CONSIDERING THE IMPACT OF AMICUS CURIAE PARTICIPATION ON FEMINIST LITIGATION STRATEGY

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ABSTRACT
Amici curiae participation plays an important role in litigation and judicial decision-making. The public interest nature of these participations has become particularly important in representing the point of view of those who might be affected by a judgment which could influence the outcome of a decision. Employing amicus curiae participation as specific litigation strategy is of importance in promoting litigation from a feminist and gendered viewpoint allowing feminist method to be employed in constructing effective legal arguments.

Key words: amicus curiae participation, litigation strategy, feminist method

I AMICUS CURIAE PARTICIPATION: AN INTRODUCTION
This article explores the importance of amicus curiae participation in devising a feminist litigation strategy to provide ways of thinking of the law, not in isolation, but in connection with using the law as a vehicle for change. The purpose of this method of litigation is analysed, followed by an analysis of the Constitutional Court’s decision in Masiya v Director of Public Prosecutions, Pretoria, to illustrate the impact amici curiae participation has on judicial decision-making and how it can be used strategically to change the law to benefit women.

The amicus curiae is a well-established concept in legal history. Translated literally from Latin – the term means ‘friend of the court’ – and the earliest example of this participation can be found in Roman law. In its most basic form, and at the court’s discretion, the amicus curiae provided information on areas of law that the court regarded as complex and beyond its expertise.

From the outset, it was clear that the amicus curiae was not a litigating party but merely seen as an assistant to the court.

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2 2007 (5) SA 30 (CC) (Masiya) (with the Centre for Applied Legal Studies (CALS) & Tshwaranang Legal Advocacy Centre (TLAC) as amici curiae).
3 Take note that the singular, amicus curiae, refers to a single party, whilst the plural, amici curiae refers to more than one party.
Participation by amici curiae became common in many jurisdictions conforming to its traditional role as a disinterested bystander who, at the court’s request or permission, informed the court on points of law. The value of this kind of intervention was obvious in times when factual material, such as law reports, was scarce and the amici curiae mainly assisted courts in avoiding error and ultimately served to maintain judicial honour and integrity.

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

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

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

The amicus curiae would still assist the court by presenting factual material considered necessary for rational decision-making, however, additional purposes can be ascribed to amici curiae participation which creates a strong tie with public interest litigation or so called ‘cause lawyering’.

First, amici participation can be used to support litigating party’s contentions, where it devotes its brief to improving the main legal arguments of the party it supports. This it does by helping the party flesh out arguments
it is forced to make in summary form and to make arguments the party wants to make, but cannot make itself.\textsuperscript{13}

Second, it can advance a particular legal position that it has chosen, independent from the party’s contentions.\textsuperscript{14} Here, the amicus moves beyond the issues specifically argued by the parties and provides the court with information fitting its preferences, or provides the court with information about the potential consequences of its decision.\textsuperscript{15} In this instance, providing assistance to the court is of secondary concern, and the purpose is to make sure that the court understands the point of view of those who will be affected by its decision, and to ensure that those who will be affected feel that their voice has been heard.\textsuperscript{16}

Last, a combination of the above is possible where an amicus curiae does side with one of the parties, but advances its own specific interpretation. This type of intervention alerts the court to the wider societal impact of the decision through aligning itself with a specific party’s contentions.

Despite the developing nature of amici curiae participation, there are still certain traditional common features with which they must comply. The amicus curiae is still not viewed as a litigating party and its participation is totally reliant on the discretion of the court.\textsuperscript{17} The amicus is generally not allowed to raise a new cause of action and is not allowed to repeat party arguments.\textsuperscript{18}

With the Constitution of the Republic of South Africa, 1996 entrenching a new constitutional democratic order, the Constitutional Court was the first court to adopt specific rules regulating amicus curiae participation and has set the benchmark for amicus participation, remaining the preferred court in which to lodge these applications.\textsuperscript{19} Ultimately, the unique nature of amici curiae participation lies in the court’s expectation that it will bring a different perspective to the case than those already before it and it has become essential

