

The role of courts in the development of the common law under s 39(2): *Masiya v Director of Public Prosecutions Pretoria (The State) and Another*

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Introduction

Although the decision in *Masiya v Director of Public Prosecutions (Pretoria) & Others* (as yet unreported) CCT Case 54/06 (decided on 10 May 2007) dealt with several issues, this note addresses only the question of how the Constitutional Court (CC) framed and resolved the tension between its constitutional obligation to promote the spirit, purport and object of the Bill of Rights and the doctrine of separation of powers. It is submitted that where the development of the common law is required in order to give full effect to the Bill of Rights,¹ the separation of powers doctrine should not unduly hinder the courts. But such development can be legitimate and coheres with the doctrine of separation of powers only if it is limited to giving full effect to the Bill of Rights of the Constitution. Thus, where the development of the common law goes beyond what is required to give full effect to the Bill of Rights, it may unreasonably usurp the constitutionally mandated powers of the legislature and thus may amount to a breach of the doctrine of separation of powers. Outside of this, however, the development of the common law by courts to give effect to the Bill of Rights does not constitute a breach of the doctrine of separation of powers as it does not preclude the legislature from enacting laws in accordance with its legislative objectives.

Background to the case

On 10 May 2007, the CC handed down judgment in the *Masiya* case. The accused, Mr Masiya, had been charged with the rape of a nine-year-old girl (the complainant). The

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

supporting evidence presented before the Regional Magistrate's Court at Graskop established that the complainant was penetrated anally. Mr Masiya's defence counsel contended that if found guilty, Mr Masiya should be convicted of indecent assault.

Since the common-law definition of rape is limited to non-consensual vaginal sexual intercourse, the Regional Court considered whether this definition should be developed to include anal penetration. Deciding that it should, the Regional Court extended the definition of rape to include 'acts of non-consensual sexual penetration of the male sexual organ into the vagina or anus of another person',² on the ground that this was required to promote the objectives of the 1996 Constitution, particularly the Bill of Rights. The court accordingly convicted Mr Masiya of rape on the basis of the extended definition. The court then referred the matter to the High Court for the purpose of confirmation of the conviction and sentencing. The High Court found that the extension of the definition of rape to include anal penetration was within the mandated power of the lower court and was legally appropriate.³ The High Court upheld the conviction of Mr Masiya on the basis of the extended definition of rape and declared the common-law definition of rape invalid.

The case was brought before the CC on appeal and also for confirmation of the declaration of invalidity by the High Court. In the CC hearing, the Director of Public Prosecutions and the Minister of Justice and Constitutional Development were the respondents. The Centre for Applied Legal Studies and the Tshwaranang Legal Advocacy Centre were admitted as amici curae.

The issues and the findings of the Court

The issues in the case were of two kinds. The first had to do with the constitutionality of the common-law definition of rape. Here, the questions as formulated by the Court were

1. whether the current definition of rape is inconsistent with the Constitution and whether the definition needs to be developed;

² *S v Masiya* case no SHG 94/04 11 July 2005, para. 45 as quoted in *Masiya* case (note 3 below) para. 11.

2. whether Mr Masiya is liable to be convicted in terms of the developed definition;
and
3. whether the declaration of invalidity of the relevant statutory provisions should be confirmed.

The other issue was whether the CC should grant Mr Masiya leave to appeal the merits of his conviction.

In deciding on these issues, the CC was primarily concerned with the question whether the facts of the case warranted an extension of the definition of rape. The majority stated that the ‘facts of the present case deal with penetration of the anus of a young girl’⁴ and framed the issue as requiring it to determine whether the definition of rape needed to be developed to include anal penetration of a female. The Court held that the definition was not inconsistent with the Constitution, but nevertheless extended the definition of rape to include anal penetration of a female on the ground that this was required to give effect to the constitutional rights of dignity, personal security, sexual autonomy and privacy.⁵ On the issue of whether Mr Masiya was liable on the basis of the extended definition, the majority found that the retroactive application of the definition was inconsistent with the fair trial rights of Mr. Masiya under the Constitution.⁶

A Framework for Analysis

As indicated at the outset, this note addresses itself only to the first set of issues as presented in the judgement of the CC and only to some aspects of this set of issues.

