



#FAILEDBYSYSTEMS

Gender- Based Violence

+SECTION27

catalysts for social justice

The Daily Maverick published this series of op-ed articles on Gender-Based Violence written by SECTION27 staff as part of its #FAILEDBYSYSTEMS campaign during 2017.

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Cover image: On 9 August 1956 20,000 Women marched to the Union Buildings in protest of pass laws.

INTRODUCTION

#FAILEDBYSYSTEMS

As an organisation dedicated to using the law to ensure the advancement of the rights to health and education, we believe that part of an adequate response to the gender-based violence (GBV) crisis South Africa is in is strengthening systems that are meant to protect the rights of victims and ensuring that through the process of attaining justice, their dignity and other rights are respected and protected. We also think it is important to take on the systems that give rise to this violence.

It is against this background that, on 14 July 2017, SECTION27 launched a campaign called #FAILEDBYSYSTEMS in which a team of SECTION27 women and non-binary people published a series of weekly op-eds in *The Daily Maverick* focusing on different systems responses to GBV.

Our aim was to shine a light on womxn, transgender people and children – from all walks of life and of all ages – as they journey through a system which seems to be designed for their protection, but actually ends in further injustice, humiliation and trauma.

Over the months of July and August, SECTION27 published a series of articles in *The Daily Maverick*, each aimed at highlighting our own or our clients' interactions with the systems meant to ensure protection against gender-based violence.

The first article by Sheniece Linderboom lays the context for the series, telling story of a young girl SECTION27 represented who was grossly failed by every process in the Basic Education system. Calling out Higher Education Institutions, Kirsten Whitfield authored a piece on these institutions' duty to protect the students on their watch and, moreover, their responsibility to educate their student body. Thabang Pooe wrote an article expressing the absolute dearth of places of safety for women who have no place to go when they leave abusive situations. Thuthukile Mbatha told the often forgotten realities of trans sex workers and their plight in accessing vital public services with specific emphasis on the Department of Health's sex worker programmes. Luvo Nelani wrote an article challenging the courts to play a more active part in the fight against GBV. Vuyokazi Gonyela penned a piece highlighting the trauma relived by victims of GBV when they interact with the public health system that oftentimes fails to provide the support survivors need. To wrap up the series, Zukiswa Pikoli wrote a piece asserting that we need to join efforts in challenging systems that entrench the violence of patriarchy.

We believe that the duty to end this epidemic starts with each one of us and we must ensure that government fulfils its obligations

to ensure responsive systems that protect the rights of GBV survivors and enables them to use the systems not only to punish but also seek to rehabilitate perpetrators of this violence.

In publishing this collection, we hope to highlight the war on womxn, children and the LGBTQIAP+ community by holding the government of South Africa accountable, especially as a government founded on the principles of human dignity, the achievement of equality and the advancement of human rights and freedoms. We assert this with regards to the government's poor response to the gross human rights violations perpetrated against women, children and the LGBTQIA+ community who are unable to participate fairly under a common South African citizenship.

We believe that a fundamental paradigm in the stakeholders systematic response regarding GBV must occur if our country is to realise its potential to end GBV. A shift in the approach that results in ownership of the issues in a profound and meaningful way.

#FAILEDBYSYSTEMS #STILLFIGHTING #ENDGBV

01 SCHOOLS

A young girl's right to education, lost in the system

The Constitutional right to basic education as we know is unqualified and immediately realizable on the part of the state. It is a right which through progressive judgments, policies and regulations has begun to take substantive shape.

In practical terms the right to education includes the right of every learner to receive textbooks before the school curriculum commences, the right to be educated by qualified teachers and the right to receive education in a safe learning environment.

The right to basic education is an important empowerment right which has been reinforced by the Constitutional Courts in many a judgment, such as that of *Governing Body of the Juma Masjid Primary School and others v Essay NO and others*;

“Basic education is an important socio-economic right directed, among other things, at promoting and developing a child's personality, talents and mental and physical abilities to his or her fullest potential. Basic education also provides a foundation for a child's lifetime of learning and work opportunities.”

Despite the laws, systems and agents in place to develop, guide and protect the most vulnerable of children, there are many that fall victim to the state's inadequacies.

This is but one example that we at SECTION27 have been involved in: In 2011, a girl who was 13 at the time was threatened at knife point, kidnapped, drugged and raped. All of this took place at the hands of an adult male teacher at her school. She summoned the courage to communicate her ordeal to her family and friends and in 2011, her parents reported the incident to the police. After being medically examined it was found that there had in fact been penetration, in other words he had raped her. The police, however, declined to investigate further on the basis that the girl was not pregnant.