\textsuperscript{13} BJ Ennis ‘Effective Amicus Briefs’ (1984) 33 Catholic LR 603, 606.
\textsuperscript{19} See rule 10 of the Constitutional Court promulgated under GN R1675 in GG 25726 (31 October 2003); rule 16A of the Uniform Court Rules first promulgated under GN 315 in GG 19834 (12 March 1999); rule 16 of the Supreme Court of Appeal Rules first promulgated under GN 1523 in GG 19507 (27 November 1998); rule 7 of the Labour Court Rules first promulgated under GN 1665 in GG 17495 (14 October 1996); rule 7 of the Labour Appeal Court Rules first promulgated under GN 1666 in GG 17495 (14 October 1996); rule 14 of the Land Claims Court Rules first promulgated under GN 300 in GG 17804 (21 February 1997).
in ensuring that courts are aware of the broader legal and policy ramifications of their decisions.\textsuperscript{20}

II FEMINIST LITIGATION AND AMICI CURIAE PARTICIPATION

Ruth Colker, poses the question whether one can be a feminist, and consistent with that perspective, make use of the courts and litigation.\textsuperscript{21} According to her, we are often told the correct feminist position on a particular issue, but we are rarely told whether the way to achieve that position is through legal argumentation and, if legal argumentation is appropriate, how to make legal arguments from a feminist perspective.\textsuperscript{22} What is so called feminist litigation and what role can amicus curiae participation play within feminist litigation strategy? Anna Pellat describes the relevance of a feminist voice in litigation:

The problem, from a feminist standpoint, is that law’s way of envisioning women’s reality, of translating the substance and circumstances of women’s lives, has tended to be dominated by the harsh exclusionary gender-based politics marking the social realm. Cultural myths and stereotypes about women and narrow, dualistic constructions of difference have dictated the way in which law has historically conceptualized and responded to women and women’s subordination. In order to make law conscious of, and responsive to, gender oppression in all of its manifestations, it is necessary to challenge signifying rules and conventions that denigrate and erase the difference that women represent and, at the same time, to find ways of re-working the discourse in order to represent who women are and what they experience in palpably real and full terms.\textsuperscript{23}

Pellat poses the question whether it is possible to counteract law’s tendency to mirror social mores, values and perspectives through the legal process, possibly providing for spaces and openings that allow advocacy for change.\textsuperscript{24}

According to Joanne Conaghan, feminist litigation first and foremost could bring a gendered perception of legal and social arrangements to a largely gender neutral way of thinking.\textsuperscript{25} She argues that the object of feminist

\textsuperscript{20} PM Collins Jr. Friends of the Supreme Court: Interest Groups and Judicial Decision Making (2008) 3; Budlender (note 14 above). It should be noted that the new found role of amici curiae participation have been critiqued. Some are concerned that amici curiae participation might unduly politicise judicial decisions. The court’s function could also be shifted from judging to legislating, permitting political battles lost elsewhere to be revisited in the courtroom. Concern has also been expressed about the neutrality and fairness of the research presented to the court as the research is not subjected to examination and cross-examination as it would be during the normal trial procedure, and it is argued that judges might not be equipped to see relevant flaws as they would when dealing with legal arguments and materials. In this regard see M Arshi & C O’Cinneide ‘Third-party Interventions: The Public Interest Reaffirmed’ (2004) Spring Public Law 69, 73; S Hannett ‘Third Party Intervention: In the Public Interest?’ (2003) Spring Public Law 128; Smith (note 12 above) 25.


\textsuperscript{22} Ibid.


\textsuperscript{24} Ibid.

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

Feminism thus presupposes that gender has a much greater structural and/or discursive significance that is commonly assumed, a significance which is ideologically but not practically diminished by its relative invisibility. In this sense, feminism purports to offer a better understanding of the social world by addressing aspects which have hitherto been ignored or misrepresented, while, at the same time, countering the ideological effects to which such misperceptions give rise. *26*

One of the challenges faced by feminist litigators, and specifically those working within the public interest sphere, is how to make the law sensitive to women’s experiences and specifically the strategy involved in identifying to a court how the law affects women’s lives. *27* As feminist lawyers, we try ‘to improve women’s social and economic status; to reach those women most in need; and to enhance women’s self-respect, power and ability to alter existing institutional arrangements’. *28* But how should we go about doing this?

