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Prosecuting Violence against Women in South African Courts: A Reflection of the Legal Culture from an Afrocentric Perspective

By Ramadimetja S. Mogale¹ and Solina Richter²

Abstract

Introduction: The first author participated in a course related to critical feminist schools of thought while pursuing her doctoral program. Engaging with a scholarly community of feminist researchers, she gained multi-layered understandings and deeper insights on ways of knowing through the perspectives of the critical feminist schools of thought in the feminist movement. Unlike other feminist schools of thought, Afrocentric feminism is about the pluralism that captures the dynamism and fluidity of different cultural imperatives, historical forces and localized realities in the lives of African women. This feminist methodology assisted the author's ability to link the 'word to the world' and 'text to the context' as it related to the oppression of women through the eyes of continentally based African women.

Aim: Adopting an Afrocentric feminist conceptual framework, the authors sought to explore and describe the legal culture surrounding the prosecution of violence against women in South African courts.

Research Methods: The study design was an Afrocentric feminist sensory ethnography. Court-scapes (recorded video tours of the physical setting of the courtrooms and court objects), participant observation, conversations with relevant court personnel, and review of relevant site documents were used to collect data.

Insights: The culture of prosecution of violence against women was analysed using an Afrocentric feminist lens from a continentally based African women's standpoint. The study indicated how *kyriarchy* as a socio-political system of perpetual hierarchical social relations, characterizes all women as inferior through the intersectional distinctions of race, ethnicity, class, ability, and locality. During the prosecution processes of violence against women, kyriarchy was evidenced and demonstrated through a collage of hierarchical criteria based on ethnicity, race, age, ability, and the location in which court case matter was heard.

Conclusions: From feminist scholarship, evidence-based prosecution, which is in line with the South African Constitution Act No 108 of 1996 is recommended. The insights indicate that cases of VAW were prosecuted in open courts while there are intermediary facilities. This was a

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counter-practice on what is recommended by feminist scholarship on evidence as well as the Constitution, regardless of the prosecutors being on the side of the survivors.

Keywords: Afrocentric feminism, kyriarchy, sensory ethnography, prosecution and women, South Africa, legal culture, South African courts

Introduction

Participating in a course related to feminist schools of thoughts for her doctoral program, the first author gained a deeper understanding of feminism as a movement through the stances adopted in each of its schools of thought. Unlike other feminist schools of thought, Afrocentric feminism with its pluralistic nature was able to capture the dynamism and fluidity of different cultural imperatives, historical forces and localized realities as far as prosecution of violence against women in South African courts the course assisted her to link the ‘word to the world’³ and ‘text to the context’⁴ (Roberts 1996, p. 150) related to the oppression of women from the eyes of continentally based African women. The course explained feminism as a movement that is obstinate and not easy to name especially from an African perspective.

Feminist movements and their various thoughts are multi-layered with a similar focal point as the counter of oppression of women globally (Geerts & Van der Tuin 2013). “Oppression of women in different localities differs and the different aspects impose such oppression across the globes. The different oppressive aspects are ascribed by either the law, imposed by social convention, or inflicted by individual men and women” (Geerts & Van der Tuin, 2013: 173). Woman-centered scholarships, which include feminist theories, then become the major solution to address political opposition to the oppression and subordination of women (hooks, 2000). Feminist theories provide a direction to transform kyriarchal⁵ practices that are embedded in government institutions like the courtrooms (Nienhuis, 2009).

This paper has a threefold organization. The first part of the paper reiterates the need and benefits of evidence-based prosecution in trials of violence against women (VAW) as advocated by feminist scholars. The second part describes the sensory ethnography research design used in this study. Part three describes an exposition of how sense and meaning of the legal culture adopted in the prosecution of violence against women in South African courts, is understood through an Afrocentric feminist lens.

Towards an Evidence-based Prosecution in Trials of VAW

Classical work on feminist scholarship urges that violence against women is the only crime globally that requires the survivor to physically and verbally prove her innocence in court (Smith, 2007; Barkhuizen, 2007). This type of prosecution portrays the victim as a walking and talking piece of evidence (Barkhuizen 2007; Smith, 2007). The prosecutorial practices of VAW worldwide, South Africa included, have shifted from the practices that diminish the victims’ self-worth and selfhood to the practices that attempt to integrate their needs in the entire legal

³ Ability to link the ‘word to the world’: A metaphor which is commonly use in critical literacy referring to the individual’s ability to interpret what is said[word] and make sense of the said as appropriate.