In 2012, she began the school year in the presence of her rapist, despite communicating her trauma to several teachers and the principal. Against legal obligations, the principal sought to mediate internally in efforts to avoid reporting the matter to the Department of Education. In 2012, at the instruction of her legal team, her matter was reported to the department together with the insistence that the teacher be placed on precautionary suspension pending the outcome of the proceedings. Disciplinary proceedings commenced and the teacher was found not guilty of gross misconduct. Disappointingly, one of the reasons included the fact that the young girl took so long to say anything, which was seen as a sign that she “must then have been making everything up”. This is despite the prohibition in the Sexual Offences Act on negative inferences being drawn from the length of time it takes to report a rape. In 2014, following an appeal to the MEC for Education the accused was found guilty of gross misconduct and was dismissed from his position.

From the time the case was opened in 2011, the police investigation saw repeated interference from the investigation officers. This ranged from attempting to convince the young girl's parents to drop the charges, taking the young girl unaccompanied to the scene of the crime and having the dockets transferred between different police stations and investigating officers, which created the need for the girl to provide several statements and relive the trauma of her rape. This unfortunately led to the case being closed in 2013, following a decision that there was insufficient evidence for a successful prosecution.

In November 2015, the case was reopened and after several postponements, the complainant, her mother, her friend, and the teacher accused of raping her were able to testify. On 11 March 2017, the Magistrate handed down a judgment finding the accused not guilty. Reasons included the contradictory evidence given by parties. As twisted fate would have it, the J88 form, which would have been a crucial piece of evidence, was not allowed to be admitted into evidence because the nurse who completed the form was declared unfit. Furthermore, we believe the investigating officers failed to interview witnesses or do much of an investigation at all to collect the necessary evidence. This resulted in the omission of four key witnesses; the child who was with the complainant when she was first called into the accused's classroom and threatened, and three friends who were with her when she was taken into the accused's car.

This story ends ultimately with a girl telling her parents and legal team at SECTION27 that she does not wish to appeal and would like to try and put this all behind her. Why would she want

to anything further? Why would she want to return to courts who have failed her, to the investigators that let her down?

This is a story of a young girl who was let down by the very systems that are meant to be in place to protect her; the teachers who are employed with the duty to impart knowledge and guidance and entrusted with developing young minds; the police who are employed to investigate the crime of rape against a young girl; the prosecutors who failed to use the evidence it had to build a case against the accused and the magistrate who misunderstood the nature of sexual violence cases, drawing inappropriate inferences from lapses in memory.

This set of events took a great toll on this young girl; she could not continue schooling and had to be transferred to another school. This brought with it additional expenses on her parents as well as the added stress experienced by adapting to a new environment. She was severely traumatised and struggled to attend school regularly. She missed days in school to attend disciplinary hearings, assessments, police interviews, court hearings and hospitalisation.

That young girl had communicated to us her aspirations of becoming a doctor. Now, 6 years later, as a 19 year old who should be entering tertiary education, can this become a reality for her? If the teachers, the police and the magistrate performed their duties with the diligence, respect and consideration it requires, then maybe so.

The right to education is not just the right to read or write, it is the right to discover one's environment and more importantly oneself.

The systems have failed this young girl and made it heartbreakingly difficult for her to access this right. This is but one girl who had legal assistance, what about the many who too have come to the same realisation and who suffer in silence without the option of legal assistance? We need to be resolute in insisting that public servants perform their duties and encourage a safe space for victims of sexual abuse to speak out and demand justice against the perpetrators of such crimes.

This is a true story of a young girl who has chosen to remain anonymous.

Education and policies are vital in fight against rape culture

By Kirsten Whitfield

The conversation about gender-based violence by no means began with #MenAreTrash. Many have been breaking the silence and resisting rape culture for decades, but their cries are too often brushed aside or mishandled.

One such site of resistance and neglect in universities Even in the last few years we have seen numerous protests on campuses across the nation, including Rhodes, the Universities of the Witwatersrand, Cape Town, KwaZulu Natal, Pretoria, and others. A common element in all the movements was a group of students and staff calling for much improved and less traumatic institutional responses to on-campus sexual violence.

Most universities have policies and offices in place which are set up to manage cases of sexual violence, and yet there are still too many stories of students attempting to access these support services and being mistreated or having their cases handled poorly, ultimately leading to further trauma on the part of the

survivor. It is probably fair to say that this is also a reflection of what happens to victims and survivors in other places.