Examining the place of feminism within the general context of legal method, Katharine Bartlett identified certain methods that could be used to place a feminist viewpoint before a court. *29* For Bartlett, being feminist and presenting a feminist voice means ‘owning up to the part one plays in a sexist society: it means taking responsibility – for the existence and for the transformation of “our gendered identity, our politics, and our choices”’. *30* Identifying methods or practices as feminist places them as ‘part of a larger, critical agenda originating in the experiences of gender subordination’. *31*

Writing about equality and gendered transformation within the South African context, Catherine Albertyn states that gendered opportunities through legal action may be presented in different ways and have multiple outcomes. *32* These could take the form of general legal rights and remedies that, when properly utilised, could affect the lives of those most in need, or the advance could be more normative ‘restating the values and norms that shape social and economic inequalities’, or it could politicise a particular issue with a range of outcomes. *33* Gendered and feminist arguments could therefore be presented to a court in multiple ways.

In this context, the three feminist methods identified by Bartlett including the ‘women question’, ‘feminist practical reasoning’ and ‘consciousness-raising’ provide a starting point in deciding how to litigate from a feminist and gendered viewpoint. The first method is described as the ‘women

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26 Ibid 360 (footnotes omitted).
27 S Burns ‘Notes from the Field: A Reply to Professor Colker’ (1990) 13 Harvard Women’s LJ 189, 196.
30 Ibid 833.
31 Ibid 834.
33 Ibid.
question’, and represents how the substance of law is often used to suppress
the perspectives of women and other excluded groups.\textsuperscript{34}

Once adopted as a method, asking the woman question is a method of critique as integral to
legal analysis as determining the precedential value of a case, stating the facts, or applying
law to facts. ‘Doing law’ as a feminist means looking beneath the surface of law to identify
the gender implications of rules and the assumptions underlying them and insisting upon
applications of rules that do not perpetuate women’s subordination.\textsuperscript{35}

Through the ‘women question’ one would ask how existing legal standards
and concepts might disadvantage women.\textsuperscript{36} Here, certain questions would
become relevant, such as have women been left out of consideration? If so,
in what way? how might this be corrected? and what difference would this
make?\textsuperscript{37} The women question is intended to reveal ‘how the position of women
reflects the organisation of society rather than the inherent characteristics of
women’.\textsuperscript{38} Without these questions, differences associated with women would
be taken for granted, justifying unequal treatment.\textsuperscript{39} Focusing attention on
the ‘women question’ does not mean that a decision should be reached that
favours women but that there should be an awareness of ‘gender bias’ and a
decision should be defensible in light of this ‘bias’.\textsuperscript{40}

The second method refers to ‘feminist practical reasoning’ which seeks
to identify perspectives not represented in the dominant culture.\textsuperscript{41} Bartlett
captures the essence of this method by stating:

Feminist rationality acknowledges greater diversity in human experiences and the value of
taking into account competing or inconsistent claims. It openly reveals its positional partiality
by stating explicitly which moral and political choices underlie that partiality, and recognises
its own implications for the distribution and exercise of power. Feminist rationality also
strives to integrate emotive and intellectual elements and to open the possibilities of new
situations rather than limit them with prescribed categories of analysis.\textsuperscript{42}

This method’s impact lies in revealing insights about gender exclusion within
existing legal rules and principles.\textsuperscript{43} Mostly feminists do this by providing
contextual evidence to expose that which would otherwise go unnoticed and
unaddressed

