

NOTES / AANTEKENINGE

THE IMPACT OF THE PRINCIPLE OF SEPARATION OF POWERS ON THE DEVELOPMENT OF COMMON LAW AND THE PROTECTION OF THE RAPE VICTIMS' RIGHTS*

1 Introduction

The importance of protecting and promoting human rights has, over the years, received enormous support in our legal system. Everyone, including our courts, is tasked, in one way or another, with the responsibility to protect and advance human rights, including those of the rape victim. Normally, the courts protect rape victims' rights by determining whether their rights have been violated, and if so, will order the guilty party to, among other things, compensate the rape victim. The courts also protect the rape victims' rights by developing common law where it does not comply with the spirit, purport and object of the Constitution of the Republic of South Africa, 1996 (hereinafter "the Constitution") (s 39(2) of the Constitution; and see also *S v Thebus* 2003 6 SA 505 (CC) 525 par 28).

When developing common law to protect rape victims' rights, the courts are required to respect and protect the principle of separation of powers which entails the division of state power between the legislature, the executive and the judiciary. The legislature is responsible for drafting the laws, the executive is tasked with implementing the law and the judiciary is tasked with interpreting the law. The court must guard against interfering with the powers of the legislature or the executive when developing the common law. The courts have developed the common law in order to protect human rights on many occasions. This note discusses two cases in which common law was developed to protect the rape victims' rights and it also analyses the impact of the principle of separation of powers upon the protection of their rights. Those cases are: *K v Minister of Safety and Security* (2005 9 BCLR 835 (CC)) and *Masiya v Director of Public Prosecution* (2007 8 BCLR 827 (CC)). The first part of this note analyses these cases with particular reference to the development of common law to

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protect rape victims' rights. The second part discusses the development of common law and the protection of rape victims' rights in these cases. The third part analyses the impact of the principle of separation of powers in these cases, on the development of common law in order to protect rape victims' rights. The fourth and the last part discusses the standard test that will assist the courts to develop the common law in order to protect the rape victims' rights, without interfering with the powers of the legislature.

2 The development of common law to protect rape victims' rights in the case of *K v Minister of Safety and Security* (hereinafter "*K's case*")

This case concerns the development of the common law principle of vicarious liability in order to protect the rape victim's rights. The applicant (a 20-year-old girl) was raped by three on-duty policemen who gave her a lift home. Charges of rape and kidnapping were laid against the policemen and they were arrested, charged and convicted of rape and kidnapping in the Johannesburg High Court. The High Court sentenced them to life imprisonment for rape and ten years' imprisonment for kidnapping. The applicant also instituted proceedings in the High Court to claim compensation from the policemen and the Minister of Safety and Security as a result of the conduct of the policemen. She later abandoned the claim against the policemen and proceeded with the claim against the Minister of Safety and Security. The legal question in the High Court was whether the Minister of Safety and Security could be held vicariously liable for the misconduct of the policemen. In answering this question, the court applied the common law principles of vicarious liability, in terms of which, the employer is liable for vicarious liability if the employee was acting within the course and scope of his employment at the time the delict was committed.

The court held that the Minister of Safety and Security was not liable because the policemen were not acting within the scope of their employment at the time of the rape. The applicant then approached the Supreme Court of Appeal after the court granted her leave to appeal. On the same legal question (whether or not the policemen were acting within the scope of their employment at the time of the rape) the Supreme Court of Appeal dismissed the applicant's claim. In reaching its conclusion the court applied the degree of deviation test which is as follows:

"whether the deviation was of such a degree that it can be said that in doing what he or she did the employee was still exercising the functions to which he or she was appointed or was still carrying out some instruction of his or her employer. If the answer is yes, the employer will be liable no matter how badly or dishonestly or negligently those functions or instructions were being exercised by the employee" (*K v Minister of Safety and Security supra* 183 par 4).

The court held that, on the application of this test, the policemen deviated from their functions and duties to such a degree that it could not be said that,

in committing the crime of rape, they were in any way exercising their functions or performing their duties. The court also rejected the applicant's argument that the common law rule of vicarious liability should be developed in the light of the spirit, purport and objects of the Constitution and that the Minister was liable because at the time of the rape, the policemen were simultaneously failing to perform their duty to protect the applicant (*K v Minister of Safety and Security supra* 184 par 7-8).