⁴ Ability to link ‘text to the context’: A metaphor that refers to individual’s ability to interpret what is written [text] in relation to where the written is situated.

⁵ Kyriarchy is socio-political system, wherein people interact and act as oppressors or the oppressed in time and moment.

proceedings (Flynn, 2015). In South Africa, the current approach attempts to be in accordance with human rights standard laws, that counter-penetrate the persistent adversarial legal culture (Ellison, 2000; Buzawa & Buzawa, 2013; Finn, 2013). Now, lately, in South Africa, the Constitution Act 108 of 1996 as amended, makes it clear that the interpretation of enactments of the prosecutorial processes enhance and optimise justice. The Constitution compels the criminal and justice personnel to uphold the human rights standards during the prosecutorial processes.

The guiding principles of the Constitution prosecutors on VAW can play an important role in bringing innovative designs into the legal system with the aim to enhance victim safety and perpetrator accountability as attested by Buzawa and Buzawa (2013) and Finn (2013). These authors, as well as the classic work of Krug (2000), affirm that prosecutors are powerful actors and key decision-makers in the screening of cases on VAW that proceed to a full trial in the justice system.

Feminist scholars on evidence such as Childs and Ellison (2000) in their classic work recommend evidence-based prosecution in trials of VAW. Buzawa and Buzawa (2013) and Finn (2013) argue that evidence-based prosecution in VAW is the type of prosecution, which allows other means and ways of giving evidence-in-chief. The techniques under which evidence-based prosecution is practiced are the same as in murder cases where the victim is not available to testify (Finn, 2013). These techniques include the use of 911 call recordings and transcripts, written statements, forensic evidence, victims' diaries, medical records, video recordings, and photographs of the sustained injuries to name a few (Finn, 2013). Oral testimony is used minimally in evidence-based prosecution trials. The essence of evidence-based prosecution is to avoid the continuous victimization of women who have experienced VAW. As the base of feminist scholarship, women are not allowed to defend themselves in open courts in evidence-based prosecution while there are intermediary facilities. Finn (2013) reflects on the positive results of the use of evidence-based prosecution. High conviction rates in VAW cases were reported when such practices were used. The techniques are usually complemented by subpoenas of an expert witness(es), experienced women advocates, or law enforcement officers who will explain to the jury the dynamics of VAW and victimization (Peterson, 2013). Evidence-based prosecution offers women respect, dignity, as part of their constitutional rights and it is women-friendly, sensitive, victim-centred, and victim vindicating (Peterson, 2013).

Feminist scholars on evidence beseech an urgent need to diverge the prosecutorial practices on VAW on women-friendly and women-centred approaches by using evidence-base prosecution (Ellison, 2000, Raitt, 2000).

Research Methods

The purpose of the research was to explore and describe the culture of the prosecution of violence against women in South Africa courts. The objectives were 1) to systematically observe the prosecutors when prosecuting VAW cases, and 2) to identify the processes, practices, and patterns employed by the prosecutors in prosecuting VAW cases.

An ethnographic design located within the interpretive paradigm was used (Monti & Tingen, 1999). The intention was to interpret and describe the culture of prosecuting of VAW as a phenomenon, to capture the insights and thoughts of the prosecutors while prosecuting VAW.

Sensory Ethnography

Sensory ethnography was used to observe, understand and know the culture of prosecuting VAW in South African courts. As a critical and innovative qualitative research method, sensory ethnography uses sensory perceptions to understand, know, and produce academic knowledge (Pink, 2009). Reflexive and experiential processes are significant underpinnings for this method. The researcher/s' self-consciousness and reflexivity, together with the method, provide the position and analytic strategies that can produce knowledge which observations or interviews (Pink, 2009) are unable to generate.

Data generation techniques

This four-phased sensory ethnographic study used different techniques to generate data.

Phase 1: Court-scapes: The first author walked, toured, and commented on the landmarks and objects in the court with a video to produce what she called "court-scapes". The intention was to provide a sensory presentation of the cultural complexities and temporalities under which prosecution happens.

Phase 2: Observations of Prosecution of VAW: The first author sat in trials and observe the prosecutors during the prosecution of VAW cases.

Phase 3: Conversations with prosecutors and other court personnel: The first authors hold conversations with the prosecutors and court personnel about the prosecution of violence against women. Conversation informed the observed events.

Phase 4: Relevant site documents used in the prosecution were retrieved and reviewed. Documents were reviewed to examine, enhance and revise prior observational and conversational claims about the prosecution process. Refer to Table 1 for the summary of generated data for this study.

