

Moving beyond 30 years of Anglo-American rape law reforms: Legal representation for victims of sexual offences

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ABSTRACT

The South African Law Commission has proposed a number of substantive and procedural reforms to South Africa's laws governing sexual offences. This article argues that, while important in principle, these reforms are unlikely to shift police and prosecution practices or to meaningfully increase the numbers of offences prosecuted or perpetrators convicted. Support for this argument is drawn from the experiences of other Anglo-American jurisdictions in implementing similar reforms. The current law reform process does, however, present an important opportunity to consider possible reforms that have the potential to shift institutional norms informing current criminal justice practice, and to provide meaningful protection for victims of sexual offences forced to navigate that system. One such reform, which has met with some success in other jurisdictions, is the introduction of a legal representative to engage with the criminal justice process on behalf of the victim. This article looks at the legal and constitutional rationale for such an innovation and at models used in comparative jurisdictions, concluding that such a reform would go a long way towards ensuring that the existing rights of rape victims are meaningfully enforced.

Introduction

The alarmingly high prevalence of sexual offences in South Africa and the particularly brutal nature of these attacks stand in glaring contrast to the South African government's stated commitment to addressing violence against women in this country. On the one hand, South Africa's Constitution enshrines the right to gender equality¹ and is unique in containing a right to freedom from all forms of violence, whether public or private in

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¹ The Constitution of the Republic of South Africa Act 108 of 1996 (hereinafter 'the Constitution') s 9.

origin.² Over the ten years since apartheid officially ended South Africa has passed progressive domestic violence legislation,³ the State President has designated violence against women and children a priority area for state efforts to combat crime, and Parliament is currently considering a bill which will substantially reform the South African laws on sexual offences.⁴ On the other hand, South Africa has one of the highest rates of reported rape in the world,⁵ with a substantial number of rapes going unreported. South African commentators liken the nature of sexual assaults in this country to those perpetrated during armed conflict, in terms of the types of degradation and the extent of injuries involved.⁶ Studies suggest that a third to half of all rapes occurring in South Africa are perpetrated by more than one offender,⁷ with the number of rape homicides estimated to be twelve times higher than in the United States.⁸ For every 100 rape cases reported in South Africa, only some 15 are prosecuted, with fewer than half of those resulting in a guilty verdict.⁹ Given this context, it is imperative that the South African government acts decisively to address this pressing problem. This article contends that the proposed reforms to South Africa's rape laws will not provide us with such a radical intervention. This is not least because, although symbolically important, many of the proposed reforms have proved to be relatively ineffectual in shifting criminal justice attitudes and practices in the countries from which South Africa has borrowed them, and in which they have been implemented over the past 30 or so years. This article argues therefore that the South African government should take the opportunity during

² Section 12(1)(c) of the Constitution.

³ Domestic Violence Act 116 of 1998.

⁴ Criminal Law (Sexual Offences) Amendment Bill [B50-2003].

⁵ L Artz and K Kunisaki 'Rape during armed conflict and reflections on the "uncivil war" on women in South Africa' in S Abdullah et al (eds) *Why is there So Much Violence against Women in Post-Apartheid South Africa?* (2003) 19, proceedings from a conference held on 14 April 2003.

⁶ Artz and Kunisaki op cit (n5) point, for example, to factors such as the high levels of mutilation and other injuries that attend rape in South Africa, as well as the prevalence of multiple-perpetrator and gang rapes, and forced pregnancy.

⁷ L Swart et al 'Rape surveillance through district surgeons' offices in Johannesburg 1996-1998: Findings, evaluation and prevention implications' (2000) 30(2) *South African Journal of Psychology* 1; LJ Martin *Violence against Women: An Analysis of the Epidemiology and Patterns of Injury in Rape Homicide in Cape Town and in Rape in Johannesburg* (1999). Rape Crisis (Cape Town) reported in 1998 that 55% of the women they counselled had been raped by more than one offender. Twenty-five percent of these rapes were perpetrated by known gangs. In multiple-perpetrator rapes the number of offenders ranged from two to 30 in respect of any one victim. See Artz and Kunisaki op cit (n5).

⁸ Martin op cit (n7).

⁹ The Crime Information Analysis Centre indicates that of 52 975 rape cases reported to the police at a national level in 2000, only 8 297 were prosecuted, with a guilty verdict in 7.7% of those cases. See *CIAC Monitor Analysis: Rape and Attempted Rape Statistics* (2001).

the current reform process to include innovative reforms that can serve to jolt deeply entrenched institutional norms and in that way improve both the criminal justice response to victims and its deterrent effect on potential perpetrators. The focus of this article is on the role that legal representation for victims of sexual assault can play in this respect.

The article proceeds as follows: Part II sets out the key reforms currently proposed by the South African Law Commission; Part III considers evidence from other jurisdictions on the effectiveness of similar reforms and the reasons for their relative failure; Part IV introduces the concept of legal representation for victims of sexual assault and looks at the applicability of various models as a means of addressing some of the problems identified in Part III. Part V looks at the potential utility of these models in the South African criminal justice system. Finally, Part VI sets out the constitutional and legal support for such an innovation in the South African context.

Proposed reforms to the South African law on sexual assault

Since 1996 the South African Law Commission has been engaged in the process of reforming South Africa's laws on sexual offences. The proposed Sexual Offences Bill aims to revise both the substance of the common law on rape, as well as numerous procedural and evidentiary aspects of the trial process. It creates a non-gendered definition of rape and recognizes that rape may occur through penetration of objects other than the penis, by replacing the concept of 'sexual intercourse' with that of 'sexual penetration'.¹⁰ Consent remains an element of the crime of 'rape', but is broadly defined in the Bill as meaning 'free agreement', excluding from this concept circumstances where, for example, a threat of harm has been made against the complainant or her property; where there has been an abuse of power or authority of such a nature that it inhibits resistance; where the victim has been led to believe that the act is something other than sexual penetration; and where the victim was asleep, unconscious, in an altered mental state, mentally disabled or below 12 years of age.