The third method, ‘consciousness-raising’ complements the above two
methods and provides a platform for women’s voices to be heard. Bartlett,

\begin{itemize}
  \item \textsuperscript{34} Bartlett (note 29 above) 836.
  \item \textsuperscript{35} Ibid 843.
  \item \textsuperscript{36} Ibid 837.
  \item \textsuperscript{37} Ibid.
  \item \textsuperscript{38} Ibid 843.
  \item \textsuperscript{39} Ibid.
  \item \textsuperscript{40} Ibid 846; Bartlett further at 848 takes note that the question could be widely framed to avoid
essentialist tendencies including questions such as what assumptions are made by law? What
assumptions are made about those whom it affects? Whose point of view do these assumptions
reflect? Whose interests are invisible or peripheral? How might excluded viewpoints be
identified and taken into account? The women question therefore requires great sensitivity to
multiple, invisible forms of exclusion faced by a multitude of women.
  \item \textsuperscript{41} Ibid 855.
  \item \textsuperscript{42} Ibid 858.
  \item \textsuperscript{43} Ibid.
\end{itemize}
describes this as ‘an interactive and collaborative process of articulating one’s experiences and making meaning of them with others who also articulate experiences’. In litigation this can be particularly relevant in deposing to affidavits or supporting affidavits to share a particular experience with the court and public at large ultimately politicising the personal.

By using these methods Bartlett envisages that feminists would be able to challenge assumptions about women that underlie several laws and would be able to demonstrate that laws based upon these assumptions are not rational and neutral but irrational and discriminatory and in need of remedial action.

To me, the three methods discussed by Bartlett are important when considering litigation strategy and, coupled with amicus curiae participation, could be the ideal starting point from which to introduce feminist arguments, aimed at addressing societal hierarchies and the subordination of women, into otherwise neutral legal doctrine. By participating as amicus curiae, the ‘women question’ allows us to consider the gendered impact of law whilst ‘feminist practical reasoning’ coupled with the method of ‘consciousness-raising’ allows us to bring contextual evidence to court that reflects women’s lived realities and voice that highlights inequalities.

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

An important question is if amici curiae participation is able to influence the reasoning of a court enabling women’s voices to be heard. I have chosen to analyse the Constitutional Court’s decision in Masiya to illustrate the purpose and impact of amici curiae participation through a consideration of certain pertinent questions like: Does the amici employ a specific feminist strategy

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44 Ibid 863.
46 Ibid 869.
49 Pieterse (note 47 above) 405.
or method? Does the court interpret and use the evidence and arguments of the amici curiae and how have the relevant cases created a platform to lobby for change.

III AMICUS CURIAE PARTICIPATION IN MASIYA

(a) Contextual and factual background to the case

For many years, women activists have advocated for the creation of new laws, policies and practices in relation to the treatment of rape survivors and punishment of sexual offenders.\(^5^0\) A focal point has been to develop the definition of rape to eradicate its archaic and patriarchal character and to acknowledge rape as a form of sexual violence that violates the dignity and autonomy of a person.\(^5^1\) The requirement of vaginal penetration was one of the identified problem areas as it sexualised the crime instead of focusing on the use of violence in order to preserve male control and power, and further entrenched hierarchical gender relations.\(^5^2\)

The law reform process that addressed the definition of rape was a particularly long and cumbersome project. In 1998, the South African Law Reform Commission (SALRC) was tasked with investigating sexual offences by and against children, which mandate was later extended to include sexual offences committed against adults, with the aim of drafting a Sexual Offences Bill.\(^5^3\) The Bill proposed a gender-neutral definition with no distinction between the different forms of penetrative assault. It also removed the reference to consent, replacing it with a concept of coercive circumstances.\(^5^4\) However, the 2003 version of the Bill tabled before Cabinet, dramatically departed from the SALRC proposals, especially with regard to the removal of consent from the definition.\(^5^5\) Civil society actively lobbied against the implementation of the Bill in its suggested form, but after national elections in 2004, rape law reform appeared to fall off the legislative agenda.\(^5^6\)

When the Masiya matter came before the Constitutional Court, TLAC and CALS saw an opportunity to use the court system as a public forum to voice their dissatisfaction with the delay in the legislative revision of the Sexual Offences Bill and the lack of participation allowed for by interested groups.\(^5^7\) The case also provided an opportunity to start to develop the rape definition

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\(^5^1\) Rape as a common law crime was defined as the intentional, unlawful sexual intercourse with a female without her consent; N Naylor ‘The Politics of a Definition’ in Artz & Smythe ibid 22.

