

The Constitutional Court gets anal about rape — gender neutrality and the principle of legality in *Masiya v DPP*

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ABSTRACT

In *Masiya v DPP* the Constitutional Court missed the opportunity to address the patently inadequate and unjust common law definition of the crime of rape. The Court had an opportunity to embrace its mandate as guardian of constitutional rights and, in adopting a conservative stance towards the development of the common law, failed to do so. Two points of particular interest that arise from the judgment are considered in this article: the Court's unwillingness to extend the definition of rape along gender-neutral lines; and the impact of the principle of legality on the Courts' ability to develop the common law definitions of crimes. There is no reason in logic or justice for why the definition of rape should be gender-specific. Furthermore, in line with the minority judgment in *Masiya*, there is no rule of law that prohibits the Court from executing such an extension.

Introduction

'The new constitution ... accords to lawyers an expanded field for real fulfilment in areas previously excluded by the sterility of the doctrine of parliamentary sovereignty; and it equips them and the courts with teeth which are

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sharp and biting enough to snarl at and chew on visible manifestations of injustice — whether it emanate from within or outside the agencies of the State'.¹

This article contends that the Constitutional Court in *Masiya v DPP*² missed the opportunity described in the quote above to gnash its sharp teeth at a visible manifestation of injustice — the patently inadequate and unjust common law definition of the crime of rape. The Court had an opportunity to embrace its mandate as guardian of constitutional rights and, in adopting a conservative stance towards the development of the common law, failed to do so. In a separation of powers that is constructed as a vibrant constitutional dialogue, the Court's contributing voice was meek indeed.

Two points of particular interest that arise from the judgment are considered in this article. The first is the Court's unwillingness to extend the definition of rape along gender-neutral lines. In reaching this decision the Court pronounced that the common-law definition of rape was not unconstitutional but merely fell short of s 39(2) of the Constitution's directive that law should promote the spirit, purport and objects of the Bill of Rights.³ This is criticised on two grounds: that it is tenuous reasoning to find law in conformity with the Constitution and yet not fulfilling the standard set in s 39(2); and that the retention of a gendered definition of rape is not in conformity with other common law crimes, nor with the reality of sexual violence nor with previous decisions of the same court. Development of the common law should be incremental but not at the expense of fully realising the spirit and protections of the Constitution. In our adoption of the principle of constitutional supremacy it is precisely the Constitutional Court that has the mandate to ensure that the vision of the framers of the Constitution is fully realised.

The second point of interest explored is the impact of the principle of legality on the courts' ability to develop the common law definitions of crimes. This article provides an alternative dialogue both to the Court's apparently implicit acceptance of this ability and of certain commentators' denial of the ability of the courts to so develop the law. It is argued that

¹ Address by Chief Justice Ismail Mahomed to the Johannesburg Bar on his appointment, 25 June 1997.

² *Masiya v Director of Public Prosecutions* 2007 (5) SA 30 (CC).

³ The Constitution of the Republic of South Africa, 1996, hereinafter referred to as 'the Constitution'. Section 39(2) reads: 'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'

if the courts cannot develop the common-law definitions of crimes, the common law will eventually be relegated to the annals of history. Further, that the distinction drawn in the past between innovation and interpretation is artificial. Finally, even if the former argument is not supported, we argue that the Court would not fall foul of legality in developing the definition of rape along gender-neutral lines.

In order to understand the above issues it is necessary to provide a brief summary of the facts and findings in the case.

The Courts' approach in this judgment

Decision in the lower courts

The applicant, Mr Masiya, had been convicted in the Regional Court at Sabie for the rape of a 9-year-old girl. He had unlawfully and intentionally penetrated the girl anally without her consent. The conviction was referred to the High Court in terms of s 52 of the Criminal Procedure Act 51 of 1977 for purposes of sentence. Ranchod J, presiding over the matter, confirmed the Magistrate's finding that the common-law definition of rape was unconstitutional and required development in terms of s 39(2) of the Constitution.⁴ As part of the court's order, the common-law definition of rape was redefined in gender neutral terms⁵ and sentencing of the applicant was postponed pending confirmation of the High Court order by the Constitutional Court. As a consequence of the gender-neutral definition of rape, the High Court was obliged to amend a number of provisions of the minimum sentencing legislation⁶ so that it would no longer refer to women and girls only but also to men and boys. It was for this reason that the matter was referred to the Constitutional Court for confirmation in terms of s 172(2)(a) of the Constitution.

The Constitutional Court

The Constitutional Court declined to confirm the High Court order. The majority, in a judgment written by Nkabinde J,⁷ found that the common-

⁴ *S v Masiya* 2006 (2) SACR 357 (T); *S v Masiya* 2006 (11) BCLR 1377.

⁵ *Masiya* supra (n2) 35 at para 2. The High Court redefined the common law definition of rape to include 'acts of non-consensual sexual penetration of the male penis into the vagina or anus of another person'. Prior to this the common law definition of rape was 'the unlawful and intentional sexual intercourse with a woman without her consent'.

⁶ Criminal Law Amendment Act 105 of 1997.

⁷ With whom Moseneke DCJ, Kondile AJ, Madala J, Mokgoro J, O'Regan J, Van der Westhuizen J, Yacoob J and Van Heerden AJ concurred.

law definition of rape was not unconstitutional insofar as it criminalised conduct that was clearly morally and socially unacceptable.⁸ The definition did, however, need to be appropriately adapted as it was found to fall short of the spirit, purport and objects of the Bill of Rights.⁹ The common-law definition of rape was thus developed incrementally to include 'acts of non-consensual penetration of a penis into the anus of a female'.¹⁰ The dissenting judgment, written by Langa CJ,¹¹ found that it was not necessary to comment on the majority's finding on the constitutionality of the common-law definition of rape. This judgment found that it is possible to extend the definition to include the anal penetration of men as ordered by the High Court without specifically dealing with the constitutionality of the common-law definition.