The research setting was multisite. Data were collected in both mainstream and previously specialised courts within the four research sites in three urban and rural provinces of South Africa. The study obtained ethical approval from the University of Alberta's Health Research Ethics Board, Canada. Permission to access the courtrooms was granted by the relevant chief magistrate, regional court president, and chief prosecutors. Individual consent was obtained from the prosecutors to be observed while prosecuting VAW cases. Prosecutors invited for conversations were purposively selected. Participants were assured anonymity, confidentiality, and termination of the conversation at any stage without consequences. Conversations lasted between forty-five to sixty minutes. See Table 1 for a summary of generated data and Table 2 for the biographical information of the participants.

Table 1
Summary of generated data

Type	Format	Total
Court-scapes	Video Clips	10
Observations	Texts (Reflections and Field-notes)	24
Conversations	Audios	8
Site Documents	Health and Welfare documents, Legislations, Texts from National Prosecuting Agency brochures and dockets from Police Services	16

Table 2
Biographical details of participants

#	Gender	Race	Ethnicity	Yrs. of Experience	Position	Qualification	Locality	Type of Court
1	Male	Black	Venda	5years	Prosecutor	B Juris & Honours	Urban	Mainstream
2	Male	Black	Pedi	31 years	Regional Court Control Prosecutor	B. Juris & Honours.	Both	Mainstream & Specialized
3	Male	White	Afrikaner	+40 years	Senior Prosecutor	B. Juris & Honours.	Metrocity	Mainstream
4	Female	Black	Tswana	7 years	Regional Prosecutor	B. Juris & Honours.	Rural	Specialized
5	Female	Black	Tsonga	24 years	Regional Prosecutor	B. Juris & Honours.	Urban	Mainstream
6	Female	Black	Pedi	3 years	Regional Court Intermediary	Diploma in Education	Both	Mainstream & Specialized
7	Female	White	Afrikaner	9 years in the current position	President of Regional Courts	B. Juris, Honours & Masters	Both	Mainstream & Specialized
8	Male	White	Afrikaner	42 years	Regional Magistrate	B. Juris & Honours	Urban	Mainstream

The phases of data generation involved an iterative process, which allowed the researchers to move in between and across the phases, multiple times. The continuous analysis commenced from the time of recording court-scapes and participant observations. The analysis influenced the synchronization of the entire research project (Pink, 2009) in optimizing what to observe, notice,

and listen to, and assisted in the refinement of ideas on the prosecution of VAW. All audio-recordings were transcribed verbatim. Data was stored, classified and ordered with the aid of qualitative software package, Atlas.ti6© for management and emergent analysis (Bell, 2010).

Findings

We saw how victims of VAW were labelled per race, ethnicity, age, class, physical ability or geography. A participant shared:

When I started working as a prosecutor, I mean a prosecutor in Regional Court; I [was made] to understand that a Black woman will never be raped--let me not say never, [According to the court]--it was only a coincidence to find that a Black woman was raped, and the court acknowledges that. Usually, if you are in court [as a prosecutor] and you are leading evidence and the woman says [that] I went to a shebeen⁶. [There and there] the magistrate will put the pen down [acting the process of putting the pen down] [which will imply that] he is already discharging the case [silence.] Even if you can meet any kind of evidence, the magistrate will cancel the case before you even start to try the woman [because the woman went to a shebeen]. Mind you in a shebeen in the townships they also sell soft drinks. If the woman can say, I went to the shop when I arrive in that shop there were some people who were drinking liquor [again acting out, putting the pen down], the magistrate will discharge the case So, the tactic, was that a Black woman is a liar as far as sexual violence is concerned.

The interpretation in this regard is that Black women are liars; they go to the shebeens to look for men and ultimately report that the men violated them. Black women in South Africa are assigned territorial areas that they can visit or not visit like shebeens even if they are to buy a soft drink. Labels such as these are arranged as a collage of hierarchies aligned with the highly structured prosecution practices that offer a minimal chance for interrogation (Hunter, 2006; Masenya, 2004).