The court's refusal to accept the applicant's argument that the common law needs to be developed was based on the belief that its development of the common law would amount to interference with the principle of separation of powers, in particular, the powers of the legislature. Scott J put it this way:

"I have deepest sympathy for the appellant, as I do for the thousands of women who are raped everyday in this country. Ideally, they should all receive compensation, but that is something for the legislature and beyond the jurisdiction of this court" (*K v Minister of Safety and Security supra* 185 par 10).

Scott J's argument could be interpreted to mean that the court respected and protected the principle of separation of powers at the expense of protecting the rights of the rape victims. This decision was, however, overturned by the Constitutional Court.

2 1 *The Constitutional Court's development of common law principle of vicarious liability*

One of the applicant's arguments in the Constitutional Court was that, if the Supreme Court of Appeal did not err in its application of the common law test, the common law test should be developed in light of section 39(2) of the Constitution, taking into account the rights of the applicant. On the question of whether the policemen were, at the time of the rape, acting within the course and scope of their employment, the Constitutional Court developed the common law test. When developing the common law test, the Constitutional Court applied the common law test from the case of *Minister of Police v Rabie* (1986 1 SA 117 (A)). The *Rabie* test is different from the deviation test applied by the Supreme Court of Appeal due to the fact that there is no single test used to determine the vicarious liability of the employer. The test in terms of *Rabie's* case is as follows:

"The first part is whether the wrongful acts were done solely for the purposes of the employee. This is a subjective test and it considers the facts. The second part is whether, even though the acts done have been done solely for the purpose of the employee, there is nevertheless a sufficiently close link between the employee's acts for his own interests and the purposes and the business of the employer. This is an objective test and it considers mixed questions of facts and the law" (*Minister of Police v Rabie supra* 134C-F).

In applying the first part of the test the court concluded that the policemen were pursuing their own objectives and not those of their employer. On the

application of the second part of the test, the court developed the test by considering the spirit, purport and objects of the Bill of Rights. It then concluded that there was a sufficiently close connection between the policemen's conduct and their employment (*K v Minister of Safety and Security supra* 857 par 51). The court gave the following reasons: the policemen all bore a statutory and constitutional duty to prevent crime and protect the members of the public; the girl placed her trust in the policemen because they were in uniform and the purpose of wearing a uniform is to make police officers more identifiable to members of the public who find themselves in need of assistance; it was reasonable for the applicant to place her trust in the policemen, who were in uniform, and offered to assist her, and that the conduct of the policemen which caused harm constituted a simultaneous commission and omission. The commission arose from their brutal rape of the applicant and their simultaneous omission arose from their failure, while on duty, to protect her from harm.

Based on the above reasons, the Constitutional Court overturned the Supreme Court of Appeal's judgment and developed the common law principle of vicarious liability. In terms of this decision, the test (used to determine whether or not the employees were acting within the scope of their employment when the delict was committed) is now extended to include the close connection between the policemen's conduct and their employment. On the application of the extended test, the court held the Minister of Safety and Security vicariously liable for the conduct of the policemen. The court's development of the common law principle of vicarious liability also serves as the protection and promotion of rape victims' rights. This decision could be interpreted to mean that the court regarded the close connection between the actions of the policemen and their employment as justifying the court's interference with the powers of the legislature.

3 The development of common law to protect the rape victims' rights in the case of *Masiya v Director of Public Prosecution* (hereinafter "*Masiya's case*")

This case concerns the extension of the common law definition of rape to include anal penetration of a female by a male sexual organ, in order to protect the rape victim's rights. Mr Masiya was charged with raping the complainant (a nine year old girl) in a Regional Court, although the evidence established that the complainant was anally penetrated. The Regional Court, of its own accord, extended the common law definition of rape to include acts of non-consensual anal penetration of a female by a male sexual organ, as a charge of rape could only be opened if there had been vaginal penetration. The court argued that there is nothing in the Constitution or other legislation that prohibits it from enquiring into, or ruling on, the constitutionality of a rule of common law and developing it where necessary.

It pointed out that section 8(3) and section 39(2) of the Constitution allows every court, tribunal or forum to develop the common law in order to harmonise it with the spirit, purport and objects of the Bill of Rights).

