Reconsidering the *amicus curiae* participation in *S v Zuma*: Lessons for future participation

AMANDA SPIES*

ABSTRACT

This discussion explores the unique nature of gender-based violence and the need for courts to understand the intricacies in adjudicating these matters. The focus is on *amicus curiae* participation as a specific litigation strategy that could enable courts to focus on the relevant victims and their experience of violence. Specifically the *amicus curiae* participation in *S v Zuma* is considered as the matter is unique in its rejection of the relevant *amicus curiae* participation focusing on the need and relevance of this method of participation in future criminal trials.

1 Introduction

In post-apartheid South Africa, feminists have actively engaged the legal system to address gender-based violence.¹ Women’s organisations strongly lobbied for the inclusion of rights that protect women’s bodily and psychological integrity in the 1996 Constitution, which led to the achievement of a series of rights that protected women against violence, as well as their right to reproductive decision-making, security and control over their bodies.² During the early stages of democracy,

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1 L Artz and D Smythe ‘Feminism vs. the state?: A decade of sexual offences law reform in South Africa’ (2007) 21 Agenda 6 at 8.

2 C Albertyn, L Artz, H Combrinck, S Mills and L Wohuter ‘Women’s freedom and security of the person’ in E Bonthuys and C Albertyn (eds) *Gender, Law and Justice* (2007) 295 at 297. Section 12 of the Constitution of the Republic of South Africa, 1996 (hereinafter the Constitution) reads:(1) Everyone has the right to freedom and security of the person, which includes the right:
   (a) not to be deprived of freedom arbitrarily or without just cause;
   (b) not to be detained without trial;
   (c) to be free from all forms of violence from either public or private sources;
   (d) not to be tortured in any way; and
   (e) not to be treated or punished in a cruel, inhuman or degrading way.

   (2) Everyone has the right to bodily and psychological integrity, which includes the right
   (a) to make decisions concerning reproduction;
important legislative and policy gains occurred concerning bodily autonomy and protection from gender-based violence; this entrenched a legal framework for the enforcement of the constitutionally protected rights.\(^3\)

However, the levels of violence against women remain alarmingly high, and confronts us with the contradiction of having a progressive constitutional and legislative framework that supposedly protects women against violence on one end of the continuum and, on the other end, seemingly unyielding levels of violence that are perpetrated.\(^4\) This has led to questions about the efficacy of the legal framework that has been implemented to curb violence against women.\(^5\)

Feminists have long viewed the criminal justice system – the system that women access to gain protection from or recourse against violence – as the ultimate gendered institution, often reinforcing ‘deeply sexist assumptions about women, their sexual and social identities and their relation to the social (male) world’.\(^6\) The harmful reproduction of certain notions of masculinity and femininity, especially prevalent in sexual violence matters, not only affects those caught up in the criminal justice system but also reinforces social conceptions of appropriate

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\(^6\) Artz and Smythe op cit (n1) 8.
gender behaviour. One can therefore say that the criminal justice system, the very source of protection against violence for women, often reinforces violent behaviour by serving to maintain a patriarchal social order.

“These images of women produced in and through the law have powerful ideological and social significance. Law is, among other things, an authoritative language or form of discourse. It has a potent ability to shape popular and authoritative understanding of situations. The laws, institutions and ideologies of the criminal justice system are particularly powerful in their ability to define appropriate ‘feminine’ behaviour, morality and roles, especially those concerned with women’s sexuality and reproduction. In this way, certain images are affirmed at the same time as others are censured through criminalisation, marginalisation and the silencing of alternative accounts of social reality.”

With this contradiction in mind, feminists have used the law as a site of struggle to address legal rules, doctrines and principles that reflect the stereotypes and myths that have contributed to entrenching a culture of violent behaviour.

The law, specifically criminal law, is seen as an important site of struggle ‘in shifting, or at least acknowledging inequalities’ that entrench gender-based violence.