Gender neutrality

Spirit, purport and objects of the Bill of Rights

Men have long been marginalised in the context of sexual violence, their experiences of humiliation and sexual violation diminished on the grounds that the violation does not constitute rape but rather indecent assault. The implication of this is that it is a lesser personal violation. The majority in *Masiya* deny this claim categorically¹² and the case, although pertaining to a young girl, was argued largely on the basis of gender-neutrality. The amicus brought to the Court's attention the prevalence of indecent assault against both boys and girls and argued that the definition of rape should be extended in a gender-neutral way.¹³

The decision by the majority to nonetheless develop the common-law definition on a gendered basis has created a patently unjust and discriminatory circumstance between the sexes. Young boys (and men) can only be indecently assaulted, while young girls (and women) can

⁸ *Masiya* supra (n2) 45 at para 27.

⁹ Ibid.

¹⁰ *Masiya* supra (n2) 60 at para 74. Note, the merits of the applicant's conviction and the power of the magistrates' court to develop the common law in respect of crimes were considered by the Court but fall outside the ambit of the discussion in this article.

¹¹ With whom Sachs J concurred.

¹² *Masiya* supra (n2) 46 at para 30 where the Court stated:

'It can hardly be said that non-consensual anal penetration of males is less degrading, humiliating and traumatic... . That this is so does not mean that it is unconstitutional to have a definition of rape which is gender-specific. Focusing on anal penetration of females should not be seen as being disrespectful to male bodily integrity or insensitive to the trauma suffered by male victims of anal violation, especially boys of the age of the complainant in this case.'

¹³ Written submissions on behalf of the amicus curiae in the Constitutional Court of South Africa paras 43-51 available at, <http://www.constitutionalcourt.org.za/Archives/8401 PDF> accessed on, 15 October 2007.

be raped when penetrated anally. This is manifestly at odds with the principles and values contained in the Bill of Rights. On an interpretation of s 39(2) alone, or read together with the human rights contained in ss 9,¹⁴ 10¹⁵ and 12¹⁶, a wider development is not only legally possible but confers a broader constitutional obligation on the members of the Court. Section 39(2) states that '[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.' The Court, in developing the definition of rape along gendered lines, failed to fulfil this obligation.

The majority states that the common-law definition of rape is constitutional. Nkabinde J makes the following observation:

'The current definition of rape criminalises unacceptable social conduct that is in violation of constitutional rights... . Invalidating the definition because it is under-inclusive is to throw the baby out with the bath water. What is required then is for the definition to be extended instead of being eliminated so as to promote the spirit, purport and objects of the Bill of Rights.'¹⁷

She then continues to point out that s 39(2) 'provides a paramount substantive consideration relevant to determining whether the common law requires development in any particular case'¹⁸ before concluding that 'the definition is not inconsistent with the Constitution but needs to be adapted appropriately'.¹⁹ This reasoning is peculiar: how can law fall short of the spirit, purport and objects of the Bill of Rights, and yet not be seen as unconstitutional. The obligation to develop the law along these lines is not just as a mission statement — it is a provision in the Constitution and needs to be adhered to like any other clause.

Finding that, despite falling short of the spirit, purport and objects of the Bill of Rights, the law is nevertheless constitutional, fails to acknowledge that the law is sending out a clearly discriminatory message to males. Young boys who are one of the most vulnerable groups in society require especially rigorous protection by the State. It fails also to protect them equally. Indecent assault is considered to be a lesser offence and offenders usually receive more lenient sentences and are sent back into society to re-offend. What is the message the Court is

¹⁴ Section 9(1) states '[e]veryone is equal before the law and has the right to equal protection and benefit of the law.'

¹⁵ Section 10 states '[e]veryone has inherent dignity and the right to have their dignity respected and protected.'

¹⁶ Section 12(1)(c) states '[e]veryone has the right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources'

¹⁷ *Masiya* supra (n2) 45 at para 27.

¹⁸ *Masiya* supra (n2) 47 at para 31.

¹⁹ *Masiya* supra (n2) 47 at para 32.

sending to our children? That if you are a female child you are more worthy of protection and more capable of being violated than a male child? The distinction is illogical and offensive. The only way to truly embrace the spirit, purport and objects of the protections contained in the Bill of Rights is to adopt the stance taken by the minority judgment. Langa CJ eloquently explains the obligation of the Court to order on gender-neutral terms:

‘...I find that the inescapable conclusion of these imperatives is that the anal penetration of a male should be treated in the same manner as that of a female ... [T]o do otherwise fails to give full effect to the constitutional values of dignity, equality and freedom: dignity through recognition of a violation; equality through equal recognition of that violation; and freedom as rape negates not only dignity but bodily autonomy. All these concerns apply equally to men and women and necessitate a definition that is gender-neutral concerning victims’.²⁰

It is shameful that the very guardians of the Constitution failed to offer vulnerable members of our society such recognition and protection. It is true that as a principle of law courts should be, and are, confined to the facts of the case before them when reaching judgment. This was the justification provided by the majority in *Masiya* for refusing to develop the definition along gender-neutral lines:

‘The facts of the present case deal with penetration of the anus of a young girl... . The facts do not require us to consider whether or not the definition should be extended to include non-consensual penetration of the male anus by a penis ... [I]t is not desirable that a case should be dealt with on the basis of what the facts might be rather than what they are’.²¹

However, adherence to this rule, or any rule for that matter, should not be observed at the expense of adhering to the principles contained in the Constitution. If, in order to produce an order that does not unfairly discriminate²² against vulnerable groups the Constitutional Court is forced to extend the reach of its judgment beyond the immediate facts

²⁰ *Masiya* supra (n2) 6 at para 80.