In developing the common law definition of rape the Regional Court argued that there should be no distinction between non-consensual anal penetration and non-consensual vaginal penetration as anal penetration is a no less private, no less subject to injury or abuse, and also this sexual penetration is no less humiliating than vaginal penetration (*S v Masiya* case no SGH 94/04 11 July 2005 par 17 unreported). The court also argued that Mr Masiya's right to a fair trial, in particular his right to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time the offence was committed and the time of sentencing, is limited by section 36 of the Constitution. The basis for the limitation, the court argued, is as follows: a non-consensual anal penetration already constitutes an offence; retroactive punishment could have been foreseen by Mr Masiya; such development will be consistent with foreign law; the rights of society are weightier than those of Mr Masiya not to be convicted of and sentenced to a more serious offence; that a less restrictive means to achieve the extension of the definition of rape would have been for Parliament to address the *lacuna* with appropriate law, but Parliament has dragged its feet, and so the developed definition would become a law of general application if endorsed by the High Court upon referral.

The Regional Court thus convicted Mr Masiya of rape in terms of the extended definition and stopped the proceedings and committed him to the High Court for sentencing (this is in terms of s 52(1)(b)(i) of the Criminal Law Amendment Act 105 of 1997 which enjoins the Regional Court, when finding an accused guilty of certain serious crimes including rape where the victim is under the age of 16 years, to refer the matter to the High Court having jurisdiction for purposes of confirmation of conviction and sentencing). The High Court had to consider whether or not it should uphold the conviction of rape and develop the common law definition of rape. The High Court concurred with the Regional Court's decision and extended the common law definition of rape to include anal penetration of a female by a male sexual organ. The court's reason was that indecent assault attracts more lenient sentences than rape and also that this distinction in sentencing results in adequate protection and discriminatory sentencing (*S v Masiya* 2006 11 BCLR 1377 (T) 1393 par 71; and 2006 2 SACR 357 (T) 378 par 71). The court thus held that the current definition of rape is constitutionally invalid and referred the declaration of invalidity to the Constitutional Court for confirmation. It then postponed the imposition of sentence pending the determination of the matter by the Constitutional Court.

3.1 *The Constitutional Court's development of the common law definition of rape*

One of the issues that the Constitutional Court had to consider was whether the current definition of rape is inconsistent with the Constitution and whether the definition needs to be developed. On this issue, the Constitutional Court held that the definition of rape is not unconstitutional, but merely needs to be developed to be in compliance with the spirit, purport and object of the Constitution. Considering the spirit, purport and object of the Constitution and in support of the Regional and High Courts' decisions, the Constitutional Court extended the definition of rape to include non-consensual anal penetration of a female by a male sexual organ (*Masiya v Director of Public Prosecution supra* 847 par 45). However, the Constitutional Court ruled that the Regional Courts do not have the power to develop the common law in order to harmonise it with the Constitution. In extending the common law definition of rape, the Constitutional Court reasoned as follows:

The Court felt that it is in the public interest and in the interest of justice to extend the current definition of rape, and that the 2003 Criminal Law (Sexual Offences) Amendment Bill which was before Parliament at the time of the decision, should not delay, defer or refuse the extension of the definition (*Masiya v Director of Public Prosecution supra* 847 par 45); in terms of the Bill, a person who unlawfully and intentionally commits an act which causes penetration to any extent whatsoever by the genital organs of that person into or beyond the anus or genital organs of another person, or any act which causes penetration to any extent whatsoever by the genital organs of another person into or beyond the anus or genital organs of the person committing the act, is guilty of the offence of rape; and it must be noted that, currently, this definition came into operation on the 16 of December 2007 in the Criminal Law Amendment (Sexual Offences) Act 6 of 2007). It further argued that any 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 complainant in this case.

The High and Constitutional Courts' extension of the definition of rape to include non-consensual anal penetration of a female by a male sexual organ constitutes the protection of rape victims' rights. The Constitutional Court, however, refused to extend the definition of rape to include anal male penetration by another male (*Masiya v Director of Public Prosecution supra* 847 par 46). One of the reasons provided by the Constitutional Court for its refusal to extend the definition of rape to include anal penetration of a male is that in a constitutional democracy such as ours, the legislature and not the courts has the major responsibility for law reform and the balance between the functions and powers of the court and those of the legislature should be recognized and respected. This is the same argument that the Supreme Court of Appeal provided, in the *K's* case, when it refused to accept the

applicant's argument the common law principle of vicarious liability should be developed to include the spirit, purport and object of the Constitution. This reveals that the Court respected and protected the principle of separation of powers at the expense of protecting the rights of the male survivors of rape. This could be deemed as undermining the struggle of fighting for the protection of rape victims' rights. Langa CJ, in delivering the minority judgment argued as follows:

"Extending the definition to male survivors therefore goes no further than is absolutely necessary to cure the defect I have found in the common law. Even if this may be a slight departure from the facts of the case, it is not unusual for this Court to give orders, either when developing the common law or determining the validity of statutes, that go beyond the exact facts but are necessitated by the underlying constitutional principles involved" (*Masiya v Director of Public Prosecution supra* 859 par 90).