Perhaps feminist jurisprudence – as a theoretical framework for changing women’s social realities of violence – can provide a starting point from which the state, the law and society can be viewed as both exercising power which

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7 According to J Du Mont and D Parnis ‘Judging women: The pernicious effects of rape mythology’ (1999) 19 Can Women Stud 102-109, commonly held myths concerning rape includes: ‘women mean “yes” when they say “no”; women are “asking for it” when they wear provocative clothes, go to bars alone, or simply walk down the street at night; only virgins can be raped; women are vengeful, bitter creatures “out to get men”; if a women says “yes” once, there is no reason to believe her “no” the next time; women who “tease” men deserve to be raped; a woman who goes to the home of a man on the first date implies she is willing to have sex; women cry rape to cover up an illegitimate pregnancy; a man is justified in forcing sex on a woman who makes him sexually excited; a man is entitled to sex if he buys a woman dinner; [and] women derive pleasure from victimisation.’ Also see in this regard D Nicholson ‘Criminal law and feminism’ in D Nicholson and L Bibbings (eds) Feminist Perspectives on Criminal Law (2000) 1 at 14; Artz and Smythe op cit (n1) 7.

8 Vogelman and Eagle op cit (n5) 213.


11 Artz and Smythe op cit (n10) 15.
sometimes nullifies women and their experiences with violence as well as serving an instrumental function of protection and one that is intrinsically symbolic. At the very least, our continued participation in the law reform process can expose the state and the criminal justice system which upholds largely masculinist interpretations of justice. It may also have the potential to address some seemingly intractable questions about women's engagement with the law.\textsuperscript{12}

In this sense \textit{amicus curiae} participation has been used as a specific feminist litigation strategy to place evidence of women's actual experience of violence before courts, in an attempt to redefine the gendered constructions of the criminal justice system and women's rights to be free from violence.\textsuperscript{13}

This discussion analyses the attempted \textit{amici curiae} participation in the \textit{S v Zuma} matter, and although a 2006 decision, is unique in its rejection of \textit{amici curiae} participation in a criminal trial.\textsuperscript{14} The \textit{Zuma} matter highlights the need to engage the criminal justice system, to reflect women's experience of violence and serves to illustrate the impact \textit{amici curiae} participation could have in shaping future legal discourse in the criminal justice system.

\textsuperscript{12} Artz and Smythe op cit (n10) 14.

\textsuperscript{13} Artz and Smythe op cit (n10) 16. An \textit{amicus curiae} ('friend of the court') is a non-litigious party that joins the litigation to assist the court to reach its decision. The role of \textit{amicus curiae} participation has evolved and today it is accepted that an \textit{amicus} can provide contextual evidence to a court to ensure that it is aware of the point of view of those who will be affected by its judgment; see P Bryden 'Public interest intervention before the courts' (1987) 66 Can Bar Rev 490; M Lowman 'The litigating \textit{amicus curiae}: When does the party begin after the friends leave?' (1992) 41 Am Univ L Rev 1243. The Constitutional Court was the first court to adopt specific rules to regulate \textit{amicus curiae} participation with other courts following suit; in this regard, see rule 10 of the Constitutional Court promulgated under Government Notice R1675 in \textit{Government Gazette} 25726 (31 October 2003) (hereinafter rule 10 of the Constitutional Court Rules); rule 16A of the Uniform Court Rules first promulgated under Government Notice 315 in \textit{Government Gazette} 19834 (12 March 1999); rule 16 of the Supreme Court of Appeal Rules first promulgated under Government Notice 1523 in \textit{Government Gazette} 19507 (27 November 1998); rule 7 of the Labour Court Rules first promulgated under Government Notice 1665 in \textit{Government Gazette} 17495 (14 October 1996); rule 7 of the Labour Appeal Court Rules first promulgated under Government Notice 1666 in \textit{Government Gazette} 17495 (14 October 1996); rule 14 of the Land Claims Court Rules first promulgated under Government Notice 300 in \textit{Government Gazette} 17804 (21 February 1997).

\textsuperscript{14} Unreported judgment delivered by Van der Merwe J in \textit{S v Zuma} case number CC321/05 WLD (27 March 2006); \textit{S v Zuma} 2006 (2) SACR 191 (W) (hereinafter \textit{Zuma}).
2 The amici curiae participation in S v Zuma

The Zuma trial made it clear that women still face insurmountable challenges if they decide to report a rape.\(^{15}\) The complainant, Khwezi, and Zuma were family friends and during an overnight visit to Zuma’s home Khwezi was allegedly raped.\(^{16}\) Zuma pleaded not guilty to the charge, admitting that he and Khwezi had sex, but claiming that the intercourse was consensual.