³ *S v Masiya* (Minister of Justice and Constitutional Development Intervening) 2006 (2) SACR 357 para. 60.

⁴ *Masiya v. Director of Public Prosecutor and Another* Case CCT 54/06 para. 30. [Masiya]

⁵ As above paras. 37-38.

⁶ Writing for the majority Nkabinde J held that ‘a development that is necessary to clarify the law should not be to the detriment of the accused person concerned unless he was aware of the criminality of his act. In this case it can hardly be said that Mr Masiya was indeed aware, foresaw or ought reasonably to have foreseen that his act might constitute rape as the magistrate appears to suggest. The parameters of the trial were known to all parties before the Court and the trial was prosecuted, pleaded and defended on those bases. It follows therefore that he cannot and should not bear adverse consequences of the ambiguity created by the law as at the time of conviction.’ *Ibid*, para. 56.

For the purpose of this note, the most important aspect of the case concerns the proper role of the courts in the development and application of the common law, particularly in cases that implicate rights guaranteed in the Bill of Rights. On this matter, the point of departure is s 39(2) of the Final Constitution (FC), which 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.

In those cases that implicate the Bill of Rights, this seems to require courts, when engaged in the development of common law, at a minimum to give due attention to the rights at issue. Another provision of the FC that has a bearing on this is s 173. In defining the inherent power of the higher courts, s 173 provides

The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.

This can be understood, together with s 39(2) as mandating courts, in applying the common law, to actively scrutinize its conformity with constitutional imperatives and transform it in a manner that promotes the Bill of Rights in general and gives full effect to the various rights at issues in particular.

The power that is invested in courts by these and other provisions of the Constitution competes with the doctrine of separation of powers. Although there is no explicit reference to the doctrine in the text of the FC, there is no doubt that it forms part of the structure of the Constitution. As the CC held in *South African Association of Personal Injury Lawyers v Health*: ‘Our Constitution provides for such separation [of powers], and laws inconsistent with what the Constitution requires in that regard, are invalid.’⁷ The Court further stated that the separation of powers doctrine was implicit in the Final

⁷ *South African Association of Personal Injury Lawyers v. Health and Others* 2001 (1) SA 883 (CC) para. 22. [*SA Association of Personal Injury Lawyers*]

Constitution. It also said that, as in the United States, the existence of the doctrine of separation of powers is based on inferences drawn from the structure and provisions of the Constitution, rather than on an explicit incorporation of the doctrine.⁸ The doctrine dictates that, whereas the main role of courts is the interpretation of laws, the power of making laws is the primary domain of the legislature. As the CC has indicated in many cases, these two roles should be kept separate.⁹ Courts are accordingly obliged to refrain from usurping the law-making powers constitutionally vested in the legislature by actively engaging in judicial law-making.

In *Masiya*, the point of contention was whether the development of the common law by the court in a way that gave *full* effect to the Bill of Rights would amount to an excessive exercise of judicial power encroaching upon the powers of the legislature. In the alternative, the question was whether in the circumstances of the case judicial restraint as advocated by the majority decision was constitutionally warranted.

At the heart of these issues lies the question of the proper role of the courts in the interpretation and application of constitutional rights. Where courts exercise a power to scrutinize the conformity of ordinary laws with constitutional imperatives, they in effect define the boundary of the law-making authority of the legislature. This may involve not only striking down legislation but also developing the common law, thus detracting from the legislature's law-making power. Both functions clash with the expression of the will of the majority, manifested through the legislature, which is central to a democratic system. The dilemma that this gives rise to is aptly captured by the phrase made popular by Alexander Bickel, namely 'the counter-majoritarian difficulty'. As Bickel put it in relation to the US, 'judicial review is a counter-majoritarian force in our system.... [W]hen the Supreme Court declares unconstitutional a legislative act ...it thwarts the will of representatives of the actual people of the here and now....'¹⁰ As a result, those who

⁸ As above, para. 21.