Although the court developed the common law definition of rape to include non-consensual anal penetration of a female by a male sex organ, it did not concur with the decision of the Regional Court which found Mr Masiya guilty of rape. The Constitutional Court, instead, found Mr Masiya guilty of indecent assault and remitted the matter to the Regional Court to impose appropriate punishment (*Masiya v Director of Public Prosecution supra* 855 par 72). The Court reasoned as follows: It would be unfair to convict Mr Masiya of an offence in circumstances where the conduct in question did not constitute an offence at the time of the commission; and that to convict Mr Masiya of rape would be in violation of his right as envisaged in section 35(3)(i) of the Constitution. Section 35(3)(i) provides that an accused person may not be convicted of offences where the conduct for which they are charged did not exist at the time the crime was committed.

4 Development of common law and the protection of the rape victims' rights

The development of common law in these two cases has undoubtedly protected and promoted rape victims' rights, which are as follows:

4.1 Right to dignity

The rape victim's right to dignity is guaranteed by section 12 of the Constitution which provides that everyone has inherent dignity and the right to have their dignity respected and protected. This right is one of the most important rights in the Constitution as it constitutes a founding value of the Constitution (*S v Makwanyane* 1995 6 BCLR 663 (CC) 777 par 328; 1995 3 SA 391 (CC) 506 par 328; and see also Rautenbach and Malherbe *Constitutional Law* 4ed (2004) 332).

The rape victim's right to human dignity is based on their inborn human qualities (Rautenbach and Malherbe 332). This right is also entrenched in international law that is binding on South African law, as South Africa is

under an international obligation to ensure that it adopts and implements appropriate measures to ensure the protection of every woman's right to respect for her dignity and protection of women from all forms of violence, particularly sexual and verbal violence (Article 1 of the Convention on the Elimination of All Forms of Discrimination Against Women (1979)), which South Africa ratified on the 15 December 1995, and which is therefore binding on South African law; and furthermore, Article 3 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2005) was ratified by South Africa on the 17 December 2004, and therefore it too is binding on South African law).

The Constitutional Court in the *K's* case protected the rape victim's right to dignity in the following way:

"when the policemen – on duty and in uniform – raped the applicant, they were simultaneously failing to perform their duties to protect the applicant. In committing the crime, the policemen not only did not protect the applicant, they infringed her rights to dignity and security of a person" (*K v Minister of Safety and Security supra* 835 par 57).

In *Masiya's* case the Constitutional Court protected the rape victim's right to dignity by arguing that the extended definition of rape would protect the dignity of survivors, especially young girls who may not be able to differentiate between the different types of penetration, and also that anal penetration results in the spread of HIV/AIDS (*Masiya v Director of Public Prosecution supra* 845 par 38).

4.2 *Freedom and security of a person*

In terms of section 12(1) of the Constitution, everyone, including rape victims, has the right to freedom and security of a person which includes the right, among other things, to be free from all forms of violence (including rape) from either public or private sources. The right to freedom and security of a person is inspired by article 5 of the Convention on the Elimination of All Forms of Racial Discrimination, which imposes a duty on state parties to protect people from violence or bodily harm whether inflicted by government officials or by individuals, by groups or institutions (Bishop and Woolman "Freedom and Security of a person" in Woolman, Roux, Klaaren, Stein and Chaskalson *Constitutional law of South Africa Vol 2* 2ed Ch 40 48).

Further, Article 2 of the International Covenant on Civil and Political Rights (ICCPR) protects the rape victim's right to freedom and security of a person by requiring governments to provide an effective remedy for abuses and to ensure the rights to life and security of the person of all individuals in their jurisdiction, without distinction of any kind, including sex (this instrument is binding on South African law as South Africa ratified it in December 1998; and see also Article 4 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, which is also binding on South African law and was ratified on 17 December 2004). Article 3 of the

ICCPR also incorporates the rape victim's right to freedom and security of a person in so far as it provides that everyone has the right to liberty and security of a person.

