4 Purpose and impact of the amici curiae submissions

MM v MN, in no uncertain terms, confirmed the importance of customary law within our constitutional framework. For the first time, the Court established the living content of custom, which it specifically refrained from doing in *Bhe* and *Shilubana*, and developed the same to ensure its constitutional compliance. The *MM v MN*

²⁰⁷ Ibid paras 71-72 (footnotes omitted).

²⁰⁸ Ibid para 75.

²⁰⁹ Ibid para 89.

²¹⁰ Zondo J, argued that the Court should not have called for additional evidence and that the matter could have been dealt with on the records from the High Court and SCA. He found that the Court, as appellate court, was not in a position to deal with contradictory evidence as clearly presented in the affidavits. For Zondo J, the evidence tendered by Mayelane and the affidavit from her uncle pertaining to Xitsonga custom was sufficient in establishing that consent was a requirement and that Ngwenyama failed to prove that she entered into a customary marriage with the deceased. According to him there was no valid marriage between Ngwenyama and the deceased, irrespective of whether one would take into account the additional affidavits; see *MM v MN* op cit note 167 paras 90-131.

Jafta J asserted that development was not needed as this was never argued by any of the parties and fell outside the scope of the case. For Jafta J, there were no compelling reasons, especially when not argued by the parties, why the Constitutional Court should sit as a court of first and last instance considering the development of customary law. In agreeing with Zondo J, Jafta J found that Ngwenyama failed to prove that a customary marriage existed between her and the deceased and that Xitsonga custom required consent which rendered development unnecessary; see *MM v MN* op cit note 167 paras 132-157.

judgment can be seen as a victory to those who advocated a custom-based approach as opposed to the rights-based approach in litigating customary matters. The case was a difficult matter to adjudicate, because it seemingly pitted two women, each equally vulnerable and disadvantaged, against each other. It was this vulnerability that the WLC wanted to focus on, since for them, this class of women should be accorded the proper protection and respect of their rights as contemplated by the Constitution.²¹¹

For the NMRW, equality had to be ascertained in context of the relevant custom and if necessary developed, to comply with constitutional norms. The Court criticised the WLC's arguments in relation to the establishment of the "contours" of consent, which had its basis in the law of contract, stressing that the focus had to be customary law.²¹² It adopted the NMRW's approach in establishing the relevant living custom and developing it to bring it in line with the Constitution.

However, when considering the development of Xitsonga custom it focused on the equality between husband and wife and not the equal treatment of the relevant wives. This approach has been criticised, as it has left the second wife powerless, and unable to live her life with dignity and respect.²¹³ Although the WLC's approach was rights-based in relation to the law of contract, it still had valuable arguments in relation to balancing the rights of both wives, which according to them, was a constitutional imperative.²¹⁴

The *MM v MN* decision might have been averted if the Court adopted the remedy as suggested by the WLC in *Gumede* namely that, awaiting law reform on the topic, the property of parties in a customary marriage be held in community of property and upon the conclusion of another marriage all property acquired after the subsequent marriage be divided in proportion to the respective contributions (both monetary and non-monetary) of the spouses to the respective marriages. This

²¹¹ Notice of motion to be admitted as *amicus curiae* of the WLC op cit note 185 para 12.

²¹² *MM v MN* op cit note 167 para 49 where the Court stated: 'courts must understand concepts such as "consent" to further customary marriages within the framework of customary law, and must be careful not to impose common-law or other understandings of that concept. Courts must also not assume that such a notion as "consent" will have a universal meaning across all sources of law.'

²¹³ Pierre De Vos 'Between a rock and a hard place for wives in polygynous marriages' available at: <http://constitutionallyspeaking.co.za/between-a-rock-and-a-hard-place-for-wives-in-polygynous-marriages/> (last accessed 24 June 2013).

²¹⁴ Notice of motion to be admitted as *amicus curiae* of the WLC op cit note 185 para 28.

remedy might have provided Mayelane with the security she wanted and could have averted the legal challenge.

The Court, in issuing its second set of directives, prevented the remittance of the matter back to the High Court and also established a unique role for the *amici curiae* in providing relevant evidence pertaining to lived custom. The *amici curiae*, specifically the CGE and NMRW, filed most of the affidavit evidence, which confirmed the *amici's* role of being of assistance to the Court and established a future role for *amici curiae* participation in customary matters.

It is interesting to note that the arguments that pertained to the importance of living customary law and its development were first argued by the CGE as *amicus curiae* in *Bhe*, which became the minority opinion in that judgment, and which had now become the majority opinion of the Court in *MM v MN*. This clearly confirms the role of *amicus curiae* participation as judicial sensitizer and although it might not influence a majority decision, it might influence a minority finding which could influence the way in which a court deliberates in future.

3 CONCLUDING REMARKS

‘Cultures are inherited ideas, beliefs and values. They provide a shared basis for social behaviour and are transmitted and reinforced over time. But cultures are man-made, and they serve the interests of particular groups. They also change continually. And they can be challenged.’²¹⁵

The cases that have been discussed have unequivocally confirmed the place of living customary law in the South African legal system and specifically women’s rights to belong to a cultural community, as long as the relevant cultural norms adhere to the Constitution and its ensuing rights.

The Constitutional Court in the above decisions grappled with key issues of custom and culture in relation to the right to equality and non-discrimination. In *Bhe* and *Shilubana*, the litigation was very much focused on establishing the role of customary law within the South African legal framework, and the importance of acknowledging the living nature of this body of law as opposed to its official codified status. The judgments acknowledged the dynamic nature of society and the need for the legal system to take account of the true, living, adaptable nature of customary law.²¹⁶ Very important, is the way in which the judgments affirmed women’s rights to equality under customary law and the community’s rights to develop their custom to take account of this.

From the start it is clear that there were two schools of thought on how courts should approach matters concerning the operation of customary law within a constitutional framework. These schools are directly related to feminist debate on the topic.

The first school (supported by the CGE and Justice Ngcobo in *Bhe*; the NMRW in *Shilubana* and the CGE and NMRW in *MM v MN*) is that courts, when confronted with a matter pertaining to customary law, should establish what the actual living custom is, enquire as to whether that custom complies with constitutional norms and if it does, not to develop the particular custom. Although the emphasis is on custom, it is custom operating within a constitutional framework. Here, there would not be a blanket decision that is applicable to everyone, but only

²¹⁵ Mbatha ‘Reforming the customary law of succession’ op cit note 20 at 273.

²¹⁶ *Bhe* op cit note 27 para 86.

those that practice a specific custom, allowing customary law to develop alongside the Constitution.

The second school of thought (supported by the majority and the WLC in *Bhe*, the CGE in *Shilubana* as well as the WLC in *MM v MN*) points to the evidentiary difficulty in establishing living custom and that the Court should, considering the vulnerability of the parties, provide immediate relief and establish legal certainty pertaining to specific rights claims. This position acknowledges the importance of living custom, although it is not applied.

The *amici curiae* that litigated in the matters could also be classified as falling within these two schools. The WLC, acting as applicant or *amicus curiae*, supported a rights-based approach and remedy that would protect as many women as possible who live under customary law. This could be ascribed to its own outcome based approach to litigation to ensure that as many women as possible benefit from a single decision.²¹⁷

The NMRW supported a custom-based approach, as the organisation represented women who lived under customary law and who felt strongly about the protection and development of their culture. The CGE, complying with its constitutional mandate, was more or less neutral following a custom-based approach in *Bhe* and *MM v MN*, where they supported the NMRW, and a rights-based approach in *Shilubana*. Prior to the *MM v MN* matter and the Constitutional Court's unequivocal support for the custom-based approach, these diverging schools led the *amici curiae* to adopt a specific litigation strategy. This strategy focused on the relevant remedy that it thought the Court should grant that would, in acknowledging the living nature of customary law, provide relief to as many women possible.

The remedy advocated by the CGE in *Bhe*, and adopted to an extent by the Court, afforded protection to women in polygynous unions and extended real rights protection to a vulnerable group of women in customary law. In *Gumede* and *MM v MN*, the WLC proposed specific remedies in an attempt to assist the Court in giving a judgment that would be sensitive to the nature of customary law, but that would also extend constitutional protection to an identified vulnerable group.

Although divergent, the general consensus between the different approaches has been the acknowledgment that, although it is possible to approach these matters

²¹⁷ Ruth B. Cowan 'The Women's Legal Centre during its first five years' (2005) *Acta Juridica* 273 at 280.

solely within an equality and discrimination framework, there is a constitutional mandate to locate these arguments within customary law and to respect the communities who practice these cultures, an acknowledgment that is important to enable the Court to reach an equitable outcome.

In litigating these matters, the *amici curiae* have especially applied feminist method. They illustrated how the substance of law, specifically customary law, has been used to suppress the perspectives of women and that the system needed to change.²¹⁸ They employed “feminist practical reasoning” in seeking to identify perspectives that have not been represented by the dominant culture in the acknowledgement of the importance of living custom, recognising the possibilities of new situations and the importance of not limiting women’s experience to prescribed (western) categories.²¹⁹

A further point of interest is the extent to which the parties and the *amici curiae* relied on the equality test as laid down in *Harksen v Lane*.²²⁰ In employing a feminist litigation strategy, the WLC as applicant in *Bhe*, and as *amicus curiae* in *Gumede*, has been able to address the rigidity of the test and through their participation incorporate context and disadvantage, to ensure that the Court, when itself applies the test, does take account of these factors.²²¹ This clearly indicates the relevance and importance of litigating from a feminist viewpoint, and establishes the relevance of *amicus curiae* participation in this regard, to ensure that the application of seemingly neutral law and precedent takes account of the position of women and ensures that the courts are aware of this, thus allowing for a more substantive approach. As feminist litigators we should work on the expansion of seemingly set law to ensure a transformative approach to equality that will actually remedy disadvantage.²²²

²¹⁸ See the feminist methods discussed in chapter 2 based on a scholarly article by Katharine T. Bartlett ‘Feminist legal methods’ (1990) 103 *Harvard Law Review* 829 at 836.

²¹⁹ Bartlett op cit note 218 at 858.

²²⁰ See the test as discussed in Chapter 1 fn 68.

²²¹ The test has been criticized for its rigidity, see for example Cathi Albertyn & Beth Goldblatt ‘Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality’ (1998) 14 *SAJHR* 248 at 262.

Albertyn, has warned that the complex and multiple forms of discrimination found in South Africa requires a flexible equality test “so that courts can respond to different forms of disadvantage, stigma and vulnerability, to differing claims of recognition and redistribution and to competing claims over power, status and resources.” See Albertyn ‘The stubborn persistence of patriarchy’ op cit note 24 at 186 in this regard.

²²² Albertyn ‘The stubborn persistence of patriarchy’ op cit note 24 at 185.

In future the *amici curiae*, that participate in customary matters, should focus on supporting and acquiring research into living custom as this is where future *amici curiae* briefs could play an important role in placing the necessary evidence of living custom before the Court.

CHAPTER 5

1 WOMEN'S VULNERABILITY, CHOICE AND THE CONSTITUTIONAL COURT

South African society is characterised by poverty and inequality, with the poorest households being headed by women, often in rural areas.¹ This poverty and women's subordinate economic position create and reinforce a lack of bargaining power that is reflected in the choices women make and the relationships they enter into.²

This chapter identifies sex work,³ and domestic life partnerships (between heterosexual couples), as areas where women's vulnerability is particularly pertinent. Existing discriminatory rules and legal exclusion are justified by the fabrication that women "choose" to be subject to their detrimental circumstances.⁴ Feminists have long argued that the law and courts rely on a liberal interpretation of choice in excluding women from legal protection. Bonthuys describes this liberal approach to choice as:

'People who make choices are viewed as isolated individuals who act as rational agents to maximize their own interests in the public sphere. This means that whatever they choose must be good for them and that they should therefore suffer the consequences of their choices. The circumstances that structure choices open to them and the social, economic and cultural conditions that influence their choices are regarded as "private" and therefore legally irrelevant.'⁵

Rather than acknowledging the constrained circumstances in which women have to make choices, the law places the responsibility of negative consequences of choice

¹ Catherine Albertyn & Elsje Bonthuys 'Introduction' in Elsje Bonthuys & Catherine Albertyn (eds) *Gender, law and justice* (Juta 2007) 1 at 7.

² Brigitte Clark & Beth Goldblatt 'Gender and family law' in Elsje Bonthuys & Catherine Albertyn (eds) *Gender, law and justice* (Juta 2007) 195 at 199.

³ The term sex work and prostitution (the term chosen by the courts) is used interchangeably to refer to the exchange of sexual services for money.

⁴ Elsje Bonthuys 'Institutional openness and resistance to feminist arguments: The example of the South African Constitutional Court' (2008) 20 *CJWL* 1 at 23.

⁵ *Ibid* 24 (footnotes omitted).

on the woman herself.⁶ South African feminists and organisations have relied on the underpinnings of socialist feminism to challenge the liberal understanding of choice in focusing on the social and economic context and relationships which influence and structure individual behaviour and choice.⁷

When the cases of *S v Jordan*,⁸ (decriminalisation of prostitution) and *Volks NO v Robinson*,⁹ (extension of the Maintenance of Surviving Spouse Act 27 of 1990 to include domestic life partnerships) came before the Constitutional Court, feminists and organisations were acutely aware of the need to focus the Court's attention on the nature of women's vulnerability, and the need to recognise women's agency and choice in these areas, in addressing inequality and disadvantage.

The discussion that follows focuses on these two decisions and the *amici curiae* who intervened to represent the categories of vulnerable women. As background, a brief outline on the different feminist responses to sex work and domestic partnerships are given in relation to the understanding of the South African position.

⁶ Id; Catherine Albertyn 'Equality' in Elsje Bonthuys & Catherine Albertyn (eds) *Gender, law and Justice* (2007, Juta) 82 at 104.

⁷ Karin Van Marle & Elsje Bonthuys 'Feminist theories and concepts' in Elsje Bonthuys & Catherine Albertyn (eds) *Gender, law and justice* (Juta 2007) 15 at 32.

⁸ *S v Jordan and Others* 2002 (6) SA 642 (CC) (hereinafter *Jordan*).

⁹ *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC) (hereinafter *Volks*).

2 CASE DISCUSSIONS

2.1 Decriminalising Prostitution: *S v Jordan and Others (Sex Workers Education and Advocacy Taskforce (SWEAT) and the Commission for Gender Equality (CGE) as amici curiae).*

2.1.1 Feminist interpretations of sex work

An on-going debate within scholarly and legal frameworks has been whether to decriminalise sex work as most countries, including South Africa, criminalise the selling of sex. Questions have been asked whether legal protection could empower women and decrease the vulnerability associated with this work, since it is accepted that women engaged in sex work are vulnerable to abuse, exploitation and stigmatisation by clients, police, pimps and society in general.¹⁰

Feminists have held divergent views about the sex industry, specifically the decriminalisation of sex work. Liberal feminists have argued that sex work should be viewed as a legitimate form of work and that women have a right to choose to engage in sex work, as they do in any other work, therefore affording them the same rights as any other workers.¹¹ This falls within the general liberal feminist acceptance “of the ideal of autonomous individuals who are free to make choices that benefit themselves” within an equality framework.¹² Liberal feminists demand the decriminalisation of prostitution and argue that if criminal sanctions were removed, it would be more likely to be accepted as a legitimate form of work. This could address vulnerabilities such as police brutality and harassment, as well as the placement of sex workers within the protective ambit of labour law.¹³ Therefore, the focus for liberal feminists is the acknowledgment of choice, the reduction of harm and the development of minimum working standards.

Radical feminists argue that women are never free to make sexual choices and that “prostitution (sex work as a term is rejected) is an extreme form of

¹⁰ Catherine Albertyn, Lillian Artz, Helene Combrinck, Shereen Mills & Lorraine Wolhuter ‘Women’s freedom and security of the person’ in Elsje Bonthuys & Catherine Albertyn (eds) *Gender, law and justice* (Juta 2007) 295 at 355.

¹¹ Id; South African Law Reform Commission *Sexual offences: Adult prostitution: Issue paper 19* Project 107 (2002) 56.

¹² Van Marle & Bonthuys op cit note 7 at 32.

¹³ South African Law Reform Commission *Sexual offences: Adult prostitution: Issue paper 19* op cit note 11 at 58.

exploitation and subordination of women by men.”¹⁴ Radical feminism rejects the claim that sex work is a valid employment opportunity as it devalues women and is the ultimate form of male domination over women. It thus opposes legal regulation to grant women greater rights to do sex work, but rather favours rights entitlements to protect women and reduce their subordination.¹⁵ For radical feminists:

‘Prostitution isn’t like anything else. Rather everything else is like prostitution it is the model for women’s condition, for gender stratification and its logical extension sex discrimination. Prostitution is founded on enforced sexual abuse under a system of male supremacy that itself is built along a continuum of coercion-fear, force, racism and poverty. For every real difference between women, prostitution exists to erase our diversity, distinction and accomplishment while reducing us to meat to be bought, sold, traded, used, discarded, degraded, ridiculed, humiliated, maimed, tortured, and all too often murdered for sex.’¹⁶

Radical feminists reject the liberal idea of choice arguing that women are directly or indirectly coerced into prostitution.¹⁷ Socialist and critical feminists have also questioned the liberal reliance on choice, as for them it “disregards the social contexts and relationships which influence and structure individual behaviour.”¹⁸ However, socialist and critical feminists also criticise the radical approach:

‘Although ‘abolitionist’ and ‘pro-sex worker’ feminists clearly hold divergent moral and political understandings of prostitution, it seems to me that the view of power implicit in both lines of analysis is equally unidimensional. The former offers a zero-sum view of power as ‘commodity’ possessed by the client (and/or third party controller of prostitution) and exercised over prostitutes, the latter treats the legal apparatuses of the state as the central source of a repressive power that subjugates prostitutes.

¹⁴ Albertyn, Artz, Combrinck, Mills & Wolhuter op cit note 10 at 355; the radical feminist perspective is specifically advocated for by Catharine MacKinnon and Andrea Dworkin. See for example Catharine MacKinnon ‘Prostitution and civil rights’ (1993) 1 *Mich J of Gender & L* 13; Andrea Dworkin ‘Prostitution and male supremacy’ (1993) 1 *Mich J of Gender & L* 1.