Such mismanagement and secondary trauma has led to student groups feeling forced into taking matters into their own hands. The best known case of this is the #RUReferenceList protests, which occurred in response to the publication of a list of alleged perpetrators of sexual violence at Rhodes University, some of which remained on the Rhodes University campus despite serious allegations which were not investigated. The list was shared on social media and became a rallying point for unhappy students aimed at what they felt was the university's inadequate sexual violence policies. These students believed the policies perpetuated victim-blaming and protected the perpetrators of sexual violence. The protests at Rhodes formed part of the group's broader approach to tackling "rape culture" on the campus under the banner of Chapter 2. Section 12 subsection 2, a movement named for the section of the South African Constitution that guarantees "the right to bodily and psychological integrity" for all, a right which is violated by sexual assault, and violated again when accusations of sexual assault are not handled adequately.

Rhodes is not the only university whose student body has come forward to shine a light on the policies of their institutions. A group of University of Cape Town students held several protests in 2015 and 2016 highlighting what they felt were poor policies of the university and accusing the institution of treating students who came forward to report sexual violence, poorly. An anonymously-run blog called [UCT Survivors](#) has been created with first-hand accounts of students containing claims of assault, alleging mismanagement of their cases.

One of the first ports of call for anyone experiencing sexual harassment or assault at UCT is the Discrimination and Harassment Office (DISCHO), an office which came under review in 2015 after being repeatedly criticised for ineffective responses to what a group of students believed was the culture of sexual violence on campus and poor handling of victims' and survivors' cases. The review can be read [here](#). The office and the management structures responsible for them were found to be inadequately meeting the requirements set out in the university's Sexual Offences Policy, Sexual Harassment Policy, and the Policy on Racism and Racial Harassment. Some felt that there was some resistance from DISCHO in response to the review findings, but the office has undertaken to make some changes.

So what are some of the solutions? Firstly, universities need to take responsibility for the failures thus far. In the wake of the protests of the past few years, many universities, like at UCT, have undertaken to review their policies and attempt to address the students' complaints. It is imperative in doing so that students and staff are made fully aware of the policies in place to protect them and even more important that the members of the offices and task forces set up specifically to manage sexual violence are clear on what those policies are and how to adequately put them into practice. It is also important that the complaints of survivors are taken into account and are at the forefront of any changes made to the universities' policies.

One step they can and should take, which goes beyond simply redressing existing policies, is to introduce mandatory, university-wide sexual and gender education in order to challenge and deconstruct the harmful ideologies many students enter universities with. Of course, these ideologies exist far beyond universities and such

education programmes should ideally begin in primary school, but the lessons will need to be learned at every level and for a long time to begin undoing the pervasive patriarchal culture we live under.

There should also be access to well-trained counsellors. There are many well-established gender- and rape-focused organisations in South Africa, such as Rape Crisis, that universities could partner with in learning how to better and more sensitively manage reports of sexual assault so that students cease to have their constitutional rights violated in the place they go to learn and grow.

Universities have a duty to protect the students on their watch and, moreover, they have a responsibility to educate their student body. To educate them on their rights, to educate them on how not to violate the rights of others, to educate them on how to effectively and lawfully challenge the systems that seek to suppress them. Universities can and should take this role seriously.

It is therefore incumbent on universities to amend their policies so that they are guided by the tenets of the South African CRIMINAL LAW (SEXUAL OFFENCES AND RELATED MATTERS) AMENDMENT ACT 32 OF 2007 in order to display and practise a commitment to the protection of their students under the law. In creating their policies it cannot be that they do so without due adherence to this act guaranteed by the constitution, as doing so can be seen as a direct act of impunity which can be constitutionally tested and criminally charged.

Whitfield is completing their Masters degree at UCT and is working as an advocacy officer at SECTION27.

03 SHELTERS

Battered, bruised and nowhere to go? ... Well many more women are in exactly that position

By **Thabang Poee**

On a cold Friday afternoon in June, SECTION27 received a call from a woman who was inconsolable and incoherent. She said she had been sexually assaulted by a family member, had run away and was stranded. We established that she had taken refuge at an old age home in a township near the Vaal but was told she couldn't stay. The social worker on duty was more anxious to get home than to assist.

"Madam, we are not a shelter, we only house old people – she cannot stay here. I REALLY need to go home NOW," she insisted.

We negotiated with her to give us a chance to find alternate accommodation for her before she threw the poor woman out

on the street. Call after call to facilities yielded nothing, either because a facility was too far, they couldn't pick her up or more popularly nobody answered the phone! We resolved to pick her up ourselves and bring her to Johannesburg if there was no other way.

Four hours later, we found a facility able to pick her up, take her to their place and give her trauma counselling.

What this case brought home so sharply is the absolute dearth of places of safety for women who have no place to go when they leave abusive situations.

While we look forward to women's month and the many events that will take place to commemorate the occasion – it is equally important to look at the continued failure of the state to respond to gender based violence and sexual violence against women.