²¹ *Masiya* supra (n2) 46 at para 29.

²² In *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) at para 31 the Court considered what constitutes ‘unfair discrimination’:

‘Given the history of this country we are of the view that “discrimination” has acquired a particular pejorative meaning relating to the unequal treatment of people based on attributes and characteristics attaching to them. We are emerging from a period in our history which humanity of the majority of the inhabitants of this country was denied. They were treated as not having inherent worth: as objects whose identities could be arbitrarily defined by those in power rather than as persons of infinite worth. In short they were denied recognition of their inherent dignity... *In our law unfair discrimination... principally means treating persons differently in a way which impairs their fundamental dignity as human beings who are inherently equal in dignity.*’ (emphasis added)

before it, then it is the only court in the land that has the clear mandate to do so. Not only may it do so, arguably it must so do, or risk falling short of the obligation in s 39(2).

Refusing to do so, as it has in *Masiya*, has serious implications for access to justice. Challenging the law is a lengthy and expensive process. To place the onus of bringing the law in line with the Constitution on individual future applicants or interest groups is both unjust and unnecessarily laborious. The Court had a valid opportunity to mend the notoriously inadequate definition of rape — relying both on its constitutional mandate for adjudication and the specific injunction to develop the common law in line with the Constitution — and lamentably failed to seize it. Instead it created a legal inconsistency that, pending the legislature's intervention, begs for another applicant to incur the costs and trauma of bringing their matter before the Court in order to remedy the gap in our criminal law.

A coherent approach

Another reason why the gender-specificity of the current judgment is undesirable is that it is an anomaly in the common law — all violent criminal offences are crafted in gender-neutral terms except for the crime of rape.²³ The Constitutional Court focused much of its discussion on the recognition that the crime of rape is not one based on 'devaluing' the virgin or on the prohibition of unchaste behaviour.²⁴ Rather it is based on imposing brute force and having power over another human being, regardless of their sex. If the Court is committed to accepting that the historical origins of the crime of rape are no longer accepted in modern society and that it is, like many criminal offences, about violence and domination, then there can be no reason for the Court to endorse a gender-specific definition of the crime.

This is particularly so in the case of the sexual assault of prepubescent children, since their sexual organs are not yet developed, a fact which further substantiates the argument that the primary motivation of the crime is domination, control and power rather than sexual lust.²⁵ Sexual offences against children are rampant and are perpetrated against

²³ The common-law crime of abortion might be another example, but there are obvious physiological reasons for such a gendered definition of the crime.

²⁴ *Masiya* supra (n2) 43 at paras 20-3.

²⁵ Written submissions on behalf of the amicus curiae in the Constitutional Court of South Africa op cit (n13) paras 40-1.

both boys and girls.²⁶ If South Africa is truly committed to protecting children, arguably the most vulnerable members of society, then more assertive intervention by our courts is required. The Constitutional Court had the opportunity to lead by example and send out a clear message that this society will not accept sexual violence against children, all of whom are equally precious, and it disappointingly failed to seize it. Limiting the relief as it did further entrenched an unacceptable dichotomy, and discrimination, between males and females who have been anally penetrated without their consent. The Court acknowledges the violation that has occurred to the human rights of male victims as a result of the crime,²⁷ but then sends the message that the violation is not so great as to warrant a robust approach to the development of the common law.

The approach in the judgment would seem to be that it is the legislature's role to remove the gender specificity.²⁸ However, the gender-specific manner in which the law has been developed in *Masiya* is not consonant with other decisions of the Constitutional Court, most notably the 'gay rights' cases. Both of the *National Coalition* cases²⁹ as well as *Gory*³⁰ and *Fourie*³¹ are examples where the Court ordered a gender-neutral remedy. These cases were brought before the Court on application by either a homosexual or lesbian couple who sought protection of their rights as well as of those of the opposite sex who

²⁶ Newspaper reports indicated that 'Police statistics show that more than 22 000 children were raped in the 2004-'05 financial year' and that 'children are the victims of almost 50 percent of all rapes and attempted rapes in the country, while just under 20 percent of all reported rapes are of children under the age of 11'. See Raubenheimer 'Shock child-rape stats revealed' *Beeld Newspaper* 17 May 2006, available at http://www.news24.com/News24/South_Africa/News/0,,2-7-1442_1934756,00.html, accessed on 14 October 2007 and; Peters 'The rape shame — no light at the end of the tunnel' *IOL Daily News* 15 September 2006, available at http://www.iol.co.za/index.php?set_id=1&click_id=125&art_id=vn20060915095502185C486450, accessed on 14 October 2007.

²⁷ *Masiya* supra (n2) 46 at para 30.

²⁸ *Masiya* supra (n2) 47 at para 30.

²⁹ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) in which the Court was required to make a finding on the constitutionality of the common-law crime of sodomy. In *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) the Court was asked to declare s 25 of the Aliens Control Act 96 of 1991 unconstitutional on the grounds that it unfairly discriminated against same-sex couples.

³⁰ *Gory v Kolver NO* 2007 (4) SA 97 (CC) in which the applicant applied for confirmation of the High Court order finding s 1(1) of the Intestate Succession Act 81 of 1987 unconstitutional.