Supporters for both Zuma and Khwezi gathered outside the courthouse, which resulted in an extremely hostile and often violent environment that required a strong police presence.\(^{17}\) Zuma’s supporters were dressed in traditional Zulu clothing and sported banners and T-shirts with slogans such as ‘burn the bitch’, ‘100% Zuluboy’ and ‘Zuma for President’.\(^{18}\)

The One-in-Nine Campaign was established to support Khwezi and all women who spoke out about rape and sexual violence.\(^{19}\) Its banners highlighted women’s constitutional rights; the need to pass the Sexual Offences Bill and the ineffectiveness of the criminal justice system in protecting rape victims and it provided a public platform, considering the amount of media attention garnered, to address issues that have long plagued women’s organisations who work in this area.\(^{20}\)

Inside the courtroom, the main question was whether there had been consent to the sexual intercourse.\(^{21}\) After Khwezi’s evidence, Zuma’s defence team brought an application to cross-examine Khwezi on her

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\(^{16}\) S v Zuma supra (n14) facts as portrayed in the headnote.

\(^{17}\) S Hassim ‘Democracy’s shadows: Sexual rights and gender politics in the rape trial of Jacob Zuma’ (2009) 68 African Stud 57 at 59; also see M Motsei The Kanga and the Kangaroo Court: Reflections of the Rape Trial of Jacob Zuma (2007) for a general discussion of the trial.

\(^{18}\) Hassim op cit (n17) 59.

\(^{19}\) A report of the Medical Research Council showed that only one out of every nine rape survivors spoke out about rape and sexual violence – resulting in the name One-in-Nine adopted by its founders, People Opposing Women Abuse (POWA). For a discussion of the One-in-Nine campaign see S Leclerc-Madlala “Come rape us!” The everyday trauma of sexual violence in South Africa’ in D Budryte, LM Vaughn and NT Riegg (eds) Feminist Conversations: Women, Trauma, and Empowerment in Post-Transitional Societies (2009) 63 at 68; M Cooper ‘Preventing the gendered reproduction of citizenship: The role of social movements in South Africa’ (2011) 19 Gender & Devel 357-370.

\(^{20}\) Hassim op cit (n17) 59.

\(^{21}\) S v Zuma supra (n14) facts as portrayed in the headnote.
past sexual history and to lead evidence in connection therewith.\textsuperscript{22}

The high court granted the request stating it would give reasons for its decision at a later time.\textsuperscript{23} Zuma’s defence team proceeded to lead evidence regarding Khwezi’s childhood during which time she was sexually abused, and also later in her life where she made allegations

\textsuperscript{22} \textit{S v Zuma} supra (n14) at 198; the application was brought in terms of s 227 of the Criminal Procedure Act 51 of 1977, which states: ‘(1) Evidence as to the character of an accused or as to the character of any person against or in connection with whom a sexual offence as contemplated in the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, is alleged to have been committed, shall, subject to the provisions of subsection (2), be admissible or inadmissible if such evidence would have been admissible or inadmissible on the 30th day of May, 1961.

(2) No evidence as to any previous sexual experience or conduct of any person against or in connection with whom a sexual offence is alleged to have been committed, other than evidence relating to sexual experience or conduct in respect of the offence which is being tried, shall be adduced, and no evidence or question in cross examination regarding such sexual experience or conduct, shall be put to such person, the accused or any other witness at the proceedings pending before the court unless-

\begin{itemize}
\item[(a)] the court has, on application by any party to the proceedings, granted leave to adduce such evidence or to put such question; or
\item[(b)] such evidence has been introduced by the prosecution.
\end{itemize}

(3) Before an application for leave contemplated in subsection (2)(a) is heard, the court may direct that any person, including the complainant, whose presence is not necessary may not be present at the proceedings.

(4) The court shall, subject to subsection (6), grant the application referred to in subsection (2)(a) only if satisfied that such evidence or questioning is relevant to the proceedings pending before the court.