Housed under the Victim Empowerment Programme (VEP) – the availability of shelters for women is a cause of grave concern. The VEP is apparently high on the agenda of the National Crime Prevention Strategy. Leading the programme is the Department of Social Development. The programme covers a wide variety of issues. Alongside it is the implementation of the Domestic Violence Act, led by the Department of Justice. It demands that the Department of Social Development facilitate and fast track the provision of shelters for abused women, as well as ensuring the availability and accessibility of counselling services to women and children. So, with such a clear mandate – why are women still left destitute when trying to escape their violent and abusive partners and circumstances?

Research done by the National Shelter Movement of South Africa, shows the majority of women entering shelters are young, often under the age of 35, have limited education and limited income. Most of them are unemployed and rely on their often abusive partners' financially. Their socio-economic background coupled with the violence means that many survivors of gender based violence have multiple financial, health and legal support needs. In order to provide this support, including for children, shelters need sufficient resources, capacity and the relevant expertise. But for many women, these shelters are far from accessible.

Shelters are an absolutely important point of crisis intervention, they serve as a refuge, a safe space when women and children are extremely vulnerable. They are a base of information for survivors to be empowered about legal avenues available to them. A shelter offers a roof, meals and a location where the abuser cannot reach them.

It also offers them an environment that can encourage a survivor's potential – a space to breathe and re-imagine life alongside those who have gone through similar experiences. It provides a place where they know they are not alone, have hope for a better future as well as new opportunities for children who have witnessed domestic abuse or experienced homelessness as a result of gender based violence. Shelters have the potential to prevent further violence and to promote women's skills so they don't return to violent relationships.

There are too few shelters, they are run by NGOs and partially

funded by the state. They have to rely on donations in order to perform this critical function while the state funding decreases.

In 1998, when South Africa enacted the Domestic Violence Act, many had hoped for a different future. After 20 years, the law is still ineffective; implementation by the state is still poor – leaving women with nowhere to turn when they try to escape abusive relationships. #systemsbeenfailing

Thabang Pooe is a legal researcher at SECTION27.

Transgender sex workers and how the system denies them equality and power.

By Thuthukile Mbatha

Can you imagine what being a sex worker in South Africa is like? You aren't protected by the law, people do what they please with your body. But even more, can you imagine the complexities of being a Transgender sex worker? Your identity is not recognised, you are prodded and abused by your clients, and in the eyes of the police you less of a being

For years, we have waited with baited breath for the National Strategic Plan on HIV, STIs and TB (NSP) to address issues of the HIV epidemic among the key population, specifically sex workers. For years we've spoken of the 90/90/90 targets by 2020 as set by UNAIDS. But every year we fall short, the epidemic continues, and lives are lost.

The NSP states that HIV prevalence among the approximately 150 000 female sex workers in South Africa ranges from 48% to 72%, compared to 14.4% among adult women in the general population.

It makes no reference to transgender people, despite the fact that they are quoted as a key population group in the same document.

In addition, despite the fact that decriminalisation of sex work was contained in two previous versions of the NSP, there is no mention of it in the 2017 version. This despite compelling evidence that shows the benefits of decriminalising sex work which includes confronting police violence and abuse, promoting human dignity, improving working condition and better access to quality healthcare.

On top of that, it is assumed that when we speak of sex workers and the challenges they face, we are merely referring to the cisgender (i.e. someone who identifies with the gender they were assigned at birth), heterosexual women and men who engage in sex work. It is clear that our progression has not moved beyond the boundaries of cisgender people. Even in 2017.

There is a dangerous assumption that the South African health department's sex worker programmes are able to assist all sex workers. However, the reality is that while all sex workers experience tough challenges such as harassment, police brutality, abuse from clients in their line of work, transgender sex workers face even greater challenges including discrimination from society as well as fellow sex workers.

Despite being in an age where information is easily available to most, there are very few organisations that work with trans sex workers. There are a few such as GenderDynamix and Sistazhood, but they are small. These organisations

need more financial support so they can grow and can continue to serve this vulnerable population effectively.

Trans sex workers are often further victimised by the system. In clinics, nurses are reported to have turned transgender patients away and refused to administer hormone and other treatments to assist in medical transition. Under the lofty goal of reaching all key and vulnerable populations with customised and targeted interventions, the NSP undertakes to provide capacity-building programmes designed to improve the skills of health providers to address the needs of key and vulnerable populations. There is no mention of what these programme will entail except to say that there will be a focus on occupational health and infection control for health providers.

According to a report titled *Police Abuse of Sex Workers* published by the Women's Legal Centre in April last year sex workers do not perceive police as mechanisms for protection or redress but rather as perpetrators and abusers.

At the hands of police, transgender sex workers are often brutalised and forced to endure homophobic and transphobic abuse. It is disheartening that in our progressive country, with a constitution that guarantees everyone, regardless of sexuality, gender, social status or age the right to human dignity, equality and freedom, transgender sex workers are still denied access to these.