⁹ See, for example, *SA Association of Personal Injury Lawyers* (note 4 above) para. 26; and *Du Plessis v. De Klerk* 1996 (3) SA 850 (CC). [*Du Plessis*]

¹⁰ Alexander M Bickel *The least dangerous branch* (2nd 2d. 1986) 16-17.

emphasize the centrality of majoritarianism in a democracy have raised formidable objections challenging the democratic legitimacy of judicial review.¹¹

The need to address the danger that countermajoritarianism poses provoked a response that insists that constitutional adjudication has to be carried out within defined limits. One can identify different approaches that were advanced articulating the form that such limits take. The first is the theory of originalism that has been prominent in the US constitutional jurisprudence.¹² According to this theory, the countermajoritarian threats of judicial review can be reduced to a democratically acceptable level if the courts are confined to enforce the constitution on the basis of the original intent of the founders.¹³ The second theory is what has been called process-based judicial review. For advocates of this approach, judicial review can be justified only as a means of safeguarding the integrity of the democratic process.¹⁴ Finally, rights-based judicial review limits courts to upholding rights deemed integral to liberal democracy properly understood.

The problem with these three approaches is that they all conceive of judicial review as involving a battle between the judiciary and the legislature. An alternative approach, the theory of institutional dialogue, treats judicial review as part of a process of constitutional decision-making within a democratic system.¹⁵ According to this theory judicial review is seen as a vehicle for dialogue between courts and the legislature.¹⁶ This views the decisions of courts on constitutional matters, including those striking down legislation, as manifesting some of the considerations that the legislature needs to take into account in its own interpretation of constitutional values. What is appealing about this approach is that it shows that the interpretation of constitutional rights by courts does not preclude the

¹¹ See Jeremy Waldron 'The core of the case against judicial review' 115 *The Yale Law Journal* (2006) 1346.

¹² A prominent exponent of the theory of originalism is Keith Whittington. See his *Constitutional interpretation: Textual meaning, original intent and judicial review* (University Press Kansas: 1999).

¹³ The problems surrounding this theory is discussed by Ronald Dworkin. See his *A matter of principle* (Oxford: Clarendon Press, 1996) 38-57.

¹⁴ The most prominent process-based theory of judicial review is that of John Hart Ely. See *Democracy and distrust: A theory of judicial review* (1980). For a critique of this theory see Dworkin (as above) 57-69.

¹⁵ See Peter W. Hogg & Allison A. Bushell 'The Charter Dialogue between courts and legislatures (or Perhaps the Charter of Rights isn't such a bad thing after all)' 35 *Osgoode Hall Law Journal* (1997) 75.

¹⁶ As above, 79.

legislature from enacting legislation on the basis of its own appreciation of how best to give effect to constitutional values. Under the South African constitutional system such a perspective can find both a textual and a jurisprudential basis.¹⁷ The dialogue takes the form of a decision by the courts which is then taken up by the legislature which develops its own interpretation of the constitutional rights and values through the enactment of legislation.

For Ronald Dworkin, one of the advocates of strong judicial review, the only limitation on judicial review relates to the principle/policy divide. In his view, courts ‘should make decisions of principle rather than policy – decisions about what rights people have under our constitutional system rather than decisions about how the general welfare is best promoted’.¹⁸ Dworkin does not accept that judicial review is antidemocratic.¹⁹ This is because, in addition to its narrow and procedural understanding as a process of majoritarian decision-making, democracy is conceived in substantive terms to involve the protection of rights. Thus, rights-based judicial review, although countermajoritarian, enriches democracy by upholding rights as essential substantive components of democracy. The implication of this is that, as long as courts arrive at the rights answer in interpreting and applying constitutional rights, it is democratically legitimate for them to make decisions even against the expressed will of the majority.