Rape victims also have a right to bodily and psychological integrity, which includes security in, and control over, their bodies (s 12(2) of the Constitution). Bodily integrity could be read to impose a duty on the state to ensure that everybody, including rape victims, is able to participate fully in society (Bishop and Woolman Ch 40 77). Psychological integrity goes beyond the protection afforded by bodily integrity and means protecting the rape victims from undue stress or shock (Bishop and Woolman Ch 40 78). The Constitutional Court in the *K's* case protected the applicant's right to Freedom and Security of a person by holding that rape amounts to an infringement of an applicant's right to the dignity and security of a person (*K v Minister of Safety and Security supra* 835 par 57). In *Masiya's* case the court held that the rape victim's right to freedom and security of a person is incorporated in article 24 of the Declaration on the Elimination of Violence against Women, which specifically enjoins member States to pursue policies to eliminate violence against women, as follows:

"Non-consensual anal penetration of women and young girls such as the complainant in this case constitutes a form of violence against them equal in intensity and impact to that of non-consensual vaginal penetration. The object of the criminalization of this act is to protect the dignity, sexual autonomy, which includes freedom and security of a person and privacy of women and young girls as being generally the most vulnerable group in line with the values enshrined in the Bill of Rights - a cornerstone of our democracy" (*Masiya v Director of Public Prosecution supra* 845 par 37).

4.3 *Right to privacy*

Rape victims' right to privacy is provided for by section 14 of the Constitution, in terms of which, everyone has a right to privacy. Their right to privacy is based on their human dignity and it preserves their choice of when and how much they allow others to know about their personal affairs or interfere with their mind, body or private activities (Devenish *A Commentary on the South African Constitution* (1998) 55, and the source quoted therein). It also preserves their dignity, including their physical, psychological and spiritual well-being (Devenish *A Commentary on the South African Bill of Rights* (1999) 135, and the sources quoted therein). Rape victims' right to privacy is also incorporated in Article 17 of the International Covenant on Civil and Political Rights 1966, which prohibits people, including rape victims, from being subjected to arbitrary or unlawful interference with their privacy and allows them to have full protection of the law against such interference or attack. In *Masiya's* case the Constitutional Court protected the rape victim's right to privacy by arguing that the object of criminalization of anal penetration is to protect the dignity, sexual autonomy and privacy of women and young girls as being the most vulnerable group in line with the

values enshrined in the Bill of Rights (*Masiya v Director of Public Prosecution supra* 845 par 37).

4.4 Right to equality

The right to equality of the rape victim is protected by section 9(1) of the Constitution which provides that everyone is equal before the law and has the right to equal protection and benefit of the law. Section 9(1) seeks to ensure that the courts treat the rape victims equally with other people (Mubangizi *The Protection of Human Rights in South Africa, A Legal and Practical Guide* (2004) 72). The equal treatment of rape victims with other people represents their right to formal equality, whereas the focus on the equality of outcome between men and female rape victims represents their right to substantive equality (De Waal and Currie *Bill of Rights Handbook* 5ed (2005) 233).

The Constitutional Court in *K's* case, referred to Articles 1 and 2 of the Convention on the Elimination of All Forms of Discrimination against Women (hereinafter "CEDAW") and article 2 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, when protecting rape victims' rights to equality. The Court referred to the above articles in the following way:

"South Africa has a duty under international law to prohibit all gender-based discrimination that has the effect or purpose of impairing the enjoyment by women of fundamental rights and freedoms and to take appropriate measures to prevent the violation of those rights" (*K v Minister of Safety and Security supra* 844 par 18).

The rape victims' right to equality is further incorporated under the word "discrimination" in terms of CEDAW, which is interpreted to include gender-based violence directed against a woman and which includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty (CEDAW, *General Recommendation 19: Violence Against Women*, 11th Session, par 6, U.N. Doc. A/47/38 (1992), in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*). This imposes an obligation on the state to eliminate gender-based violence (sexual harm or rape) against woman. The state's failure to eliminate gender-based violence violates the rape victims' right to equality as such failure amounts to discriminating against them.