Furthermore, it is the state's duty to respect, protect and promote the Bill of Rights. It is disheartening that because of the poor response and training of police, most of these

abuses go unreported and are not dealt with accordingly. The system does not work to protect vulnerability, but only further exasperates their vulnerability.

What needs to be done now, is to advocate and take critical steps in addressing the shortfalls of the system, and to decriminalise sex work. There needs to be greater accountability for police who should serve and protect, but instead terrorises the most vulnerable groups in society. Our systems needs to change, they need to be reworked and centred on the realisation that systems should serve and protect the most vulnerable.

Although decriminalisation may not solve all of the problems of police abuse and misconduct, it can empower sex workers to come forward to register complaints against police who act unlawfully, and to bring offenders to justice without fear of negative consequences for their own livelihoods.

Thuthukile Mbatha is a SECTION27 researcher.

Women's Day is not a privilege

By Thabang Pooe & Zukiswa Pikoli

In the midst of all the doom and foreboding news we read every day around the overwhelming violence we as women face, it can be quite hard to see a parting in the clouds revealing optimism. It is however important that we find this optimism in order for us to continue the business of inspiring, empowering and just generally living our best lives. In doing so we need to look to the positive and admirable advances that women around us are contributing to our society daily, in fact we affirm that we too need to aspire to being such formidable women.

There seems to be a pervasive attitude from men that Women's Day is their gift to us and in doing so the damaging patriarchal narrative of women existing at a man's mercy gains legitimacy. It is this narrative that makes men feel they are entitled to sanctioning our actions by beating us when they think we are out of line. It is this narrative that makes figures of authority think that violence against women is only to be paid lip service at official engagements, but when away from the public eye

they flout the law and abuse women with impunity. Yes we're talking about you Deputy Minister Mduduzi Manana.

We need to decentralise men from the discussions on women's self-actualisation and achievement which is imperative to a progressive social discourse around gender. Not doing so maintains the currently unequal gender relations. It is infinitely frustrating that somehow even in the case of gender based violence conversations, men still find a way to steer and shape these discussions. We don't need guidance from men in order to be self-determinate. Women's month and more specifically Women's Day, is meant to remind us of our greatness, our achievements and that among us walk formidable forces of nature. It is imperative that we change the narrative of our power being based on how resilient we are in the face of poverty, pain and trauma often times at the hands of patriarchy.

We must never forget that within every one of us lives the burning spirit to reach beyond ourselves and to contribute equally and indelibly to the tapestry of our country. Therefore our actions should speak to the continued renewal of spirit and undeniable shaping of an ethos that sees and respects women as equal partners in taking South Africa forward.

Last year on Women's Day the women of SECTION27 wrote a letter to the public urging people to remember the many powerful women (both those in the public eye or behind the scenes) that South Africa has known. Both those that have gone before us and those continuing to make significant strides towards our fight for the South Africa envisioned in our democracy.

And that is why we honour Mam Duba, who had to nurse her dying husband after he was retrenched from the mines after decades of service. Mam Duba borrowed money, took a bus from the Eastern Cape and arrived in Johannesburg to find her ailing husband sitting in cold bath water unable to get out because of his health condition. Mam Duba, carried him to the bus station, took him home and took care of him until his death. From housewife to sole provider – Mam Duba works hard to ensure that her children are able to attend school and have a meal to eat. Mam Duba was one of the women activists who spoke out against the mining companies' continued opposition to the silicosis action and demands compensation for her family and thousands of other women and children who have lost fathers, brothers and sons to silicosis.

We honour Mam Sibiya, mother of a child living with a disabilities in Manguzi, KwaZulu-Natal. Mam Sibiya wanted to ensure that her daughter, like other children, gets the opportunity to learn and get an education so that she is able to make something of herself. Mam Sibiya carries her daughter on her back to school and back because she is determined to ensure that her daughter gets to school. Mam Sibiya will not allow the pace of government efforts to get her daughter a wheelchair to get in the way of her child's education. Mam Sibiya is not alone, we honour her together with all the mothers in her position.

We honour Tobeka Daki who was a single mother from Mdantsane township in the Eastern Cape, and was diagnosed with HER2+ breast cancer in 2013. Following her diagnosis, Tobeka was informed that she needed trastuzumab, in addition to a mastectomy and chemotherapy, to improve her chances of

survival. She was denied the necessary medication because she could not afford to buy it. Her cancer spread to her spine and on November 14, 2016 she died in her home. Tobeka advocated strongly for equitable medicine access for all during 2016. In the months before her death, Tobeka led a march calling on the South African government to end delays in reforming South Africa's patent laws to improve medicine access. Tobeka's inspirational leadership continues to inspire activists working on patent law reform to continue fighting for access to affordable medicines.