¹⁵ South African Law Reform Commission *Sexual offences: Adult prostitution: Issue paper 19* op cit note 11 at 60.

¹⁶ Sarah Wynter ‘Whisper: Women hurt in systems of prostitution engaged in revolt’ in Frederique Delacoste & Priscilla Alexander (eds) *Sex work: Writings by women in the sex industry* (1987) as cited in Nicole Bingham ‘Nevada sex trade: A gamble for the workers’ (1998) 10 *Yale Journal of Law and Feminism* 69 at 81.

¹⁷ Albertyn, Artz, Combrinck, Mills & Wolhuter op cit note 10 at 356.

¹⁸ Van Marle & Bonthuys op cit note 7 at 32.

However, the power relations involved in prostitution are far more complicated than either of these positions suggest.¹⁹

For socialist and critical feminists “prostitution as a social practice is embedded in a particular set of social relations which produce a series of variable and interlocking constraints upon action”.²⁰ Both locate prostitution within this particular set of socio-economic conditions which questions the reliance on individual choice and calls for an understanding of choice within the socio-economic circumstances that women find themselves in.²¹

The South African approach to sex work has mostly been influenced by socialist and critical feminism and sex work has been linked to wider social and economic relations, considering our high levels of poverty and inequality, rather than focusing on individual choice.²² However, a liberal approach is also supported as decriminalisation is seen as an option to address the vulnerability of sex workers by providing a “safer” work environment.

In the late nineties, the South African government realised that their approach to sex work needed to change.²³ On provincial level, in 1996, the Gauteng Ministry of Safety and Security drafted a policy document that provided the provincial cabinet with statistics on how resources were utilised in policing sex work.²⁴ The argument was that resources could be better spent in other areas and that policing sex work should not be a priority.²⁵ On a national level, the Department of Justice and Constitutional Development’s 1999 Gender Policy Statement mentioned the decriminalisation of sex work as an international obligation in terms of the Convention on the Elimination of All forms of Discrimination Against Women (CEDAW).²⁶ At the same time, the South African Law Reform Commission (SALRC)

¹⁹ Julia O’Connell Davidson ‘Prostitution, power and freedom’ in Jeffrey Weeks, Janet Holland & Matthew Waites (eds) *Sexualities and society* (Blackwell Publishing Inc 2003) 204 at 205.

²⁰ Ibid 206.

²¹ Albertyn, Artz, Combrinck, Mills & Wolhuter op cit note 10 at 356.

²² Ibid 358.

²³ South African Law Reform Commission *Sexual offences: Adult prostitution: Issue paper 19* op cit note 11 at 36.

²⁴ Janet M. Wojcicki ‘The movement to decriminalize sex work in the Gauteng Province, South Africa, 1994-2002’ (2003) 46 *African Studies Review* 83 at 87.

²⁵ Ibid.

²⁶ The Department of Justice and Constitutional Development’s *Gender Policy Statement* (1999) drafted under the leadership of Deputy-Minister M.E Tshabala-Msiamang, available at: <http://www.justice.gov.za/policy/gender/genderPOL.htm> (last accessed 31 January 2013) 15-16.

was tasked with its own investigation in reforming the area of law that started as an investigation on sexual offences by and against children, but expanded into a project concerning sexual offences against adults, including a project on adult prostitution.²⁷ The civil society organisation, the Sex Workers Education and Advocacy Task Force (SWEAT), strongly in favour of the decriminalisation of sex work, actively lobbied the SALRC.²⁸ These initiatives, combined with the SALRC process, created a positive framework for legislative change concerning sex work.

When the *Jordan* case was brought forward in early 2002, it came as a surprise to those working in the area, as they were satisfied that their engagement with the executive would lead to decriminalisation and there were no plans to litigate on the issue.²⁹ According to Albertyn, organisations working in the area did not believe that this was the ideal case and set of facts to decide the issue of decriminalisation, as Jordan's circumstances were not representative of the sex work trade in general, specifically the circumstances of poor outdoor sex workers.³⁰

However, as the case was already before the Constitutional Court, there was no choice but to participate as *amicus curiae* to attempt to provide the Court with the contextual evidence, clearly lacking in Jordan's arguments, and to ensure that all relevant voices were placed before the Court.³¹ In a disappointing judgment the Court found against decriminalisation. It conceded that decriminalisation was not constitutionally required despite the Court's progressive equality jurisprudence. The *Jordan* judgment suggested that there were limits to litigation to effect meaningful change for women.³²

²⁷ South African Law Reform Commission *Sexual offences: Adult prostitution: Issue paper 19* op cit note 11 at 27-28.

²⁸ Ibid; Albertyn, Artz, Combrinck, Mills & Wolhuter op cit note 10 at 356.

²⁹ Interview Catherine Albertyn, CALS (29 January 2013).

³⁰ Ibid; the case was brought by a brothel owner and a prostitute that was working in the brothel. The same sentiments were shared by the Women's Legal Centre (WLC) see Ruth B. Cowan 'The Women's Legal Centre during its first five years' (2005) *Acta Juridica* 273 at 287.

³¹ Interview Catherine Albertyn, op cit note 29.

³² Saras Jagwanth & Christina Murray 'Ten years of transformation: How has gender equality in South Africa fared?' (2002) 14 *CJWL* 255 at 284.

2.1.2 Factual background

Ellen Jordan, a brothel owner together with two of her employees, was arrested for contravening the Sexual Offences Act 23 of 1957 (hereinafter the Sexual Offences Act).³³ Jordan was charged with the keeping of a brothel; Brooderyk, the receptionist, for assisting in the management of a brothel and Jacobs, the sex worker, for committing an act of indecency for reward with a policeman (parties hereinafter collectively referred to as Jordan). Jordan argued that the relevant sections of the Sexual Offences Act were unconstitutional and requested the decriminalisation of prostitution and brothel-keeping.

The High Court concluded that the section criminalising prostitution was unconstitutional but held that the sections in relation to brothel-keeping were not. The declaration of invalidity against the sex work provision was sent to the Constitutional Court for confirmation and Jordan appealed the High Court's refusal to set aside the brothel provisions.³⁴ My specific focus is on the constitutionality of the sex work provision as it was the main point of contention.

2.1.3 The parties

Jordan based her challenge on the rights to privacy, equality and freedom of trade.³⁵ The most important arguments were made in relation to the right to equality, as Jordan argued that all sex workers were unfairly discriminated against on the basis of gender, given that only the acts of the sex workers (mostly women) were

³³ Sec 20(1)(aA) of the Sexual Offences Act states :

'Any person who has unlawful carnal intercourse, or commits an act of indecency, with any other person for reward, shall be guilty of an offence. Sec 2 of the act states that any person who keeps a brothel shall be guilty of an offence and sec 3 provides that certain persons would be deemed to keep a brothel including '(b) any person who manages or assists in the management of any brothel; (c) any person who knowingly receives the whole or any share of any moneys taken in a brothel.'

³⁴ *Jordan* op cit note 8 para 36. From the outset it should be noted that there was contending views whether the matter was to be heard in terms of the Interim or Final Constitution. The Interim Constitution was in force when the events that gave rise to the proceeding occurred. However, the High Court decided the matter in terms of the Final Constitution. Jordan in her argument relied on the provisions of the Final Constitution, although the Constitutional Court and some of the parties argued that the matter should be dealt with in terms of the Interim Constitution, as it was in force when the events occurred and that the provisions relied upon, specifically the equality provision, was not materially different from the equality provision in the Interim Constitution; see *Jordan* op cit note 8 paras 2-4.

³⁵ See sec 14, 9 and 22 of the Constitution of the Republic of South Africa, 1996 (hereinafter the Constitution). Jordan also argued that section 12 of the Constitution provided for a general right to liberty.

criminalised as opposed to those of the client (mostly men).³⁶ In terms of the right to equality before the law,³⁷ she asserted that sex workers were victimised since the stigma associated with sex work made it difficult for sex workers to lay charges of, for example, assault and rape.³⁸

The State's case emphasised the harm caused by prostitution. Arguments in relation to the decriminalisation of prostitution have often categorised prostitution as a harmless form of immorality that should not be punished, whilst others have argued that prostitution is inherently harmful and should be controlled.³⁹ According to the State, the range of social ills inherent to prostitution meant that it was reasonable for it to combat these ills by prohibition rather than regulation.⁴⁰ For the State, the choice to criminalise prostitution was a constitutionally permissible choice, although it conceded that it might not have been the only or most perfect choice (this argument was adopted by the majority of the Court). In defending its choice to prohibit, the State argued:

'The first is that the combat of the social ills of prostitution, is a legitimate and important state objective. It is permissible for the state to employ its legislative power to that end. The second is that there is no perfect cure for the social ills of prostitution. They may be addressed in different ways but all of them are imperfect. The state is in other words limited to a range of imperfect policy options. It is accordingly not helpful merely to point to imperfections in the means that parliament has chosen to combat the ills of prostitution.'⁴¹

The State countered Jordan's equality arguments by arguing that the prohibition was gender-neutral and that the offence could be committed by any person (both female

³⁶ Written submissions of the applicant, as drafted by C.R Jansen & N Janse van Nieuwenhuizen, case number: CCT 31/01 paras 29-32.

³⁷ Section 9(1) of the Constitution states:

'Everyone is equal before the law and has the right to equal protection and benefit of the law.'

³⁸ Written submissions of the applicant op cit note 36 para 45.

³⁹ South African Law Reform Commission *Sexual offences: Adult prostitution: Issue paper 19* op cit note 11 at 64.

⁴⁰ Written submissions of the State, as drafted by Wim Trengove (SC) & Alfred Cockrell, case number: CCT 31/01 para 5; also see paras 6-25 for the social ills referred to including: the encouragement of violent physical abuse; encouragement of trafficking in women and children; spreading sexually transmitted diseases; drug abuse and the encouragement of other crimes such as bribery, corruption, drug trafficking, assault, public nuisance, robbery and even murder.

⁴¹ Written submissions of the State op cit note 40 para 7.

and male prostitutes).⁴² The State supported a broad interpretation of the section which would criminalise both the prostitute and her customer and argued that, even if the Court did not follow a broad interpretation, a client could still be held guilty as an accomplice and could incur the same penalty.⁴³

In support of their contentions, the State relied on radical feminist arguments illustrating that prostitution degraded women and commodified their sexuality.⁴⁴ Although there is a link between viewing prostitution as a form of harm and radical feminism, the State misconstrued these arguments, including them merely as tactical persuasion to indicate that even feminists were against prostitution.⁴⁵ The State (possibly also a strategic choice) relied on substantial affidavit evidence in support of their arguments which led to an equal number of answering and replying affidavits by all the parties.⁴⁶

⁴² Ibid paras 46-49.

⁴³ Id.

⁴⁴ Ibid paras 8-12.

⁴⁵ Jordan refuted the State's reliance on radical feminist arguments responding in a supplementary affidavit that outlined the current feminist theories surrounding prostitution; see applicant's supplementary affidavit, deposed to by Lillian Artz case number: CCT 31/01.

⁴⁶ The States supplementary and replying affidavits included affidavits by Frans Johannes Kloppers a member of the South African Police Service (SAPS) concerning trafficking of women and children; affidavit by Andre de Vries, the Director of Public Prosecutions for the Witwatersrand Local Division; affidavit by Penuall Mpapa Maduna, the Minister of Justice and Constitutional Development; affidavit by Pieter Karel Smit, a state advocate attached to the Asset Forfeiture Unit concerning trafficking of women and children; affidavit by Daniel Johannes Bester concerning public nuisance; affidavit by Anne Stewart Keyworth concerning public nuisance; affidavit by Harhklha Kyrishz concerning public nuisance; affidavit by Maria Sophia Elizabeth Van Zyl concerning public nuisance; affidavit by Albertus Van Eeden concerning HIV/AIDS and sexually transmitted diseases; affidavit by Pieter Willem Kruger, a police officer, in relation to brothel-keeping in residential areas; George Fredrick Hardaker, employee of the National Prosecuting Authority, as a response to the *amici curiae* affidavits of Crous and Gernalis in relation to brothel-keeping; answering affidavits by Andries Petrus De Vries, Director of Public Prosecution for Witwatersrand Local Division in response to the *amici curiae* affidavits of Crous and Gernalis.

Even the Court commented on the amount of affidavits filed and stated:

'Although the affidavits were replete with denials and counter-denials, the differences in position adopted by the experts and other deponents related not so much to empirical facts as to how to characterize the activities concerned and what conclusions should be drawn from them. Little of the argument accordingly turned on disputed questions of fact.'; see *Jordan* op cit note 8 para 37.

2.1.4 *The amici curiae*

The main *amici curiae* briefs were brought by the CGE and SWEAT.⁴⁷ The SWEAT brief was a collaborative brief between SWEAT, the Centre for Applied Legal Studies (CALS) and the Reproductive Health Research Unit (RHRU; hereinafter referred to collectively as the SWEAT brief) with each of the organisations bringing its own expertise to the table. SWEAT represented the voices of sex workers as an advocacy organisation, that works towards the empowerment of sex workers; CALS brought its legal expertise in furthering women's equality ideals and the RHRU, its expertise in sex workers' health concerns and their access to health care services.⁴⁸

Both the *amici curiae* aimed to expand on the equality arguments brought by Jordan and wanted to introduce progressive arguments regarding sex workers and their rights. Specifically they wanted to argue:

'that the criminalization of sex work violated women's rights to freedom and security of the person – that women exercised choices to engage in sex work under constrained circumstances and that the criminalization of sex work violated this right and rendered women vulnerable to multiple consequent rights violations.'⁴⁹

According to Albertyn, the *amici* took a strategic decision that the CGE would focus on the equality arguments, whilst SWEAT would focus on the rights arguments.⁵⁰

The structure of the discussion that follows focuses on the equality and rights arguments of the *amici curiae* and the Court's interpretation and response to both in relation to the judgment. The Court was strongly divided in its decision which leads to an interesting deduction that the minority judgment was intended to be the majority judgment.⁵¹ The minority judgment sets out the relevant facts and methodically addresses the different right entitlements whilst the majority judgment

⁴⁷ It should be noted that there were other *amici curiae*, including Pieter Crous and Michael Gemeliaris, who represented the interests of brothel owners and Andrew Lionel Phillips, also a brothel owner, who only participated on the contention whether the Final or Interim Constitution should apply.

⁴⁸ Written submissions of SWEAT, as drafted by G.J Marcus (SC) & S.J Cowen, case number: CCT 31/01 paras 1.5 -1.9.

⁴⁹ Catherine Albertyn 'Defending and securing rights through law: Feminism, law and the courts in South Africa' (2005) 32 *Politikon* 217 at 228.

⁵⁰ Interview with Cathi Albertyn op cit note 29; the RHRU would supplement these briefs by providing specific contextual evidence pertaining to sex workers' health.

⁵¹ The majority judgment was delivered by Ngcobo J with Chaskalson CJ, Kriegler J, Madala J, Du Plessis AJ and Skweyiya AJ concurring; the minority judgment was delivered by O'Regan J & Sachs J with Langa DCJ, Ackerman J and Goldstone J concurring.

merely counters these arguments. The structure of the majority judgment is confusing to the reader, without the benefit of the minority judgment, as the majority merely replies to the minorities' reasoning. I discuss the judgment starting with the minorities' findings, followed by the majority's interpretation in relation to the *amici curiae* arguments, which in my opinion leads to a better understanding of the judgment.

The Commission for Gender Equality and the equality arguments:

The purpose of the CGE's brief was to expand on the equality arguments brought by Jordan and to advance a strong claim that the sex work provision breached the right to equality and resulted in unfair discrimination. The CGE provided the Court with background information and contextualised the relevant issues at the outset, before it engaged the actual equality analysis.⁵² An important argument was the fact that the vast majority of prostitutes were women and the vast majority of clients were men.⁵³ The CGE linked prostitution with the experience of being a woman and stated:

'What does, however, emerge as a thread common to almost all depictions of prostitution is the recognition (albeit sometimes tacit) that prostitution is inextricably linked to the experience of being a woman. This is because prostitution cannot be severed from the reality of women's experiences of inequality which experience is manifested in the most extreme cases in abuse and subordination and in less extreme cases in the limited options or choices available to women. Ultimately, however it is told, the story of prostitution is fundamentally a story about women and their position in society.'⁵⁴

It criticised the State's approach in linking prostitution with harm and the professed purpose of the legislation to protect prostitutes and stated that the actual purpose of the criminal sanction was the enforcement of the moral views of a specific section of society.⁵⁵

The CGE's main arguments revolved around section 9(1) and 9(3) of the Constitution. Following the test in *Harksen v Lane*, it argued that the sex work

⁵² Written submissions of the CGE, as drafted by Shanee Stein, case number CCT: 31/01 para 5.

⁵³ Ibid paras 5.1-5.2.

⁵⁴ Ibid para 5.4.

⁵⁵ Ibid para 10.

provision differentiated between prostitutes with no legitimate government purpose or rational connection, despite the social ills as propagated by the State.⁵⁶ Each of the social ills was discussed, refuting the State's contentions in respect of them.⁵⁷ The CGE submitted that it was permissible for the State to legislate morality but only where such morality accorded with the values entrenched in the Constitution and not to enforce the private moral views of a certain section of society.⁵⁸ According to the CGE, the Act, and the sex work provision in particular, drew a distinction between "chaste" women that needed to be protected and "unchaste women" that needed to be punished.⁵⁹ It was this enforcement of morality that had no legitimate government purpose as required by section 9(1):

'It is apparent, therefore, that the morality which is sought to be upheld by the criminalisation of the sale by a prostitute of sexual services is the private morality of a section of the community premised on a conservative construction of good and bad. It is further based on a paternalistic outlook in which "good" women require protection and other "bad" women and "bad" men (such as homosexuals) who challenge notions of decency require punishment. This private morality is antithetical to the constitutional promise of equality and dignity.'⁶⁰

The CGE further argued that the provision unfairly discriminated on the grounds of gender, in terms of section 9(3), as it disproportionately affected women.⁶¹ The discrimination was seen to be manifestly unfair as it was based on stereotypical preconceptions about women who sell sexual services, which the State portrayed as

⁵⁶ Specifically in relation to sec 9(1) the *Harksen v Lane* 1998 (1) SA 300 test requires the following questions to be asked:

(a) Does the law or conduct differentiate between people or categories of people?