During the research process, it was noted with concern that some women prosecutors, as part of their daily work, disregard the survivor's emotional state during prosecution. On the other hand, some male prosecutors during the trials were hard on victims during prosecution as required by their scope of work. There were diverse voices in this regard. An excerpt from a female participant speaks to how the prosecutors view the prosecutorial process as a normal day's work especially on the issue of using the intermediary facility:

Sections 258 and 170 [of the Criminal Procedure Act] indicate that as long as she is a witness [the intermediary facility can be used]. If you are a witness, who sometimes maybe you are afraid to face the accused, what I will do usually, I will do an application in court that I am having this witness of 32 years but she does not want to face the accused, and I will place my reasons before the court. As the prosecutor I will argue with defense for the court and give a ruling that the case be prosecuted from the private testifying room (CCTV). The decision will be from the court. This implies that if the court approves then the woman will testify

⁶ An unlicensed establishment or private house selling alcoholic liquor and usually viewed as disreputable.

through CCTV [depending on the granted request and other reasons]. We usually use a private testifying room and CCTV with children. However, I once had a case of a 10- year old whom I took to the open court. She was very brave and clever girl. Eventually the accused was sentenced to life imprisonment. The child wanted to testify in the open court; she didn't have any problems. She testified in an open court and was openly standing there. The way she was small [body size] you couldn't even see that there is someone in the witness stand.

During the observations, it was noted that cases were not prosecuted based on their merit as a crime against humanity as set in the legal framework. Among others, the current legal framework does not require the survivors of rape to defend themselves in open courts while there are intermediary facilities. An intermediary facility, also known as the private testifying room, is a separate room from the main courtroom where the victim can testify during the court proceedings. A video camera or one-way mirror is used to facilitate communication during the testimony.

One example of such observations was:

Hesitantly and with visible difficulty, the victim who was physically disabled (limping from congenital drop foot) and around 45 years of age looked up to face the Public Prosecutor and provided a step-by-step account of what exactly happened on the day of her rape incident. The victim re-told the story in graphic details about how the accused, sneaked up on her in the kitchen, shoved and pinned her down while strangling her throat and forcefully slept with her [meaning rape in English] on her kitchen floor. As the victim was talking, it was physically apparent that she was at the brink of collapse (physically shaking with visible perspiration all over her face and clutching the sides of the witness stand where she stood). The public prosecutor further asked the victim to describe in detail the duration of the rape incident, if she was sober, and how she felt while she was being raped. [This questioning was followed by sighs and laughter from the public gallery]. Agitated and with a heavy sigh, the victim replied that she felt helpless and she was 'on plug' (meaning she took a few drinks, so she was neither drunk nor sober).

For the prosecutor to establish the essential facts of the event in this specific case, he concluded by saying:

“So, you want to tell this court that you were under the influence of liquor when you were raped and [this happened] in your own kitchen?”

The verdict of the case, where the perpetrator was not convicted, leads one to think that a woman cannot be raped in her kitchen or be raped if she is not sober. In contrast, we also noticed how some prosecutors (males and females) revolted against the linearity and inevitability (Kotzè, 2014) of the process of prosecution to hold the perpetrators accountable. Despite the law being straight and objective, some prosecutors worked through various types of evidence to reach a counter-narrative that was used against the perpetrator. Yet concurrently, such prosecutors will make the point that the survivor obtains a fair trial from the prosecution. One participant indicated that:

When reading the victim statement [it] is simple sometimes and easy to see the discrepancy. Then if there is a discrepancy it is better to ask that woman so that you clarify everything before you can go to trial ... Because you find that the complainant or victim is not the one who writes the statement. She only tells the police then the statement is written in English where maybe she is communicating in one of... ehh... home language, unfamiliar with English. As public prosecutors we are to consult with the victim to see whether whatever she is saying is in line with the statement because the very statement is used by the defense. The defense [will] also get a copy of the [statement] before we can start trial. If the defense finds a gap somewhere in the statement it will use this against the woman and the case will lose its creditability during the trial.

It was evident from our analysis that the court personnel (public prosecutor, defence lawyer and presiding magistrate) needed to know the story to reshape, re-tell and reconstruct the violent incident. This is what bell hooks (1992) referred to as the de-centering of a woman. The prosecutorial processes to suit legal language (Ellison, 2000; Kotzè, 2014) progressively strip women's stories of their agency. Finally, the story is completely reconstructed and reshaped. Women are depersonalized and forgotten by the court personnel who have staged an oral competition while the women are placed at the margins.