\(^5^2\) Ibid 23.


\(^5^4\) Artz & Smythe (note 50 above) 6.

\(^5^5\) Ibid; see the Criminal Law (Sexual Offences and Related Matters) Amendment Bill, Bill B50d-2003.

\(^5^6\) Artz & Smythe (note 50 above) 7.

\(^5^7\) Interview with Lisa Vetten, TLAC (14 December 2012).
through litigation and to test the boundaries of the legal system in terms of how far it would go in extending and reconceptualising the definition.\textsuperscript{58} Masiya was brought before a regional court on a charge of rape. It was alleged that he raped a nine-year-old girl but during the trial it was established that the complainant was penetrated anally.\textsuperscript{59} The state applied that he had to be convicted of indecent assault, a competent verdict on a charge of rape. However, the regional court and later the High Court found him guilty of rape, stating that the common law definition was unconstitutional and should be extended to include the anal penetration of a victim irrespective of gender.\textsuperscript{60}

The Constitutional Court was asked to confirm the judgment of the High Court, in particular its development of the common law definition of rape and the consequent changes to the Criminal Procedure Act 51 of 1977 and the Criminal Law Amendment Act 105 of 1997, and to consider Masiya’s appeal against the High Court judgment.\textsuperscript{61}

(b) The litigating parties

Masiya focused on his fair trial rights, specifically the principle of legality provided for in the Constitution.\textsuperscript{62} He stressed the importance of the separation of powers doctrine, in light of the already proposed Sexual Offences Bill and argued that the common law definition of rape was neither archaic nor discriminatory and that it specifically protected women from rape:

We submit that the definition of rape and the punitive consequences that follow upon the perpetration of that crime, reflect an age old expression of society’s fundamental regard for the sanctity, respect and honour of the physical core of womanhood. Women incidentally enjoy special protection by the Constitution. The unique aspect of rape, pertaining only to women, expresses simply what is still, in the most liberal mind, an urge to protect the very cradle of life itself and stems from an ethical, religious and biological perspective of mankind at large that this is the origin of human existence, most intricately linked to the ethical sphere of romantic love. Women and society in general are entitled to the utmost protection against violation of that part of the woman’s physique that in the view of mankind in its broadest sense transcends mere biological existence or the privacy of the individual involved.\textsuperscript{63}

This perspective reflected exactly what feminists and organisations had worked towards countering. By focusing on the sex of the particular victim

\textsuperscript{58} Ibid.
\textsuperscript{59} Masiya (note 2 above) para 6.
\textsuperscript{60} Masiya ibid as discussed by E Bonthuys ‘Institutional Openness and Resistance to Feminist Arguments: The Example of the South African Constitutional Court’ (2008) 20 CJWL 1, 15.
\textsuperscript{61} Masiya ibid as discussed by S Woolman ‘The Amazing Vanishing Bill of Rights’ (2007) 124 SALJ 762, 766.
\textsuperscript{62} Masiya referred to s 35(3)(l) & (n) of the Constitution which states: ‘Every accused person has a right to a fair trial, which includes the right – (l) not to be convicted of an act or omission that was not an offence under either national or international law at the time it was committed or omitted; (n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing.’ Written Submissions of the Applicant, as drafted by PJJ De Jager (SC) & J Bauer, case no CCT 54/06 <http://www.constitutionalcourt.org.za> para 2.3.
\textsuperscript{63} Written Submissions (note 62 above) para 11.
and ensuing social stereotypes, the crime is sexualised thereby ignoring the actual reasons and implications of rape, by portraying women as the classical victim.