Where rights are entrenched in a supreme constitution and the constitution mandates their enforcement through a constitutional court as in the 1996 Constitution of South Africa, the approach that Dworkin advances, together with the theory of institutional dialogue, helps to explain the role of courts in the application and interpretation of constitutional rights. This is particularly true under the South African constitutional system given that s 7(1) of the Constitution declares that ‘[t]he Bill of Rights is a cornerstone of democracy

¹⁷ See Stu Woolman and Henk Botha ‘Limitation’ S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds.) *Constitutional Law of South Africa* (2nd ed. July 2006) Chapter 34. For the views of the CC on this see *National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs* (2000) (2) SA 1 CC particularly para 76.

¹⁸ Dworkin (note 13 above) 69.

¹⁹ See, for example, his *Freedom’s Law: The moral reading of the American Constitution* (1996) 1-35; *Taking rights seriously* (Chapter 5); and *A matter of Principle* (1996) 23-28.

in South Africa.²⁰ For the issues at hand, this provision, when read with s 39(2), means that courts can and should inquire into the constitutional fitness of the common law and harmonise it, both with specific rights and with the spirit, purport and objects of the Bill of Rights in general.²¹ Where the performance by the courts of this function is called for, there is no room for courts to defer to the legislature, for this would be to leave certain rights unprotected. To the extent that this encroaches on the domain of the legislature, the theory of institutional dialogue suggests that the proper response is the enactment by the legislature of constitutionally compatible legislation.

Analysis of the judgment

The constitutional inquiry appraised

Nkabinde J for the majority judgment in *Masiya* framed the issue presented by the case as dealing with ‘penetration of the anus of a young girl.’ According to her ‘[t]he 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.’²² This formulation of the constitutional inquiry differs in its extent from the approach adopted by both the Regional Court and the High Court. Whereas these two courts framed the inquiry as involving the question of whether the common-law definition of rape was contrary to the Constitution and whether it should accordingly be developed to include the anal penetration of any person, the CC limited the constitutional inquiry to the question whether the common-law definition of rape should be extended to include penetration of the anus of a female. As far as the majority was concerned, the gender specificity of the common-law definition was not at issue on the facts of the case.

Although the majority judgment acknowledged that anal penetration of a man was as offensive as vaginal penetration, it insisted that it ‘does not mean that it is

²⁰ See Theunis Roux ‘Democracy’ in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds.) *Constitutional Law of South Africa* (2nd ed. July 2006) Chapter 10.

²¹ Stuart Woolman discusses this in detail in his ‘Application’ in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds.) *Constitutional Law of South Africa* (2nd ed., OS, July 2006).

²² *Masiya* (note 3 above) para. 29.

unconstitutional to have a definition of rape which is gender-specific.’²³ Paradoxically enough, however, the judgment in the same paragraph stated that

Extending the definition to include non-consensual penetration of the anus of the male by a penis may need to be done in a case where the facts require such a development.

In holding that the gender specificity of the definition of rape was not unconstitutional, the majority simultaneously remarked that such a definition may need to be amended to become gender neutral. It is not clear why there would be a need for such development if the gender specificity of the definition of rape was not found not to have been in line with the rights and values enshrined in the Constitution, and hence did not give rise to the question of constitutional conformity. What warrants the development is essentially that the law is not in line with the rights and values contained in the Constitution. It is only where the common law is inconsistent with the Constitution that the CC needs to develop the common law to make it congruent with the dictates of the Constitution. Indeed, this is what guided the majority in effecting a partial development of the common law definition of rape. Thus, in her judgment extending the definition to include anal penetration of female, Nkabinde J indicated that such extension was necessary to ‘harmonise the common law with the spirit, purport and objects of the Bill of Rights.’²⁴