(5) In determining whether evidence or questioning as contemplated in this section is relevant to the proceedings pending before the court, the court shall take into account whether such evidence or questioning-

\begin{itemize}
\item[(a)] is in the interests of justice, with due regard to the accused’s right to a fair trial;
\item[(b)] is in the interests of society in encouraging the reporting of sexual offences;
\item[(c)] relates to a specific instance of sexual activity relevant to a fact in issue;
\item[(d)] is likely to rebut evidence previously adduced by the prosecution;
\item[(e)] is fundamental to the accused’s defence;
\item[(f)] is not substantially outweighed by its potential prejudice to the complainant’s personal dignity and right to privacy; or
\item[(g)] is likely to explain the presence of semen or the source of pregnancy or disease or any injury to the complainant, where it is relevant to a fact in issue.
\end{itemize}

(6) The court shall not grant an application referred to in subsection (2)(a) if, in its opinion, such evidence or questioning is sought to be adduced to support an inference that by reason of the sexual nature of the complainant’s experience or conduct, the complainant-

\begin{itemize}
\item[(a)] is more likely to have consented to the offence being tried; or
\item[(b)] is less worthy of belief.
\end{itemize}

(7) The court shall provide reasons for granting or refusing an application in terms of subsection (2)(a), which reasons shall be entered in the record of the proceedings.\textsuperscript{24}

\textsuperscript{23} See \textit{S v Zuma} supra (n14) at 198-204 for the reasons provided in the final judgment.
of rape against certain individuals.\textsuperscript{24} Most of the evidence led was accepted by the high court as relevant.\textsuperscript{25}

The trial was a particularly difficult case for women’s rights activists as the case questioned whether on-going advocacy for rape law reform had any effect.\textsuperscript{26} The admission of evidence regarding Khwezi’s past sexual history and her cross-examination in this regard were particularly worrisome and served to publicise and reinforce several rape stereotypes (women should forcefully resist; if a complainant does not conform to traditional sex norms she might be the sexual deviant; rape is about sex and not intricate power relations exercised in a violent manner).\textsuperscript{27}

It was after the closing of the state’s case that the Centre for Applied Legal Studies (CALS), the Centre for the Study of Violence and Reconciliation (CSVR) and the Tshwaranang Legal Advocacy Centre (TLAC) lodged an application to participate as \textit{amici curiae}.\textsuperscript{28} They thought it was important to provide the high court with evidence that would explain Khwezi’s behaviour and that would attempt a balance between her and Zuma’s constitutional rights. The high court refused the \textit{amici}’s application for admission, arguing that it was ill-conceived and not necessary. The high court proceeded to adopt certain universal assumptions about women’s agency and voice.\textsuperscript{29} The fact that Khwezi did not exhibit a ‘normal response’ to the rape; in other words, physically resisting and immediately reporting the incident, lead to the conclusion that she was lying about the rape and that the sex was consensual.\textsuperscript{30}

The \textit{amici curiae} were uncertain whether their participation would be wise as a result of the politically charged atmosphere and the possibility that their involvement could be misconstrued as a publicity stunt.\textsuperscript{31} However, after seeing how Khwezi was treated in and outside the courtroom, and the extent to which every possible rape stereotype was being brought to the fore, the \textit{amici curiae} were of the opinion that their participation was required to address these common

\textsuperscript{24} \textit{S v Zuma} supra (n14) at 220.
\textsuperscript{25} Ibid.
\textsuperscript{26} Combrinck op cit (n15) 262.
\textsuperscript{27} DP Bryden and S Lengnick ‘Rape in the criminal justice system’ (1997) 87 \textit{J Crim L Criminol} 1194-1384.
\textsuperscript{28} Notice of motion in the joint application of TLAC, CALS and CSVR to be admitted as \textit{amici curiae}, case number CC321/05.
\textsuperscript{29} S Robins ‘Sexual politics and the Zuma rape trial’ (2008) 34 \textit{J Sthn Afr Stud} 411 at 424.
\textsuperscript{30} Robins op cit (n29) 424; specifically see \textit{S v Zuma} supra (n14) at 216-218 for the judge’s interpretation of Khwezi’s response to the alleged rape.
\textsuperscript{31} Interview Lisa Vetten, TLAC (14 December 2012).
There was also considerable external pressure on the participating organisations to intervene, considering the manner in which the trial was conducted. The organisations, after their decision to enter as amici curiae, were faced with a difficult strategic choice on how they were going to frame their arguments to balance the individual and broader issues of the case. In their application for admission they stated that they intervened not only in their own interests, but also in the interest of the community, which included women and children who were victims of sexual violence or who could be victims; and on behalf of women and children who as a result of the criminal justice system were unable or afraid to prosecute their cases and, in the public interest, in order to promote the protection and development of the rights to equality, dignity and privacy for complainants in sexual offence cases. The amici curiae argued that the case raised important constitutional issues that went to the heart of the enjoyment of women’s constitutional rights and that their participation would:

‘enable substantive issues of social and legal significance to be properly ventilated in the interest of a fair trial and will also ensure utilisation of common law processes in a manner consistent with the constitutional principles’.