³¹ *Minister of Home Affairs v Fourie: Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 (1) SA 524 (CC). The Court was required to adjudicate on the constitutionality of the common law definition of marriage and, to the extent that it was impacted, on the constitutionality of the definition of marriage as found in the Marriage Act 25 of 1961.

are in a similar position to themselves. The Court in every case granted relief as sought (with variations where statutory provisions were implicated) and did not limit the relief based on the sex of the particular parties before it, be they a lesbian or homosexual couple. These cases were all incremental in their development, not because the relief was tailored to the sex of the parties before it, but because it was tailored to the offensive common law (or statutory) provision at issue. This would have been the appropriate way forward for the Court in *Masiya*.

Principle of legality

The Court's inadequate approach to gender-neutrality in *Masiya* is also evident in its' handling of the principle of legality. The focus of the judgment is clearly on the manner in which the principle impacts the applicant's conviction, especially the prohibition on retrospective application of the law, with little discussion of any depth on whether the principle permits the development of the common law definition of crimes at all.³² It clearly doesn't view this aspect of the principle as problematic or worthy of detailed attention, as it did indeed develop the common law definition of rape to include the anal penetration of females. Inherent in this decision must be an acknowledgment that such development does not constitute an infringement of legality, though substantiation was not provided.

Regarding retroactivity, the Court rightly avoids falling foul of this aspect of the principle of legality in deciding not to apply their extension of the definition of rape to the applicant. In reaching this decision the Court correctly, in our view, distinguished the European Courts' decision in *SW v United Kingdom; CR v United Kingdom*,³³ in that the legislation establishing criminal liability for marital rape had been at a more developed stage than that of the Sexual Offences Bill³⁴ and the public were more aware of the change in the law.³⁵ But this foreign precedent can be distinguished on other grounds too. Ashworth and Emmerson have criticised *SW* 'on the ground that the court sacrificed an important constitutional principle in order to achieve a *socially* desirable result in the individual case' (emphasis added).³⁶ In *Masiya*, however, developing the common law to its full logical conclusion would have produced a *constitutionally* and socially desirable result. Following the Court's logic,

³² See the principles of legality as outlined by Professor J Burchell below.

³³ *SW v United Kingdom; CR v United Kingdom* (1995) 21 EHRR 363.

³⁴ *Criminal Law (Sexual Offences and Related Matters) Amendment Bill (B 50-2003)*. Hereinafter referred to as 'the Sexual Offences Bill' or 'the Bill'.

³⁵ *Masiya* supra (n2) at para 56.

³⁶ B Emmerson and A Ashworth *Human Rights and Criminal Justice* (2001) 10-29, cited in Hoctor, 'Recent cases: Specific crimes' (2007) 1 SACJ 78 at 85.

such development would not have fallen foul of the principle of legality as, unlike in the case of *SW*, the extension would not have been applied to the applicant himself. In the light of this, the Court's failure to extend the definition on gender-neutral lines is anomalous.

Despite the Court's apparent acceptance of their ability to develop the common law definition of crimes, not all commentators recognise this power as falling within the limits of the principle of legality. For example, in a recent case review Hoctor provided a well-reasoned consideration of the principle of legality in order to motivate that the Constitutional Court should not uphold the decisions of the two lower courts in *Masiya*.³⁷ According to this line of reasoning, to develop the definition of rape along gender-neutral lines, or any lines, would fall foul of the principle of legality and the separation of powers.³⁸

What follows is an alternative conception of the principle of legality to that proffered by the above reasoning. It is argued that there are sound reasons why the principle should not have been an obstacle to developing the definition of rape along gender-neutral lines, which the Court unfortunately did not explicitly address.

Theft — is the legality principle different under our new constitutional regime?

Extending the ambit of the crime of theft to include theft of credit³⁹ has been cited as an example of the courts' historical development of the

³⁷ Hoctor op cit (n36).

³⁸ See for example Hoctor op cit (n36) at 86:

'...[I]t should be recognised that there is a crucial difference between the legitimate and vital role of the courts in striking down criminal law rules which are unconstitutional and the act of extending the bounds of existing crimes, which founders on the principle of legality. Notwithstanding the difficulties associated with the slow passage of the Sexual Offences Bill into law and the problems with the common law definition of the crime of rape, it remains unacceptable that a court should disregard the principle of legality in usurping the function of the legislature.'

³⁹ See for example *R v Milne and Erleib* (7) 1951 (1) SA 791 (A) E at 865:

'Where, therefore, a person takes another's money without authority to do so and intending to consume it ... he commits theft, even if he intends to return other money, if it is proved that he did not, when he took it, believe that he had the right to take it or that the owner, had he been consulted, would have consented to the taking.'

See also *R v Solomon* 1953 (4) SA 518 (AD) at 522: 'It must be borne in mind that, under our modern system of banking and paying by cheque or kindred process, the question of ownership in specific coins no longer arises in cases where resort to that system is made' and; *R v Herholdt* 1957 (3) SA 236 (A). Reference is made to these decisions in *S v Grabam* 1975 (3) SA 569 (A) at 577:

'The foregoing decisions have not escaped academic criticism, but they stand as judgments of this Court. They were referred to in the arguments in the instant case without criticism and I need say no more than that I am unpersuaded that they are manifestly wrong. They are therefore binding.'

definitions of common-law crimes.⁴⁰ This example has however been distinguished from *Masiya* on the basis that this particular development occurred ‘some thirty years prior to the coming into force of the Bill of Rights, and today such an extension would fly in the face of the incorporation of the principle of legality in the Constitution’.⁴¹ It is unclear exactly what is meant by this statement. Does it mean that the principle of legality, as incorporated in the Constitution, is different from that under common law, which pre-dated the constitutional variety? Or does it mean that the principle of legality is the same as it has always been but since it is now incorporated in the Constitution it holds more weight, so that prior to its inclusion in the Constitution it was understandable that the courts disregarded it in the context of the common law crime of theft?