This contradictory position is seemingly a result of the approach taken by the majority in the investigation of the question of the constitutionality of the common law definition of rape. According to this approach, the starting point of the constitutional inquiry should be the facts of the case, and the inquiry should be limited to and bound by those facts. The two other courts on the other hand adopted a different approach. Thus, although they started from the facts of the case to define the constitutional inquiry on the need for development, they nevertheless framed the inquiry as inviting an examination of the extent of the development that is necessary to give full effect to the rights implicated. This seems to be consistent with the framework of the two-stage inquiry in respect of s 39(2), as formulated by the CC in the *Carmichele* case.

²³ As above, para. 30.

²⁴ As above, para. 39.

The first stage is to consider whether the existing common law, having regard to the s 39(2) objectives, requires development in accordance with these objectives. This inquiry requires a reconsideration of the common law in the light of s 39(2). If this inquiry leads to a positive answer, the second stage concerns itself with how such development is to take place in order to meet the s 39(2) objectives.²⁵

The different approaches of the majority in the CC and the other Courts are essentially manifestations of a difference in the perception of the majority in the CC and the two Courts about what is exactly demanded of courts by the rights and values of the Constitution as envisaged under s 39(2) in developing the common law.

According to Nkabinde J, the power of courts to develop the common law ‘is exercised in an incremental fashion as the facts of each case require.’ She goes on to state that ‘[t]his incremental manner has not changed,’ despite that fact that ‘the Constitution in section 39(2) provides a paramount substantive consideration relevant to determining whether the common law requires development in any particular case.’²⁶ For the majority, therefore, the constitutional requirement that courts must promote the spirit, purport and objects of the Bill of Rights does not warrant a consideration of whether the extension of the common-law definition of rape should also be gender-neutral, even if such an extension might have rendered the law fully harmonious with the spirit, purport and objects of the Bill of Rights. This, held the majority, was required to avoid the appropriation of the legislature’s role in law reform in the course of the development of the common law.²⁷

Such an approach is flawed for several reasons. First, the obligation that the Bill of Rights in general and s 39(2) in particular imposes on courts is of a peremptory character. As Ackermann and Goldstone JJ put it in *Carmichele*:

²⁵ *Carmichele v. Ministry of Safety and Security and Another (Centre for Applied Legal Studies)* 2001 (4) SA 938 (CC) para. 40. [*Carmichele*]

²⁶ *Masiya* (note 3 above) para. 31.

²⁷ As above, para. 30.

It needs to be stressed that the obligation of Courts to develop the common law, in the context of the s 39(2) objectives, is not purely discretionary. On the contrary, it is implicit in s 39(2) read with s 173 that where the common law as it stands is deficient in promoting the s 39(2) objectives, the courts are under a general obligation to develop it appropriately.²⁸

When it comes to giving effect to the rights in the Bill of Rights, it is not a matter of discretion for courts to effect the development of common law. Thus, where the development of common law is necessary to give full effect to the Bill of Rights, it is imperative upon courts to effect such development accordingly.

One question that arises here is the extent to which courts can develop the common law. In the light of s 39(2), it seems that such development must be taken to a level that gives the rights whose protection is at issue their full effect. To put it differently, courts must develop the common law to a level at which it becomes consistent not only with the rights whose protection is at issue in the case at hand but also with the spirit, purport and objects of the Bill of Rights in general.²⁹ In the words of the *Carmichele* Court, ‘where the common law deviates from the spirit, purport and objects of the Bill of Rights the courts have an obligation to develop it by removing that deviation.’³⁰ Given the nature of judicial review envisaged by the Constitution, this is a proper exercise of judicial power, and does not in any way amount to interfering in the law making power of the legislature. Contrary to the views of the majority in the *Masiya* case, there is a strong argument to make that, if judicial review is legitimate at all, it is more legitimate where courts develop the common law than when they strike down legislation. This is because developing the

²⁸ *Camichele* (note 25 above) para. 39.