We honour Justice Leona Theron, recently appointed to the Constitutional Court. Justice Theron joins only two other women Justices on the Con Court bench – which unfortunately continues to be untransformed. When appointed to the KwaZulu-Natal division of the high court in 1999 Theron J became its first black female judge and, at the age of 33, its youngest. Her judgements reflect a deep passion for women's rights and in 2008, she made a judgement which forever protected the rights of women in customary marriages. Prior to her judgement, women in customary marriages could not make a claim on property if they got divorced. The moral of Judge Theron's story is this: Never underestimate the person who is packing your groceries, filling your petrol tank, or cleaning your garden. You could be looking at the next Judge of the Constitutional Court.

We honour Mokgadi Caster Sememya, one of our country and world's most ground-breaking athletes, who despite the many challenges of gender discrimination and prejudice has risen to unfettered heights. Born in the Limpopo village of Ga-Masehlong Caster exploded onto the athletics scene in 2008 when she

participated in the Junior Olympics and won the 800m. Since then she has gone on to win the 2009 World Championships, she achieved silver medals at the 2011 World Championships and the 2012 Summer Olympics, she won gold in the 2016 Summer Olympics and this week won the bronze in the 1500m at IAAF World Championships. She is one of the many South African women inspiring a nation of young girls to reach for the dreams that seem unattainable and shatter expectations.

We honour women from all walks of life, who despite adversities continue to inspire. As women we have to realise that our right to equality is not conferred but innate, when we realise and harness that, none will dare challenge us when we say Sizimbokodo!

Thabang Pooe is a Legal researcher at SECTION27

Zukiswa Pikoli is a Communications Officer at SECTION27

Judicial Discretion in Sentencing Rape

By **Luvo Nelani**

We are once again retreating into our resignation with gender-based violence following the attention recently paid to this scourge, recognising it as a societal ill after the murder of Karabo Mokoena.

Barring our often unending anger at those stories that make the news, there remains our fleeting indignation when the rape of a child is reported, in amongst the detritus of state capture, racist teachers and the humdrum of the rainbow nation. However, in the same ways, the systems in place to respond to gender-based violence will go on failing victims. For one, many courts will continue to mete out partial justice in the service of patriarchy to reinforce the status quo. This will be so, until we say enough, for women everywhere, including those whose stories won't get any media attention.

Section 51 of the Criminal Law Amendment Act ("the Act") prescribes minimum sentences for certain serious offences such as rape. The Act allows judges to use their discretion to deviate from imposing these minimum sentences when substantial and compelling circumstances exist. The Supreme Court of Appeal in *S v Malgas* directed the courts that the prescribed sentences are not be "departed from lightly

and for flimsy reasons". Although the Act, for example, explicitly excludes the consideration of "apparent lack of physical injury to the complainant" as a factor to be taken into account when imposing a sentence in cases of rape, these and other considerations regarding the 'severity of rape' continue to feature in the reasoning employed under judicial discretion to depart from imposing mandatory minimum sentences. In a way, judicial discretion leaves room for reliance on subjective predispositions in sentencing rape, which often has a detrimental impact on rape jurisprudence, gender equality and essentially, the pursuit of justice for victims of rape.

In many courts during sentencing, the consideration of violence (the lack of violence) is still accepted as a mitigating factor, which is ancillary to rape. In *S v Mfnyeza*, for example, the judgement reads under substantial and compelling factors "no physical violence was perpetrated against the complainant at the time of the rape", as if rape is not itself violent. Similarly, in sentencing an accused for the rape of his neighbour's 10-year-old daughter, in *S v Nkawu* the court held "the physical injuries suffered by the complainant were not serious. They are indicative of a relatively minor degree of force being used". Also in this same case, as in many others, the circumstances of the accused, that he was "gainfully employed and supported his family", were considered as one of the "substantial and compelling" factors to justify deviating from imposing the mandatory minimum sentence. The rationale here is baffling and leads me to assume something of the ways we reward 'responsible men'. In Wesley Lowery's *They Cant Kill Us All* he comments on our conception of violence, "we believe that if we can somehow figure out the character and life of the person at the centre of the story, we can somehow understand what happened." In sentencing rape,

the distinction and prioritisation of who people are often perverts the interpretation of the facts and gives weight to subjective ideas of what people deserve, and for example, whether they are even capable of rape, in the ugly ways we think about rape.