It is contended that both of these interpretations is incorrect. As Hoctor states, ‘the principle of legality is at the core of the rule of law doctrine’.⁴² As such it was a fundamental and binding principle of law before the Constitution and it remains so after it. It is further disputed that the principle of legality as contained in the Constitution is different from the pre-Constitution principle.

The principle of legality is defined similarly by both Professors Burchell⁴³ and Snyman.⁴⁴ The cardinal common-law aspects to the principle are these:

1. crimes and their punishments must be created by a properly made law explicitly identifying the conduct as a crime;
2. there must be some punishment affixed to the commission of the act;
3. the definition of the common law and statutory crimes should be reasonably precise and settled;
4. penal statutes should be strictly construed;
5. the law should be accessible;
6. the punishment for offences must be prescribed by law; and
7. criminal laws must have a prospective operation, in other words there can be no punishment imposed retrospectively.⁴⁵

The above items can be contrasted with the constitutional protection of the legality principle contained in s 35(3)(l) of the Constitution. It states that:

⁴⁰ Hoctor op cit (n36) 81.

⁴¹ Ibid.

⁴² Hoctor op cit (n36) 79.

⁴³ J Burchell *Principles of Criminal Law* Revised 3ed (2006) 96.

⁴⁴ CR Snyman *Criminal Law* 4ed (2002) 39.

⁴⁵ Burchell op cit (n43) 96-104.

'[e]very accused person has a right to a fair trial, which includes the right not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted'.⁴⁶

So what is the impact, if any, of the different expression of the principle of legality as found in the Constitution as against its expression in common law? The inclusion of the principle in the Constitution should be seen as a re-statement of the prominence of the principle in the rule of law, and as requiring an infusion of the ethos of the Bill of Rights into the interpretation of the principle of legality. It encapsulates all of the common law elements of the principle without needing to specifically restate each element:

'The principle of legality is the juristic kernel of the Rule of Law in the context of the criminal law. The founding provisions of the Constitution of the Republic of South Africa, 1996, refer to the 'rule of law' and so any aspects of the principle of legality not specifically referred to in the Constitution could be read into the Constitution by an interpretation of the ambit of the Rule of Law'.⁴⁷

The fact that the entire ambit of the principle is not explicitly included in the Constitution should not be read as altering its formation. The Constitution includes the skeleton of the principle which the courts should then understand in the light of the years of jurisprudence which flesh it out.

If this is so, then how is one to understand the court's development of the ambit of the crime of theft? Did the court err and fall foul of the principle of legality? No such challenge has been launched and the common law definition of theft in its developed form today includes

⁴⁶ Other Constitutional references to the principle of legality are contained in s 1(c) which states

'The Republic of South Africa is one, sovereign, democratic state founded on the following values: Supremacy of the Constitution and the rule of law.'

Section 35(3)(m) and (n) enshrine the following aspects of the principle:

'Every accused person has a right to a fair trial, which includes the right—

(m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;

(n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing.'

⁴⁷ Burchell op cit (n43) 106. See also *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) at paras 58-9 in relation to the Interim Constitution.

the theft of credit.⁴⁸ The court, in so developing the common law, did not fall foul of the principle of legality and performed its designated role. The very nature of the common law is that it develops over time as society develops and as the courts' understanding of certain concepts or laws develop. The law, along with society in general, progresses and changes over time. If the courts were not able to develop the common law, in line with the principle of legality, as society develops, the common law would become defunct and would eventually be replaced by more relevant legislation. The boundary between common law and civil law systems would be increasingly blurred.

Interpretation vs innovation

The preceding discussion of legality encompasses a robust approach to the relationship between the development of the common law and the principle of legality. Such an approach requires recognising that while the courts have drawn a distinction between 'legitimate interpretation and innovation',⁴⁹ interpretation is not necessarily devoid of, nor distinct from, innovation. In order to ensure the meaningful survival of our common law the courts will need to be innovative in their interpretations of the definitions of crimes so that they remain relevant in modern society. As such, additional components of crimes that have not previously been recognised by the courts may now have to be in order to ensure the law's relevance — for example that theft of credit may indeed be a component of the definition of the crime of theft despite the fact that it had not previously been recognised. In this way the common law grows within the existing framework of crimes

⁴⁸ See as a recent example of the courts recognition of theft including theft of incorporeals, *S v Boesak* 2000 (3) SA 381 (SCA) 404 at paras 96-8. The court has not always been willing to embrace, or even recognise, its ability to develop the ambit of common-law crimes. See for example, *Ex Parte Minister van Justisie: In re S v J; S v Von Molendorff* 1989 (4) SA 1028 (A) at 1042 where the court refused to recognise non-patrimonial benefit within the common law crime of extortion: 'Indien daar 'n behoefte in die samelewing is dat afpersing uitgebrei behoort te word, dan is dit 'n beleidsaspek vir die Wetgewer om te oorweeg' and; *S v Mintoor* 1996 (1) SACR 514 (C) at 517 where the court refused to recognise theft of electricity as part of the common law crime of theft: 'In die algemeen gesproke, is dit in elk geval juridies ongesond om die trefwydte van ons strafreg deur Hofbeslissings te vergroot. Die uitbouing van strafregtelike sanksies is 'n taak wat normaalweg aan die Wetgewer oorgelaat word om te verrig indien en insoverre hy dit nodig ag'. The courts' reluctance to so develop the law in these instances does not recognise earlier decisions, such as those referred to in (n39) above, emanating from the Appellate Division. This reluctance to so engage with the common law is thus unfounded.