²⁹ This distinction between particular rights and the spirit, purport and objects of the Bill of Rights holds to the extent that one accepts the two instances that the *Thebus* Court identified as instances where the need to develop the common law under Section 39(2) could arise. According to the *Thebus* Court,

The first would be when a rule of the common law is inconsistent with a constitutional provision. Repugnancy of this type will compel an adaptation of the common law to resolve the inconsistency. The second possibility arises even when a rule of the common law is not inconsistent with a specific constitutional provision but may fall short of the spirit, purport and objects. Then, the common law must be adapted so that it grows in harmony with ‘the objective normative value system’ found in the Constitution.

S v. Thebus 2003 (6) SA 505 (CC) para 28.

³⁰ *Camichele* (note 25 above) para. 33.

common law is in fact quite a traditional function of courts.³¹ The Constitution itself acknowledges this when it recognizes that the development of the common law is an inherent power of courts other than magistrate courts.³² Under the circumstances, the only instance where the judiciary can legitimately be accused of usurping the constitutionally mandated power of the legislature under s 39(2) is where the common law is developed beyond what is required to give full effect to the rights at issue or to make it consistent with the spirit, purport and objects of the Bill of Rights.

Partial protection of rights: Between the proper exercise of judicial power and excessive judicial restraint

The issues raised in *Masiya* concern the protection of several rights enunciated in the Bill of Rights. As Nkabinde J rightly pointed out, these rights include ‘the right to dignity, the right to equality, freedom and security of the person and children rights...’³³ In her reasoning, however, she did not fully develop the implications of all of these rights. Instead, her approach can be characterised as reductionist and partial. Thus, although she appropriately identified the rights implicated and did so comprehensively, she reduced their importance to substantiating the extension of the definition of rape to include anal penetration of a female. As she put it:

The object of the criminalisation of this act is to protect the dignity, sexual autonomy and privacy of women and young girls as being generally the most vulnerable group in line with the values enshrined in the Bill of Rights – a corner stone of our democracy.³⁴

Unless one refuses to accept as rape the anal penetration of a man, as Langa CJ in his minority opinion concurred in by Sachs J rightly pointed out, ‘the criminalisation of rape is about protecting the “dignity, sexual autonomy and privacy” of all people, irrespective

³¹ I would like to thank Theunis Roux for bringing this point to my attention. Indeed, the main opposition challenging the democratic legitimacy of judicial review is directed against what Waldron calls ‘strong judicial review’ which involves the power of striking down legislation. Waldron (note 11 above) 1353-1359.

³² See s 173 of the Constitution.

³³ *Masiya* (note 3 above) para. 18.

³⁴ As above, para. 37.

of their sex or gender.’³⁵ The effect of the reduction of the implication of the rights involved in Nkabinde J judgment is a failure to give full consideration to the arguments of the DDP and the Amici supporting the judgment of the High Court. The most important effect is, however, the failure to give full effect to the rights the protection of which was at issue. Once the court found that there was a need to develop the common law, a proper application of s 39(2) would require that it be developed fully taking in to account all the relevant facts. Arguably, the partial development pursued by the majority compromised constitutional principles of high importance. One would therefore fully agree with Langa CJ, who upheld the need for treating the anal penetration of a male in the same manner as that of a female:

In my view, to 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.³⁶

The majority’s partial protection of the rights involved may further be considered as amounting to a failure on the part of the CC to properly discharge its mandate and obligations. This nevertheless depends upon a determination of whether or not in the circumstances of the case judicial restraint of the type adopted by the majority was constitutionally warranted. In this regard, it is necessary to consider the reasons advanced by the majority in support of its approach.