(b) If so, it should be established whether there is a rational connection between the differentiation and a legitimate government purpose. It should be kept in mind that even if there is a rational connection that it might still amount to discrimination.

The complete test is discussed in chapter 1 fn 68; written submissions on behalf of the CGE op cit note 52 para 4.

⁵⁷ Written submissions of the CGE op cit note 52 paras 32-63.

⁵⁸ Ibid para 65; the CGE to this extent relied greatly on the debates that served before Parliament when they debated the Sexual Offences Act. They also referred to the history of the Act, which was first termed the Immorality Act 5 of 1927, which contained provisions against interracial sexual relations, homosexuality and sex work.

⁵⁹ Written submissions of the CGE op cit note 52 para 69.2.

⁶⁰ Ibid para 69.3.

⁶¹ Ibid para 92.

the social ills it wanted to protect society from.⁶² Accordingly the discrimination in terms of section 9(3) could not be justified under the limitation clause.⁶³

The Sex Workers Education and Advocacy Task Force and the rights entitlement arguments:

The purpose of the SWEAT brief was to focus on the sex workers and bring the relevant contextual evidence to the Court's attention. SWEAT wanted to outline the nature of the indoor and outdoor sex industry and the impact that the criminalisation of sex work had on adult commercial sex workers.⁶⁴

At the core of the brief, SWEAT wanted to illustrate that prostitutes were entitled to certain constitutional rights and that the Act curtailed these rights. SWEAT primarily relied on the right to freedom and security of the person and stated that the right encompassed autonomy from interference in determining for oneself what to do with one's own body. Although the right to freedom and security of the person was more restrictively defined in the Interim Constitution than its counterpart the Final Constitution,⁶⁵ SWEAT argued that section 11 of the Interim Constitution still allowed for an interpretation that endorsed personal autonomy in accordance with the Court's previous interpretation of the right.⁶⁶

In addition, SWEAT contended that the Act violated sex workers' right to dignity, their right to free economic activity, their right to privacy and supported the CGE's submissions that the section discriminated unfairly.⁶⁷

⁶² Ibid para 94.

⁶³ Id.

⁶⁴ Notice of motion to be admitted as *amici curiae*, SWEAT brief, affidavit deposed to by Jayne Arnott, case number: CCT 31/01 para 18.

⁶⁵ See sec 12 of The Constitution discussed in chapter 3 fn 2 above and sec 11 of the Interim Constitution discussed in chapter 3 fn 54 above.

⁶⁶ Written submissions of SWEAT op cit note 48 para 5; counsel referred to the Court's interpretation of section 11 of the Interim Constitution in *Ferreira v Levin NO 1996 (1) SA 984 (CC)* at para 184 where the Court stated:

'This does not mean that we must necessarily confine the application of s 11(1) to the protection of physical integrity. Freedom involves much more than that, and we should not hesitate to say so if the occasion demands it. But, because of the detailed provisions of chap 3, such occasions are likely to be rare. If despite the detailed provisions of chap 3 a freedom of a fundamental nature which calls for protection is identified, and if it cannot find adequate protection under any of the other provisions in chap 3, there may be a reason to look to s 11(1) to protect such a right. But to secure such protection, the otherwise unprotected freedom should at least be fundamental and of a character appropriate to the strict scrutiny to which all limitations of s 11 are subjected.'

⁶⁷ Sections 10, 26, 13 and 8 of the Interim Constitution respectively; see the written submissions of SWEAT op cit note 48.

For SWEAT, the legal enforcement of morality (the actual purpose of the Act if viewed historically) was unjust, as the State should not be allowed in the current constitutional dispensation to impose a moral code concerning sexuality through criminal sanction.⁶⁸ SWEAT maintained that the harm caused by the criminal sanction could not be constitutionally justified.

SWEAT further focused on several categories of vulnerability entrenched by the relevant criminal sanction including: vulnerability to violence, unsafe, unfair and poor working conditions, the stigmatisation of sex workers, their access to health, social, police, legal and financial services, prohibitions adverse impact on safe sex practices and the ability to find other employment.⁶⁹ SWEAT advocated that prohibition was not the only viable option and that even without any legislation regulating the industry there existed a strong legal framework, including labour laws, business laws, liquor laws, solicitation laws and nuisance laws that could assist in regulating the industry and addressing the State's fears.⁷⁰

SWEAT argued that the relevant sections should be struck down with immediate effect and that there were sufficient legislative provisions to protect sex workers and to regulate the industry, pending the outcome of the law reform process, which had been undertaken by the SALRC.

2.1.5 The Court's response to and interpretation of the CGE's equality arguments

The minority judgment

The minority judgment, penned by O'Regan J & Sachs J (with Langa DCJ, Ackerman J and Goldstone J concurring), gives the impression of being the planned majority judgment, with the equality arguments being the common ground around which the judgment would revolve.

The minority first considered section 9(1), namely whether the sex work provision differentiated between prostitutes and their clients and whether the differentiation had a legitimate government purpose.⁷¹ It found that it was not

⁶⁸ Written submissions of SWEAT op cit note 48 paras 6.13-6.14.

⁶⁹ Ibid paras 6.57-6.85.

⁷⁰ Ibid para 14.7.1.

⁷¹ *Jordan* op cit note 8 para 57.

irrational for the legislature to punish the conduct of only one group but not the other. It then considered section 9(3) and found that the differentiation did amount to discrimination as the Act differentiated on a ground which had the potential to impair human dignity or to affect people adversely in a comparably serious manner.⁷²

Here the minority relied on the CGE'S arguments to conclude that the discrimination was indirect gender discrimination, that is, that prostitutes (who were mostly women) were disproportionately affected by the Act as opposed to their clients (mostly men).⁷³ The minority rejected the State's arguments that the section was gender-neutral and that clients were equally liable in terms of the common law and legislation, specifically the Riotous Assemblies Act 17 of 1956 (it is here that the majority opted out of the minority's reasoning).⁷⁴ The minority proceeded to identify the gender stereotypes that give rise to the discrimination:

'In the present case, the stigma is prejudicial to women and runs along the fault lines of archetypal presuppositions about male and female behaviour, thereby fostering gender inequality. To the extent therefore that prostitutes are directly criminally liable in terms of s 20(1)(aA) while customers, if liable at all, are only indirectly criminally liable as accomplices or co-conspirators, the harmful social prejudices against women are reflected and reinforced. Although the difference may on its face appear to be a difference of form, it is in our view a difference of substance that stems from and perpetuates gender stereotypes in a manner which causes discrimination. The inference is that the primary cause of the problem is not the man who creates the demand but the woman who responds to it: she is fallen, he is at best virile, at worst weak. Such discrimination, therefore, has the potential to impair the fundamental human dignity and personhood of women.'⁷⁵

⁷² Ibid paras 57-60.

⁷³ Ibid para 63.

⁷⁴ Ibid para 61; In terms of sec 18 of the Riotous Assemblies Act 17 of 1956 (hereinafter the Riotous Assemblies Act):

(1) Any person who attempts to commit any offence against a statute or a statutory regulation shall be guilty of an offence and, if no punishment is expressly provided thereby for such an attempt, be liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.

(2) Any person who-

(a) conspires with any other person to aid or procure the commission of or to commit; or

(b) incites, instigates, commands, or procures any other person to commit any offence, whether at common law or against a statute or statutory regulation, shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.

⁷⁵ *Jordan op cit* note 8 para 65.

In determining whether the indirect discrimination was unfair, the minority, to an extent, detracted from its above positive averment of discrimination by relying on a liberal interpretation of choice and stated:

'There can be no doubt that they are a marginalised group to whom significant social stigma is attached. Their status as social outcasts cannot be blamed on the law or society entirely. By engaging in commercial sex work, prostitutes knowingly accept the risk of lowering their standing in the eyes of the community. In using their bodies as commodities in the marketplace, they undermine their status and become vulnerable.'⁷⁶

However, they acknowledge that many prostitutes become involved in prostitution because they have few alternatives.⁷⁷ Ultimately it found that the provision discriminated unfairly which decision it based on the arguments put forward by the CGE.⁷⁸

The majority judgment

The majority judgment by Ngcobo J (with Chaskalson CJ, Kriegler J, Madala J, Du Plessis AJ and Skweyiya AJ concurring), simply countered the minority's arguments alluding to the conclusion that the majority judgment was initially intended to be the minority judgment.

The majority, in establishing discrimination, simplistically adopted the State's arguments that perceived the section to be gender-neutral, as it penalised both male and female prostitutes.⁷⁹ It argued that the criminality of the conduct was equal as both parties incurred liability, the prostitute in terms of the Sexual Offences Act, and the client at common law and in terms of Riotous Assemblies Act.⁸⁰ In relation to the unfairness of the discrimination the majority stated:

⁷⁶ Ibid para 66.

⁷⁷ Ibid paras 67- 68.

⁷⁸ The minority specifically stated:

'In determining whether the discrimination is unfair, we pay particular regard to the affidavits and argument of the Gender Commission. It is their constitutional mandate to protect, develop, promote respect for and attain gender equality. This Court, of course, is not bound by the Commission's views but it should acknowledge its special constitutional role and expertise. In the circumstances, its evidence and argument that s 20(1)(aA) is unfairly discriminatory on grounds of gender reinforces our conclusion.'; see *Jordan* op cit note 8 para 70 (footnotes omitted).

⁷⁹ *Jordan* op cit note 8 paras 9-10; written submissions of the State op cit note 40 paras 46-49.

⁸⁰ *Jordan* op cit note 8 para 14; also see fn 74 above.

‘And if there is any discrimination, such discrimination can hardly be said to be unfair. The Act pursues an important and legitimate constitutional purpose, namely to outlaw commercial sex. The only significant difference in the proscribed behaviour is that the prostitute sells sex and the patron buys it. Gender is not a differentiating factor. Indeed, one of the effective ways of curbing prostitution is to strike at its supply.’⁸¹

For the majority, the stigma attached to prostitution was not a legal issue and could be attributed to the prostitute through her own conduct and not her gender.⁸² The majority did not pay any attention to the CGE’s equality arguments except in so far as it refuted the minority’s analysis that relied on them.

2.1.6 The Court’s response to and interpretation of SWEAT’s rights arguments

The minority judgment

The minority did not engage SWEAT’s arguments and built on its earlier statement that prostitutes were, to an extent, to blame for their own vulnerability as a result of the choice they exercise in becoming involved in prostitution.⁸³

In relation to SWEAT’s main arguments concerning the right to freedom and security of the person, it found that the invasion of the right was as a result of the prostitute’s own conduct and not as a result from an intrusion on the right by the State.⁸⁴ This alludes to the minority’s own liberal approach in the understanding women’s choice that was picked up by the majority and which formed the basis of their decision. The minority adopted the same reasoning in relation to SWEAT’s other rights arguments. With reference to the right to dignity it stated:

‘To the extent that the dignity of prostitutes is diminished, the diminution arises from the character of prostitution itself. The very nature of prostitution is the commodification of one’s body. Even though we accept that prostitutes may have few alternatives to prostitution, the dignity of prostitutes is diminished not by s 20(1)(aA) but by their engaging in commercial sex work.’⁸⁵

⁸¹ Ibid para 15 (footnotes omitted).

⁸² Ibid para 16.

⁸³ See reference to the quote in fn 76 above.

⁸⁴ *Jordan* op cit note 8 para 75.

⁸⁵ Ibid para 74.

Although it found that the sex work provision infringed the right to privacy, it did so in a constrained manner:

'By making her sexual services available for hire to strangers in the marketplace, the sex worker empties the sex act of much of its private and intimate character. She is not nurturing relationships or taking life-affirming decisions about birth, marriage or family; she is making money. Although counsel for the appellants was undoubtedly correct in pointing out that this does not strip her right to be treated with dignity as a human being and to have respect shown for her as a person, it does place her far away from the inner sanctum of protected privacy rights. We accordingly conclude that her expectations of privacy are relatively attenuated. Although the commercial value of her trade does not eliminate her claims to privacy, it does reduce them in great degree.'⁸⁶

The majority judgment

The majority also did not take account of any of SWEAT's arguments. It's reasoning in terms of the rights claims were formalist and focused on the unlawful nature of the conduct with no reference to the lived realities of prostitutes.

It chose to implement traditional legal method, that relies on relevant and persuasive evidence, to determine facts (which for the majority was the State's arguments); a reliance on legal precedent (in this case the common law and Riotous Assemblies Act) to provide a framework for analysis that lead them to the decision that the restriction was constitutionally permissible.⁸⁷ The majority rejected the confirmation of invalidity and was deferential in stating that the legislature had to consider whether the interests of society would be better served by decriminalising prostitution.⁸⁸

It is clear that the majority was not ready to accept the feminist arguments introduced by the *amici curiae* that challenged its traditional method of reasoning. It merely considered the constitutionality of the legislation which it argued passed constitutional scrutiny.⁸⁹

⁸⁶ Ibid para 83.

⁸⁷ Mary Jane Mossman 'Feminism and legal method: The difference it makes' (1987) 3 *Wisconsin Women's Law Journal* 147 at 153: see chapter 2 for a discussion of traditional legal method.

⁸⁸ *Jordan op cit* note 8 para 30 and 33.

⁸⁹ Mary Jane Mossman 'Feminism and the law: Challenges and choices' (1998)10 *CJWL* 1 at 5.

2.1.7 Purpose and impact of the amici curiae submissions

Seeing as the applicant's brief in *Jordan* was ill-conceived, the case called for feminist intervention and the application of feminist method to ensure that the relevant contextual evidence was placed before the Court and the voices of sex workers were adequately represented.

The CGE's discrimination arguments were the arguments on which consensus was dependant, as the greatest part of the Court's analysis is devoted to it eliciting a great degree of debate and consideration from the Court. The minority's interpretation possibly received initial majority support, but was rejected with the majority opting for simplistic interpretative reasoning, finding that it is constitutionally permissive to legally prohibit prostitution. However, despite attaching great value to the CGE's brief, it is interesting how both the majority and minority judgments did not attach any value to the SWEAT submissions.

The SWEAT brief focused on the sex workers themselves and their experience as opposed to the CGE's brief, that focused on the gendered discrimination underlying sex work, that affected all women. Both the minority and majority judgments attempted to neutralise difficult rights assertions made by prostitutes by framing the case as a general women's issue. It might be that the CGE's equality arguments were seen as the safest and most familiar, as opposed to having to consider difficult rights assertions by a distinct group.

Sheehy states that judges will often validate the more conservative or simplified feminist arguments to reach consensus and to conform with traditional legal paradigms and established hierarchies.⁹⁰ However, this represents the importance of the feminist project in law to challenge formalist reasoning and established hierarchies:

'The power of law to define boundaries so as to exclude "irrelevant" facts about women's lives represents a formidable challenge. Yet, the power of feminism to critique a construction of law that has safely situated itself outside social life is also a choice, albeit, not an easy one. Both of these challenges – the challenge to acknowledge complexity in assessing the impact of cases and the challenge to recognize relationships between law and social arrangements – represent feminism's

⁹⁰ Elizabeth A. Sheehy 'Feminist argumentation before the Supreme Court in *R. v Seaboyer*; *R. v. Gayme*: The sound of one hand clapping' (1991) 18 *Melbourne University Law Review* 450 at 462.

challenges to law. They demonstrate both the law's power and the power of feminism to resist it. However, the effort to take up these challenges and to resist the power of traditional legal method, depends on a third choice, which is whether or not to persist in seeking justice within law.⁹¹

Feminists had to intervene in *Jordan* to ensure that sex workers' voices were represented and to introduce progressive arguments regarding their rights entitlements. Although the *amici curiae* intervention was not successful in persuading the Court to adopt its arguments, the indirect impact of the participation ensured that these arguments were before the Court, thereby eliciting debate and discussion regarding women's subordination. The judgment was disappointing and widely criticised considering the extensive *amici curiae* briefs and, since many organisations had for a long time lobbied and worked towards the decriminalisation of prostitution.⁹²

The case dealt a blow to the positive framework that was established by organisations with the executive in reforming the sex industry, as the issue of decriminalisation seems to have fallen off the legislative agenda since the judgment. The CGE has only recently again publicly announced its support for the decriminalisation of sex work through legislative efforts.⁹³ To date, the response from Parliament has also not been positive, as the Sexual Offences Act has been

⁹¹ Mossman 'Feminism and the law' op cit note 89 at 14.

⁹² See Jagwanth & Murray op cit note 32 at 284; Ronald Louw 'The Constitutional Court upholds the criminalisation of sex work' (2003) *Agenda* 104; Nicole Fritz 'Crossing Jordan: Constitutional space for (un) civil sex?' (2004) 20 *SAJHR* 230; Usha Jivan "Let's talk about sex, baby' – but not in the Constitutional Court: Some comments on the gendered nature of legal reasoning in the *Jordan* case' (2004) 17 *SACJ* 368; Michelle O' Sullivan and Christina Murray 'Brooms sweeping oceans? Women's rights in South Africa's first decade of democracy' (2005) *Acta Juridica* 1 at 26; Elsje Bonthuys 'Women's sexuality in the South African Constitutional Court' (2006) 14 *Feminist Legal Studies* 392; Chesa Boudin & Marlise Richter 'Adult, consensual sex work in South Africa – The cautionary message of criminal law and sexual morality' (2009) 25 *SAJHR* 179.

According to Wessel Le Roux 'Sex work, the right to occupational freedom and the constitutional politics of recognition' (2003) 120 *SALJ* 452 at 463 the issue could possibly be litigated on again as it was decided under the Interim Constitution and should it be argued in terms of the Final Constitution, the outcome might be different, although this might be stretching the usefulness of court action in changing social and political discourse.