⁴⁹ Hoctor op cit (n36). See also *Masiya* supra (n2) 55 at para 52 in which the Court seems to recognise the distinction between clarification of the common law and the creation of new common-law offences.

it recognises, thus adhering to the principle of legality by not creating new categories of, or labels for, common law crimes. If behaviour cannot be legitimately fitted into an existing common law definition and requires a new label altogether, then it is, and should be, wholly up to the legislature to intervene.

Furthermore, such an approach to the principle of legality and the development of the common law does not fall foul of the separation of powers, as the legislature is always free to intervene should they find that the court erred in its interpretation of the common law crimes. Far from breaching the separation of powers, such a division of labour is utterly consonant with the conception of the separation of powers in South Africa, which is conceived of as a constitutional dialogue⁵⁰ with each arm of the State given checking functions over the others. This is a collaborative and co-operative model that ensures the smooth functioning and legitimacy of the operations of the State. The Constitution explicitly requires such co-operation between the three arms of State to facilitate the ideals of the Constitution.⁵¹

'The doctrine of the separation of powers, while suggesting good reasons why...lines must be drawn (judicial non-accountability, institutional competence, etc), does not of itself indicate precisely where they should be placed'.⁵²

Simply stating that law-making is the preserve of the legislature does not mean that the judiciary should not, nor never does, involve itself in the development of law.

'The principle of the separation of powers... recognises the functional independence of branches of government. On the other hand, the principle of checks and balances... anticipates the... unavoidable intrusion of one branch on the terrain of another. No constitutional scheme can reflect a complete separation of powers: the scheme is always one of partial separation.'⁵³

⁵⁰ See Chaskalson et al *Constitutional Law of South Africa* (1999) at 41-8: 'A different conception (of the separation of powers) is needed which emphasises the need to develop a culture of openness, responsiveness and justification in the interchange between the different branches of government.'

⁵¹ Section 41(1)(b) of the Constitution states:

'All spheres of government and all organs of state within each sphere must co-operate with one another in mutual trust and good faith by—

- (i) fostering friendly relations;
- (ii) assisting and supporting one another;
- (iii) informing one another of, and consulting one another on, matters of common interest;
- (iv) co-ordinating their actions and legislation with one another;
- (v) adhering to agreed procedures; and
- (vi) avoiding legal proceedings against one another.'

⁵² Chaskalson op cit (n50) 41-9, 41-10.

⁵³ *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC) at para 109.

For example, policy and budget are traditionally the preserve of the executive, but adjudicating on socio-economic rights has implications for both.⁵⁴ Furthermore, the mere fact that a right has social policy implications has not precluded judicial intervention in other spheres. Issues such as the constitutionality of the death penalty and the right to equality have implications for a range of social programmes, yet the Court's pronouncement on these issues has not led to allegations of a breach of the separation of powers — nor should its development of the common law, when done within the parameters of the principle of legality.

Constitutional development of the common law

It is clear that commentators may take a more conservative approach when it comes to legality and developing the common law.⁵⁵ Though this article would disagree with such a stance, even on this conservative approach it is possible to distinguish *Masiya* and argue that the Court should have developed the law to its logical conclusion, being gender neutral in that case. In this respect it is important to distinguish between expanding the common law and bringing it in line with the Constitution. If courts cannot do the latter then the constitutional injunction for the courts to develop the common law in line with the Constitution⁵⁶ is rendered meaningless.⁵⁷ Our Constitution was intended as a document with teeth, capable of instituting real change in people's lives and in their position before the law. To pay only lip service to this injunction would be contrary to the spirit and purport of the Constitution. It is trite to say that caution should be exercised in so developing the common law and that appropriate deference should be paid to the other arms of State. However, when the legislature has dragged its feet to the point of negligence, as was the case with the Sexual Offences Bill, it is both necessary and desirable that the Courts intervene. In so doing they are both fulfilling their checking function towards the legislature⁵⁸ and fulfilling their obligation to ensure the law is consistent with the Constitution.

⁵⁴ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC); *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC).

⁵⁵ Hoctor op cit (n36) at 86.

⁵⁶ Section 39(2) of the Constitution.

⁵⁷ This is recognised by the majority in *Masiya* supra (n2) 53 at para 51.

⁵⁸ See the powers of the Constitutional Court in s 167(5) of the Constitution:

'The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force.'

A further distinction can be drawn between developing the common law because the current definition is felt to be unacceptable on moral grounds, and developing the common law to be in line with the Constitution. Here the following quote from Marais J's judgment in *S v Augustine*⁵⁹ is illuminating:

'There are always people to be found who invite and favour "extensions" by the Court of the existing principles of the common law to encompass situations which they feel "should" be encompassed, even if they have not hitherto been so encompassed. I do not think the Courts should respond too readily to such invitations. Fundamental innovations of this kind are for the Legislature...and not the Courts.'