Proposed procedural and evidentiary amendments mirror those adopted in other common law jurisdictions, including England and Wales, Canada, Australia, New Zealand and a number of American states. Indeed, in many respects these have served as a blueprint for the South African reforms. These reforms include the statutory abolition of the cautionary rule,¹¹ and instructions that the court may not draw a negative inference from the fact

¹⁰ Section 2 of the Criminal Law (Sexual Offences) Amendment Bill [B50-2003].

¹¹ Although some commentators consider this rule to have been abolished by the Supreme Court of Appeal's decision in *S v Jackson* 1998 (1) SACR 470 (SCA), others suggest that the courts have continued to take a 'cautionary approach', which is essentially a

that a previous consistent statement has not been made, or from a delay in reporting the alleged offence.¹²

From a principled perspective the reform of South Africa's rape laws is important. As proposed, the Bill does away with a crime that, by definition, excludes the possibility that men may be victims and that ignores the nature of sexual violation as an act that bears little resemblance (whatever Posner or Paglia may think¹³) to consensual homo- or heterosexual intercourse. The distinction is reinforced by the inclusion in the Bill of a recognition that consent cannot be freely given under coercive circumstances. Evidentiary and procedural reforms reflect an increased awareness of and sensitivity to the ways in which victims respond to rape, in respect of, for example, reporting patterns and rape trauma syndrome. It is, at least, a rhetorical move away from the institutional scepticism that marks criminal justice responses to rape complaints.

It is not, however, at all clear that these reforms will materially affect complainants' experiences of the criminal justice process, that they will encourage reporting or increase convictions, or that they will serve as a deterrent to the currently high levels of rape in South Africa. The experiences of comparative jurisdictions with similar reforms suggests, rather, that changes will be diluted by and subsumed into existing deeply entrenched and profoundly masculinist criminal justice practices. The following section considers the evidence from these jurisdictions.

Rape law reform in comparative perspective

During the 1970s and 1980s a number of common law jurisdictions enacted statutes that sought to reform sexist laws relating to rape. Horney and Spohn¹⁴ identify four major reforms that typically occurred during this period: changes to the definition of rape; elimination of the requirement that

reformulation of the cautionary rule. The South African Law Commission has accordingly recommended that it be formally abolished. See PJ Schwikkard and SE van der Merwe *Principles of Evidence* 2ed (2002) for the former view and the South African Law Commission Discussion Paper 102 (Project 107) 'Sexual Offences: Process and Procedure' (2002) at para 31.2.4.10 for the latter.

¹² Section 16 of the Criminal Law (Sexual Offences) Amendment Bill [B50-2003].

¹³ R Posner *Sex and Reason* (1992); C Paglia *Vamps & Tramps: New Essays* (1994). See also KK Baker 'Text, context and the problem with rape' (1999) 28 *Sw U L Rev* 297. To my mind the insistence by scholars such as these and others on equating rape with consensual sex gone wrong stems from a narrow obsession with coming to terms with date rape in America. It largely ignores the immense violence and mindless brutality that is associated with rape in other contexts. Marital rape is, for example, often extremely violent, with high incidences of weapon use and physical injuries. See P Eastale 'Rape in marriage: Has the licence lapsed?' in P Eastale (ed) *Balancing the Scales: Rape, Law Reform and Australian Culture* (1998).

¹⁴ J Horney and C Spohn 'Rape law reform and instrumental change in six urban jurisdictions' (1991) 25 *Law and Society Review* 117 at 118.

there should have been resistance; elimination of the need for corroboration; and the enactment of rape shield laws. Finding useful indicators to measure the impact of these reforms is complex and difficult, but at least in respect of the aims of reducing re-victimization of the complainant during the trial, encouraging reporting, and decreasing attrition, it seems that 'success' must be measured in very small and relative changes. The often minor and generally inconclusive nature of these shifts (where they have occurred at all) have led a number of commentators to question the effectiveness of such reforms in achieving either feminist or crime-control objectives.¹⁵ For the most part there is agreement that laws which looked good on paper have been thwarted in their implementation by recalcitrant criminal justice agents and agencies.¹⁶ This problem becomes starkly apparent when one looks at the main attrition points in the criminal justice process: the victim's decision to report, police discretion as to whether they will accept and investigate the case, prosecutorial discretion whether to prosecute, and the trial process itself.

The decision to report

If one in 20 women is reporting her rape to the police in South Africa,¹⁷ the decision to report is clearly the point at which most victims are lost to the system and is a cause for much concern. While the decision whether or not to report a rape is undoubtedly a complex and very personal one, studies suggest that criminal justice performance and attitudes play a critical role. Statistics Canada's 1993 survey on violence against women¹⁸ reports that 50% of respondents who had not reported their assault to the police based this decision on a belief that the police would not be able to do anything. Forty-one percent cited criminal justice attitudes and 33% fear of retaliation by the perpetrator. In a country like South Africa where police performance is arguably worse than in Canada and patriarchal attitudes more generally tolerated, victims' responses would no doubt reflect similar concerns. Phone-in surveys in Australia suggest that reasons for non-reporting in that country include fear of disbelief by the police, fear of blame, retaliation and the court process, and uncertainty as to whether the assault amounted to 'rape' or, perhaps more importantly, would be defined as such by the criminal justice system.¹⁹

¹⁵ C. Goldberg-Ambrose 'Unfinished business in rape law reform' (1992) 48 *Journal of Social Issues* 173.

¹⁶ Goldberg-Ambrose op cit (n15) 174; L Kelly *Routes to Injustice* (2001) passim.