An examination of the reasoning of the majority judgment reveals that the determination of the extent of the development of the common law definition of rape was one divided between the need to give effect to the rights involved and the perceived requirement for judicial restraint. One can discern that the majority attempted to meet the demands of these two seemingly opposing needs. This explains its failure to take the implications of the rights at issue to their logical conclusion by giving them their full effect. Nkabinde J

³⁵ As above, para. 84.

emphasised that in a constitutional democracy such as ours the Legislature and not the courts has the major responsibility for law reform and the delicate balance between courts' functions and powers on one hand and those of the Legislature on the other should be recognized and respected.³⁷ According to her, the constitutional role of courts in the development of the common law should be one of incremental, fact-driven development.

One may wonder if this requirement would not amount to excessive limitation on the proper exercise of judicial power necessary for the protection and enforcement of the Bill of Rights. To appreciate this, one can contrast Nkabinde J's formulation with the citation she referred to from the *Carmichele* Court:

[C]ourts must remain vigilant and should not hesitate to ensure that the common law is developed to reflect the spirit, purport and objects of the Bill of Rights . . . *whether or not the parties in any particular case request the Court to develop the common law under s 39(2)*.³⁸

The emphasis of the Court in *Carmichele* is clearly on promoting the spirit, purport and objects of the Bill of Rights. This is only logical given the fact that the *Carmichele* Court stated this after quoting from *Du Plessis v De Klerk*, among other things, the statement that '[t]he Judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.'³⁹

It may be that in the normal course of things the court may need to wait for an issue to be properly put in evidence before it. In cases like this one, however, the court can take judicial notice of all the relevant facts that would make it possible to afford constitutional protection to all persons similarly situated. Indeed, as pointed out by Langa J in the

³⁶ As above, para. 80.

³⁷ As above, para. 30.

³⁸ As above, para. 33. (emphasis added)

³⁹ *Du Plessis* (note 9 above) 61.

minority judgment,⁴⁰ in the *Fourie*⁴¹ case the CC developed the gender-specific common law definition of marriage to allow marriage for both gays and lesbians despite the fact that the only parties before it were lesbians. In the case at hand, the *Masiya* court could have taken judicial notice of the existence of male rape in South Africa and extended the definition in gender-neutral terms. This was required not merely for reasons of principle. It was also dictated by the need to avoid possible harm that might have been caused to male victims due to the non-inclusion of anal penetration of a male in the common law definition of rape. Moreover, doing so would still have left for the legislature a role in enacting the Sexual Offences Act that was already in the pipeline.⁴²

If one considers *Carmichele* as an authoritative statement of the role of courts in developing the common law, one can understand it as making a distinction between two instances that may require the development of the common law. The first of this is where the common law is not in line with the Bill of Rights. The other, which can be gathered from its reference to *Du Plessis*, is where it is necessary to reflect changes in the social, moral and economic fabric of the country.⁴³ Where the development of the common law is necessary to bring it in line with the Bill of Rights, the obligation on courts to develop the common law is mandatory. Moreover, this obligation entails that the common law be developed to the extent necessary to give effect to the rights whose protection is at issue in the particular case. For that, the court should take into account, based on the case before it, all the relevant facts necessary to give effect to the rights at issue notwithstanding that the parties to the case did not deem it necessary, and hence did not

⁴⁰ *Masiya* case (note 3 above), para. 90.

⁴¹ See *Minister of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others as Amici Curiae); Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Another* 2006 (1) SA 524 (CC).