Lillian Artz and Heléne Combrinck describe the common misperception of rape as reflected in our criminal justice system:

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

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

(c) The participating amici curiae

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

In their substantive submissions, the amici curiae provided the court with information regarding the historical development of the definition. They focused on the gendered nature of the definition in early Roman and English law where women were viewed as possessions and a certain value was attached to their chastity – therefore the focus on vaginal penetration. For the amici, a contrary understanding of rape that would focus on the specific power relations at play and not solely the mode of penetration was necessary:

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

The amici curiae further argued that the definition did not reflect the experiences of sexual assault of men and boys, which reinforced the conception that rape

64 C Hall ‘Rape: The Politics of Definition’ (1988) 105 SALJ 67, 72 describes these stereotypes as: ‘Male sexuality is linked to aggression, forcefulness and initiative, and female sexuality is constructed as passive and receptive. These sexual “scripts” for normal sexuality cast men in the role of predators and prime women for the role of victims.’ (footnotes omitted); According to JA Howard ‘The “Normal” Victim: The Effects of Gender Stereotypes on Reactions to Victims’ (1984) 47 Social Psychology Quarterly 270, 273 women are for example seen as weak, vulnerable, influenceable, submissive, irrational and excitable.
67 Ibid 84.
68 Notice of Application to Intervene as Amicus Curiae, Founding Affidavit deposed to by S Mills, case no CCT 54/06 <http://www.constitutionalcourt.org.za> para 12.
70 Ibid para 43.
was an act of sexuality rather than an act of force and coercion.\textsuperscript{71} In light of these contentions, the amici argued that the definition was unconstitutional as it infringed the rights of both men and women to equality and dignity.\textsuperscript{72}

In referring to the principle of legality, the amici curiae argued that the case merely involved a reinterpretation of the existing elements of the crime of rape and did not involve the declaration of previously lawful conduct to be unlawful.\textsuperscript{73} The amici provided the court with a comparative perspective on the development of the definition of rape in foreign jurisdictions focusing on developments in the United Kingdom, Canada, Australia and the United States.\textsuperscript{74}

(d) Decision by the Constitutional Court

The judgment, delivered by Nkabinde J, is difficult to follow and is a peculiar combination of the amici curiae and Masiya’s arguments.\textsuperscript{75}

In considering the constitutionality of the definition, the court discussed the historical evolution of the definition as the amici curiae did in its submissions.\textsuperscript{76} The court maintained that the definition was not discriminatory, as it criminalised conduct that was morally and socially unacceptable and that it was not necessary to consider the amici’s arguments that viewing women as victims would enforce patriarchal interests in women’s sexuality.\textsuperscript{77} For the court, it would be counterproductive to invalidate the definition for under-inclusivity and the question should rather be the possible extension of the definition to include both male and female penetration to promote the spirit, purport and objects of the Bill of Rights.\textsuperscript{78} The court justified the gender-specific focus of the definition by stating:

The evolution of our understanding of rape has gone hand in hand with women’s agitation for the recognition of their legal personhood and right to equal protection. To this end, women in South Africa and the rest of the world have mobilised against the patriarchal assumption that underlay the traditional definition of rape. They have focused attention on the unique violence visited upon women. Much of this activism focused on creating support systems for women, such as rape crisis centres and abuse shelters; and also on the process whereby rape is investigated and prosecuted. It is now widely accepted that sexual violence and rape not only offend the privacy and dignity of women but also reflect the unequal power relations between men and women in our society.\textsuperscript{79}

\textsuperscript{71} Ibid paras 39–42.
\textsuperscript{72} Ibid para 45.
\textsuperscript{73} Ibid para 57.
\textsuperscript{74} Ibid paras 27–35.
\textsuperscript{75} Moseneke DCJ, Kondile J, Madala J, Mokgoro J, O’Regan J, Van der Westhuizen J, Yacoob J & Van Heerden AJ concurred.
\textsuperscript{76} Masiya (note 2 above) paras 20–4 in relation to the Written Submissions of the Amici Curiae (note 69 above) paras 31–6.
\textsuperscript{77} Masiya (note 2 above) para 27. In fn 51, the court stated: ‘Some protagonists of women’s rights, however, argue that the focus on the woman only as the victim of rape still perpetuates patriarchal interests in controlling a woman’s sexuality. It is not necessary to consider that argument for the purpose of this case.’ See Bonthuys (note 60 above) 19.
\textsuperscript{78} Masiya (note 2 above) para 27.
\textsuperscript{79} Ibid para 28.
Although not clearly stated, the court tried to support a more radical feminist approach that concentrated on women’s subordination as a possible justification of the need for a gender-specific definition. However, the court failed to acknowledge that power or control could be exercised irrespective of the gender of the victim.