¹⁷ Nicro (1993) and Rape Crisis (1996), cited in Artz and Kunisaki op cit (n5) 19.

¹⁸ Statistics Canada *Violence Against Women Survey* (1993), catalogue no 11-001E, Ottawa, Ontario.

¹⁹ J Barga and E Fishwick *Sexual Assault Law Reform: A National Perspective* (1995) Office of the Status of Women, Canberra.

The way in which the responses of police, prosecutors and judges shape the construction of rape within the criminal justice system has been the subject of scathing critique, most notably in the form of Susan Estrich's landmark book, *Real Rape*.²⁰ Real rapes, according to Estrich, are those involving a weapon and injury, committed by strangers, outdoors. These are the cases that criminal justice personnel take seriously. Looking at the English context, Liz Kelly too speaks of a 'real rape' template adopted by criminal justice agents.²¹ She argues that conformity to this template – which informs the victim's self-conception of the assault as a rape and her belief that the police will also see it that way – along with support from friends and family, are the strongest predictors of whether a rape will be reported. Women know what the system considers to be rape and many will choose not to risk further victimization by reporting assaults that may not fit that conception. On the question of whether rape law reform has increased reporting levels, the research is inconclusive, with neither Marsh's 1982 study²² nor Horney and Spohn's 1991 study²³ finding significant changes in reporting rates, and the United States Senate Judiciary Committee's 1993 study²⁴ finding an increase in reporting levels, but none in arrests or convictions.

Police and prosecutorial discretion

Once in the system rape victims fare little better. The Crime Information Analysis Centre²⁵ statistics discussed in the introduction to this article indicate that during 2000 between 40% to 60% of rape cases reported in South Africa were withdrawn by the police or prosecution. While it might be tempting to attribute this to the dysfunctionality of the South African criminal justice system, the unfortunate reality is that statistics from England and Wales, collected by the British Home Office,²⁶ show that in that jurisdiction 44% of cases reported during the study period were withdrawn in this way. The United States Senate Judiciary Committee study²⁷ found a pre-trial dismissal rate of 48% of reported cases, although there were significant differences noted between states. The most common reasons cited by police for their decision to withdraw the matter

²⁰ S Estrich *Real Rape: How the Legal System Victimized Women Who Say No* (1987).

²¹ Kelly op cit (n16) 10.

²² JC Marsh *Rape and the Limits of Law Reform* (1982).

²³ Horney and Spohn op cit (n14).

²⁴ Senate Judiciary Committee *The Response to Rape: Detours on the Road to Equal Justice* (1993).

²⁵ CIAC *Monitor Analysis: Rape and Attempted Rape Statistics* (2001).

²⁶ J Harris and S Grace *A Question of Evidence? Investigating and Prosecuting Rape in the 1990s* (1999) Home Office Research Study 196.

²⁷ Senate Judiciary Committee op cit (n24).

is that it was a false complaint in the first place²⁸ – not surprising then that complainants are wary of reporting rapes – or a decision by the victim herself to withdraw the matter. These two reasons are not, of course, mutually exclusive in police minds. In a study comparing the impact of New Zealand's rape law reform to findings from Jennifer Temkin's United Kingdom study,²⁹ Jan Jordan found (as did Temkin) that despite the rhetoric of reform little has changed in police processing of rape complaints. This, she says, is because rape law reform is attempting to act on an 'occupational culture profoundly influenced by traditional patriarchal thinking'.³⁰ Jordan does not, however, treat the police as a monolithic institution, and is quick to point to the positive experiences of some respondents in her study, which suggests to her that individual police attitudes can be changed.³¹ The problem is simply that neither law reform, nor new legislation, nor 15 years of training appears to have done the trick at an institutional level. As Carol Goldberg-Ambrose states, '[t]he goal of rape reform legislation that seems most difficult to achieve is change in knowledge, values and attitudes about gender and sexuality'.³² Lisa Frohmann, in an ethnographic study conducted over 15 months in two prosecutors' offices, found these same attitudes and values embedded in prosecutorial assumptions about not only gender and sexuality, but also socio-economic status and race.³³ And it is these assumptions, she suggests, that hover in the background of every decision whether to prosecute or drop a case.

In court

For the few who manage to run this gauntlet and make it to trial the troubles have just begun. Both the restrictive judicial interpretation of laws³⁴ and masculinist interpretations of the facts presented in court³⁵ have acted to undermine the goals of rape law reform. Mirroring in some ways Estrich's 'real rape' template, Adler's 1987 study found that despite substantial reforms to English rape laws (especially those governing character evidence), six factors consistently predicted a successful

²⁸ J Gregory and S Lees *Policing Sexual Assault* (1999).

²⁹ J Temkin 'Plus ça change: Reporting rape in the 1990s' (1997) 37 *British Journal of Criminology* 507.

³⁰ J Jordan 'World's apart? Women, rape and the police reporting process' (2001) 41 *British Journal of Criminology* 679 at 702.

³¹ Jordan op cit (n30) 704.

³² Goldberg-Ambrose op cit (n15) 182.

³³ L Frohmann 'Discrediting victims' allegations of sexual assault: Prosecutorial accounts of case rejections' (1990) 38 *Social Problems* 213.

³⁴ Z Adler *Rape on Trial* (1987).