The type of scenario described above is not one that includes the scenario involved in *Masiya*. Yes, most right thinking people believe that the definition of rape should be developed and that it is both morally unacceptable and socially inappropriate in terms of encompassing and reflecting rape survivors' experience. But that is not the point judicially. The point is rather — with due respect to the finding of the majority to the contrary — that the common law definition of rape *is* unconstitutional. This is so both because it fails to meet the standard set in s 39(2) and because, to reiterate the finding of Langa CJ, it

'fails to give full effect to the constitutional values of dignity, equality and freedom: dignity through recognition of a violation; equality through equal recognition of that violation; and freedom as rape negates not only dignity but bodily autonomy. All these concerns apply equally to men and women...'⁶⁰

That is sufficient justification for the Court to develop the common law (in line with the afore-mentioned constitutional injunction) without having to resort to justifications under the principle of legality. This is even more pronounced considering that the partial extension the Court permitted was, rightly, not applied retrospectively to Mr Masiya himself. The partial extension of the common-law definition of rape by the Constitutional Court in *Masiya* is particularly lamentable. It has resulted in what must surely be considered the absurd and untenable situation of the Constitutional Court issuing an order that, according to the above line of reasoning, can itself be challenged for being unconstitutional. The revised definition of rape, which excludes men from being victims

⁵⁹ *S v Augustine* 1986 (3) SA 294 (C) at 302-3. Note, this quote was relied on by Professor Hoctor to motivate *against* the courts intervening in *Masiya* in Hoctor op cit (n36) 82.

⁶⁰ *Masiya* supra (n2) 61 at para 80.

of the crime, discriminates against some of the most vulnerable groups in society, such as young boys, homosexuals and prisoners.⁶¹

Conclusion — picking battles

It may well be that the majority of the Court adopted the position they did on the basis that the Sexual Offences Bill was tabled to be considered before Parliament. Indeed, no more than two weeks after the judgment was handed down, the legislature passed the Bill⁶² — which has subsequently been accepted by the NCOP. It is on the basis of this deferential dynamic between the judiciary and the legislature that support has been expressed for the non-intervention of the Court in *Masiya*.⁶³ Presumably though, on this line of thinking, the Court should not have developed the definition at all — especially in light of the majority's finding that the common-law definition of rape was not unconstitutional. This stance feels intuitive. Each branch of the State adheres clearly to its' own mandate and as a result the smooth functioning of the State is bolstered. Nonetheless, it is argued that this was a disappointingly conservative stance for the Court to adopt towards the separation of powers and one that is not consonant with the Court's previous approach.

The powers of the legislature and the courts arise from different constitutional provisions⁶⁴ and these provisions impose a mandatory and separate obligation on these organs of government to perform their constitutional roles. The reality that these different processes may intersect is where the debate on the proper functions and roles of these organs begin. It must however be borne in mind that the processes run parallel to one another and although consideration must be given to what another organ of state is doing, the obligation and duty is foremost to the Constitution. Thus, even when respecting the separate functions of the legislature and the courts, the Court ought to have affected a complete development of the common law in a manner that resulted in an order that is harmonious with the rights contained in Chapter 2 and with the spirit of the Bill of Rights. Refusing to do so is failing to fulfil its primary responsibility to uphold the Constitution.

⁶¹ The relevance of vulnerability in deciding whether discrimination is 'unfair' was clearly described by O'Regan J in *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) at para 112: 'The more vulnerable the group adversely affected by the discrimination, the more likely it will be held to be unfair'.

⁶² Passed by Parliament on 28 May 2007.

⁶³ Hoctor op cit (n36) 82.

⁶⁴ The legislature derives their law-making power from ss 43, 44, 75 and 76 read with Schedules 4 and 5 of the Constitution; while the judiciary derives the power to interpret and pronounce on the constitutional validity of laws from ss 8, 39, 167-73 of the Constitution.

The majority interestingly cite *Carmichele*⁶⁵ as precedent for the incremental development of the common law. Yet *Carmichele* can in fact be seen to promote judicial activism. The case provided for an extension of state liability within the law of delict. The approach adopted by the Court with regard to state liability in this case flies in the face of conventional wisdom in similar jurisdictions, according to which allowing such delictual claims would open the floodgates. This would disable the state that in most instances functions well. However, the same cannot always be said of the South African state and the Court's stance reflects this. Decisions such as *Carmichele* ensure that pressure is put on government to be more accountable, not just for the actions of the police, but generally in the manner in which it performs its duties to the public. The Court stated that a new and different set of legal norms was brought into operation by the Constitution and that:

'under section 39(2) of the Constitution concepts such as "policy decisions and value judgments" reflecting the "wishes ... and perceptions ... of the people" and "society's notions of what justice demands" might well have to be replaced or supplemented and enriched by the appropriate norms of the objective value system embodied in the Constitution'.⁶⁶

In *Masiya*, much less is asked of the Court. Gender neutrality was raised in the papers of the amicus and to not provide this remedy has correctly been questioned by both the legal profession⁶⁷ and civil society.⁶⁸

Carmichele is not the only example of a judgment issued by the Court that can be seen as courageous. While *Carmichele* required the

⁶⁵ *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC).

⁶⁶ *Carmichele v Minister of Safety and Security* supra (n65) at para 56. See also *Du Plessis v De Klerk* 1996 (3) SA 850 CC at para 86:

'the common law is not to be trapped within the limitations of its past... It needs to be revisited and revitalised with the spirit of constitutional values defined in chapter 3 of the Constitution and with full regard to the purport and objects of that chapter.'

⁶⁷ See for example De Vos 'Male rape: What were the judges smoking?' *Constitutionally Speaking* 10 May 2007 available at, <http://constitutionallyspeaking.co.za/?p=247#comments> accessed on, 15 October 2007:

'This is ... the "halfway pregnant" approach to legal reasoning. Really, even as a mere matter of logic the argument does not stand up to scrutiny. Either the present gender and orifice specific definition of rape flies in the face of the constitutional values like dignity, equality and bodily integrity and requires a development of the common law, or it does not (in which case no development would be required).'