These are not unique examples on which the criticism on patriarchy can be made, in the context that the inconsistencies of gender are shaped and distributed by functionaries, who form part of a legitimated system that informs societal behaviour. This is to say that those who form part of the judicial system and are responsible for echoing public right and wrong make decisions that have a material impact on people's lives. As such, the exercise of judicial authority, in the way it produces and entrenches legal and social culture, should be considered against the realities of systematic violence in our society and should be directed to give effect to section 9 of the Constitution to protect and promote gender equality. Especially because, as recognised in *Carmichele* "sexual violence and the threat of sexual violence goes to the core of women's subordination in society. It is the single greatest threat to the self-determination of South African women."

The impact of biased jurisprudence should concern us in light of, amongst others, retired Judge Mabel Jansen remarks indicating that rape is part of the culture of black people. Barbara Fields and Karen Fields' aptly articulate the seriousness of the problem in *Racecraft* saying 'everyone has skin colour, but not everyone's colour counts as race, let alone as evidence of criminal conduct. The missing step between someone's physical appearance and the invidious outcome is the practise of a double standard, in a word, 'racism'. In other words, the way that prejudice functions

is that it paints our bias as reality when we are confronted with a set of facts that fit into our existing narratives about who people are. This predetermination operates to corroborate and legitimise the double standard and has a material bearing on judging and the public. The exercise of judicial discretion should as far as possible be guided to avoid the confluence of partialities and material mitigating factors, whatever those may be.

Pumla Gqola describes this systematic fault fittingly in *Rape: A South African Nightmare* saying "When we make excuses we become the perpetrators and their allies. It is important to redefine what justice means, recognising that it lies not in political speeches, at the mention of non-sexism at the bottom of stationery, for many women it is not in the criminal justice system". Our courts must consistently speak with a definitive and objecting voice against the continued violence on the dignity, bodily integrity and freedom of women, otherwise they too are part of the problem.

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Trauma relived, how the public health system fails victims of gender-based violence

By Vuyokazi Gonyela

When Statistics South Africa released the 2016 Demographic and Health Survey in May 2016, Karabo Mokoena's charred remains had yet to be discovered and Mduduzi Manana had not yet assaulted two women on an average night out. So the statistics released that one in five South Africa women over the age of 18 has experience physical violence did not hit home as forcefully as it should have.

It may have escaped our attention that one in three women in the poorest households had experience physical violence between June 27 and November 4, 2016 when the survey was conducted. But since then, there have been increased reports of GBV and a public outcry. Dialogues have been held, citizens have weighed in on social media, government departments have released all kinds of "plans". Yet when

it comes to accessing health services in the public sector, victims are treated callously and are made to feel shame.

As if the pain, trauma and humiliation of the violence is not enough, it has been reported that survivors of GBV who seek treatment within the public health system are often dismissed with nothing more than painkillers and without the requisite professional and compassionate treatment or counselling.

The failure of government departments to put in place proper prevention programmes and respond meaningfully to gender-based violence (GBV) is too poor to be ignored, even more so within the public health sector (and often the private health sector as well).

The Department of Health as a public entity has a core responsibility to provide treatment to all survivors of GBV and rape. According to the *National Health Act of 2003* the State, must provide-

- pregnant and lactating women and children below the age of six years, who are not members or beneficiaries of medical aid schemes, with free health services;
- all persons, except members of medical aid schemes and their dependants and persons receiving compensation for compensable occupational diseases, with free primary health care services; and
- women, subject to the Choice on Termination of Pregnancy Act, 1996 (Act No. 92 of 1996), free termination of pregnancy services.

It is with this in mind that the *2003 National Management Guidelines for Sexual Assault* state that survivors of sexual assault and rape are encouraged to report to their nearest

health facility within three days of the assault in order to access effective post exposure treatment and support. A further stipulation is that when healthcare providers treat GBV and rape cases, survivors are offered HIV counselling and testing within three days to ensure access to anti-retrovirals. Implementing this requirement however is challenging as some health facilities experience HIV testing kit stock outs and do not provide proper facilities or the necessary counselling.

In a report published by the Treatment Action Campaign in July this year, more 10 clinics in Limpopo province alone were said to be without HIV testing kits. It is important to note that HIV testing is a primary pre-requisite to dispensing medication and without test results, a person is not eligible for Post Exposure Prophylaxis.

If these hurdles to women accessing the proper services, especially in the case of GBV, are not adequately addressed women will continue to be secondary victims of an uncaring system. It is traumatic enough to experience sexual abuse and violence without the compounding trauma of being denied health services due to staff failure to adhere to policy requirements and resource shortages. Therefore the health department as service providers of such a key function should do its job and make sure adequate services are rolled out.

GBV survivors' experiences of seeking health services under such trying circumstances will affect their decisions to access healthcare in the future. If the Department of Health does not prioritize fixing the broken and collapsed health systems, we will have a society that does not choose to seek health

services and as was the days of AIDS denialism, opt for alternative remedies and treatment or simply stay away.