The amici curiae maintained that the social context evidence that they would bring would place the high court in a better position to make a decision ‘confident of its social consequences’. The expert evidence was tailored to Khwezi’s specific circumstances and focused on the effects of childhood sexual abuse and the power dynamics associated with a personal relationship as the one Khwezi and Zuma had. The amici also wanted to provide a comparative perspective on the promotion of constitutional values within trial proceedings. Ultimately, the high court rejected the application for admission by the amici curiae. It found that the proposed expert evidence would

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32 Ibid.
33 Interview Catherine Albertyn, CALS (29 January 2013).
34 Ibid.
35 Notice of motion in the joint application of TLAC, CALS and CSVR op cit (n28) at para 12.
36 Notice of motion in the joint application of TLAC, CALS and CSVR op cit (n28) at para 14.
37 Notice of motion in the joint application of TLAC, CALS and CSVR op cit (n28) at para 14.7.
38 Notice of motion in the joint application of TLAC, CALS and CSVR op cit (n28) at para 16.
39 Notice of motion in the joint application of TLAC, CALS and CSVR op cit (n28) at para 17.
delay the matter unnecessarily and that a delay would have a profound negative effect on Khwezi as she most probably would have to be recalled as a witness.\textsuperscript{40} It further regarded the expert evidence provided by the state as sufficient and found that the \textit{amici curiae} could not bring anything new that could be of assistance.\textsuperscript{41}

The \textit{amici curiae} made a strategic decision to construct the brief around Khwezi, as counsel advised that criminal courts were more receptive to a person with a face and name than broader social context.\textsuperscript{42} The individualised nature of the brief turned out to be problematic and the submissions were seen as supplementing the state’s evidence rather than being of assistance to the court.\textsuperscript{43} In hindsight, the choice to focus on Khwezi might not have been the best one, but it seemed viable at the time, specifically considering the way in which she was treated in and outside the courtroom. A further problem was the impression that the \textit{amici curiae} saw the judge as a lay person regarding the intricacies of rape law and that they were the only ones able to assist him in this regard. The \textit{amici curiae}, in its submissions stated:

‘I respectfully aver that the submissions to be made by Tshwaranang will assist the Court in that the rape of a woman is unlikely to be an issue within the general knowledge or experience of judicial officers. Rape has frequently been described as a crime that seldom sees the light of day, let alone comes under the scrutiny of our courts. Rape victims or rape survivors have usually endured their experience in silence, and the particular and somewhat unique character and features of rape have long gone unstudied.’\textsuperscript{44}

The tone and way in which the brief was drafted was understandable in a sense, as the amount of attention drawn and publicity surrounding the case created a hostile, oppositional environment in which it was difficult to distance oneself from the particular factual scenario. However, one can deduce an attitude of resentment from the judge towards the \textit{amici curiae} in his final judgment where he stated:

‘A disconcerting aspect of this trial is the fact that all and sundry were prepared to, and apparently claimed the right to, comment on my decision in terms of s 227 of the Act, even before they knew the bases on which and the reasons why leave was granted to cross-examine the complainant on her past sexual experience, and to lead evidence concerning aspects of that past.'
People commented on the ruling without having been in Court or knowing anything about the contents of the application, or the provisions of s 227 of the Act.\textsuperscript{45}

And further:

‘This case is, in my judgment, a good illustration why pressure groups and individuals should not jump to conclusions and express criticism before having heard all the evidence. At the time when I allowed the complainant to be cross-examined on her sexual history, and evidence to be led in that respect, I was fully aware of what was contained in Hully’s affidavit. I realised that there was at least a possibility that, at the end of the case, it could be said that a false accusation of rape was made against the accused. Instead of waiting, some people stated categorically that rape victims, would as a result of this case, be hesitant to report an incident of rape because of the treatment the complainant received, apparently also from this Court.’\textsuperscript{46}