The court found it was not desirable to extend the definition to reflect gender-neutral standards and deferred this responsibility to Parliament. Here, it repeated Masiya’s arguments that it was not unconstitutional to have a gender-specific definition and that women needed special protection. This inadvertently reinforced the stereotypes of victimhood which the amici curiae attempted to bring to the court’s attention. These stereotypes ignored the intricate power relations at play in a rape scenario. The court here confirmed its use of traditional legal method, where it is a mere interpreter of law, ignoring the broader analysis of context necessary for its development and disregarding its impact on rape survivors.

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

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

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

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

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80 See CA Mackinnon ‘Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence’ (1983) 8 Signs 635 for a discussion of the radical feminist approach toward rape law.
81 Written Submissions of the Amici Curiae (note 69 above) para 41.
82 Masiya (note 2 above) paras 28–30.
83 Ibid para 30.
84 Ibid para 36.
86 Masiya (note 2 above) para 39.
87 Ibid para 51.
88 Ibid para 77.
89 Ibid para 85.
90 Ibid para 86.
91 Ibid.
The majority judgment of the court was justifiably criticised by many legal scholars.\(^{92}\) The court failed to recognise that legal rules played a role in perpetuating harmful stereotypes.\(^{93}\) Although the majority hinted at the importance of gender domination in rape, they ended up focusing on the sex of the victim ‘ignoring the fully gender implications of rape’.\(^{94}\) Elsje Bonthuys ascribes this to the court’s failure to understand the intersecting nature of gender, sex and sexual orientation:

As a result of the failure to appreciate the intersection of gender and sexual orientation issues in male rape, the judgment reiterates and strengthens the very stereotypes of female and male sexuality – that women can only be passive victims and that men can only be perpetrators – which form the basis of violent, sexual aggressive masculinity. The argument is not that the court should not have recognised that most victims of rape are women but that, in failing to see the similarities between male and female rape victims, it did not go far enough and ended up reinforcing, rather than transcending, gendered stereotypes of sexuality.\(^{95}\)

Sexual violence is fuelled by social hierarchy ‘inflicted on those who have less social power by those who have more’.\(^{96}\) The Constitutional Court failed to recognise this fully. The amici curiae wanted to alert the court to this reality, but its arguments were inverted to support the court and criminal justice system’s own understanding and interpretation of rape. Although the judgment was inclusionary in extending the definition to include the anal penetration of women, it did not address the social conditions that create and perpetuate systemic inequalities.\(^{97}\) It could have done this by adopting the arguments of the amici curiae that took into account the contextual evidence that considers the power relations associated with rape and thus accurately reflects the actual impact of rape on its victims.

(e) **Purpose and impact of the amici curiae submissions**

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

The use of the amici curiae brief was distorted as the court relied on their general and introductory arguments, but reverted to Masiya’s arguments concerning content and context. The court’s reasoning for wanting to focus on women as the overwhelming victims of rape, and therefore the need for a


93 Bonthuys (note 60 above) 19.

94 E Bonthuys ‘Putting Gender into the Definition of Rape or Taking it out?’ (2008) 16 Feminist Legal Studies 249, 257.

95 Bonthuys (note 60 above) 28.

96 MacKinnon (note 65 above) 240.

97 Bonthuys (note 94 above) 259.
gender-specific crime, is understandable and defensible but badly articulated and argued.