⁹³ Commission for gender Equality 'Commission for Gender Equality: Position on sex work' (2013) available at:

http://www.cge.org.za/index.php?option=com_docman&task=doc_download&gid=223&Itemid= (last accessed 28 August 2013).

amended to explicitly criminalise the clients of sex workers,⁹⁴ and no feedback is available from the SALRC concerning their report on the law reform process.⁹⁵

⁹⁴ The Criminal Law (Sexual Offences and Related Matters) Amendment Act 6 of 2012 amended sec 11 of the Criminal Law (Sexual Offences Act) 32 of 2007 which now states:

‘A person (“A”) who unlawfully and intentionally engages the services of a person 18 years or older (“B”), for financial or other reward, favour or compensation to B or to a third person (“C”) –

(a) For the purpose of engaging in a sexual act with B, irrespective of whether the sexual act is committed or not: or

(b) By committing a sexual act with B, is guilty of engaging the sexual services of a person 18 years or older.’

The imposition of penalties in respect of this section is left to the discretion of the courts.

⁹⁵ South African Law Reform Commission *Sexual offences: Adult prostitution: Issue paper 19* op cit note 11.

2.2 Extending Legislation to Include Domestic Life Partnerships: *Volks NO v Robinson* (Centre for Applied Legal Studies (CALs) as *amicus curiae*).

2.2.1 Feminist interpretations of domestic partnerships

The inadequacy of the legal framework in protecting a particularly vulnerable group of women is also illustrated through the issue of cohabitation. Domestic partnerships between women and men are widespread and, although there are different reasons why women enter into these relationships, in the South African context an overwhelming reason is financial need and dependency.⁹⁶ Here, women's vulnerability stems from the fact that when a partner leaves or dies there is no legal entitlement to maintenance or any share of the property despite their contributions.⁹⁷

Feminist responses to the legal recognition of these partnerships have also differed.⁹⁸ Liberal feminists view legal recognition as reinforcing the harmful stereotype of female dependence, which is counterproductive in an era where many women are establishing social and economic independence.⁹⁹ Many liberals subscribe to the ideal of individualism and respect for individual choice that is premised on:

'[f]irst, the dignity of the individual; secondly autonomy, or self-direction; thirdly, privacy, or a sphere of thoughts and action that should be free from public interference; and, fourthly, self-development.'¹⁰⁰

They are therefore against the legal regulation of domestic partnerships and argue that choosing whether or not to enter in such a relationship is an exercise of one's own choice and freedom to contract, which will be unduly restricted if regulated -- therefore a form of State paternalism.¹⁰¹

⁹⁶ Beth Goldblatt 'Regulating domestic partnerships – A necessary step in the development of South African family law' (2003) 120 *SALJ* 610. Also unique to South Africa's context is the extent to which migrant labour has led many African men to marry women in rural areas, and to form domestic partnerships in the urban areas where they work.

⁹⁷ Clark & Goldblatt op cit note 2 at 208.

⁹⁸ Ibid 209.

⁹⁹ Id.

¹⁰⁰ Ruth L. Deech 'The case against legal recognition of cohabitation' (1980) 29 *Int'l & Comp. L.Q.* 480 (footnotes omitted).

¹⁰¹ Goldblatt 'Regulating domestic partnerships' op cit note 96 at 616.

Socialist feminists maintain that a liberal viewpoint is dependent on the specific society as well as the social and economic position that particular women find themselves in, and that legal regulation could play a role in improving the lives of poor women.¹⁰² In the South African context, feminist scholars have been in favour of legal recognition, especially equitable redress when a relationship comes to an end, as women's choice in entering such a relationship is mostly influenced by economic need and social powerlessness in negotiating the terms of a relationship.¹⁰³ For South African feminists, there also need to be an acknowledgement and recognition that marriage is not the only relationship form nor the only relationship entitled to legal protection. They have argued that relationships and families should not be categorised by specific legal definitions but by the function that they fulfil, entitling them to legal protection. Minow, states:

'that it is not important here whether a group of people fit the formal legal definition of a family (created by marriage or adoption). Instead, what is important is whether the group of people function as a family: do they share affection and resources, think of one another as family members, and present themselves as such to neighbours and others?'¹⁰⁴

In the context of domestic partnerships, Goldblatt described the importance of understanding the functionality of a family relationship as:

'The purpose of family law is to protect vulnerable members of families and to ensure fairness between the parties in family disputes. Women and children are vulnerable groups in our society and often become poorer when families break down. The lack of legal protection afforded to domestic partnerships increases the vulnerability of these groups living within such arrangements. A domestic partnership is but one amongst many different types of family and should be included within the definition of family for the purposes of family law. Our constitution requires the law to give effect to the rights to dignity and equality of the members of all forms of families, particularly when such members are vulnerable within their relationships.'¹⁰⁵

¹⁰² Clark & Goldblatt op cit note 2 at 209-210.

¹⁰³ Id.

¹⁰⁴ Martha Minow 'Redefining families: Who's in and who's out?' (1991) 62 *Colorado Law Review* 269 at 270.

¹⁰⁵ Goldblatt 'Regulating domestic partnerships' op cit note 96 at 610-611.

In South Africa, law reform in this area was considered and the SALRC produced a report that called for a system of registration of domestic partnerships alongside the recognition of *de facto* partnerships which led to draft legislation on the topic.¹⁰⁶ Whilst the SALRC process was under way, the *Volks* case came before the Constitutional Court.

Unlike *Jordan*, the WLC was actively looking for a case to litigate in order to secure rights for women in domestic partnerships as part of their identified substantive priorities for the organisation.¹⁰⁷ When the WLC was requested to advise Robinson about her claim for maintenance from a deceased estate, they saw an opportunity to advance the arguments they wanted to bring in extending rights protection to all women in domestic partnerships.¹⁰⁸

The facts of the case were not ideal, as it was brought by a woman who was relatively privileged and not representative of the majority of poor women who enter into these relationships. CALS saw an opportunity to supplement the WLC's arguments to bring the relevant contextual evidence to Court and to ensure that the reality of poor women in these relationships was brought before the Court.¹⁰⁹

Again the Court employed traditional legal method, refusing to extend rights protection to women in domestic partnerships, deferring to Parliament to grant protection.¹¹⁰

2.2.2 Factual background

Robinson was in a stable long term relationship with Shandling who, upon his death, left some money to her in his will. However, Robinson felt that she would not be able to sustain herself with the amount as she was supported by the deceased financially. She proceeded to institute a claim of maintenance against the deceased estate in terms of the Maintenance of Surviving Spouses Act 27 of 1990 (hereinfter the Maintenance of Surviving Spouses Act). She argued that the relevant Act should not

¹⁰⁶ South African Law Reform Commission *Domestic Partnerships Discussion Paper 104* Project 118 (2003); Beth Goldblatt 'Different routes to relationship recognition: A comparative discussion of South Africa and Australia' (2008) *Paper Delivered at the Law and Society Association Australia and New Zealand (LSAANZ) Conference 10-12 September, University of Sydney* 6.

¹⁰⁷ Cowan op cit note 30 at 285.

¹⁰⁸ Ibid; *Volks* op cit note 9 paras 8-10.

¹⁰⁹ Interview Beth Goldblatt, CALS (14 December 2012).

¹¹⁰ Albertyn 'Defending and securing rights through law' op cit note 49 at 230.

only apply to married couples, but also to the survivor of a permanent heterosexual life partnership where the couple lived as husband and wife.¹¹¹

Volks, the executor of the deceased's estate, rejected Robinson's claim on the basis that she was not a spouse in terms of the Act.¹¹² Robinson challenged the constitutionality of the Act, in that, it discriminated against her on the ground of marital status and infringed her right to dignity.¹¹³ The High Court confirmed Robinson's contentions which Volks appealed alongside confirmation by the Constitutional Court.

The WLC, similar to the *Bhe* matter, not only represented Robinson but joined the proceedings as a party, acting in their own interest, on behalf of all partners in permanent life partnerships and in the public interest.¹¹⁴ This strategy had the aim that notice be taken of the public interest nature of the case, bringing to the Court's attention that a decision will have implications far wider than the relevant parties.

CALS entered as *amicus curiae* to supplement the WLC'S arguments to ensure that all women who find themselves in these relationships were represented and to bring the relevant contextual evidence to Court.

2.2.3 The parties

For the executor of the deceased's estate, Volks, the most important arguments revolved around Shandling's rights to freedom of testation and freedom of contract, specifically his choice not to enter into a marriage contract with Robinson.¹¹⁵ Volks argued that there was no maintenance duty between co-habitants whilst they were alive and that there was no convincing reason to provide such after death. If, for whatever policy reasons, the reciprocal duty to maintain should be extended, Volk's argued that it was an issue for the legislature and not the courts.¹¹⁶ (Volks later, at the beginning of the trial, conceded that the Act discriminated unfairly against women in domestic partnerships).

¹¹¹ *Volks* op cit note 9 paras 3-7.

¹¹² *Ibid* para 9; sec 1 of the Maintenance of Surviving Spouses Act defines survivor as the surviving spouse in a marriage dissolved by death. Marriage is therefore a prerequisite to claim maintenance in terms of the Act.

¹¹³ *Volks* op cit note 9 para 12.

¹¹⁴ *Ibid* para 11 and 22.

¹¹⁵ *Id.*

¹¹⁶ *Ibid* para 16.

For the WLC, it was important to view domestic partnerships within the South African context and the fact that, although cohabiting had similar dependencies to marriage, few of the protective and supportive measures available to married couples were available to cohabiting couples.¹¹⁷ The WLC relied, to a great extent, on an academic article by Beth Goldblatt (also the basis of the *amicus's* arguments) which explored cohabitation from a South African perspective as well as the discussion paper by the SALRC on domestic partnerships.¹¹⁸

The WLC rejected Volk's choice arguments and emphasised that the choice exercised by individuals in these relationships are often unfair, unequal and constrained and had to be viewed within the context of gender inequality and patriarchy, where free and equal choice to set the terms of a relationship, were often lacking.¹¹⁹ The WLC referred to several pieces of legislation that included domestic partnerships in their ambit and the inclusive trend of extending legal protection to people in same-sex relationships.¹²⁰

The WLC also contended that the Act discriminated on the grounds of marital status and that the emphasis on marriage as a sacred institution was constitutionally offensive, as it privileged marriage in a way which did not show equal concern and respect for other forms of relationships and partnerships.¹²¹ The impact of the discrimination on women in domestic partnerships would increase their vulnerability

¹¹⁷ Written submissions of the respondents, as drafted by G.J Marcus (SC) & M O' Sullivan, case number: CCT 12/04 para 4.

¹¹⁸ Goldblatt 'Regulating domestic partnerships' op cit note 96 at 610; South African Law Reform Commission *Domestic Partnerships Discussion Paper 104* op cit note 106.

¹¹⁹ Written submissions of the respondents op cit note 117 para 4.10.

¹²⁰ Ibid para 4.12; the WLC specifically referred to the Domestic Violence Act 116 of 1998 (sec 58); the Insolvency Act 24 of 1936 (sec 21(3)); the Medical Schemes Act 131 of 1998 (sec 24(2)); the Pensions Fund Act 24 of 1956; the Compensation for Occupational Diseases Act 61 of 1997; the Basic Conditions of Employment Act 75 of 1997 (sec 27(2)(c)); the Independent Media Commissions Act 148 of 1993 (sec 6(1)(f)); the Housing Act 107 of 1997 (sec 8(e)(iii)(aa).

Further in para 6.3.6 they referred to the cases of *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) regarding the issuing of immigration permits under sec 25(5) of The Aliens Control Act 96 of 1991 to the permanent life partners of same-sex couples; *Satchwell v President of the Republic of South Africa* 2003 (4) SA 266 (CC) which case addressed the unfair exclusion of same-sex couples from the provisions of the Judges' Remuneration and Conditions of Employment Act 88 of 1989; *Du Toit v Minister for Welfare and Population Development* 2003 (2) SA 198 (CC) which case declared certain provisions of the Child Care Act 74 of 1983 unconstitutional for limiting joint adoption to married people to the exclusion of same-sex couples; *J v Director-General, Department of Home Affairs* 2003 (5) SA 621 (CC) which case considered the exclusion to include same-sex partners as parents of children conceived by way of artificial insemination in the Children's Status Act 82 of 1987.

¹²¹ Written submissions of the respondents op cit note 117 paras 7-8.

and compound the social and economic disadvantage that occurs at the end of a relationship.¹²² The WLC requested the Court to declare the relevant provision of the Act unconstitutional and to provide ancillary relief in reading into the challenged provisions wording that would cure the constitutional defect and provide Robinson with meaningful relief.¹²³

2.2.4 The *amicus curiae*

CALS joined as *amicus curiae* to provide the Court with the context of poor women in domestic partnerships since Robinson was a relatively privileged white woman and it was important to them that the Court considered the position of all South African women who found themselves in these relationships.¹²⁴ CALS wanted to focus on the nature of South African domestic partnerships, in light of the migrant labour structure that forced many men to move to urban areas in search of work, mostly the mines, where they formed long term domestic partnerships with “urban women” whilst being married to a wife in a rural area.¹²⁵ In assessing whether the Act discriminated, the Court had to take cognisance of all women’s lived reality.¹²⁶

CALS wanted to provide information to the Court, based on its own research, on the changing notion of family in South Africa; gender inequality and its relationship to the family; the patterns of cohabitation in South Africa and the features of a cohabitant relationship which point to it being a permanent life partnership.¹²⁷ The CALS report explored and rejected Volk’s so called choice arguments and argued, as the WLC did, that men and women approached intimate relationships from different social positions and with different measures of bargaining power, and that gender inequality and patriarchy resulted in women lacking the

¹²² Ibid para 7.17.

¹²³ Ibid para 9.5.

¹²⁴ Interview Beth Goldblatt op cit note 109.

¹²⁵ Goldblatt ‘Regulating domestic partnerships’ op cit note 96 at 613.

¹²⁶ Written submissions of the *amicus curiae*, as drafted by Kameshni Pillay, case number: CCT: 12/04 para 56.

¹²⁷ Application to be admitted as *amicus curiae*, affidavit deposed to by Beth Ann Goldblatt, case number: CCT 12/04 para 11; the research report was based on a qualitative study and involved sixty eight interviews in eight sites across four provinces. The report was to be viewed as primary research as a result of limited research in the area and was aimed at understanding why people cohabit, how they arrange their relationships and what their views were on law reform. The research report was also published as an academic article referred to in fn 96 above.

choice to freely and equally set the terms of these relationships.¹²⁸ It was this inequality with regards to choice that entitled women to protection within these relationships. The report also drew a direct correlation between unequal power in relationships and the socio-economic circumstances of women in general.¹²⁹

CALS supported the WLC's submissions that the Act discriminated on the ground of marital status but argued, as was evident from its research, that the discrimination had a gender and race dimension, since the group worst affected by the exclusion were black women.¹³⁰

CALS wanted to focus on the functions that families performed in determining whether a relationship created responsibilities and expectations for the parties involved.¹³¹ In constructing a remedy, CALS suggested that the Court should not defer, as the legislative process had already taken several years and was not near completion, and supported the remedy as constructed by the WLC.¹³²

2.2.5 CALS's research report

The research report upon which CALS based its arguments, was disputed in supplementary arguments filed by the parties.¹³³ Volks submitted that the evidence in the *amicus's* report was not incontrovertible or uncontroversial as required by the rules of the Court.¹³⁴ Volks stated that the report was commendable but proceeded from a particular premise focusing only on women's perspective.¹³⁵

CALS, in response, argued that none of the parties ever disputed the evidence and, whilst never contending that the evidence was incontrovertible, contended that the evidence was common cause and that the Court could in any event take judicial notice of the contents of the research report.¹³⁶

¹²⁸ Goldblatt 'Regulating domestic partnerships' op cit note 96 at 616.

¹²⁹ Written submissions of the *amicus curiae* op cit note 126 para 27.

¹³⁰ Ibid para 61.

¹³¹ Goldblatt 'Regulating domestic partnerships' op cit note 96 at 616.

¹³² Written Submissions of the *amicus curiae* op cit note 126 para 67.

¹³³ The parties were allowed to file supplementary arguments after oral argument had been heard due to the complexity of the matter.

¹³⁴ Appellant's replying note, as drafted by Anton Katz & Paul Farlam, case number: CCT 12/04 para 22; see rule 31 of the Constitutional Court in chapter 2 above fn 100.

¹³⁵ Appellant's replying note op cit note 134 para 22.1.

¹³⁶ Written submissions of the *amicus curiae* in response to appellant's replying note, as drafted by Kameshni Pillay, case number: CCT 12/04 paras 21-22.

At the beginning of its judgment, the Court referred to the arguments presented by the *amicus curiae*, specifically the report they tendered as evidence.¹³⁷ The Court, adopting the argument advocated for by Volks in his replying note, rejected the admission of the report as evidence and stated that it was apparent that the conclusions and solutions offered were not incontrovertible or uncontroversial.¹³⁸ The Court referred to the report as non-representative and stated that it could not be regarded as scientific or capable of easy verification and found that it would broaden the case beyond the issues before it.¹³⁹

2.2.6 Decision of the Constitutional Court

Majority and concurring judgments:¹⁴⁰

At the beginning of the proceedings Volks conceded that the Act discriminated unfairly, however, the majority found it necessary to fully consider the question of constitutionality despite the abandonment of the appeal in this regard.¹⁴¹

The Court agreed with the WLC that the differentiation based on marital status amounted to discrimination, but questioned whether this discrimination was unfair. The Court recognised the important role that marriage played in South African society and found that a distinction between married and unmarried persons was legally permissible.¹⁴² The Court accepted Volks's chosen arguments and described the parties to the relationship as free agents who chose not to marry, thus accepting the consequences:

'Her relationship with Mr Shandling is one in which each was free to continue or not, and from which each was free to withdraw at will, without obligation and without legal or other formalities.'¹⁴³

¹³⁷ *Volks* op cit note 9 para 31.