In *Masiya's* case, the Constitutional Court protected the rape victim's right to substantive equality in the following way:

"The inclusion of penetration of the anus of a female by a penis in the definition will increase the extent to which the traditionally vulnerable and disadvantaged group will be protected by and benefit from the law" (*Masiya v Director of Public Prosecution supra* 845 par 39).

The High Court in *Masiya's* case, protected the right to equality of the victims of anal rape as follows:

“everyone is equal before the law; the state may not unfairly discriminate against on grounds of, inter alia, gender and sexual orientation” (*S v Masiya supra* 378 par 72, and the source quoted therein).

The Constitutional Court's refusal, however, as it has been mentioned, to develop the definition of rape to include non-consensual anal male penetration of a male by a male sexual organ amounts to the violation of the male survivor's right to equality and other rights to which they are entitled.

4 5 *Children's rights*

Child rape victims are, in addition to the rights discussed above, entitled to section 28(1)(d) which protects them from being maltreated, neglected, abused or degraded. This subsection imposes a positive obligation on the state, in particular the courts, to impose heavy sentences on rapists in order to prevent harm (in the form of rape) to child rape victims (Friedman and Pantazis “Children's Rights” in Woolman *et al Constitutional law of South Africa Vol 2 2ed* Ch 47 18-19). Child rape victims are also protected by section 28(2) which obliges the state, including the courts, to consider the child rape victim's best interests in every matter concerning them. The best interest requirement tasks the state to create the necessary legal and administrative infrastructure to ensure that the child rape victims receive the protection they are entitled to in terms of section 28 (Currie and de Waal 691, and the source quoted therein; and the principle of the best interests of the child is also incorporated in the objectives of the Children's Act 38 of 2005).

Although there seems to be no concrete definition of the concept “best interests of the child”, the Constitutional Court reaffirmed the significance of this principle in the case of *Minister of Welfare and Population Development v Fitzpatrick* (2000 3 SA 422 (CC) 428 par 17-19). International law has also accepted that in every matter concerning the child, the child's best interests must be of paramount importance (African Charter on Human and Peoples Rights, ratified on July 1996 and the African Charter on the Rights and Welfare of the Child, ratified on October 1997). So both these instruments are binding on South African law.

5 The impact of the principle of separation of powers on the development of common law and the protection of rape victims' rights

As it has been mentioned, the impact of the principle of separation of powers is analysed with reference to the powers of the legislature and the judiciary. The Supreme Court of Appeal in the *K's* case respected and maintained the principle of separation of powers, by holding that the task of law reform lies

with the legislature and not the courts. The Court, in maintaining the principle of separation of powers, dismissed the appellant's claim that the common law principle of vicarious liability should be developed in order to hold the Minister of Safety and Security vicariously liable for the actions of the policemen.

While deeply sympathetic to the plight of the victim, the court respected and maintained the separation of powers principle at the expense of developing the common law to protect rape victims' rights (*K v Minister of Safety and Security supra* 185 par 10). Fortunately, the Constitutional Court overturned the Supreme Court of Appeal's decision by developing the common law principle of vicarious liability and holding the Minister of Safety and Security vicariously liable for the actions of the policemen. This implies that the Constitutional Court regarded the development of the common law to protect rape victims' rights as more important than enforcing the principle of separation of powers. Had the applicant not approached the Constitutional Court for relief, her rights would not have been protected as the Supreme Court of Appeal dismissed her claim on the ground that it maintained the principle of separation of powers at the expense of developing the common law to protect the rights of rape victims.

Further in *Masiya's* case the Constitutional Court protected the principle of separation of powers at the expense of protecting the rights of the male survivors of rape, when it refused to extend the common law definition of rape to include non-consensual anal penetration of a male by a male sexual organ. The reasons for the Court's refusal to extend the definition of rape to include anal penetration of a male were as follows:

- (a) it felt that it should leave the extension of the definition of rape to include non-consensual male anal penetration by another male organ in the hands of the legislature, as it argued that in a constitutional democracy such as ours the legislature and not the courts has the major responsibility for law reform; and
- (b) it should restrict itself to the facts before it, namely the non-consensual anal penetration of a female, as reading beyond the facts would exceed the judiciary's limited constitutional role.