³⁵ Horney and Spohn op cit (n14); G LaFree *Rape and Criminal Justice: The Social Construction of Sexual Assault* (1989); Temkin op cit (n29).

prosecution: the victim's sexual inexperience, her respectability, absence of consensual contact with the accused before the assault, resistance and injury, and early complaint.³⁶ Where all six factors were present, she found a 100% conviction rate; where none occurred there were no convictions. Similarly, one after another American study has found rape law reform to have had a negligible effect on prosecution or convictions rates.³⁷ Particularly disturbing are findings from Australia, which is considered to have implemented some of the most progressive laws and policies relating to sexual offences. Although New South Wales is one of the jurisdictions which has done most to limit sexual history evidence and change the conduct of rape trials, a government-sponsored study reports that rape victims appearing in court were discredited as a matter of course and attacked during cross-examination with biased and stereotypical questions relating to what was considered 'appropriate' behaviour for them in relation to sex and sexual assault. Fifty-two percent of complainants were accused of making accusations based on vengeance or some other ulterior motive, and a third were accused of initiating the case solely in order to obtain compensation. Eighty-two percent were cross-examined about lying. Over half (57%) were asked about sexually provocative behaviour, and over a third about resistance (37%). The corroboration warning (that it is dangerous to convict on the uncorroborated word of a complainant in a rape case) was given in 40% of cases, and in only 14 of the cases sampled was no warning at all given to the jury in relation to the credibility of the witness. Having largely exhausted the limits of rape law reform, the thrust of most recommendations in this report is that the reforms be better advertised to members of the judiciary and prosecution, who should be trained on issues of gender bias (as well as on the content of the legislation). The study finds, however, that such 'bias is systemic and inherent within the legal system... [limiting] women's access to justice'.³⁸

Legal representation for victims of sexual assault

The key question is how one starts to shake up these institutional norms. One of the ways in which entrenched norms can be jolted is through the

³⁶ Adler op cit (n34).

³⁷ See, for example, Marsh op cit (n22); S Caringella-MacDonald 'Sexual assault prosecution: An examination of model rape legislation in Michigan' (1984) 4 *Women & Pol* 65; K Polk 'Rape reform and criminal justice processing' (1985) 31 *Crime & Delinq* 191; WD Loh 'The impact of common law and reform rape statutes on prosecution: An empirical study' (1981) 55 *Wash L Rev* 543; R Bachman 'Predicting the reporting of rape victimisation: Have rape reforms made a difference?' (1993) 20 *Crim Just & Behav* 254; R Bachman and R Paternoster 'A contemporary look at the effects of rape law reform: How far have we really come?' (1993) 84 *J Crim L & Criminology* 554.

³⁸ New South Wales Department of Women *Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault* (1996) at 13.

introduction of a person into the criminal justice process who speaks the language of law and can effectively represent the rights and interests of the victim. One of the more radical innovations mooted at various times by scholars concerned with the relative failure of rape law reform to substantially improve the position of rape victims in the criminal justice system, is that victims be allowed legal representation throughout or at specific points in the process.³⁹ Because many civil law countries provide for victims of, especially, sexual assaults to be legally represented in some measure,⁴⁰ it is not surprising that advocates of such reforms in the United Kingdom, Australia, the United States and South Africa have turned to these systems for models that might be usefully applied in their own countries. Pizzi and Peron,⁴¹ in their critique of adversarialism in the United States, and Pithey et al⁴² both draw heavily on the German *Nebenklage* approach.⁴³ Based on this model, a victim of a crime that is particularly personal in nature⁴⁴ may join the case as an ‘ancillary prosecutor’, once the state has instituted proceedings against the accused.⁴⁵ In this way she obtains the right to participate in the trial on an equal footing with the accused, whether personally or through a legal representative.⁴⁶ She has, amongst others, the right to question witnesses, inspect records, request the recusal of a judge, and lead and object to evidence.⁴⁷ Similar provision is made through the *parte civile* process in Belgium and France, a system which has the added advantage of joining the criminal matter with the civil issue of compensation.⁴⁸ It comes as no surprise that stalwarts of the adversarial system and adversarialism in general have reacted with horror to these recommendations, arguing that the proposals fail to account of the many fundamental differences, from the role of judges to the ways in which evidence is collected and adduced, that differentiate the Anglo-American

³⁹ Temkin op cit (n29); Barga and Fishwick op cit (n19); WT Pizzi and W Perron ‘Crime victims in German courts: A comparative perspective on American problems’ (1996) 32 *Stan J Int’l L* 37; WJ Murphy ‘The victim advocacy and research group: Serving a growing need to provide rape victims with personal legal representation to protect privacy rights and to fight gender bias in the criminal justice system’ (2001) 10 *Journal of Social Distress and the Homeless* 123; I Bacik et al *The Legal Process and Victims of Rape* (1998).

⁴⁰ Spain, the Netherlands, Luxembourg, Finland, Italy, Austria, Sweden, Norway, Germany, France and Belgium all allow for some level of legal representation to be afforded to rape victims. See Bacik op cit (n39)

⁴¹ Pizzi and Perron op cit (n39).

⁴² B Pithey et al *The Legal Aspects of Rape* (1999).

⁴³ See s 395(1) of the German *Strafprozessordnung* (StPO).

⁴⁴ For example murder, assault, kidnapping and rape.

⁴⁵ StPO s 396(1).

⁴⁶ StPO s 397(1).

⁴⁷ StPO s 240(2) and s 244(3)-(6).