¹³⁸ *Ibid* para 33.

¹³⁹ *Ibid* paras 34-35.

¹⁴⁰ Skweyiya J delivered the majority judgment with six justices concurring Chaskalson CJ, Langa DCJ, Moseneke, Ngcobo, Van der Westhuizen and Yacoob; a separate concurring judgment was delivered by Ngcobo J; dissenting judgments were delivered by Justices Mokgoro and O'Regan and Justice Sachs with his own dissenting judgment.

¹⁴¹ *Volks* op cit note 9 paras 26-27.

¹⁴² *Ibid* paras 51-54.

¹⁴³ *Ibid* para 55.

For the Court, the Constitution did not require the imposition of an obligation on the estate of a deceased person in circumstances where the law attached no such obligation during his lifetime and where there was no intention on the part of the deceased to undertake such an obligation.¹⁴⁴

The Court recognised the vulnerability and economic dependence of women in these relationships, but stated that it was not due to the under-inclusiveness of the Act.¹⁴⁵ For the Court, women's vulnerability is part of a broader societal reality, that should be corrected by empowering women through social policies, initiated by the legislature.¹⁴⁶ The Court did not confirm the order made by the High Court and upheld Volks's appeal.¹⁴⁷

Ngcobo J's concurring judgment was based on the arguments relating to choice. He also admitted that the Act differentiated between married and unmarried couples, but for him, the discrimination was not unfair, as there was no legal impediment for heterosexual couples to get married.¹⁴⁸ The law merely provided for a legal regime that regulated the rights and obligations for those who decided to get married.¹⁴⁹ For Justice Ngcobo, to marry or not to marry, is simply a matter of choice and an acceptance of the consequences of that choice.¹⁵⁰

Minority judgments:

Justices Mokgoro and O'Regan in their minority judgment focused on the functionality of the relationship, as advocated for by CALS, and stated if a relationship was socially and functionally similar to marriage and treated differently, discrimination was present.¹⁵¹ For them, a surviving partner in a domestic relationship would be particularly vulnerable and therefore the limitation imposed by the Act would discriminate unfairly.¹⁵²

¹⁴⁴ Ibid para 58.

¹⁴⁵ Ibid paras 63-65.

¹⁴⁶ Ibid para 66.

¹⁴⁷ Ibid paras 61-62 and 70.

¹⁴⁸ Ibid paras 76-80.

¹⁴⁹ Ibid para 92.

¹⁵⁰ Ibid para 94.

¹⁵¹ Ibid para 108.

¹⁵² Ibid paras 128-132.

Justice Sachs in his minority judgment followed a wider contextual approach, mostly in support of the *amicus's* contentions. He rejected the method of reasoning followed by the majority and stated:

'I do not accept that it is appropriate to examine the entitlements of the surviving cohabitant in the context of what the common law would provide during the lifetime of the parties. To do so is to employ a process of definitional reasoning which presupposes and eliminates the very issue which needs to be determined, namely, whether for the limited socially remedial purposes intended to be served by the Act, unmarried survivors could have legally cognisable interest which founds a constitutional right to equal benefit of the law.'¹⁵³

For Sachs, failure to provide legal protection results in a failure to afford these individuals with equal concern and respect. He examined the philosophical context of freedom of choice and equality and the importance of considering socio-legal context during the interpretive enquiry.¹⁵⁴ He situated the interpretation within the ambit of family law and supported the functional approach suggested by the *amicus curiae*, and followed by O'Regan and Mokgoro, that marriage should be defined according to the function that it serves and that non-traditional relationships such as domestic partnerships could fulfil the functions traditionally attributed to marriage.¹⁵⁵

Taking into consideration the "key ingredients" of the Act namely familial relationship, intimacy and need, he reached the conclusion that it would not only be socially harsh to exclude domestic partners from the ambit of the Act, but also legally unfair.¹⁵⁶ He paid particular attention to the vulnerability of women within these relationships and the often limited choices they are faced with and stated that this context needed to be considered when interpreting the Act.¹⁵⁷ He consequently

¹⁵³ Ibid para 151.

¹⁵⁴ Ibid para 154-166.

¹⁵⁵ Ibid para 172.

¹⁵⁶ Ibid para 220.

¹⁵⁷ Ibid para 225 where he specifically stated:

'The reality in which the Act must be interpreted is that many recently bereaved, elderly, and poor women find themselves with no assets or savings other than their clothing and cooking utensils, little chance of employment and only the prospect of a State old-age pension to keep them from penury. Thus, while it is necessary to emphasise the importance of people taking responsibility for their lives, and to acknowledge the extraordinary self-reliance shown by many women in the face of extreme hardship, the law cannot ignore the fact that lack of resources has left many women with harsh options only. Their choice has been between destitution, prostitution and loneliness, on the one hand, and continuing cohabitation with a person who was unwilling or unable to marry them on the other.'

found the provision to discriminate unfairly which discrimination could not be justified.¹⁵⁸

2.2.7 Purpose and impact of the *amicus curiae* submissions

The *Volks* judgment, as much as the judgment in *Jordan*, have been criticised for its legal formalism and reflection of popular prejudice.¹⁵⁹ The *Volks* case was not concerned with gender discrimination but was argued on the basis of discrimination on the grounds of dignity and marital status.¹⁶⁰ It is uncertain why Robinson and the WLC restricted their discrimination claims, but the lapse could be ascribed to reliance on positive legislative recognition and positive litigation outcomes in extending legal protection to same-sex relationships.¹⁶¹

In hindsight participation by women and feminists' organisations as *amicus curiae* in the same-sex relationship cases might have led feminist litigators to carefully consider the tension and difference in the arguments that the two groups were making. Although both women and same-sex couples were arguing for the legal protection of their relationships, same-sex couples were specifically excluded from legal protection, especially in entering into marriage, whilst women in heterosexual relationships had a choice to marry or not. Earlier *amici* intervention in the same-sex cases could have alerted feminists to the complexity and difference in these relationships and the different direction of arguments that the two groups were following. This might have led to a different approach by the WLC in *Volks* in not necessarily overtly relying on the same-sex precedent, with these cases being viewed within their own context and within their own constraints.

Any consideration of the fairness or otherwise of excluding from maintenance claims people who chose the latter path, must take account of this.'

¹⁵⁸ *Volks* op cit note 9 para 239.

¹⁵⁹ Bonthuys 'Institutional openness and resistance to feminist arguments' op cit note 4 at 34: also see the following criticisms of the judgment: Anita Cooke 'Choice, heterosexual life partnerships, death and poverty' (2005) 122 *SALJ* 542; Lawrence Schafer 'Marriage and marriage-like relationships: Constructing a new hierarchy of life partnerships' (2006) 123 *SALJ* 626; Helen Kruuse 'Here's to you, Mrs Robinson': Peculiarities and paragraph 29 in determining the treatment of domestic partnerships' (2009) 25 *SAJHR* 380; B.S Smith & J.A Robinson 'An embarrassment of riches or a profusion of confusion? An evaluation of the continued existence of the *Civil Union Act* 17 of 2006 in the light of prospective domestic partnerships legislation in South Africa' (2010) 13 *PELJ* 30; Karin van Marle 'The 'archaic structures of our desire'' (2010) 25 *SAPL* 195.

¹⁶⁰ Bonthuys 'Institutional openness and resistance to feminist arguments' op cit note 4 at 13.

¹⁶¹ See fn 120 above.

It is uncertain whether a gender claim by the WLC would have influenced the judgment in any way, but the possibility exists that it could have, in light of strong minority opinions and the possibility that a gender claim could have rallied support for the minority findings.

CALS's main purpose was to extend the Court's focus to all women, specifically poor black women cohabitants within the confines of the factual scenario and arguments presented by the parties.¹⁶² CALS's participation can be described as a classical public interest brief, as the main purpose of the brief was to make sure that the Court understood the point of view of those who would be affected by its decision and to ensure that those affected feel that their voice had been heard.¹⁶³

The Court's rejection of the empirical study of CALS was disappointing, as the Court, despite questioning the report, could have taken judicial notice of the contextual evidence provided.¹⁶⁴ The minority supported CALS's findings, specifically O'Regan and Mokgoro J, in focusing on the functionality of the relationship, and Sachs J, who throughout his judgment referred to the vulnerability of women in domestic partnerships, with specific emphasis on their socio-economic vulnerability. Sachs J used the *amicus's* evidence by relying on Goldblatt's academic article that was based on CALS's initial research.¹⁶⁵

Criticising the Court's rejection of the *amicus's* evidence, Lind states that, although the impact of gender-based inequality in cohabitation relationships may not be universal, it was so overwhelming "and so obvious to anyone with the most rudimentary, unrefined skills of observation, that it seems almost ludicrous to demand evidence of [it]."¹⁶⁶ It might be that the Court was persuaded by Volk's arguments and, coupled with the factual scenario presented to it, it was seen as an easy way to revert back to the familiar and narrow confines of matrimonial law and traditional legal method. Lind states that:

¹⁶² Bonthuys 'Institutional openness and resistance to feminist arguments' op cit note 4 at 13; written submissions on behalf of the *amicus curiae* op cit note 126 para13.

¹⁶³ Philip Bryden 'Public interest intervention in the courts' (1987) 66 *The Canadian Bar Review* 490 at 513.

¹⁶⁴ Bonthuys 'Institutional openness and resistance to feminist arguments' op cit note 4 at 20.

¹⁶⁵ Id.

¹⁶⁶ Craig Lind 'Domestic partnerships and marital status discrimination' (2005) *Acta Juridica* 108 at 119.

'It is regrettable that they chose to regard the law as so obvious and so obviously constitutional when there are so many reasons to see it, instead, as remarkably opaque and desperately in need of clarification and elucidation.'¹⁶⁷

The Court showed some understanding of the systemic inequalities that underpin women's choices and dependence, but distorted this contextual analysis by implementing traditional legal method that rely on certain traditional concepts of marriage and choice.¹⁶⁸ The Court also acted within the confines of what was argued and chose to follow Volks's well-structured brief that suited its own moral conservatism best.

The contradictory majority and minority judgments and the extent to which the *amicus curiae* brief was considered (and not considered) illustrates that the brief had a definite impact, as it provoked a great deal of debate within the Court.¹⁶⁹ This also points to the fact that in considering context, the Court is strongly influenced by individual judicial attitudes and that an *amicus curiae* brief could/should be structured to speak to receptive attitudes and to educate others.¹⁷⁰ Therefore, it is important in structuring an *amicus curiae* brief to take account of the composition of a court and the mind-set of individual judges in order to target those that you might think would be the most receptive to your arguments. Ennis stresses the importance of focusing on individual judicial opinion in drafting a successful *amicus curiae* brief:

'Amicus briefs, like all briefs, should not be written to be read by an abstract entity known as "a court". They should be written to appeal to and persuade individual judges, with individual predispositions and widely varying judicial philosophies. Particularly at the Supreme Court level, it is important for amici (and for parties) to try to predict which Justices are likely to be the "swing votes" on particular issues. It is a waste of time for an amicus to preach to the already converted, or to urge individual Justices to adopt positions they have squarely rejected in earlier decisions. Once the "swing vote" Justices have been identified, the amicus should be drafted to catch *their*

¹⁶⁷ Ibid 115.

¹⁶⁸ Catherine Albertyn 'Substantive equality and transformation in South Africa' (2007) 23 *SAJHR* 253 at 267; see the discussion on traditional legal method in chapter 2.

¹⁶⁹ Ibid 268; Bonthuys 'Institutional openness and resistance to feminist arguments' op cit note 4 at 35.

¹⁷⁰ Albertyn 'Substantive equality' op cit note 168 at 274.

attention, to anticipate and respond to *their* likely concerns, and to urge positions that are likely to attract *their* votes.¹⁷¹

Therefore, in considering litigation strategy, it is important for prospective *amici curiae* to familiarise themselves with the judicial preference of the individual justices and as Ennis suggests to stress prior opinions of identified judges and employ counsel with a known positive litigation record before these specific judges.¹⁷²

¹⁷¹ Bruce J. Ennis 'Effective *amicus* briefs' (1984) 33 *Catholic University Law Review* 603 at 608.

¹⁷² *Ibid* 609.

3 CONCLUDING REMARKS

The *Jordan* and *Volks* judgments were disappointing, especially considering the detailed *amici curiae* briefs and contextual evidence provided. Of particular concern was the libertarian view the Court followed in its consideration of choice that placed the consequence of a choice on the person who chose, irrespective of their constrained circumstances.¹⁷³ The Court also fell into the trap of stereotypical reasoning, where only women who are seen as proper victims, are entitled to constitutional protection, whilst women, who are seen to be responsible for their own vulnerability, are denied this protection.¹⁷⁴ Albertyn frames the Court's restrictive approach in terms of current societal discourse, a discourse that society and by implication, legal structures, are not ready to accept:

'Perhaps, together with society as a whole, the Court recognises women as particular kinds of victims – of violence, of the burdens of motherhood, of stereotypes of capacity and role – but not as agents making 'uncomfortable' choices in often constrained social and economic circumstances that take them outside of accepted understandings of gender roles.'¹⁷⁵

The *amici curiae* briefs did little to affect the reasoning of the Court and it might be an indication that *amicus* briefs are more accepted when they "speak to general issues of disadvantage that resonate with the Court", but where evidence is brought outside the "safety zone" of the Court, they are less successful.¹⁷⁶ Despite the Court's liberal track record of granting extensive rights to same-sex couples,¹⁷⁷ the Court has illustrated its own conservative constraints, even in the same-sex cases, pertaining to what it believes to be an acceptable relationship - marriage. Albertyn in describing the Court's interpretation of the *Volks* case states:

'In *Robinson*, the Court was concerned about the choice 'not to marry' of the claimant and (particularly) her partner, while in the sexual orientation cases the Court is concerned with overwhelming legal prohibitions on the choice to marry. It grants rights

¹⁷³ Martha Chamallas *Introduction to feminist theory* (Aspen Law & Business 1999) 20.

¹⁷⁴ Ibid 267; Bonthuys 'Institutional openness and resistance to feminist arguments' op cit note 4 at 34.

¹⁷⁵ Albertyn 'Equality' op cit note 6 at 104.

¹⁷⁶ Id.

¹⁷⁷ See fn 120 above.

to same-sex couples to eliminate the consequences of the state's legal prohibition to those relationships that are otherwise 'the same as' marriage. In both instances, the result is a society in which social inclusion is based on sameness, rather than difference, and which limits the choice unless exercised within (re)stated boundaries of acceptable relationships.'¹⁷⁸

Although the judgments in *Volks* and *Jordan* could be seen as a step back from the Court's established equality jurisprudence, the strong dissenting opinions indicate that the majority's conservative approach was not shared by all. In both judgments, the dissenting opinions recognised feminist method and followed a more substantive and contextual approach and in many instances supported the evidence provided by the *amici curiae*.

Bonthuys points to the fact that the dissents in both *Jordan* and *Volks* were given by judges who have always been sensitive to a feminist analysis, with the majority being socially conservative, and that concurrence is reliant on downplaying feminist arguments.¹⁷⁹ An *amicus's* contribution in focusing on feminist arguments is important, as it provides ammunition for feminist judges and sensitises those who are not familiar with feminist reasoning. The minority judgments clearly reflected the *amici's* reasoning and ensured that the precedent set would reflect these arguments, placing them in the public domain.

Feminist method was particularly evident in the *Jordan* and *Volks amici curiae* briefs. The *amici*, in focusing on two particularly vulnerable categories of women, were able to bring to the Court's attention, how the substance of law and/or lack of legal protection, are used to suppress the perspectives of women. In providing detailed and context specific briefs, the *amici curiae* attempted to indicate to the Court how the current constructs of law contributed to women's vulnerability and how change or recognition could address this vulnerability.

Although the impact and relevance of the contextual evidence provided is very much dependant on judicial attitudes, the chosen strategies of the litigating parties had a role to play in the decisions reached.¹⁸⁰ In *Jordan* the applicants did not seem to have consulted with the various women's organisations working in the area, which led to a misplaced application, with watered down constitutional arguments and no

¹⁷⁸ Alibertyn 'Substantive equality' op cit note 168 at 272.

¹⁷⁹ Bonthuys 'Institutional openness and resistance to feminist arguments' op cit note 4 at 32.

¹⁸⁰ Alibertyn 'Substantive equality' op cit note 168 at 274.

contextual evidence, whilst there was considerable work being done in the area. Most of the constitutional arguments and contextual evidence were brought by the *amici curiae*, represented by organisations working in the area, who in lengthy briefs attempted to argue the case from the applicant's viewpoint. This is not the purpose of an *amicus curiae* brief and created unnecessarily bulky briefs which could have been more focused and crisp, focusing mostly on the realities of these women and how this could influence the law.

Volks indicated the importance of bringing a case with the “correct” client, that is representative of a broad category of women, taking into account that “the relative privilege of certain claimants could limit the transformative potential of litigation by making it easier for courts to ignore the impact of their judgments on the most disadvantaged of women.”¹⁸¹ In hindsight, the WLC in *Volks* was perhaps too reliant on positive established precedent concerning same-sex couples and legislative reform in the area and should have considered bringing the discrimination claim both on the grounds of marital status and gender.

In both *Jordan* and *Volks*, the Court employed traditional legal method in its reasoning and followed a deferential tone with the legislature seen as the ideal forum where these issues should be addressed. In both instances the SALRC was in the process of discussing and deliberating the issues.¹⁸² The Court was possibly of the opinion that, seeing as legislative debate was imminent, that it was probably best to let the process run its course, rather than imposing a view or placing unnecessary strain on an already complicated process. The Court perhaps believed that its relief would not be suitable to issues so intrinsically embedded in social beliefs and that the legislature would be better suited to formulate social policy that could have the desired impact.

However, the *Jordan* judgment seems to have slowed the legislative process removing a sense of urgency and allowing conservative factions to regain momentum in order to advocate against the process of decriminalisation.¹⁸³ There is still no final report from the SALRC on decriminalisation and, apparently, as a result

¹⁸¹ Bonthuys 'Institutional openness and resistance to feminist arguments' op cit note 4 at 20.