In a society with such high rates of GBV and of HIV infection, the Health Department should be doing everything it can to ensure survivors of assault and sexual violence are given adequate treatment. We cannot fight HIV infection rates without addressing the rampant gender-based violence we face in this country and if survivors are treated poorly by the healthcare system, the battle to combat HIV and STIs and GBV will be futile.

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Challenging systems that entrench the violence of Patriarchy

By Zukiswa Pikoli

Violence: behaviour involving physical force intended to hurt, damage, or kill someone or something.

By that definition alone it is clear that the existence of violence is that, which cannot be politely endured or evoked without due sanction. However the definition would be incomplete without the acknowledgement that there also exists violence that is not of a physical nature. It is a violence that is engendered and engineered in our societal structure and psyches with the same damaging purpose and that system is called patriarchy.

My first experience of witnessing gender based violence was at the age of about seven years old when I saw a male family friend slap his girlfriend because she had done something he did not approve of. Now there were many dynamics that were involved in this altercation such as the age difference (he was almost twice her age), class and wealth (he was wealthy) and of course gender. What I think stuck with me the most, other than the physical slap, was that afterwards they both went on as though nothing happened and the incident was a natural part of coupling and that he had no qualms with a) slapping her b) doing it in public and c) in my full view.

As I cast my mind back to the incident now, I can't help but think that there has to be some sort of encoded messaging that was being passed here in both instances and the more I think about it the clearer it becomes. To my mind he was firstly sending a message to her and the people witnessing, that he was a man protecting his manhood and that no woman could challenge that and if they dared well he'd put paid to that. Secondly he was also subconsciously letting me know that mine was to grow up and never challenge a man and that I had to know my place if I didn't want to meet the same fate.

Patriarchy by definition operates by wielding and maintaining power in the hands of men while women are seen as inferior and therefore have little to no say. They are of lesser value as humans. Women are by gendered strata in the most vulnerable position of being the primary victims of gender based violence because in order for our patriarchal systems of society to thrive violence is a key modus operandi. According to section 9 of our constitution

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

And yet as we have highlighted week by week in our #FAILEDBYSYSTEMS articles women face this exact discrimination and subjugation at the hands of not only men, but systems that violate their rights daily.

It has been my observation that violence seeks to break and bridle its recipients as a way of asserting dominance, inadvertently showing a struggle with the inner self versus the outward one. Truthfully, it is an action that we are all capable of and to varying degrees may practice, particularly when feeling threatened as it is a way of defence and self-preservation.

When looking at specific violence meted upon women such as beatings, rape, psychological warfare and ultimately death, more often than not it is at the hands of partners who claim to love them. It seems the case that men lure women into relationships under the pretext of love and protection only to completely abandon and violate that undertaking.

It is then incumbent on us that we unpack and point out the micro-aggressions that lead to the ultimate brutalities and often fatal violence. You see it is in the things we brush off as minor, such when as a woman enters into a relationship with someone and they cheat on you. Understand that this is a form of violence. When they consistently insist on elevating themselves and their needs above yours, that is violence. When you get into an argument and he physically strikes you 'in the heat of the moment' that is violence. When he controls your movements and won't allow you to see or speak to certain people, that is violence. When you are terrified of upsetting him and play "smaller" than you are, for fear of diminishing his 'manhood', that is violence. The reason why we question and doubt it is because it is a sanctioned and systemic violence that gaslights us into doubting ourselves.

In the build up to and during Women's month we have embarked on a campaign that seeks to challenge and highlight the violence

of systems that are complicit in gender based violence. It is an institutional and systemic undertaking that cannot continue unabated and as such we as women for whom these systems are against, are obligated to rise up and speak out against such systems.

In the past few weeks we have had many women considered to be gender activists turn around and throw women and our collective struggle under the bus in pursuit of self-preservation either for political or financial gain. The Criselda Dudumashes and Minister Bathabile Dlamini (a whole president of the ANC Women's League) of this world. The ones who are meant to be champions of women and their issues are the very ones who are so deep in the clutches of the allure of patriarchy. This is but a reflection of the far reaching effects of indoctrination that finds a way to continue to thrive by ensuring that the oppressed end up oppressing themselves.

It also occurs to me that patriarchy has at its centre the flawed thinking of fulfilling a righteous moral imperative therefore excusing the acts of violence of this system. Nomboniso Gasa recently published an article that asserted that the rule of law is the lowest standard by which to measure one's moral obligation and I found much resonance with that as I let it percolate in my mind. The messaging here essentially says that morality is not attained by punitive measures, but it comes from an inherent sense of right and wrong. It means we must always aspire to doing right regardless of the potential consequences of doing wrong. While we have an inclusive and living constitution it is meaningless without an inherent societal moral compass, we can and must do better.

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