As discussed, the first reason clearly represents the Court's protection of the principle of separation of powers. However, it is surprising why the Court did not read beyond the facts and develop the definition to also include male survivors of rape also as it has done so in the past. The minority judgment argued that extending the definition of rape to male survivors, does not violate the principle of separation of powers, as it is not unusual for the Court to give orders, when developing common law, that go beyond the exact facts and necessitated by the underlying constitutional principles involved (*Masiya v Director of Public Prosecution supra* 859 par 89-90).

The different views of the Supreme Court of Appeal and the Constitutional Courts, in the *K's* case, and the different views of the Constitutional Court

judges in *Masiya's* case, on the issue of maintaining the separation of power principle and developing the common law to protect rape victims' rights, leads to the following question: Is there a standard test or guidelines to assist the courts on when or how they should develop common law to protect rape victims' rights, without interfering with the powers of the legislature? Considering the different opinions of the courts in this issue, one would argue that there is absolutely nothing to assist the courts in this regard. The Constitutional Court in *Masiya's* case, as it has been mentioned, seems to argue that the public interest, or the interest of justice, justifies the Court's interference with the powers of the legislature in order to develop the common law to protect rape victims' rights. The minority judgment in the same case argues that a minimal interference with the powers of the legislature justifies the court's interference with the principle of the separation of powers.

Further, in *K's* case, the Supreme Court of Appeal refused to develop the common law principle of vicarious liability, on the basis that it respected the principle of separation of powers. However, the Constitutional Court, in the same case, developed the common law principle of vicarious liability by introducing a close connection test to be considered when determining the vicarious liability of the employer. All these different judgments, essentially, lead to the conclusion that there is no uniformity and consistency among our courts on the issue of developing the common law to protect rape victims' rights, without interfering with the powers of the legislature.

Even if one considers the public interest or interest of justice test introduced in *Masiya's* case, it still does not provide a complete solution to the problem, as it is still not clear what constitutes public interest or interest of justice, for the purposes of developing the common law to protect the rape victims' rights. The minimal interference test introduced by the minority judgment also does not provide a solution as it is also not clear what constitutes a minimal interference or how a minimal interference might be measured for the purposes of interfering with the separation of power principle, in order to protect rape victim's rights. Likewise it is not clear how much of a close connection between the actions of the employee and his employment (as introduced by the court in *K's* case) justifies the court's interference with the powers of the legislature. This could then be interpreted to mean that it is not clear when or in what situations the courts are entitled to interfere with the powers of the legislature, in order to develop common law to protect rape victims' rights.

The grey area in this regard, it is argued, leaves the courts with an implied discretion to decide whether or not to interfere with the powers of the legislature in order to develop the common law to protect rape victim's rights. This leads to the conclusion that the development of common law to protect rape victims' rights lies in the manner in which the court interprets a particular case. In short, there are no clearly stipulated factors assisting the court to determine whether or not it should develop common law to protect

rape victims' rights, while maintaining the principle of separation of powers between the legislature and the judiciary. The absence of the stipulated test in this regard leads to a serious violation of rape victims' rights, including child rape victims' rights as provided for by the Constitution, as may be seen from the analysis of the above cases.

It is then submitted that there should be a clearly stipulated standard test that will assist the court to develop the common law in order to protect the rape victims' rights, without interfering with the powers of the legislature. The lesson could be drawn from the case of *Government of South Africa v Grootboom* (2001 1 SA 46 (CC)). In this case the court introduced a test to determine whether or not the government violated children's right of access to housing. In terms of the test our courts are required to consider the efforts of the state in fulfilling children's rights, in terms of section 26 of the Constitution, when imposing on the state that it should provide shelter and other services to children until the parents can provide it (*Government of South Africa v Grootboom supra* 68 par 40-43). This test assists the courts to enforce socio-economic rights without interfering with the principle of separation powers.

6 Standard test that will assist the courts to develop the common law in order to protect the rape victims' rights, without interfering with the powers of the legislature

The standard test on this issue is necessitated by the general obligation imposed on the court by section 39(2), read with section 173 of the Constitution (*Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) 955 par 39). Section 39(2) requires the courts, when developing common law, to promote the spirit, purport and objects of the Bill of Rights. Section 173 requires the courts, using their inherent powers, to take into account the interest of justice when developing the common law. The general obligation imposed by section 39(2) does not necessarily mean that the court should embark on an independent exercise to determine whether the common law is in need of development in each and every case, except in exceptional circumstances where the court is obliged to raise the matter on its own and require argument from the parties (*Carmichele v Minister of Safety and Security supra* 955 par 39). Although the court did not provide the list of exceptional circumstances, the high rape statistics in South Africa should sufficiently justify the need for the court, on its own, to require arguments from the parties in order to develop the common law to protect rape victims' rights. On the basis of the fact that the courts are required to develop the common law to protect rape victims' rights, taking into account the principle of separation of powers, in particular the powers of the legislature, this note proposes the following standard test:

The court should consider whether the existing common law, having regard to the objectives of section 39(2) (promotion of the spirit, purport and object of the Bill of Rights) and the principle of separation of powers, requires development in accordance with the section 39(2) objectives. Factors to be considered are as follows:

- (a) The nature and extent to which rape victims' rights are violated. This should entail the court's consideration, in a particular case, of the importance of rape victims' rights as discussed above;
- (b) the extent of the existing common law's non-compliance with the spirit, purport and object of the Bill of Rights. This entails the court's analysis of the extent or seriousness of the existing common law violation of rape victims' rights; and lastly
- (c) the legislature's response, or actions, aimed at aligning the existing common law with the spirit, purport and object of the Bill of Rights to protect rape victims' rights. Factors to be considered are: whether the legislature has embarked on the process of enacting a law to protect rape victims' rights in a particular case and, if so, how far the legislature has gone with that process and how long it will take for it to become the law protecting the rape victims' rights.

In essence, the above factors should assist the courts to determine whether or not the development of the common law to protect rape victims' rights, in a particular case, justifies the court's interference with the principle of separation of powers. Using the above test, all the above factors should have been satisfied in *Masiya's* case. In other words, it would have been a natural extension for the court to develop the common law definition of rape to include non-consensual anal male penetration as such development would have constituted a justified interference with the principle of separation of powers, in particular, the powers of the legislature. The reasons are as follows: the male survivor of rape is entitled to the most important rights in terms of the Constitution and international law which are binding on South African law, discussed above, and the fact that the existing common law definition of rape excludes non-consensual anal male penetration constitutes a serious violation of the rights of male survivors of rape in terms of the Constitution and the international law binding on South African law. This is the case because the existing common law had been violating the spirit, purport and object of the Constitution as it discriminated against the male survivors of rape. Further, the 2003 Criminal Law (Sexual Offences) Amendment Bill, incorporated non-consensual anal penetration of a male in its definition of rape, which was before Parliament at the time of the decision (10 May 2007) should likewise have been deemed as constituting an unreasonable delay in protecting male rape victims' rights.

Using the above test, the Constitutional Court was quite correct when developing the common law principle of vicarious liability in the *K's* case. In other words, its development of the principle of vicarious liability constitutes

a justified interference with the powers of the legislature. The reasons are as follows: rape victims' rights are important and the existing common law principle of vicarious liability constitutes a serious violation of rape victims' rights, which are locally and internationally recognized. This is the case because the existing common law principle of vicarious liability failed to consider the spirit, purport and object of the Constitution when determining whether or not the policemen were acting within the scope of their employment when they raped the victim. Further, the legislatures, at the time of the decision, had not enacted a law aimed at preventing the violation of rape victims' rights.

7 Conclusion

The development of common law, since the coming into operation of the Constitution, has contributed significantly towards the protection and promotion of human rights. The courts are obliged to respect the principle of the separation of powers when developing the common law to protect the rights of rape victims. The analyses of the two above cases show that there are no clearly stipulated guidelines to assist the courts on the question of when they should maintain or ignore the doctrine of separation of powers, when they have to develop the common law to protect rape victims' rights. As it has been argued, the absence of concrete guidelines to assist the courts in this regard, might have some serious implications for the immediate and long-term protection of rape victims' rights. This is substantiated by the analyses of these two cases where the courts, using their implied discretion came to different conclusions on the issue of whether or not the common law had to be developed to protect rape victims' rights. This means that there is no uniformity and consistency between the courts on the question of interfering with the powers of the legislature to develop the common law in order to protect rape victims' rights.

This note argues that, to strengthen the protection of our democracy, and of rape victims' rights, there need to be stipulated guidelines or a standard test to assist and support the courts when they see fit to develop the common law in order to protect and promote rape victims' rights. It is submitted that such guidelines or a standard test will help the courts to develop the common law when necessary without interfering with the powers of the legislature.

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