¹⁸² See fn 11 and 106 above.

¹⁸³ Interview Catherine Albertyn op cit note 29.

of the *Jordan* judgment, criminal sanctions have been increased.¹⁸⁴ There are still on-going efforts in getting government to consider decriminalisation and the CGE have recently decided to actively engage government to promote legislative reform and to sensitise the public to address their conservative attitudes towards sex work.¹⁸⁵

Similarly, with domestic partnerships, there has been no law reform despite a draft Domestic Partnership Bill published in 2008.¹⁸⁶ There is currently no indication as to when the Bill will be passed and it seems to have slipped from the Parliamentary agenda, despite strong lobbying from the non-governmental sector.¹⁸⁷ A positive decision in *Volks*, although not solving all the questions regarding legal protection for domestic partnerships, would have provided some protection to those desperately in need and could have been the incentive for the legislature to implement planned legislation. In the meantime, partners in a domestic relationship, upon its dissolution, must rely on the ill-suited law of contracts or undue enrichment to attempt equitable distribution or simply accept that there is no recourse.¹⁸⁸

Despite the delayed legislative process and restrictive judgments, feminist litigators have not given up on litigation as a means to gain some protection for sex workers and women in domestic partnerships and are approaching the courts in an attempt to soften the harsh exclusionary effects of *Jordan* and *Volks*.

In *Kylie v CCMA*, a sex worker felt that she was unfairly dismissed and approached the courts for redress.¹⁸⁹ The Labour Appeal Court found that although it could not sanction sex work, the fact that prostitution was illegal did not derogate the prostitute's constitutional rights and in this specific instance her right to fair labour

¹⁸⁴ See the South African Law Reform Commission *Sexual offences: Adult prostitution* op cit note 11. A report should have been filed by end February in 2011, but to date no report has been filed. For information pertaining to the status of the issue paper see http://www.justice.gov.za/salrc/media/2010_wmp_adultpros.html (last accessed 17 January 2013); for the legislative amendments see fn 94 above.

¹⁸⁵ CGE's statement on sex work (16 May 2013) available at <http://www.cge.org.za> (last accessed 20 May 2013).

¹⁸⁶ Domestic Partnership Bill Government Gazette number: 30663 (14 January 2008). For a detailed discussion of the Bill see B. Smith 'Rethinking *Volks v Robinson*: The implications of applying a "contextualised choice model" to prospective South African domestic partnership legislation' (2010) 12 *PELJ* 238.

¹⁸⁷ Bonita Meyersfield 'If you can see, look: Domestic partnerships and the law' (2010) 3 *Constitutional Court Review* 271 at 289; Goldblatt 'Different Routes to relationship recognition reform' op cit note 106.

¹⁸⁸ Meyersfield op cit note 187 at 273; Elsje Bonthuys 'Family contracts' (2004) 121 *SALJ* 879.

¹⁸⁹ *Kylie v CCMA and Others* 2010 (4) SA 383 (LAC) (hereinafter *Kylie*).

practices.¹⁹⁰ The judgment softened the decision of *Jordan* to an extent and the arguments presented would not have been possible without the dicta in *Jordan*'s minority judgment and SWEAT's arguments that specifically advocated for constitutional rights entitlements.

In relation to domestic partnerships in *Ponelat v Schrepfer* a woman relied on the common law acknowledgement of a universal partnership, to claim a portion of her life partner's estate when their relationship ended.¹⁹¹ In a progressive judgment, the Supreme Court of Appeal, in establishing whether a universal partnership existed, took account of the woman's contributions (financially and domestically) and found that such a partnership indeed existed and that she was entitled to a portion of her partner's estate.

The *Kylie* and *Ponelat* decisions are indicative that litigation is still an option in addressing vulnerability. Although it is not the ideal to fight for individual protection, it is possible, and positive judgments such as these strengthen and build on the arguments brought by the *amici curiae* in *Jordan* and *Volks*, in that courts should take account of women's vulnerability and that legal protection could address this vulnerability.

Although the decisions in *Jordan* and *Volks* could be described as regressive, they actually provided an opportunity for women's organisations to confront the Court with evidence concerning women's lived realities, and although those realities were not acknowledged by the Court, it created an important platform for these arguments to be debated. Important lessons were also learned regarding strategic co-operation and judicial boundaries.¹⁹²

¹⁹⁰ Ibid para 54; sec 23(1) of the Constitution states:

'Everyone has the right to fair labour practices.'

¹⁹¹ *Ponelat v Schrepfer* 2012 (1) SA 206 (SCA) (hereinafter *Ponelat*).

¹⁹² Albertyn 'Substantive Equality' op cit note 168 at 275.

CHAPTER 6

1 THE PURPOSE AND IMPACT OF *AMICI CURIAE* PARTICIPATION

This study has focused on how women's organisations and feminist litigators have used *amicus curiae* participation as a means of advancing feminist and gender equality goals in law. I explored key gender decisions of the Constitutional Court to establish whether the *amici curiae* that have participated in these matters were able to influence the judicial decisions in any way, and if *amicus curiae* participation is a viable litigation strategy to communicate a feminist and gendered viewpoint to affect the outcome of a case.

The three feminist methods identified in Chapter 2, namely the "women question", "feminist practical reasoning" and "consciousness-raising" provided a starting point in identifying and developing a feminist litigation strategy.¹ These methods enabled me to establish whether the *amici curiae* that participated in gender equality cases were able to address the gendered impact of law and, through their presentation of contextual evidence, ensure that the Court is aware of this impact and women's lived realities.

Of particular interest was the way in which the *amici curiae* used the method of "feminist practical reasoning", specifically contextual evidence, to further their goals. Through the contextual evidence provided, the *amici* were able to build and, in certain instances, contest established jurisprudence, provide or contest an interpretation of a right and suggest a specific remedial option.

Despite important legal gains and lessons, *amicus curiae* participation and their ability to influence the law and judicial process has to be viewed, as discussed in Chapter 1, within the constraints of the legal system and its ability to effect change:

'[t]he law of equality is also the law of inequality. The law marks a liminal point. It declares what constitutes unequal treatment as a matter of law. At the same time it also states what is not unequal treatment, or put slightly differently, what forms and claims of inequality the law will not recognize as presenting real or remediable problems of inequality. The law sees only some forms of inequality and not others because that is how law is made. First, law is simply imperfect. It cannot prevent all

¹ The feminist method identified is based on the academic article by Katharine T. Bartlett 'Feminist legal methods' (1990) 103 *Harvard Law Review* 829.

unfair or unjust inequalities even if it wanted to. Second, and most important, law is a compromise of contending forces and interests in society that is articulated in terms of doctrines and principles. Legal doctrines that enforce ideas of equality enforce the nature of that compromise and restate it in principled terms. Thus, what law enforces is not equality, but equality in the eyes of the law. Law does not stand outside the forms of social hierarchy and social stratification that exists in any society. To some extent, law also supports them and legitimates them. That does not mean that law cannot do enormous good in reforming discredited social practices. The point, rather is that even (and especially) when law participates in social change, law is complicit in the new forms of social stratification that replace older, discredited forms. As law recognizes and outlaws some forms of inequality, it fails to recognize or legitimize others.²

To me, the purpose of *amici curiae* participation, as part of a feminist litigation strategy, is the importance of challenging the law irrespective of whether the subsequent decision reflects the *amici's* arguments or not. The importance of litigating from a feminist viewpoint is described as follows:

'If the feminist project is seen not only as the immediate dismantling of sexist social structures but also as raising gender issues, gradually influencing legal and popular discourses about gender, and mobilizing women to claim their constitutional rights, then success should be measured otherwise than by a count of cases won and lost.'³

Amici curiae participation is but one litigation strategy that is located within the bigger picture of feminist litigation and activism, but it should be acknowledged as one of the potential tools to expose and argue for the legal redress of women's subordination.⁴ The evidence seems to suggest that the *amici curiae* that participated in the Constitutional Court were able to harness the "rule shifting" capacity of law in influencing legal decisions that created new rights and remedies for victims; altered the conduct of government; expressed new moral ideals and

² Jack M. Balkin *Constitutional redemption: Political faith in an unjust world* (Harvard University Press 2011) 141.

³ Elsie Bonthuys 'Institutional openness and resistance to feminist arguments: The example of the South African Constitutional Court' (2008) 20 *CJWL* 1 at 35.

⁴ Diana Majury 'The *Charter*, equality rights, and women: Equivocation and celebration' (2002) 40 *Osgoode Hall Law Journal* 297 at 303.

standards and affected cultural attitudes and patterns.⁵ Although it is difficult to assess the “culture shifting” capacity of law,⁶ in harnessing the law’s “rule shifting” capacity, feminists have been able to influence the law to reflect women’s lived realities and voice. In many instances, this has, made a significant difference to women’s lives, for example, the *Bhe* case enabled women married in terms of customary law to inherit intestate.⁷ The discussion below draws together the purpose and impact of the relevant *amici curiae* participation.

⁵ Thomas B. Stoddard ‘Bleeding heart: Reflections on using the law to make social change’ (1997) 72 *New York University Law Review* 967 at 980.

⁶ See the discussion on Stoddard op cit note 5 in chapter 1.

⁷ *Bhe and Others v Magistrate, Khayelitsha, and Others; Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another* 2005 (1) SA 580 (CC) (hereinafter *Bhe*).

2 AMICUS CURIAE PARTICIPATION IN SELECTED CONSTITUTIONAL COURT DECISIONS

In chapter two I established the overall purpose, direct and indirect impact of *amicus curiae* participation. In accordance with this framework, I will reflect on the purpose and impact of the *amici curiae* that participated in the Constitutional Court's gender matters. The findings will also be tabled in accordance with this structure at the end of this chapter (see annexure B).

2.1 Violence Against Women, Women's Voice and the Efficacy of the Criminal Justice System

When an analysis of violence against women is undertaken, it should rest within a broader feminist analysis that examines the societal norms, values and institutions that perpetuate violent behaviour towards women.⁸ Although this study did not focus on locating violence against women within this broader theoretical framework, it has attempted to illustrate that litigation could be key in challenging patriarchal constructs, specifically with the use of *amicus curiae* briefs.

Although law and the criminal justice system uphold masculinist interpretations of justice, women and organisations working in this area, have engaged the system to place the real life experiences of South African women before the courts in order to expose the system's inherent discriminatory nature, its structural inadequacies and limited scope and application.⁹ The importance of engaging law in an attempt to address gender inequalities pertaining to violence has been described as:

'Engaging in law reform, and in that process, making statements about the reality of women's lives and their engagement with the law, gives conversations about the law some depth. It creates oppositional positions and even raises ambiguities about the law, which is more than non-engagement with the law and legal systems would do. The feminist project on the law is deeply challenging and imperfect, but the fact that women are negotiating a system – one that was historically exclusionary and

⁸ Kersti A. Yllo 'Through a feminist lens. Gender, diversity, and violence: Extending the feminist framework' in Donileen R. Loseke, Richard J. Gelles & Mary M. Cavanaugh (eds) *Current controversies on family violence* (Sage Publications, 2nd edition, 2005) 19 at 21.

⁹ Lillian Artz & Dee Smythe 'Introduction: Should we consent' in Lillian Artz & Dee Smythe (eds) *Should we consent? Rape law reform in South Africa* (Juta 2008) 1 at 13.

systematically discriminating – can be considered an essential tread in our efforts to address sexual violence and the attainment of equality more generally.’¹⁰

The four case studies focused on defending protective legislative gains; developing the common law to entrench the State’s liability for protecting women against violence; extending the definition of rape and an attempt to balance the constitutional rights of complainants of sexual offences against the fair trial rights of accused persons.¹¹ The *amici curiae* that participated had a common strategy of focusing the court’s attention on the gendered nature of violence and the need to take this into account when adjudicating these matters. It is necessary to reflect whether these briefs established a common strategy; whether they were able to better represent the complexities of women’s lives; whether they had impacted on the specific decision and if there was any indirect effects.

The *Baloyi* case defended the Prevention of Family Violence Act 133 of 1993, which provided for the immediate arrest of a person that breached the terms of a protection order. The *amici curiae* briefs by the Commission for Gender Equality (CGE) and Minister of Justice interpreted the legislation and briefly referred to the need for special measures to protect women against violence. The briefs can be criticised for not providing sufficient contextual evidence in establishing the gendered nature of violence. This could be as a result of inexperience as it was one of the early *amici* briefs before the Constitutional Court. The interpretive nature of the briefs could also have been strategic, as the briefs were aimed at protecting progressive legislation and a narrow interpretive stance could have been perceived to be the best strategy to ensure a positive result. The Court took account of the *amici’s* arguments and expanded on them considerably to establish positive precedent concerning the gendered nature of violence against women and contributed to an understanding of domestic violence in its broader social context.

The *amicus curiae* brief in *Carmichele* focused on developing a principle in the law of delict confirming the State’s responsibility to protect women against violence. The Centre for Applied Legal Studies (CALs) focused on supplementing

¹⁰ Ibid 20.

¹¹ *S v Baloyi* 2000 (2) SA 425 (CC) (hereinafter *Baloyi*); *Carmichele v Minister of Safety and Security and Another* 2001 (4) SA 938 (CC) (hereinafter *Carmichele*); *Masiya v Director of Public Prosecutions, Pretoria and Another* 2007 (5) SA 30 (CC) (hereinafter *Masiya*) and *S v Zuma* 2006 (2) SACR 191 (W) (hereinafter *Zuma*) respectively.

Carmichele's arguments to bring contextual evidence concerning gender-based violence. Although women's rights arguments were not the focal point of the Court's judgment, it did refer to the *amicus's* arguments and confirmed the importance of protecting women against violence. CALS's participation provided an important platform to emphasise the need for gendered arguments to be taken into account when developing the common law.

As with *Baloyi*, the importance of the *amicus curiae* participation in *Carmichele* lies in the positive precedent it set for courts to respond to the experiences of women in similar matters. The importance of "follow-up" *amici curiae* participation was also illustrated in the decisions that followed *Carmichele*. Subsequent decisions, that dealt with the State's delictual liability in protecting women from violence, show that *amici curiae* participation is crucial in alerting courts to established positive precedent and in ensuring that it is followed and strengthened. The subsequent High Court and SCA decisions in *Carmichele* was disappointing, as they lacked the gendered arguments present in the Constitutional Court judgment and indicated how important *amici curiae* participation could be in framing a case from a gendered viewpoint.

The *Masiya* case concerned the development of the definition of rape to include anal penetration. CALS and the Tshwaranang Legal Advocacy Centre (TLAC) entered as *amici curiae* to voice their dissatisfaction with the lengthy law reform process and to develop the definition through litigation in order to provide extended protection to victims of sexual violence. The *amici curiae* stressed the gendered nature of the definition and the need to understand rape as a violent act to exert power. Although the Court took account of the *amici's* arguments, the brief was misconstrued and the arguments used to justify a more restrictive finding. The judgment was disappointing but *Masiya* provided women's organisations with an opportunity to voice their dissatisfaction with the legislative process and forced the Minister to account to the Court about what the status of the Sexual Offences Bill was.

The *amicus curiae* participation in *Zuma* was important in establishing the role of *amicus curiae* participation in criminal trials. The case was indicative that caution should be exercised in criminal trials not to draft a brief that is too closely related to a specific party, but that the brief should be impartial and its only purpose should be to assist the court in adjudicating the matter. The *Zuma* case also pointed to the

inherent risks of getting involved in a high profile matter and the possibility of the media misconstruing the intentions of organisations in an attempt to polarise issues for public consumption.¹²

From the case analysis, it is clear that women and organisations have used the court system to challenge the social and legal understanding of women's experience with violence, in an attempt to ensure that these experiences are embodied within the law and criminal justice system.¹³ The above organisations, in support of women complainants, have intervened as *amici curiae* to place specific information pertaining to the gendered nature of violent crime before the Court and were able to focus on the relevant women and their experiences. For the organisations involved, this understanding and experience is key to affording the necessary protection and in contributing to an understanding of the social and masculine constructs that fuel violent behaviour towards women.

Activists have acknowledged the contradictory nature of their engagement with law as the criminal justice system is seen as a site of oppression as well as a site "for protection, liberation and justice."¹⁴ This contestation has been accepted and the focus has been using the court and *amici curiae*'s participation as a "site of resistance and struggle in shaping and re-defining women's gendered experiences and the right to be free from violence."¹⁵ To this extent, *amicus curiae* participation in violence matters has definitely had an influence on the extension of protection to women, on setting positive precedent for future development and creating a platform for the legal understanding of the actual dynamics that fuel violent behaviour towards women.

¹² Vasu Reddy & Cheryl Potgieter 'Real men stand up for the truth': Discursive meanings in the Jacob Zuma trial' (2006) *Southern African Linguistics and Applied Language Studies* 511 at 513.

¹³ Lillian Artz 'The weather watchers: Gender, violence and social control' in Melissa Steyn & Mikki van Zyl (eds) *The prize and the price: Shaping sexualities in South Africa* (HSRC Press 2009) 169 at 188.

¹⁴ Artz & Smythe 'Introduction: Should we consent?' op cit note 9 at 16.

¹⁵ Ibid 17.

2.2 Women as Part of Cultural Communities: Gender versus Culture

With the Constitution recognising customary law, debates arose as to the application of the equality principle within custom, as many practices were seen as discriminatory.¹⁶ Litigation played an important role in addressing this potential conflict and gave rise to its own complexities, since the official and codified sources of customary law were not representative of actual practice. The aims of women and activists were “to contest and re-define cultural norms and practices, and in the process, to redress the gendered balance of power represented by the present system of customary law.”¹⁷ But, there were diverging views in how this was to be achieved. Some advocated for a rights-based approach, with the rights of equality and dignity being central in challenging discriminatory practices, whilst others argued that actual living custom had to be established and applied, and if necessary developed, to bring in line with constitutional norms of equality.