It is clear that the judge viewed the \textit{amici}’s submissions and planned participation as a personal attack on his judicial integrity and that the purpose of the participation was misconstrued. The court would most certainly have benefited from the proposed \textit{amici curiae} participation and contextual evidence it planned to bring. As Robins stated:

‘A close reading of the Zuma judgment suggests that the Judge uncritically accepted gender stereotypes about rape victims and Zuma’s version of “traditional” Zulu masculinity. While the Judge accepted Zuma’s essentialist rendition of “Zulu masculinity” he did not unpack the way in which the gendered power relations between accused and complainant were culturally construed; instead he opted for a thoroughly decontextualised and standardised conception of the “rape victim.”’\textsuperscript{47}

According to Robins, the court should have considered the possibility that the relationship between Zuma and Khwezi could have been culturally and politically structured in such a way as ‘to make it extremely difficult for the latter to reject or resist the sexual advances and demands of the accused.’\textsuperscript{48}

Towards the end of the \textit{amici}’s submissions they stated that they would have liked to provide the high court with an analysis of the constitutional rights of complainants in sexual offence cases, which would have required and attempted a balance between the fair trial rights of the accused and the constitutional rights of the complainant/s.\textsuperscript{49} This point is of specific interest and could have been the new and relevant

\textsuperscript{45} \textit{S v Zuma} supra (n14) at 198.
\textsuperscript{46} \textit{S v Zuma} supra (n14) at 222-223.
\textsuperscript{47} Robins op cit (n29) 423.
\textsuperscript{48} Robins op cit (n29) 424.
\textsuperscript{49} Notice of motion in the joint application of TLAC, CALS and CSVR op cit (n28) at para 20.5.
issue that the court was looking for, had the judge not interpreted the participation to be an attack on his judicial integrity.

However, despite these failings the *amici curiae*’s participation in *Zuma* alerts us to the indirect impact this method of participation can have in shaping future legal discourse. The discussion that follows focuses on the indirect judicial impact of *amicus curiae* participation and the need for this method of participation in criminal trials.

3 Considering the impact of *amicus curiae* participation

Legal mobilisation scholars have long focused on the indirect impact litigation might have in spurring legal and possibly even social change despite unsuccessful or indeterminate court action. The direct impact of litigation refers to changing a law and/or policy, especially through the extension of rights, which has a direct impact on the applicants’ lives. On the other hand, the indirect impact of litigation could be multiple, including political mobilisation around a particular issue; publicising an issue as a method of communicating with the public; legitimising with the authority of law a particular struggle; and/or influencing jurisprudence to facilitate future litigation; for example, setting new precedent in influencing the writing of *obiter dictum* statements or a minority judgment.

What emerges from the work of legal mobilisation scholars is that the indirect impact of judicial decision making is of equal importance. The same direct/indirect impact attributed to litigation can be attributed to *amicus curiae* participation. The direct impact *amicus curiae* participation can have refers to instances when their arguments/interpretation and/or remedy is reflected in the main judgment. Although persuading a court to decide a matter differently is the ultimate prize for an *amicus curiae*, its indirect impact and role as judicial sensitiser is as important. Songer and Reginald aptly capture the indirect impact of *amicus curiae* participation and state:


51 J Dugard and M Langford ‘Art or science? Synthesising lessons from public interest litigation and the dangers of legal determinism’ (2011) 27 SAJHR 39 at 57.

52 The *Minister of Health v Treatment Action Campaign (2)* 2002 (5) SA 721 (CC) could be seen as an example here.

53 Dugard and Langford op cit (n51) 57.

54 Holzmeyer op cit (n50) 274.

'They may hope to convince their own members that they are fighting the good fight even if they expect to lose; or, anticipating that the Court will support their group's position, they may want to be able to claim credit for a new policy. Amicus participation may also provide a vehicle to generate publicity about a case that will help to mobilize opinion behind expected future group action in other forums. Groups may also file briefs in an attempt to shape long-term Court policy; even if they do not expect to influence the outcome of a present case, they may hope to plant ideas in the justices' minds that will make them more receptive to groups' arguments in future cases. Another possibility is that amicus briefs may influence the content of opinions even though they have little impact on the overall outcome.'

It is clear that the impact of *amicus curiae* participation (or the rejection of planned participation) is much broader than the actual court judgment and the importance lies in engaging the justice system to indicate how the law disregards women's experience, especially in sexual violence matters.