⁴² In the *Masiya* judgement the majority extensively discussed the draft of the Sexual Offences Act Bill. And part of the reason for its partial development of the common law definition of rape is that the legislature is considering to address the matter in a more comprehensive manner. Indeed, the Sexual Offences Act was enacted by the Legislature soon after the *Masiya* judgement was handed down. One may thus say that whatever constitutional lacuna, and resultant potential harm, that was left by the *Masiya* judgement was ultimately rectified. If this is what guided the *Masiya* court in making its decisions, consistency would have required that the Court deferred to the Legislature the extension of the definition to include anal penetration of a female as well. Besides, such an approach is not consistent with constitutional commitments that dictate the transformation of various regimes of South African Law through the application of the Bill of Rights by courts. See *Carmichele* (note 25 above) para. 54.

rely upon it. On the other hand, where the development of the common law is prompted by changes in the social, moral and economic fabric of the society, the obligation of courts is not as peremptory. Moreover, in that instance the common law must be developed incrementally and on a case by case basis.⁴⁴ Such development must be limited to and bound by the facts that the case raised before the court.⁴⁵ This is the distinction that the majority of the CC in the *Masiya* case failed to make.

On the side of the requirements under s 39(2) of the Constitution, the majority restricted the effects of the rights implicated to require the extension of the definition of rape to include anal penetration of a female only. In doing so, the Court limited the obligation of Courts under s 39(2) to giving incomplete effect to the Bill of Rights by insisting that the obligation must be limited to affording protection to the rights of the party in the case. Consistent with this standing, the majority reduced the purpose of the criminalisation of rape to the protection 'of the dignity, sexual autonomy and privacy of women and young girls.'⁴⁶

Given that the majority identified two interests to be at stake, the question one would like to raise is whether such partial protection of the rights in the case was warranted. The majority did not offer a compelling reason for its approach. There was very little to strongly support its argument about judicial restraint and avoidance of encroaching upon the powers of the Legislature. It did not sufficiently show, for example, that giving full effect to the rights implicated and developing the common-law definition of rape in a gender-neutral form, as argued for by the minority, would constitute a major and unconstitutional intrusion into the law reform powers of the Legislature. Indeed, there is little, if at all, that this detracts from the law reform powers of the legislature, particularly since the extension of the definition by the CC in a gender-neutral form is not meant to bring to finality the possibility of legislating on the crime of rape. Moreover, one fails to understand how much difference it would make, as far as the powers of the Legislature is

⁴³ For a comprehensive discussion on this see Theunis Roux 'Continuity and change in a transforming legal order: The impact of Section 26(3) of the Constitution on South African Law' 121 *SALJ* (2004) 466.

⁴⁴ *Du Plessis* (note 9 above) para. 58.

⁴⁵ *Gardener v. Whitaker* 1996 (4) SA 337 (CC) para. 16.

⁴⁶ *Masiya* (note 3 above) para. 37.

concerned, to deny the extension of the definition in gender-neutral terms while at the same time extending the definition to include anal penetration of a female. On the other hand, extending the definition of rape to include anal penetration of a *person* makes a huge difference. First, it brings the common law definition of rape in line with the Bill of Rights. The second and related advantage of such extension is that the law would then afford equal and full protection to all persons who may happen to be victims of the dehumanising crime of rape. In other words, the interest of justice would have been served more by such inclusive definition.

Conclusion

Even if the constitutional role of courts in the development of the common law has to take account of the requirements of separation of powers and the power of the legislature in law reform, this is not meant to restrain the courts from giving full effects to the rights and values in the constitution. The only instance where the judiciary can legitimately be accused of usurping the constitutionally mandated power of the legislature under s 39(2) is where the common law is developed beyond what is required to give full effect to the rights at issue or to make it consistent with the spirit, purport and objects of the Bill of Rights. In the absence of such reasons and evidence, as in this particular case, judicial restraint unnecessarily inhibits the full application of the rights and values of the Constitution. In this case, the failure of the CC to give full effect to the rights of dignity, equality and personal security of all persons by developing the common-law definition of rape in a gender-neutral fashion risks an abdication of the proper exercise of its constitutional mandate, particularly under s 39(2) read with s 173. It also fails to treat constitutional interpretation by courts as an aspect of the constitutional decision-making process integral to South African democracy.