The *Bhe* case questioned the application of the rule of male primogeniture in the context of customary law of succession and presented an ideal opportunity to dissect the relationship between culture and equality.¹⁸ The Women’s Legal Centre (WLC), representing Bhe and as applicant, followed a rights-based approach and from the outset had a specific strategy to provide the Court with the relevant gendered arguments based on the right to equality. The CGE, as *amicus curiae*, supported a custom-based approach and argued that the rule of male primogeniture had to be developed on a case-by-case basis, if necessary, in terms of the specific custom. They also focused on a particularly vulnerable group, women in polygynous marriages, and the negative effect that a civil remedy in terms of the Intestate Succession Act 81 of 1987 would have on these marriages. The Court supported the rights-based approach of the WLC, although it also acknowledged the importance of taking account of living customary law, but it was furthermore concerned with how living custom was to be proved. The minority judgment adopted and supported the arguments of the CGE.

The *Shilubana* judgment questioned whether a community could develop its customs and traditions to bring them in line with the Constitution, in allowing a

¹⁶ Sec 211 of the Constitution of the Republic of South Africa, 1996 (hereinafter the Constitution).

¹⁷ Likhapha Mbatha, Najma Moosa & Elsje Bonthuys ‘Culture and religion’ in Elsje Bonthuys & Catherine Albertyn (eds) *Gender, law and justice* (Juta 2007) 158 at 168.

¹⁸ *Bhe* op cit note 7.

woman to become chief of a community.¹⁹ In *Shilubana*, the CGE, in contradiction with its strategy in *Bhe*, focused on the fact that the practice discriminated in terms of the Constitution. The National Movement of Rural Women (NMRW), on the other hand, supported the application of living customary law which has already allowed for women chieftainship. It did not see a need to develop the custom as the lived custom was already constitutionally compliant. In its decision, the Court made numerous references to the *amici's* arguments, especially the arguments of the NMRW, and found, as argued by *Shilubana*, that the particular custom had developed, thereby confirming her appointment as chief.

The *Gumede* case concerned the constitutional validity of certain provisions of the Recognition of Customary Marriages Act 120 of 1998 (RCMA).²⁰ The WLC, as *amicus curiae*, wanted to focus the Court's attention on the vulnerability of the specific group of women to whom the RCMA applied and on the fact that the application of the Act was discriminatory. It focused on a particular vulnerable group, women in polygynous marriages, and advocated for a remedy that would extend protection to women in these marriages. The strategy employed was both context specific and rights-based. The WLC's contextual evidence led to an awareness of the vulnerability of these women, but the Court rejected its arguments in relation to the proposed remedy and focus on women in polygynous unions. *Gumede* is a good example of the Court not paying much attention to an *amicus curiae* brief or regarding it as unnecessary in light of its own positive precedent (established in *Bhe* and *Shilubana*), and of a case which has an equitable outcome but not necessary the equitable outcome advocated for by the *amicus curiae*.

The *MM v MN* judgment shows the Court's clear support for the custom-based approach and was a victory for those supporting it.²¹ *MM v MN* dealt with the question whether consent was a requirement for a second or subsequent customary marriage. The WLC, as *amicus curiae*, focused on establishing equality between the different wives, having regard for their lived realities and vulnerability as a group. It followed a rights-based approach, and was concerned with the contractual

¹⁹ *Shilubana and Others v Nwamitwa* 2009 (2) SA 66 (CC) (hereinafter *Shilubana*).

²⁰ *Gumede v President of the Republic of South Africa* 2009 (3) SA 152 (CC) (hereinafter *Gumede*).

²¹ *MM v MN and Another* 2013 (4) SA 415 (CC) (hereinafter *MM v MN*).

requirements of consent. The CGE and NMRW, as *amici curiae*, focused on the specific custom and whether, in terms of Xitsonga culture, consent was required.

In calling for further evidence pertaining to Xitsonga custom, the Court clearly indicated its support for a custom-based approach. In reviewing the additional evidence, most of which was submitted by the CGE and NMRW, it found that Xitsonga custom prescribed consent but that the custom should be developed in light of the principles of equality and dignity, referring to the necessity of equality between husband and wife. It found that consent of the first wife is an express requirement of Xitsonga custom for the conclusion of a subsequent customary marriage. The case confirmed the importance and role of *amici* in providing evidence as proof of the content of customary law.

What is noteworthy of the *amici* participating in the abovementioned matters, especially by those who support a custom-based approach, is the way in which they reflect an anti-essentialist approach to law. They have attempted to indicate that as women are subject to customary law, their experiences are unique and different from women not subject to its practice and that the Court has to take account of these differences and their specific experience. The different strategies employed by the *amici curiae* are also indicative of the existence of different feminist strategies in litigating, and despite distinctive legal outcomes, both have the communal goal of attaining equality for women.

The *amici curiae* participation in customary matters has enabled a multiplicity of voices, specifically female voices, in establishing the role of customary law within a constitutional framework.²² For future matters, and building on the custom-based approach that is clearly supported by the Court, *amici curiae* have a definite role to play in placing evidence of lived custom before the Court, ensuring the development of customary law within the constitutional framework of equality.

²² Catherine Albertyn “The stubborn persistence of patriarchy’? Gender equality and cultural diversity in South Africa (2009) 2 *Constitutional Court Review* 165 at 206.

2.3 Women's Vulnerability, Choice and the Constitutional Court

Prostitution and co-habitation are two areas of women's vulnerability that I felt needed specific mention, as there was considerable work done by organisations in these areas to address this vulnerability. When the cases of *Jordan* and *Volks* came before the Constitutional Court, organisations were well placed to participate as *amici curiae* in order to place the relevant contextual evidence before the Court.²³ In both instances, the Constitutional Court refused to extend protection and employed a formalist, a-contextual method of reasoning, deferring to Parliament to grant protection. The *amici's* participation was dissected to determine why such conservative decisions were given in light of detailed and sophisticated *amici curiae* briefs.

The *amici curiae* participation by the Sex Workers Education and Advocacy Taskforce (SWEAT),²⁴ and the CGE in *Jordan* was reactionary, as they were not actively looking for a case and were not expecting to litigate on decriminalisation while engaged in lobbying government to promulgate legislation. Considering the factual scenario and applicant's simplistic brief, SWEAT and the CGE felt obliged to participate as *amici curiae* to represent the voices of all sex workers and to place the relevant contextual evidence and rights-based arguments before the Court, which were clearly lacking in the applicant's brief. The CGE focused on equality arguments whilst SWEAT focused on sex workers' specific rights entitlements.

When reading the judgment it becomes clear that the Court struggled to reach consensus. The equality arguments brought by the CGE played an important role in attempts to reach consensus and it could be deduced that the minority judgment first enjoyed majority support, but that this depended on the acceptance of the equality arguments. The Court's rejection of the SWEAT arguments was disappointing and indicative of the Court's own social boundaries and liberal views, especially regarding choice. Through the SWEAT brief, the *amici curiae* learned that there are certain boundaries which the Court will not cross, despite clear arguments and relevant contextual evidence being available.

²³ *S v Jordan and Others* 2002 (6) SA 642 (CC) (hereinafter *Jordan*); *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC) (hereinafter *Volks*).

²⁴ The SWEAT brief was a collaborative brief between SWEAT, the Centre for Applied Legal Studies (CALs) and the Reproductive Health Research Unit (RHRU).

Unlike *Jordan*, women's groups were actively looking for a case to litigate to extend legal protection to women involved in domestic partnerships. The WLC identified a suitable case, but the factual scenario was not ideal, as the applicant was relatively privileged. This prompted CALS to enter as *amicus curiae* to present the situation of poor women who find themselves in these relationships. Through a research report, CALS wanted to provide the Court with the relevant contextual evidence pertaining to the changing notion of family in South Africa; gender inequality and its relationship to the family; the patterns of cohabitation in South Africa and the features of a cohabitative relationship which points to it being a permanent life partnership.

The majority judgment rejected the evidence contained in the report, as it was not incontrovertible or uncontroversial, as required by the relevant rules of the Court.²⁵ Both the minority judgments extensively relied on CALS's evidence with Sachs J's judgment specifically reflecting this. *Jordan* and *Volks* are indicative of the limits of law in effecting change. Although these judgments could be seen as a step back from the Court's established equality jurisprudence, the strong minority judgments indicate that the majority's conservative approach was not shared by all.

As stated in the introduction, this study was interested in questions of law and social change with a particular focus on how litigation could strategically be used to influence the law to benefit women. Through an analysis of the Constitutional Court's key gender jurisprudence, I have questioned whether *amicus curiae* participation, as part of feminist litigation strategy, has contributed to changing the law to benefit women.

As discussed, I have employed an analytical framework to determine the direct/indirect impact that *amicus curiae* participation had on certain judicial decisions and to determine, as a result, if the *amici* were able to represent women's lives to secure legal protection.

Several of the cases had a direct impact on women's lives as a result of arguments and contextual evidence brought by the *amici curiae*. The cases of *Carmichele*, *Bhe*, *Shilubane*, *Gumede* and *MM v MN* mentioned, secured and extended rights protection to women and set important positive precedent. These cases demonstrate the importance of employing feminist method as strategy to secure and initiate change through legal action.

²⁵ See Rule 31 of the Constitutional Court, chapter 2 note 100 above.

The decisions, where the Court ignored or rejected the *amici curiae* arguments, are those judgments in which the indirect impact has been the greatest. This confirms the sentiments of legal mobilisation scholars that litigation forms part of a wider struggle for change and that judicial outcome does not determine the success of achieving change through legal action.²⁶ The *Masiya* case is an example, that despite a restrictive judgment, the *amici* was able to focus attention on the implementation of an important piece of legislation.²⁷ The *Jordan* and *Volks* judgments are other examples that, despite restrictive judgments, the *amici*'s arguments were able to elicit debate within the Court and contributed to an understanding of the limits of law in initiating change.

Overall, the case analysis confirmed the importance of the feminist project in law in engaging and harnessing the law's "rule shifting" capacity which has the capacity to become "culture shifting".

²⁶ Michael W. McCann 'Reform litigation on trial' (1992) 17 *Law and Social Inquiry* 715.

²⁷ Criminal Law (Sexual Offences and Related Matters) Amendment Bill, Bill Number B50d-2003.

3 RECURRENT THEMES

The discussion that follows, focuses on certain key themes that have been identified throughout the different case and *amici curiae* analyses that warrant specific mention:

3.1 The Importance of Minority Judgments

What has become evident from the case analyses is the extent to which minority/dissenting judgments refer to and implement the arguments presented by the *amici curiae*. Although the ultimate goal of *amicus curiae* participation is to influence the majority judgment of a particular court, the possible influence on a minority judgment is not without benefits.²⁸ A minority judgment might not set precedent, but it highlights the weaknesses of the majority; offers possible avenues for future litigation; suggests an alternative interpretation of the majority judgment and most importantly, increases the likelihood that a majority judgment would be overturned in future.²⁹

Collins describes minority judgments as “democratic conversations” where a judge engages in a form of “institutional disobedience” by not agreeing with the majority.³⁰ Therefore, a judge is able to point out flaws in the majority’s reasoning, whilst presenting his/her own interpretation of the correct application of legal principles.³¹ *Amici curiae* participation assists in this democratic conversation, as the information and evidence provided by them, creates a framework for minority opinions to develop, which promotes democratic dialogue, specifically indicating to the public that the majority’s decision is not supported by all.³² The importance of stimulating public debate, coupled with political commitment could see a majority judgment overturned in future. Therefore, as discussed in Chapter 2, even if a dissent does not become law, its contribution in stimulating judicial and public debate

²⁸ L’Heureux-Dube ‘The dissenting opinion: Voice of the future?’ (2000) 38 *Osgoode Hall Law Journal* 495; Paul M. Collins Jr ‘*Amici curiae* and dissensus on the U.S. Supreme Court’ (2008) 5 *Journal of Empirical Legal Studies* 143 at 145; Claire Ruth Bader Ginsburg ‘The role of dissenting opinions’ (2010) 95 *Minnesota Law Review* 1.

²⁹ Collins ‘*Amici curiae* and dissensus on the U.S. Supreme Court’ op cit note 28 at 145; also Randall T. Shepard ‘Perspectives: Notable dissents in state constitutional cases’ (2005) 68 *Albany Law Review* 337 at 342.

³⁰ Paul M. Collins Jr *Friends of the Supreme Court: Interest groups and judicial decision making* (Oxford University Press 2008) 144-146.

³¹ Ibid 144.

³² Ibid 146.

is invaluable. This confirms the importance of considering the indirect impact that a finding might have when devising litigation strategy.³³

Cases without *amici curiae* participation are usually narrowly defined and the justices only consider the issues raised by the litigants, whilst *amici curiae* participation and the evidence they bring, broadens the issues, providing a possible different interpretation as to the application of the law.³⁴ Although *amici curiae* participation is not the only reason why judges write minority/dissenting opinions, it can play a very significant role in the decision to dissent.³⁵

The *Masiya*, *Bhe*, *Volks* and *Jordan* cases all have strong minority judgments in which the *amici curiae* arguments are engaged in and reflected on. The minority judgments in *Volks* and *Jordan* should be noted as the majority judgments could be classified as the most restrictive and conservative pertaining to women's equality and the degree of debate that was elicited and evident in the minority judgments indicate that the conservative views of the majority was not shared by all.³⁶

Subsequent decisions, such as *Kylie*,³⁷ indicate that minority judgments, and particularly the *amici's* arguments within these judgments could influence later decisions. *Amici curiae* participation therefore plays a substantial role in court decisions, even if its arguments are only reflected in a minority decision. The importance of minority judgments and the *amici curiae's* contribution in shaping these, should not be underestimated, as it could play an important part in shaping subsequent jurisprudence, and places arguments and ideas in the public realm that could enable the culture shifting capacity of law.³⁸

³³ Henk Botha 'Judicial dissent and democratic deliberation' (2000) 15 *SAPL* 321 at 328; Pius Langa 'The fifth Bram Fischer memorial lecture. The emperor's new clothes: Bram Fischer and the need for dissent' (2007) 23 *SAJHR* 364 at 370.

³⁴ Collins 'Friends of the Supreme Court: Interest groups and judicial decision-making' op cit note 30 at 150.

³⁵ Ibid 164.

³⁶ Bonthuys op cit note 3 at 35.

³⁷ *Kylie v CCMA and Others* 2012 (4) SA 383 (LAC) (hereinafter *Kylie*), see the discussion of the case in chapter 5.

³⁸ Robert G. Flanders Jr. 'The utility of separate judicial opinions in appellate courts of last resort: Why dissents are valuable' (1999) 4 *Roger Williams University Law Review* 401.

3.2 Democracy, Voice and *Amicus Curiae* Participation

The importance of judicial decision-making within a democratic and transformative context has been described as follows:

‘Judges are required to subject public and private power to the demand for dialogic justification; to participate in a transformative debate about the relationship between the individual and collective. It is their duty to resist normative closure, to renounce attempts to make the current boundary between the collective and the individual appear natural and necessary; to challenge the assumption that ‘the people’ have a fixed identity, or that a broad social consensus is ‘out there’ waiting to be discovered. It is their responsibility to facilitate democratic deliberation; to promote respect for the ‘marginalised other’; to allow a multiplicity of voices to be heard. As participants in a culture of justification, judges are required to take responsibility for their own actions, to spell out the moral and political values upon which their decisions rest.’³⁹

Amicus curiae participation assists in this process as it provides the opportunity for persons that might be affected by a judgment to participate and so adds legitimacy to the judicial process and reassures the public of the courts receptiveness to the norm of democratic inclusion.⁴⁰ However, *amicus curiae* participation does much more in terms of the democratic process, as it provides real democratic benefits to vulnerable groups.⁴¹

In this sense, *amicus curiae* participation provides an important channel of communication with the judiciary, as an *amicus* is in the position to represent a vulnerable group’s interests, allowing for a multiplicity of voices to be heard.⁴² *Amicus curiae* participation fulfils an expressive function that can be equated to the feminist method of “consciousness-raising” because it provides a public platform for women’s voices to be heard that strengthens the participatory nature of democracy.⁴³ *Amicus curiae* participation is also an important method through which

³⁹ Botha op cit note 33 at 322.

⁴⁰ Omari Scott Simmons ‘Picking friends from the crowd: *Amicus* participation as political symbolism’ (2009) 42 *Connecticut Law Review* 187 at 198.

⁴¹ *Ibid* 199.

⁴² *Id.*

⁴³ See feminist method as discussed in chapter 2 above; Bartlett op cit note 1; Ruben J. Garcia ‘A democratic theory of *amicus* advocacy’ (2008) 35 *Florida State University Law Review* 315.

social movements and organisations can access the public domain to get their goals and messages across.⁴⁴

The *amici curiae* that participated in the customary matters, played an especially important role, considering South Africa's history and the need for claims of culture, gender and diversity to be understood in the right context.⁴⁵ Although all the *amici curiae* that participated allowed for the voices of women to be heard, the *amici curiae* that participated in the customary law matters warrant specific mention, as they were able to represent the voices of a specific vulnerable and marginalised group and made sure that these women's voices were heard before the Court and that strengthened South Africa's commitment to democratic participation. Ultimately, *amici curiae* participation fosters democratic ideals by allowing interest groups the option of influencing the way in which legal decisions are made, by representing the voices of those not before court.⁴⁶

3.3 Broad Categories of *Amicus Curiae* Participation

Amicus curiae participation has enabled us to litigate from a feminist and gendered viewpoint. This has allowed us to bring contextual evidence to the Court through which current constructs of the law was challenged.⁴⁷

Within the strategy employed by the participating *amici curiae* I have identified certain broad categories within which the *amici* operated in claiming rights and advancing gender equality for women within the court system. These categories illustrate the broad consequences of *amici curiae* participation and speak to the "rule shifting" capacity that is harnessed by *amicus curiae* participation in influencing legal decisions; in creating new rights and remedies for victims; in altering the conduct of government and in expressing new moral ideals and standards.⁴⁸

These categories include: setting new standards of inclusion in developing the common law through a representation of women's voice; extending rights protection and advocating for specific remedial gains; defending existing rights protection and

⁴⁴ Garcia op cit note 43 at 318.