Despite the obvious rejection of the *amicici curiae* in the *Zuma* matter their participation and engagement did have an indirect impact in highlighting the treatment of rape victims in the criminal justice system advocating for change. The ensuing media attention generated by the *amicici curiae* participation did focus attention on the long awaited Sexual Offences Bill and some feel that the *Zuma* matter impacted on government's decision to finally implement the Criminal Law (Sexual Offences and Related Matters) Amendment Act.\(^\text{57}\) Although the *Zuma* matter was indicative that caution should be exercised in criminal trials not to draft a brief that is too closely related to a specific party, it highlighted the importance of engaging the criminal justice system to provide ways of thinking of the law, not in isolation, but in connection with the utilisation of the law as a vehicle for change.\(^\text{58}\)

The use of *amicus curiae* participation in criminal trials could enable feminist litigators to offer evidence of women's experience to challenge current constructs of the law.\(^\text{59}\) However, the *Zuma* matter and the rejection of the *amicici curiae* participation has deterred women's organisations to attempt further *amicus curiae* participation in criminal trials despite the potential this method of litigation has in highlighting gender disparities. Pellat describes the necessity to


\(^{57}\) 32 of 2007; Vetten op cit (n31); the Sexual Offences Act was implemented in December 2007 just little after a year the *Zuma* matter was heard.

\(^{58}\) Brickhill op cit (n43); A Shalleck 'Feminist legal theory and the reading of *O' Brien v Cunard* (1992) 57 *Missouri L Rev* 371 at 387.

\(^{59}\) C Albertyn 'Law, gender and inequality in South Africa' (2011) 39 *Ox Devel Stud* 139 at 143.
engage the law (and in the author’s view the criminal justice system) from a feminist perspective as:

‘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 its manifestations, it is necessary to challenge the 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.’

4 Conclusion

There is a future for amicus curiae participation in criminal matters but there is a necessity to focus on the drafting of proper amicus curiae briefs to ensure judicial attention. Participating amici curiae should play their traditional role as ‘friend of the court’ and should carefully structure subsequent submissions to objectively frame the relevant context and issues they would like to draw to the court’s attention. The key is to frame controversial arguments/ideas in such a way that they would be accepted by a court, possibly influencing the way in which a decision is reached or the way in which a decision is reached in future.

Balancing the actual parties’ needs versus the amici’s and ensuring its distinctiveness, is key in bringing a successful amicus curiae brief to a court. It is important for the amicus curiae not to usurp the role of one of the parties, as it should assist the court in the interpretation of the relevant arguments. Amici curiae participation could serve as entry point for women’s voices to be heard in the criminal justice system, which could translate into legal precedent and law.

Judicial officers in criminal matters should take cognisance of the fact that despite the adversarial nature of these trials their decisions have to be taken within a democratic and transformative context:


‘Judges are required to subject public and private power to the demand for dialogic justification; to participate in a transformative debate about the relationship between the individual and collective. It is their duty to resist normative closure, to renounce attempts to make the current boundary between the collective and the individual appear natural and necessary; to challenge the assumption that “the people” have a fixed identity, or that a broad social consensus is “out there” waiting to be discovered. It is their responsibility to facilitate democratic deliberation; to promote respect for the “marginalised other”; to allow a multiplicity of voices to be heard. As participants in a culture of justification, judges are required to take responsibility for their own actions, to spell out the moral and political values upon which their decisions rest.’

*Amicus curiae* participation provides an important channel of communication with the judiciary, as an *amicus* is in the position to represent a vulnerable group’s interests, allowing for a multiplicity of voices to be heard – a role that the criminal justice system should embrace.

The criminal justice system continues to be an important arena where women’s activists contest for women’s voices to be heard. Although the adversarial nature of the criminal justice system limits the role of *amicus curiae* participation, it does not mean that there is no role to be played by *amici curiae* in criminal matters. It is clear that engaging the criminal justice system is an important feminist project and of equal importance is the role that *amicus curiae* participation can play in this. Although the rejection of the *amicus curiae* participation in the *Zuma* matter was a setback in developing this method of participation as feminist litigation strategy in criminal trials, women’s organisations should not be deterred in establishing a role for this method of participation in future sexual violence matters.

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