⁴⁸ Bacik et al op cit (n39) 175 and 210.

and civil law traditions.⁴⁹ At least conceptually this model also blurs the distinction between private prosecutions, aimed at personal vindication, and the principle that it is the state's role to prosecute offenders, in the interests of society at large. The potential for conflicts of interest between these two positions is one that cannot be wished away, not least, as Henderson suggests, in respect of prosecutorial strategy.⁵⁰

Although the civil law approach has not found general favour, the underlying rationale for adopting some form of representation for victims of sexual assaults has been more widely accepted. In this respect, at least, advocacy that has drawn on the civil law model has met with some success. Thus, for example, although the Australian Law Reform Commission⁵¹ rejected Bargaen and Fishwick's recommendation⁵² that legal representation be provided to victims throughout the rape trial process, it acknowledged the urgent need for some sort of intermediary in victims' interactions with the system. As a result specially trained sexual assault workers have been introduced in various Australian states to assist victims during the trial process.⁵³ The provision of support persons does not, however, address the fundamental imbalance that results from the construction of rape and the nature of the rape trial within the adversarial system. This is because such persons lack the ability to engage with and fundamentally change established patterns of interaction and institutional bias that exist within the criminal justice system. In this respect Henderson acknowledges that the 'failure of law reform to expand the prosecution of rape' lies not in a lack of rights or protection for victims, but is rather attributable to 'law enforcement, prosecutors, juries and courts, (who) together with cultural norms, determine whether a woman is a rape victim or not'.⁵⁴ It is exactly for the purpose of countering this institutional bias and enforcing (or at least contesting) the rights which are granted, in law, to rape victims that legal representation is so important. Given that the reservations to such an innovation derive in large measure from objections to their inquisitorial antecedents, it might be that those who recognize the need to provide a buffer between victims and the criminal justice system will find greater

⁴⁹ L Henderson 'Revisiting victim's rights' (1999) *Utah L Rev* 383 at 427-30; Kelly op cit (n16) 37.

⁵⁰ Henderson addresses this issue in the context of a broader attack on the American movement to have victims' rights included in the United States Constitution. She raises, for example, the issue of plea-bargaining, particularly in multiple-perpetrator offences (her example is the Oklahoma bombing), as one where victims' wishes may be at odds with prosecutorial strategy.

⁵¹ Australian Law Reform Commission Issues Paper 1 'Review of s 409B of the Crimes Act 1900 (NSW)' (1997).

⁵² Bargaen and Fishwick op cit (n19) 103.

⁵³ Kelly op cit (n16) 36.

⁵⁴ Henderson op cit (n49) 423.

utility in models that are grounded in the adversarial system. In this respect I would suggest that the Danish and Irish models are particularly useful, as is the emergence of a similar approach in the International Criminal Court.

The Danish model

Although the Danish criminal justice system contains a number of inquisitorial elements, it is essentially adversarial in nature. In 1980 the Danish legislature introduced legal representation for rape victims, a provision extended in 1997 to victims of other crimes.⁵⁵ Legal representation is state-funded and lawyers are drawn from a list of those willing to provide such representation. The system kicks in at the time that a complaint is made to the police. Under the Administration of Procedure Act⁵⁶ there is a duty on the police to inform the victim when she first reports the rape, and before she makes a statement, that she has a right to legal representation. This does not preclude her from choosing to make a statement without such assistance. The police are under a duty to keep the victim informed of the investigation and, in practice, her lawyer makes sure that this occurs.⁵⁷ Moreover, her lawyer has access to the police investigation and all evidence collected prior to the arrest and may discuss these with the victim, thus facilitating her involvement in the case.

At trial, the victim's lawyer may only be heard on matters directly affecting the victim. Thus, she may not ask for additional witnesses to be called, nor cross-examine the accused or any of the other witnesses. Nor may the victim's lawyer make submissions to the court on points of law. She only has the right to be present at the trial while the victim is giving evidence. At this stage she may object to questions put to the victim by both the defence and the prosecution. She may also ask that the victim give evidence *in camera* or be cross-examined without the defendant being present. At sentencing, the victim's lawyer may call witnesses and lead evidence in respect of the impact that the crime has had on the victim and the issue of compensation, but may not address the court on the question of sentence. That the victim's lawyer may not act as a second prosecutor is emphasized in the memorandum accompanying the original bill that introduced this concept. This means, it is suggested, that she may not concern herself with 'questions of guilt, innocence or sentence'.⁵⁸ Notably, Denmark has a conviction rate of approximately 40% of all cases reported to the police.⁵⁹

⁵⁵ Administration of Procedure Act 1980 s 171.

⁵⁶ Administration of Procedure Act 1980 s 741A-E.

⁵⁷ Bacik op cit (n39) 198.

⁵⁸ Bacik op cit (n39) 199.

⁵⁹ Bacik op cit (n39) 203. This figure relates to convictions as a percentage of cases reported during 1993-1995.

The Irish model

Irish commentators have grappled at some length with the constitutional and due process implications of providing legal representation for rape victims within an adversarial system.⁶⁰ As a compromise, rape victims were given the right, in 1995,⁶¹ to obtain state-funded legal advice on their case, a right generally considered to be of little utility in that it did not provide victims with assistance where they needed it: in court.⁶² After substantial lobbying the legislature introduced legal representation for complainants in cases where the defence seeks to adduce evidence relating to the previous sexual history of the complainant.⁶³ Although this represents a far more limited intervention than that envisaged in Denmark, it is nonetheless an important recognition that there are times during the trial process when the victim must be allowed, in order to protect her own rights and interests, to participate in the trial as something more than a witness.⁶⁴

The International Criminal Court

The United Nations General Assembly's Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power⁶⁵ admonishes state parties that victims should be treated 'with compassion and respect for their dignity' within a responsive criminal justice system, by keeping victims informed of the progress and disposition of their case, allowing the 'views and concerns of victims' to be heard during proceedings, and providing 'proper assistance to victims throughout the legal process'.⁶⁶ Allowing the 'views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected' in a way that allows them equal and meaningful access to the justice process would seem to require, in most cases, that such representation be made through, or at least with the assistance of, a legal representative. It is telling, therefore, that the Rules of Procedure

⁶⁰ A Connelly (ed) *Gender and the Law in Ireland* (1993); Bacik op cit (n45) 259-60.

⁶¹ Civil Legal Aid Act 1995 s 26(3).

⁶² Bacik op cit (n39) 258.