⁴⁵ Catherine Albertyn 'The stubborn persistence of patriarchy' op cit note 22 at 196.

⁴⁶ Garcia op cit note 43.

⁴⁷ Catherine Albertyn 'Law, gender and inequality in South Africa' (2011) 39 *Oxford Development Studies* 139 at 143.

⁴⁸ Stoddard op cit note 5 at 980.

interpreting existing rights. For ease of reference the categories are tabled in relation to the relevant cases as:

Setting new standards of inclusion: Developing the common law	Extending rights protection and advocating for specific remedial gains	Defending existing rights protection	Interpreting existing rights protection
<ul style="list-style-type: none"> - <i>Carmichele v Minister of Safety and Security.</i> - <i>Masiya v Director of Public Prosecutions.</i> 	<ul style="list-style-type: none"> - <i>S v Jordan.</i> - <i>Volks NO v Robinson.</i> - <i>Bhe and Others v Magistrate, Khayelitsha, and Others.</i> - <i>Shilubana v Nwamitwa</i> - <i>MM v MN and Another.</i> - <i>Masiya v Director of Public Prosecutions.</i> 	<ul style="list-style-type: none"> - <i>S v Baloyi.</i> - <i>S v Zuma.</i> 	<ul style="list-style-type: none"> - <i>MM v MN and Another.</i> - <i>Gumede v President of the Republic of South Africa.</i>

It is within each of these categories that the *amici curiae* were able to represent the complexity of women's lives to the Court. This framework, coupled with the discussion in section 2 above, assists in understanding the purpose and aims of *amici curiae* intervention and highlights the importance of employing a feminist strategy in litigating.

3.4 The Importance of Drafting a Proper *Amicus Curiae* Brief

When drafting an *amicus curiae* brief, one has to ensure that it complies with its intended and traditional purpose. One of the main concerns relating to these briefs, is that they would be a mere duplication of the parties' arguments, not bringing anything new to a court except focusing possible attention on the organisation and its politics.⁴⁹ According to Sungaila, *amici curiae* should be particularly weary of so called "me too" briefs and should focus on the "three C's" namely communication, cooperation and coordination when filing these briefs.⁵⁰ When contemplating participation as *amicus curiae*, it is important to keep in mind that no undue prejudice should be suffered by the original parties to the litigation, and the *amicus curiae* should ask itself whether its arguments would be of assistance to the court.⁵¹

Balancing the actual parties' needs versus the *amici's* and ensuring its distinctiveness, is key in bringing a successful *amicus curiae* brief to a court. It is important for the *amicus curiae* not to usurp the role of one of the parties, as it should assist the court in the interpretation of the relevant arguments. The SWEAT brief in *Jordan* might be indicative of a brief that was perceived by the Court to usurp the role of the applicant because it introduced intricate rights arguments not argued by the parties.

When drafting an *amicus curiae* brief the unique dynamics of the court and individual judges should be considered. It is important to identify judges that might be able to steer the court in a specific direction and attempt, when formulating arguments, to catch their attention; to anticipate and to respond to their concerns, and to advocate arguments that would attract their votes.⁵² This is of particular relevance in ensuring that although an argument might not enjoy majority support, it might be expanded on in a minority finding, ensuring that the *amicus curiae's* arguments form part of the judgment.

It is interesting to note that where the CGE's briefs relied on a "straight forward" equality analysis, it was accepted by the Court (such as in *Baloyi* and *Jordan*). This could be indicative of the Court's and specific judges' reluctance to

⁴⁹ Mary-Christine Sungaila 'Effective *amicus* practice before the United States Supreme Court: A case study' (1999) 8 *Review of Law and Women's Studies* 187 at 189.

⁵⁰ *Id.*

⁵¹ John Koch 'Making room: New directions in third party interventions' (1990) 48 *University of Toronto Faculty Law Review* 151 at 155.

⁵² *Id.*

embrace feminist reasoning, as they might have perceived the arguments of the CGE to be more traditional and neutral. Sheehy states:

'If feminist arguments are successful in that they invoke a judicial response or, indeed, win the case, these arguments are often understood in their simplest or most conservative forms. The more radical feminist arguments are unfamiliar, not within the traditional legal paradigm and profoundly disruptive of established hierarchies.'⁵³

This again highlights the importance of the feminist project in law and the pursuance of feminist litigation strategy to confront conservative and formalist judicial reasoning. Even if feminist arguments catch the attention of only one or two judges, it could lead to a minority judgment that serves as an entry point "into judicial conversations of more radical discourses and concepts, which may eventually become more widely accepted".⁵⁴

Despite the Court's acceptance of a neutral and basic analysis, in some instances it should not be seen as creating a precedent for *amici curiae* briefs to be drafted in general and neutral terms. This would counter the feminist project in law and the purpose of *amici curiae* participation is to ensure that it serves as entry point for feminist discourses and concepts to be heard, which might become more widely accepted thus translating into legal precedent and law.⁵⁵

⁵³ Elizabeth A. Sheehy 'Feminist argumentation before the Supreme Court of Canada in *R. v Seaboyer*; *R. v Gayme*: The sound of one hand clapping' (1991) 18 *Melbourne University Law Review* 450 at 462.

⁵⁴ Bonthuys op cit note 3 at 32.

⁵⁵ Bonthuys op cit note 3.

4 FUTURE RESEARCH

The research undertaken in this thesis focused on the purpose and impact of *amicus curiae* participation in advancing gender equality through law. The study has been limited to certain key Constitutional Court decisions and an analysis of the relevant *amicus curiae* participation within each of these decisions.

The finding has been that the *amicus curiae* briefs were able to promote equality and feminist viewpoints through the arguments and information they provided and, although a judgment might not have reflected the specific arguments advanced by the *amici curiae*, it is clear that its indirect impact is of equal importance.

This study did not focus much on the indirect impact of *amicus curiae* participation. Future research could focus on this impact and how *amici* participation was able to politically mobilise an issue and how publicity has been used to influence public opinion in an organisations favour. Further research could also focus on specific feminist theory and how this theory has been and could be applied as feminist litigation strategy to better women's lives.

Research pertaining to *amicus curiae* participation in South African courts, has been scant and it is important to pursue research in the area to ensure that the importance of these participations is not overlooked especially in influencing judicial decisions.

ANNEXURE A: RESEARCH METHODOLOGY

The study is based on a qualitative analysis of relevant literature, legislation and court decisions pertaining to the objectives of the study.

As stated in Chapter 1, the main body of the thesis is dedicated to a case-based analysis of the Constitutional Court's core gender jurisprudence and the *amici curiae* that have participated in these matters. The case discussions are divided into three categories namely violence against women, women as part of cultural communities and specific areas of vulnerability including prostitution and domestic partnerships (between heterosexual couples). The purpose of this analysis is to establish whether the *amici curiae* that have participated in these matters were able to influence the judicial decisions reached in any way and how the *amici* used this litigation strategy to bring a feminist and gendered viewpoint across.

The usual method in analysing case law is based on the court decision itself. However, I followed a different approach focusing on the litigating party and *amici curiae*'s submissions. This called for an extensive analysis of court pleadings and documents to gain insight into the context in which a decision was given. The structure of the case analysis focuses on the contextual and factual background of the case, followed by an analysis of the submissions of each of the relevant parties and participating *amici curiae*. The actual court decision is then analysed in relation to the participating *amici curiae*'s arguments, discussing the purpose and impact of the *amici curiae* participation. In order to understand how the judgments were received and interpreted, academic responses and discussions were studied.

To further understand the purpose of the relevant *amici curiae* participations, interviews were undertaken with individuals representing organisations that participated as *amicus curiae* and in some instances the legal counsel that represented them. The interviews were informal, with no set structure, and sought to establish why organisations decided to enter as *amici curiae* and to gain insight into the specific strategy they employed to reach their set objectives. The importance and value of the interviews should be viewed against the background that they enabled me to gain a general background to the relevant participations and assisted me in understanding the contextual background to the participations. However, they generally lacked specific content, as most of the cases were decided some time ago leading to deductions having to be made in relation to specific strategy. Another

impediment was the inability to interview all relevant individuals as a result of time and professional constraints. Ethical considerations pertaining to the interviews were taken into account and the relevant clearance and approval obtained from the University.

ANNEXURE B

Purpose and impact of *amici curiae* participation in gender equality cases.

PURPOSE	DIRECT IMPACT	INDIRECT IMPACT
<p><i>Baloyi.</i> CGE & Minister of Justice as <i>amici curiae</i></p>		
<ul style="list-style-type: none"> • Specific legislative interpretation • Reference to academic opinion and obligations in terms of the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)⁵⁶ stressing the need for specific legislation protecting women against violence. 	<ul style="list-style-type: none"> • CGE's arguments reflected in judgment concerning the possible interpretations of sec 3(5) of the Prevention of Family Violence Act; the social context of domestic violence and South Africa's obligations in terms of CEDAW. • Positive precedent set. Court considered and utilised the <i>amici curiae</i> briefs expanding on them and specifically acknowledging the gendered nature of domestic violence. 	<ul style="list-style-type: none"> • Minister's participation as <i>amicus curiae</i> confirmed government's commitment to addressing gender-based violence.
<p><i>Carmichele</i> CALS as <i>amicus curiae</i></p>		
<ul style="list-style-type: none"> • Contextual information pertaining to women's vulnerability and the link between gender-based violence and gender inequality. • Interpretation of an established delictual 	<ul style="list-style-type: none"> • Judgment specifically referred to the arguments presented by the <i>amicus curiae</i>. • Positive precedent set concerning the acknowledgement that the State has a duty to 	<ul style="list-style-type: none"> • The <i>amicus curiae</i> participation in <i>Carmichele</i> paved the way for similar interventions in subsequent cases, entrenching delictual liability for the State and

⁵⁶ *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (1979).*

<p>principle questioning whether there was a constitutional obligation on the State to prevent the violation of certain constitutional rights.</p>	<p>protect women against violent crime.</p>	<p>specifically the police when they fail to protect women from violence.</p> <ul style="list-style-type: none"> • Stressed the importance and need of “follow-up” <i>amici curiae</i> participation in building and strengthening positive established precedent.
<p>Masiya CALS & TLAC as <i>amici curiae</i></p>		
<ul style="list-style-type: none"> • Evidence pertaining to the historical development of the common law rape definition. • Evidence pertaining to examining rape, focusing on gender roles and reinforcement of power relations. • Provided a comparative perspective. 	<ul style="list-style-type: none"> • What could be described as a distorted <i>amici curia</i> brief. The Court relied on the general and introductory arguments of the <i>amici curiae</i>, but rejected or simply ignored the arguments where they tried to provide the Court with actual content and context reverting in those instances to Masiya’s arguments. 	<ul style="list-style-type: none"> • Platform to express its dissatisfaction with the legislative reform process. Engaging with the Minister in a public forum.
<p>Zuma CALS & TLAC as prospective <i>amici curiae</i></p>		
<ul style="list-style-type: none"> • Expert evidence pertaining to victim’s response to trauma specifically in relation to the complainants past, sexual abuse and previous alleged rape allegations. 	<ul style="list-style-type: none"> • <i>Amici curiae</i> participation refused. • Resentment towards <i>amici curiae</i> reflected in final judgment. 	<ul style="list-style-type: none"> • Important lessons learned pertaining to <i>amicus curiae</i> participation in criminal trials and the way briefs should be constructed for future participation. • Negative media coverage influencing public perception

		regarding the organisation's integrity. ⁵⁷
<i>Bhe</i> CGE as <i>amicus curiae</i>		
<ul style="list-style-type: none"> Contextual evidence pertaining to the distinction between official and living customary law and the importance of focusing on living customary law. Contextual evidence as to what living customary law prescribes in the specific situation. Suggested interpretation of how living customary law should be applied and suggested remedy that would best support such an interpretation. Focus on particular vulnerable group: women in polygynous unions. 	<ul style="list-style-type: none"> Court stressed the importance of taking account of living customary law although it acknowledges the difficulty in establishing such custom. Remedy specifically catered for women in polygynous unions. 	<ul style="list-style-type: none"> First Constitutional Court judgment specifically locating gender arguments within a customary law framework. Diverging strategies emerging between women's groups: rights-based v customs based approach. Minority judgment specifically implemented the arguments of the <i>amicus curiae</i>. Focus on living customary law provided a framework for discussion on how evidence of living custom should be placed before a court.
<i>Shilubana</i> CGE, NMRW and CONTRALESA as <i>amici curiae</i>		
<ul style="list-style-type: none"> Stressed the importance of accepting the nature of customary law as living. Focus on the 	<ul style="list-style-type: none"> Extensive referencing indicating that the <i>amici's</i> arguments had a substantial influence on the Court's 	<ul style="list-style-type: none"> Clear trend established between litigating factions supporting a rights-based or custom-based approach.

⁵⁷ See for example the newspaper article by Mathatha Tsedu negatively reflecting on the *amici* participation interpreting it as a publicity stunt by the organisations, *Rapport Newspaper*, 2 April 2006.

discriminatory nature of the practice.	reasoning. <ul style="list-style-type: none"> • Clear support for the NMRW's arguments thus supporting a more custom-based approach. 	<ul style="list-style-type: none"> • The CGE indicating flexibility in its litigation strategy in supporting a rights-based approach as opposed to <i>Bhe</i> were it supported a custom-based approach.
<i>Gumede</i> WLC as <i>amicus curiae</i>		
<ul style="list-style-type: none"> • Specific contextual evidence pertaining to the vulnerability and marginalization of the grouping of women. • Reference to relevant international and regional instruments. • Suggested remedy pertaining to women in polygynous marriages. 	<ul style="list-style-type: none"> • Referred to the arguments presented by the <i>amicus curiae</i> rejecting the suggested remedy. 	<ul style="list-style-type: none"> • Lesson learned that courts do not always pay attention to <i>amicus</i> arguments and that despite a rejection an equitable outcome is still possible.
<i>MM v MN</i> WLC, CGE and NMRW as <i>amici curiae</i>		
<ul style="list-style-type: none"> • The WLC explored the requirement of consent. • The CGE and NMRW advocated for a custom-based approach and submitted several affidavits in support thereof. 	<ul style="list-style-type: none"> • The Court adopted the CGE & NMRW's approach but instead of remitting the matter back to the High Court called for extra evidence and established the content of Xitsonga custom itself and developed said custom accordingly. 	<ul style="list-style-type: none"> • Indicated clear support for the custom-based approach. • Confirmed the importance of <i>amicus curiae</i> participation in customary matters as they are in the ideal position to place evidence before a court pertaining to lived custom.

<p style="text-align: center;">Jordan CGE and SWEAT, as amici curiae</p>		
<ul style="list-style-type: none"> • CGE focuses on equality arguments in terms of sec 9(1) and 9(3). • CGE & SWEAT provided intricate arguments regarding the constrained choices available to women and the vulnerability of prostitutes. • SWEAT described particular rights entitlements and the infringement of these through the Sexual Offences Act. 	<ul style="list-style-type: none"> • The majority judgment merely refuted the minorities' equality arguments. • No reference to the SWEAT arguments. 	<ul style="list-style-type: none"> • CGE's arguments featured prominently in the minority judgment and concurrence revolved around these arguments. • Possible negative effect on already initiated steps towards decriminalisation. • Realisation that despite solid arguments certain boundaries that the Court is not prepared to cross. • Litigation strategy altered to focus on extending existing legal protection within particular frameworks as evident in the <i>Kylie</i> judgment.
<p style="text-align: center;">Volks CALS as amicus curiae</p>		
<ul style="list-style-type: none"> • Specific evidence pertaining to the vulnerability of women in domestic partnerships as well as the changing notion of family in South Africa; gender inequality and its relationship to the family; the patterns of cohabitation in South Africa and the features of a cohabitative 	<ul style="list-style-type: none"> • Majority judgment rejected evidence presented. • Majority judgment acknowledged vulnerability but did not engage the issues deferring to Parliament. 	<ul style="list-style-type: none"> • The minority judgments took specific account of the evidence with Sachs J stating that the relevant context should have been considered. • Weak precedent set. • Indicative of the limits of law/litigation in effecting change / specifically perceptions of conservative judges.

<p>relationship which points to it being a permanent life partnership.</p>		<ul style="list-style-type: none"> • Draft Domestic Partnership Bill was initiated but to date it has not been implemented. • Litigation strategy altered to focus on extending existing common law principles to provide protection. See the <i>Ponelat v Schrepfer</i> judgment.⁵⁸
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⁵⁸ *Ponelat v Schrepfer* 2012 (1) SA 206 SCA.

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PLEADINGS AND DOCUMENTS FROM THE CONSTITUTIONAL COURT

The below list of documents are all available from the Constitutional Court website:

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Bhe and Others v Magistrate, Khayelitsha, and Others; Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another 2005 (1) SA 580 (CC)

- Notice of motion application by the *amicus curiae* for condonation of non-compliance with directions, affidavit deposed to by Piliso-Seroke, Joyce, case number: CCT 49/03.
- Notice of motion for a declaratory order SAHRC & WLC, founding affidavits deposed to by Kollapen, Narandran Jody & O' Sullivan, Michelle, in the High Court of South Africa, Transvaal Provincial Division.
- Notice of motion to be admitted as *amicus curiae*, founding affidavit deposed to by Piliso, Seroke, Joyce, case number: CCT 49/03.
- Written submissions of *Bhe*, as drafted by Trengrove, Wim (SC); Paschke, Ron & Cowen, Susannah, case number: CCT 49/03.
- Written submissions of the *amicus curiae*, as drafted by Mtshaulana, P.M & Pillay, Karrisha, case number: CCT 49/03.
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Carmichele v Minister of Safety and Security and Another 2001 (4) SA 938 (CC)

- *Amicus curiae* notice of motion, supporting affidavit deposed to by Mills, Winifred, Shereen, case number: CCT 48/00.
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- Directions of the Constitutional Court, dated 1 August 2012, case number: CCT 57/12.
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- Notice of motion to be admitted as *amicus curiae* WLC, affidavit deposed to by Williams, Jennifer Lynn, case number: CCT 57/12.
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