Drawing from the words of hooks (1990) in *Marginality as a site of resistance*, the culture of prosecution of VAW in South African courts indicated how the powerful take the stories of the "other" by silencing them:

"No need to hear your voice when I can talk about you better than you can speak about yourself. No need to hear your voice. Only tell me about your pain. I want to know your story. And then I will tell it back to you in a new way. Tell it back to you in such a way that it has become mine, my own. Re-writing you I write myself anew...." (hooks 1990)

Discussion

Linking the Insights and Reflections to an Afrocentric Feminism Perspective

The insights presented are part of our reflexivity, interpretation, and construction of meaning (Ntarangwi, 2010) of the culture of prosecuting VAW in South African courts. These insights are considered to be the eyes and ears of the women; they are the window through which we saw and analysed the culture of prosecuting VAW in South African courts.

The common thread that runs through the insights of this inquiry was that prosecution of violence against women cases is a biased cultural script that collectively considers women voiceless. We were mindful that collectively and globally various kyriarchial practices in state institutions are crafted to silence the voices of women with the prosecution of VAW being one such a practice. Not only did sensory ethnography and Afrocentric feminism heighten our awareness of the silencing of women in the courtrooms, but the subject positions of pockets of hierarchies such male/female, victim/perpetrator, black/white that infused within the prosecutorial practices, stood out.

Afrocentric feminism unpacked and centred women and women's issues as the unit of analysis (Njaka, 1971; hooks, 2000). Afrocentric feminism analyses the oppression of women from

the eyes of continentally based African women, who lived and work their entire lives with “cultural structures that are liberating and enabling” (Nnaemeka, 1998, p.5). Additionally, Afrocentric feminist thought deplors those structures that are “limiting and debilitating” to women (Nnaemeka, 1998, p.5). Afrocentric feminism respects pluralism in feminism like other schools of feminist thought, especially multiculturalism, Black feminism, and African womanism, while it is concerned with real lives, struggles and experiences of women (Brah & Phoenix, 2013; Kushner, 2005). However, the main feature of Afrocentric feminism is the role played by the positive aspects of African culture in the lives of African women (Nnaemeka, 1998).

Two decades ago, Black South Africans, men, and women, were fighting side by side as equals against oppression (hooks, 2000). After the dawn of democracy in South Africa, Africans especially women are still not completely free of apartheid and its oppressive practices (Mophoso, 2013). This time the oppression is from their fellow men, and sometimes from other African women through oppression diffusion (Mophoso, 2013). In oppression diffusion, the previously oppressed endure self-oppression among themselves and perpetuate in what Schüssler-Fiorenza (1984), coined as kyriarchy. Kyriarchy is a socio-political system, wherein people interact and act as oppressors or the oppressed in their daily interactions (Masenya, 2004; Schüssler-Fiorenza, 1984). According to Schüssler-Fiorenza (1984) kyriarchy is historically structured from the domination/subordination fallacy that oppresses people as ‘others of the other’. The domination/subordination dichotomy is based on labels of gender, race, ethnicity, class, ability, nation, geography, colonization, culture, and others (Sprague, 2005).

Through Afrocentric feminism, we interrogated the kyriarchial practices that are embedded in the court as a socio-political system. The system embodied a collage of hierarchies based on individual woman’s ethnicity, race, age, ability, geographic ideologies and as well as the type of court where her case was tried. As a lens, Afrocentric feminism enabled us to identify the court system as an epiphenomenon that creates counter-images of a victim and the violent incident when cases of VAW are prosecuted. The prosecution of VAW entails three main processes: the examination in chief, cross examination, and re-examination. All three processes are conducted through a confrontational question-answer approach. The confrontational question-answer approach negatively influences survivors of VAW as it leaves them to draw their own conclusions on evidentiary processes and prosecution (Stephens & Sinden, 2000). Even if prosecutors are on the victims’ side, the victims believe that the evidentiary processes are a form of secondary victimization (Bowen, 2008). They are required to re-live violent acts through re-telling their stories about the violent incidents. The process of re-telling the violent incident is seen as a fundamental requirement in the prosecution of VAW cases (Waterhouse et al., 2002).

Recommendations

VAW is a complex crime that needs further research. Inquiry into this VAW beseeches researchers to be cognizant of the overt and subtle kyriarchial practices that are not women-friendly in managing VAW. It is possible to achieve the women-friendly management of this crime by including processes that will avoid reproduction and support the protection of women from revictimization. From an Afrocentric feminist perspective, there is a need to change the way women are listened to and how experiences are interpreted. It is important that the prosecution of VAW is grounded on hierarchical social relations and many other distinctions such as the ability and locality where the incident happened. As researchers, we are to validate their experiences and

name the truth of silence, which is embedded in the discriminatory processes in the prosecution practices.

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