⁶³ By way of s 34 of the Sex Offenders Act 2001, amending the Criminal Law (Rape) Act 1981.

⁶⁴ It also parallels, in effect, s 2907.02(F) of the Ohio Criminal Code, which provides that:
Upon approval by the court, the victim may be represented by counsel in any hearing in chambers or other proceedings to resolve the admissibility of evidence. If the victim is indigent or is otherwise unable to obtain the services of counsel, the court, upon request, may appoint counsel to represent the victim without cost to the victim.

⁶⁵ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, A/RES/40/34 (1985).

⁶⁶ Sections 4-6.

and Evidence of the International Criminal Court⁶⁷ allow for the victims of crimes tried within that forum to be legally represented and for that representative to participate substantially within the trial process. While such participation may be somewhat circumscribed by the Chamber (which may, for example, require that interventions be confined to written observations and submissions),⁶⁸ the victim or her legal representative enjoys an absolute right to participate equally in arguments concerning the probative value and therefore the admissibility of evidence related to her alleged consent (through words, conduct or silence) and to her 'credibility, conduct or predisposition to sexual availability'.⁶⁹ Such a legal representative is also empowered to apply to the Trial Chamber for the application of both protective⁷⁰ and special measures⁷¹ to protect the victim. These include non-disclosure of the victim's identity, use of electronic means to disguise the victim's identity, provision of support persons and *in camera* hearings.

Evaluation

The presence of a legal representative for the victim potentially adds value at each stage of the criminal justice process, not only in protecting the rights and interests of the victim, but also in providing a check on the discretion of criminal justice personnel and therefore, at a more general level, promoting the integrity of the criminal justice system. The following section considers how legal representation for victims of sexual assault might work in practice and the utility it would bring to various stages of the criminal justice process.

Police investigations

Providing a lawyer from the time that the complaint is made to the police ensures, insofar as it is possible, that the complainant's statement is accurately recorded and that where she is not able, because of trauma or fatigue or inebriation, to make a coherent statement, the recording thereof is deferred. This is not only a more victim-friendly approach, but has the distinct advantage of reducing inconsistencies between first reports and later testimony. In South Africa, this is an acute problem, substantially exacerbated by the fact that police officers are at times only marginally familiar with the language in which the complainant's report is made, and that complainants may be only nominally literate. In such cases the risk of

⁶⁷ PCNICC/2000/1/Add.1.

⁶⁸ Rule 91.2.

⁶⁹ Rule 72.

⁷⁰ Rule 87.

⁷¹ Rule 88.

the complainant signing an inaccurate record of her report is particularly high, a fact that can rebound at trial, where the focus of the defence is often directed at seizing upon these inconsistencies. In this context, the presence of a victim's lawyer at the time that a statement is taken would help to ensure that the victim is properly and appropriately interviewed and that medico-legal services are made available. Her presence may also serve to balance the potential vagaries of police, and later prosecutorial, discretion as to whether to accept a complaint in the first place.

Bail hearings

Once the perpetrator has been apprehended and the court process starts, the question of representation becomes even more important. The facts in the *Carmichele* case,⁷² where a woman was brutally attacked by a man who had been granted bail because the police and prosecution failed to notify the court that he was awaiting trial on charges of attempted rape, and the numerous cases recorded by Barday and Combrinck in their review of the application of bail legislation in rape cases,⁷³ speak of a distinct disregard for victims' rights during bail proceedings. In the Barday and Combrinck report women speak over and over again of their shock at being confronted on the street by their rapist, not having been informed of his release on bail.⁷⁴ Legal representation at this stage of proceedings would ensure that the fears and concerns of the victim are taken into account by the court, and her safety adequately protected. Again, this does not mean the introduction of new rights for victims, but the effective protection of those rights which already exist.

At trial

Rape violates the victim's physical, psychological and sexual integrity. It is a uniquely personal crime that is invasive, dehumanizing and humiliating. As Andrea Dworkin puts it, 'the boundary of the body itself is broken by force and intimidation...'.⁷⁵ Despite its uniquely personal nature rape remains, conceptually at least, a crime against society. As such, the state arrogates to itself the right⁷⁶ to prosecute the alleged perpetrator, in the interests of exacting retribution, ensuring that both the perpetrator and other potential offenders are deterred and, to a lesser or greater degree, facilitating the

⁷² *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC).

⁷³ R Barday and H Combrinck *Implementation of Bail Legislation in Sexual Assault Cases. First Research Report 2000-2002* (2002)

⁷⁴ *Ibid*

⁷⁵ A Dworkin *Life and Death: Unapologetic Writings on the Continuing War against Women* (1997) 23.

⁷⁶ Or more often the right of first refusal. Private prosecutions may only be instituted once the state has declined to prosecute - see Criminal Procedure Act 51 of 1977 s 7.

perpetrator's rehabilitation. Compensation for victims is something that our bifurcated system generally leaves to the civil courts. The prosecutor is an officer of the court, with a duty to represent the state in protecting societal interests by assisting the presiding officer, who acts as 'neutral umpire', to ascertain the truth of the matter at hand. The prosecutor also has a responsibility, within a constitutional regime enshrining values of due process, to ensure that the rights of the accused are protected. This is manifested, for example, in the prosecutor's duty to make available to the defence evidence that may prejudice the state's case. No reciprocal or comparable duty rests on the defence. The prosecution does not represent the rape victim at trial⁷⁷ and has no more responsibility to her than to any other witness. At times the interests of the prosecution may in fact be completely misaligned with the immediate personal interests of the victim – it may, for example, be in the interests of the prosecution for the court to see the victim reduced to tears as she defends her credibility under cross-examination. Legal representatives for the accused are expected to mount a vigorous defence against the charges brought by the state. Inevitably the rape victim or witness, having recounted every intimate detail of her assault to the court on the instruction of the prosecutor, will come under a full frontal attack by the defence. It is her story that must be rebutted if the defendant is to walk free. To this end the defence must argue that either the victim was not raped at all or, if she was raped, it was not by the defendant or, if it was the defendant with whom she had sexual relations, that these were consensual. In the face of the rape victim's testimony the defence strategy must therefore in most cases focus on her credibility as a witness. It is hardly surprising then that the United Nations Special Rapporteur on Violence against Women reports as follows:

'Indeed, in rape cases, it is the victim who is most often placed on trial rather than the perpetrator, accused of having ulterior motives and subjected to degrading questions with often pornographic overtones. Prosecutors might fail to adequately address the victims' needs and all too often, information is, either intentionally or unintentionally, withheld from victims.'⁷⁸

In support of a defence strategy based on attacking the credibility of the complainant, the defence will inevitably turn to character evidence,⁷⁹ most often in the form of allusions to previous sexual history and, more recently, applications for access to counselling records – what Estrich calls the 'nuts

⁷⁷ This is explicitly stated by the South African Law Commission in its Discussion Paper at para. 12.7.1 ('the role of the prosecutor is not that of a legal representative for the victim'). See South African Law Commission Discussion Paper 102 (Project 107) 'Sexual Offences: Process and Procedure' (2002).

⁷⁸ Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Ms Radhika Coomaraswamy E/CN.4/1997/47 12 February 1997 at para 28.

⁷⁹ Temkin op cit (n29).

and sluts' approach.⁸⁰ In this respect the experience of rape victims is materially different from that of other victims in the system and warrants special treatment. Responding to arguments that this would be unjust or inequitable, Estrich argues that:

'If the defenders of the system are right in saying rape cases are treated just like assault, and just like robbery and burglary, they are surely wrong in taking this as evidence of a fair and just system. The weight given to prior relationship, force and resistance, and corroboration effectively allows prosecutors to define real rape so as to exclude the simple case, and then to justify that decision as neutral, indeed inevitable, when it is neither.'⁸¹

It is arguably during cross-examination of the victim and during the defence case that she is most vulnerable and most in need of assistance from a person who knows the law. There is no reason, in principle, why the adversarial system cannot accommodate such limited representation, as illustrated by the Irish model.

My preference, however, is for a more extensive model, in which the victim's lawyer, as a trained legal professional can, as research suggests she does, complement the role of criminal justice personnel. This view is supported by Bacik et al's 1998 study of rape case processing in various European countries. Looking at the impact of independent legal representation for victims the study finds that:

- (i) participants experienced significantly fewer difficulties in obtaining information about case developments;
- (ii) participants had a significantly clearer understanding of their role at trial;
- (iii) participants reported higher levels of confidence and articulacy when testifying;
- (iv) participants rated the attitude of the accused's lawyer as significantly less hostile;
- (v) the impact of the trial process on the participants' families was considered to be significantly less negative;
- (vi) participants were significantly more satisfied with the legal process overall than were participants who did not have their own legal representative during the trial process.⁸²

Based on this study the researchers strongly recommended the introduction of victims' lawyers in all jurisdictions (both adversarial and inquisitorial), a view endorsed by then United Nations High Commissioner for Human Rights, Mary Robinson, in her foreword to the report.⁸³ This is

⁸⁰ S Estrich 'Rape shield laws aren't foolproof' *USA Today* 27 July 2003.

⁸¹ Estrich op cit (n20) 25.

⁸² Bacik op cit (n39) 151.

⁸³ Bacik op cit (n39) xii.

a recommendation that must be taken seriously if we are to move away from a system where the defendant's right to 'due process' and a 'fair trial' in a rape case is, more often than we might like to admit, contingent on the victim's incoherence, disempowerment and alienation from the criminal justice process.

The South African constitutional and legal context

The South African Constitution explicitly guarantees the right to freedom from all forms of violence, whether from public or private sources,⁸⁴ as an aspect of the right to freedom and security of person.⁸⁵ Both the specific inclusion of a right to freedom from violence and the inclusion of 'private' violence are seen as significant in extending the right to freedom and security of person beyond a 'due process' guarantee against arbitrary arrest and detention.⁸⁶ Hel ne Combrinck argues convincingly that read with s 7(2) of the Constitution, which requires the State to 'respect, protect, promote and fulfil the rights in the Bill of Rights', s 12(1)(c) places a positive duty on the South African state to act in pursuance of this right.⁸⁷ This interpretation conforms to emerging international human rights norms, requiring state parties to prevent, investigate and punish violations of human rights, a principle initially established in the well-known case of *Velasquez Rodriguez*.⁸⁸ Radhika Coomaraswamy, then United Nations Special Rapporteur on Violence Against Women, emphasizes this duty as follows:

'In the context of norms recently established by the international community, a State that does not act against crimes of violence against women is as guilty as the perpetrators. States are under a positive duty to prevent, investigate and punish crimes associated with violence against women.'⁸⁹

The Committee on the Elimination of Discrimination Against Women provides a similar interpretation of state obligations under the Convention on the Elimination of All Forms of Discrimination Against Women⁹⁰ in its General Recommendation 19,⁹¹ stating that:

⁸⁴ Section 12(1)(c) of the Constitution.

⁸⁵ Section 12(1) of the Constitution.

⁸⁶ H Combrinck 'The right to freedom from violence and the reform of sexual assault law in South Africa' 184-94 in J Sarkin and W Binchy (eds) *Human Rights, The Citizen and the State: South African and Irish Approaches* (2001).

⁸⁷ H Combrinck 'Positive state duties to protect women from violence: Recent South African developments' (1998) 20 *Human Rights Quarterly* 666.

⁸⁸ *Velasquez Rodriguez Case*, 29 July 1988, Inter-Am Ct HR (Ser C) No 4 (1988) at 164-77.