⁶⁸ See for example Adams 'Court finds men can't be raped' *The Mercury Newspaper* 11 May 2007 available at, http://www.iol.co.za/index.php?set_id=1&click_id=15&art_id=vn20070511033421378C502887 accessed on, 15 October 2007:

'Joan van Niekerk, the Director of Childline, said it was a surprising conclusion for a court with the responsibility of upholding the principles of equality. She said the issue of male rape, particularly of children, remained "largely unaddressed" by the justice system.'

Court to stand firm in the face of government sentiment, the Court has also found itself under pressure from the public. As the high crime rate persists, public anger about the Court's perceived leniency towards criminals rises. Two examples of particularly contentious judgments in the eyes of the public include the decision to rule out the death penalty as unconstitutional⁶⁹ and the decision to allow prisoners voting rights.⁷⁰ These decisions have led to accusations that the court is 'radical'.⁷¹

This allegation is puzzling in light of several judgments in which one could accuse the court of pandering to public fear or prejudice. For example, in 1999 the court rejected a challenge to a piece of legislation that tightened the conditions under which awaiting trial prisoners can be awarded bail.⁷² It is widely contended that this law was enacted to placate the growing public rage at the perceived ease with which murderers and rapists obtain bail. The court justified its decision not to interfere by explicitly referring to the high crime rate.⁷³

The Court's oscillation between 'cautious' and 'radical' rulings is not evidence of an identity crisis on its part, but shows that the Court is learning how to pick its battles. The court needs to be, and needs to appear to be, impartial, or it risks losing legitimacy in the eyes of either government or the public or both: 'The court cannot stray too far from the mainstream for fear of losing its legitimacy. On the other hand, the court must defend the marginalised and vulnerable against the potential tyranny of any majority'.⁷⁴ Judging from the diversity of applicants that make use of the Court and the fact that, though at times resentfully, government has agreed to abide by court orders against them,⁷⁵ it appears that the Court has managed to establish and maintain its legitimacy: 'That suggests that although the court might not be loved, it is trusted and respected'.⁷⁶

Regarding *Masiya*, however, it is submitted that the Court missed the opportunity to pick a battle that urgently needed fighting. The legislature had failed its duty to the public by persistently failing to pass the Sexual Offences Bill. The Constitutional Court, in failing to develop the definition of rape adequately, failed to speak up in the constitutional dialogue that functions in South Africa between the

⁶⁹ *S v Makwanyane* 1995 (3) SA 391 (CC).

⁷⁰ *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders (NICRO)* 2005 (3) SA 280 (CC).

⁷¹ P De Vos 'Constitutional Court judges are far from radical' *Sunday Times Newspaper* 28 March 2004.

⁷² *S v Dlamini* 1999 (4) SA 623 (CC) at 623.

⁷³ *S v Dlamini* supra (n72) at para 2, footnote 6 and para 67.

⁷⁴ De Vos op cit (n71).

⁷⁵ *Government of the Republic of South Africa v Grootboom* supra (n54); *Minister of Health v Treatment Action Campaign* supra (n54).

⁷⁶ De Vos op cit (n71).

various arms of state. There is no reason in logic or justice for why the definition of rape should be gender-specific. Furthermore, in line with the minority judgment in *Masiya*, there is no rule of law that prohibits the Court from executing such an extension. On the contrary, creating a gender-neutral order would have enhanced the Court's commitment to its obligation in s 39(2). The Court has the power to make any order that is just and equitable.⁷⁷ The order issued seems however to illustrate Beresford's gloomy view of the courts expressed in 2004: '...[O]ne is left scratching around for "watchdogs" of liberty... the judiciary has shown little sign of its being a bulwark of constitutional rights'.⁷⁸

Hoctor⁷⁹ reminds the reader of Burger J's statement in *S v Burger* that 'one must guard against disgust for the accused's conduct and the desire that he be punished leading to the illegitimate extension of a legal principle'.⁸⁰ But lamenting the Court's finding in *Masiya* is not simply about disgust at the applicant's conduct. The nature of his behaviour is equally reprehensible whether it has the label 'rape' or 'sexual assault' attached to it. It seems absurd to argue that penetrating a nine-year old anally is less reprehensible if it is called indecent assault. The judgment is lamentable because the state of the law in this area is itself abhorrent. The *law* is reprehensible. The law is also unconstitutional and thus, in our constitutional supremacy, ripe for the Constitutional Court to develop. This development could have been affected with the intention of the legislature in mind as the Bill, on which the legislature so noticeably dragged its feet, was available for the Court to consult.

⁷⁷ The Constitution contains both primary and secondary remedial clauses. The primary remedy clauses are a supremacy clause and a fundamental rights remedy clause. The supremacy clause (s 2) reads: 'This Constitution is the supreme law of The Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled'. The fundamental rights remedy clause, s 38, is found in the Bill of Rights: 'Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief...' The secondary remedy clause in The Constitution is s 172(1):

'When deciding a constitutional matter within its power, a court —

- (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of the inconsistency; and
- (b) may make any order that is just and equitable, including —
 - (i) an order limiting the retrospective effect of the declaration of invalidity; and
 - (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect'.

⁷⁸ Beresford 'On South Africa's long road to freedom' *The Guardian Newspaper* 3 June 2004.

⁷⁹ Hoctor op cit (n36) 86.

⁸⁰ *S v Burger* 1975 (2) SA 601 (C) at 622H.