Solomon Dersso describes the majority’s reasoning as ‘reductionist and partial’, and from reading the relevant court documents one wonders whether it could be, in addition to employing traditional legal method, a misrepresentation of the relevant parties’ pleadings that led to such a constrained interpretation.98 My interpretation, after reading the relevant pleadings and judgment is that it could be partly assigned to a reworked ‘cut and paste’ job from the parties’ submissions where the court relied on several arguments of the parties but without any substantial analysis that led to peculiar conclusions.

Although the amici curiae were disappointed with the decision in relation to extending the definition of rape, Masiya provided women’s organisations with an opportunity to voice their dissatisfaction with the legislative process concerning the enactment of the Sexual Offences Bill.99 The court case put pressure on the Minister of Justice and Constitutional Development, as he had to depose to an affidavit regarding the status of the Bill and, although the affidavit did not provide any answers as to when the Bill would be finalised, it granted women’s organisations the opportunity to engage with the minister in a public forum.100 The court, as vocal as it could be on the subject, expressed concern with the delayed implementation of the Bill.101 Shortly after the Masiya judgment (10 May 2007) the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, the rephrased Sexual Offences Bill, was implemented (13 December 2007).

In this sense, Masiya provided a platform for concerned organisations to pressurise government to engage with the public regarding the status of an important piece of legislation and highlights the importance of amici curiae participation.102

IV Conclusion

Amicus curiae participation is important, as it allows participation in court by a range of people and represents interests that go well beyond those of the actual parties. The purpose of this participation is to ensure that courts understand the point of view of those who will be affected by their decisions; and although the amici curiae might not be party to the actual case, its participation recognises that the public have a legitimate interest in

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98 Dersso (note 92 above) 381.
99 Vetten (note 57 above).
100 Second Respondent’s Affidavit, deposed to by I. Bassett, case no CCT 54/06 <http://www.constitutionalcourt.org.za>.
101 Specifically the court stated: ‘The Court, while not unmindful of the fact that the 2003 Bill is before Parliament, cannot delay, defer or refuse to deal with an extension of the definition when the facts before it demand such an extension and when it is clearly in the public interest to do so. A further delay in or suspension of the extension of the current definition will constitute an injustice upon survivors of non-consensual anal penetration such as the nine-year-old complainant in this case.’; Masiya (note 2 above) para 44.
102 See the Second Respondent’s Affidavit (note 100 above) 169.
influencing the way in which law is made. The different perspective that an amicus curiae brings to a matter provides for more informed decisions and might lead a court to decide a matter differently than it would have otherwise, conscious of its impact through the ‘multidimensional and anti-foundational representation of people’s lives’. Ultimately, amicus curiae participation sensitises a court in its decision-making process and ensures that a court is better informed when making its decision.

As stated, one of the challenges faced by feminist litigators is how to make the law sensitive to women’s experience, and specifically, the strategy required to identify to a court how the law affects women’s lives. It is here that amicus curiae participation has and can play an important role in providing an avenue for feminist and gendered arguments to be heard by a court; to indicate to a court the impact that a particular decision might have on women, and to advocate for the necessary change through legal action.

The Masiya matter confirms the importance and relevance of amicus curiae participation in ensuring that women’s voices are heard in the judicial system. The amici curiae that participated in Masiya were aided by the employment of feminist method and a key strategy has been to place women’s experience before the court in an attempt to re-define their experience and their right to be free from violence. By asking the ‘women question’, the amici curiae were able to focus attention on women and their specific experience relating to violence. ‘Feminist practical reasoning’ featured prominently and the amici focused on placing contextual evidence before the court that highlighted women’s experience and exclusion within the legal system. The amici’s participation further created opportunities for feminist activists to educate the public and legislators about the nature and extent of sexual violence to which some South African women are subjected and to call for the enactment of the Sexual Offences Bill.

Ultimately, the most important purpose of the amici curiae participation in Masiya was its engagement with the legal system and the introduction of feminist litigation strategy that would otherwise not have featured. As Lillian Artz and Dee Smythe state in relation to law reform equally applicable to litigation:

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

103 Bryden (note 16 above) 513.
105 Murray (note 7 above) 250.
106 Ibid 15.
107 Artz & Smythe (note 50 above) 8.