⁸⁹ Preliminary report submitted by the Special Rapporteur on Violence against Women, its Causes and Consequences. UN ESCOR Commission on Human Rights, (50th session, 1994), UN DOC E/CN 4/1995/42 (1994) at 18.

⁹⁰ UN DOCA/RES/34/180 (1980).

⁹¹ General Recommendation 19 (11th session, 1992). See UN DOC CEDAW/C/1992/L.1/Add 15 (1992).

'Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence...'⁹²

In terms of these international law norms, the state is liable for the infringement of individual rights that result both from the actions or omissions of the state. This requires 'due diligence' to prevent the violation occurring in the first place, but also effective investigation and prosecution of cases where violations have occurred.⁹³ In this respect the court in *Velasquez Rodriguez* found that:

'Where the acts of private parties that violate the Convention are not seriously investigated, those parties are aided in a sense by the government, thereby making the State responsible on the international plane.'⁹⁴

This position has recently been endorsed by the South African Constitutional Court in the case of *Carmichele v Minister of Safety and Security*.⁹⁵

Given the extremely high levels of sexual violence in South Africa and the apparent reluctance of police and prosecutors to follow up on all but a small percentage of reported incidents, it is certainly arguable that the state is in breach of both the international and constitutional duties imposed on it to protect the rights of victims. The relative failure, in other jurisdictions, of the types of rape law reform proposed by the South African Law Commission to meaningfully shift criminal justice attitudes and practices suggests that these reforms will do little to change this rather dire picture. As long as police continue to turn away inordinate numbers of rape complaints, as long as prosecutors exercise their discretion in similar fashion, as long as rape victims continue to fear for their safety because rapists are being allowed out on bail with no reference to victims' fears of retaliation, and as long as they experience high levels of re-victimization in the courtroom, the state will remain in breach of the constitutional imperatives created by the right to freedom from violence enshrined in s 12(1)(c) and will not meet the standards laid down in *Carmichele's* case. That being so, it is incumbent on the state to move beyond the principled reforms mooted and to look to innovations that will actually improve the position for victims and the numerous potential victims of rape in South Africa.

Although I would argue that the provision of legal representation for rape victims does not, in any way, limit the accused's fair trial rights, it is important to note that the South African courts have shown themselves prepared, in recent years, to limit the constitutionally protected fair

⁹² Para 9.

⁹³ See *Velasquez Rodriguez Case* supra (n88) at paras 172 and 177.

⁹⁴ *Velasquez Rodriguez Case* supra (n88) at para 177.

⁹⁵ *Carmichele v Minister of Safety and Security* supra (n72).

trial rights of the accused when they conflict with individual rights or those of the broader society by, for example, limiting the extent of the accused's right to cross-examine the victim. This has occurred in two rape cases. In *Klink v Regional Court Magistrate NO*,⁹⁶ Melunsky J, while recognizing that the right to confront and cross-examine the complainant is an important component of the right to a fair trial, held that it was still necessary to balance the right of the accused with the rights of witnesses not to be subject to further trauma in their pursuit of justice, in this case by being aggressively cross-examined by an unrepresented accused. Similarly, in *S v Cornelius*⁹⁷ the court found, on review, that the excessive length and the nature of the accused's cross-examination of the victim in a rape case should have been curbed in the interests of the victim's right to dignity. This balancing must surely also apply in respect of the victim's constitutional right to privacy.⁹⁸ The recognition that a need for such balancing is required will, however, remain *ad hoc* and the jurisprudence surrounding it impoverished until such time as opportunity is made for rape victims' rights to be properly represented, disputed and adjudicated.

Conclusion

This article has taken the position that the reforms proposed by the South African Law Commission to amend the laws on sexual assault are largely inadequate and insufficient to deal with the enormity of the problems posed by both the nature and extent of rape in this country and problematic criminal justice responses. The evidence from comparative jurisdictions supports this proposition, by illustrating the often minor effects of similar reforms in those jurisdictions over the past 30 years. Much of this failure can be attributed to recalcitrant attitudes of criminal justice personnel and deeply entrenched masculinist norms within criminal justice institutions. It is argued that, in the face of this evidence and in light of the international human rights and constitutional responsibilities placed on the South African state to prevent, investigate and punish violations of the right to be free from all forms of violence, whether emanating from public or private sources, the state must look to innovative reforms that can meaningfully

⁹⁶ *Klink v Regional Court Magistrate NO* 1996 (3) BCLR 402 (SE).

⁹⁷ *S v Cornelius* 1999 JDR 0145 (C).

⁹⁸ Section 14 of the Constitution. The constitutional privacy arguments applied to applications for disclosure of victims' counselling records in Massachusetts provide an important example of the role that victims' lawyers can play in shaping rape cases and forcing the courts to recognize and balance the rights of rape victims. For a useful overview of these cases and a compelling example of the importance of victims' lawyers, see WJ Murphy 'Minimizing the likelihood of discovery of victims' counselling records and other personal information in criminal cases: Massachusetts gives a nod to a constitutional right to confidentiality' (1998) 32 *New Eng L Rev* 983.

shift criminal justice attitudes and address institutional biases towards victims of sexual assault. One way in which this can be done is by providing legal representation for victims of sexual assault, along the lines of the Danish and Irish models described in this paper. While the Danish model is perhaps the ideal, in that it provides protection for the victim from the time that the rape is reported, adoption of the more limited Irish model would still represent an important recognition of the victim's dignity and privacy rights and her interest in protecting these rights during the trial process. Without innovative interventions into prevailing practices, it is argued, the treatment of sexual assault in the criminal justice system will continue to rely on and reproduce arcane notions of acceptable feminine behaviour and masculinist myths about who is and who is not a deserving victim.