

# **CULTURE, VIOLENCE AND RAPE ADJUDICATION: REFLECTIONS ON THE ZUMA RAPE TRIAL AND JUDGMENT**

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## **ABSTRACT**

*This paper offers contextualised reflections on the role of cultural arguments during the rape trial of South Africa's former Deputy President, Jacob Gedleyihlekisa Zuma. In conjunction with an analysis of International and South African Law on violence against women, it establishes and applies a gender and culture sensitive framework with which rape adjudication and other criminal law judgments can be examined.*

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## **INTRODUCTION**

Starting in November 2005 the newspapers in South Africa have been dominated by reports of the rape case against South Africa's former Deputy President, Jacob Gedleyihlekisa Zuma, which was finally tried in Johannesburg in April 2006. Heightened media attention, including large numbers of photographs, was given to traditionally clothed protesters dancing outside the court house. Following also the debate around cultural argumentations one could get the impression that the whole case is a question of South African culture and tradition opposing institutionalized law. This observation could possibly be even more appealing to observers from Europe, feeding into the questionable but popular belief about postcolonial situations as being characterized by an ongoing struggle between traditions and human rights law.<sup>1</sup>

The starting point for this paper is the question of what role cultural arguments have played in the Zuma rape case, both within the formal proceedings and also in connection to the supporters and the 'trial' outside the courtroom. Considering numerous references to culture in more general assessments on violence against women in South Africa (Röhrs 2005; Schäfer 2005) and around the world (Merry 2006), the importance given to cultural considerations in this trial does not seem to be an isolated case. Before looking at the Zuma rape case in the second part of the paper, I first analyse to what extent cultural arguments are introduced in the laws dealing with violence against women, both internationally and nationally.

While not claiming to accomplish an exhaustive analysis of either the media coverage or the discourse concerning violence against women, the paper offers reflections on both the Zuma trial and judgment by seeing them in the context of the connections South African and International Law makes of culture and violence against women as well as in that of rape adjudication and its critique.

## **CULTURAL ARGUMENTS AND VIOLENCE AGAINST WOMEN**

Following, I give an overview of cultural arguments in International Law as well as South African Law before analysing what these concepts and understandings of culture and tradition imply. Finally, I offer an alternative framing and usage.

### **International Law**

When discussing violence against women (VAW), traditional or customary practices are often referred to as being its root causes or at least cultural justification for violence is condemned (Merry 2006, 26).

Notably, there is no international agreement with hard law character that deals comprehensively with violence against women. Rape is mentioned as a crime against humanity and a war crime in the Statute of the International Criminal Court<sup>2</sup> and the Geneva Convention of 1949 (Art. 27) and can also be recognised as a form of torture prohibited in the Convention against Torture (CAT)<sup>3</sup>.

The 1979 UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), sometimes referred to as the international bill of rights for women, only bears indirectly on the issue of violence against women when referring to trafficking in women, the exploitation of prostitution (Art. 6), and women's equal position in the family (Art. 16). In 1989 the Committee which is in charge of monitoring the implementation of CEDAW and receiving individual complaints<sup>4</sup> issued a General Recommendation (No. 12) on the issue which was elaborated later in 1992 with the General Recommendation No. 19.<sup>5</sup> Para. 11 of the latter states that "[t]raditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles" perpetuate and justify gender-based violence like family violence, forced marriages, dowry deaths, female circumcisions and as a consequence "help to maintain women in subordinate roles and contribute to the low level of political participation and to women's lower level of education, skills and work opportunities". Traditional attitudes are used to explain the prevalence of violence against women and can also be imagined to justify its occurrence.

The Committee dealt with violence against women in preparation of the 1993 World Conference on Human Rights which resulted in the Vienna Declaration and Programme of Action.<sup>6</sup> The latter asks governments to reconcile "any conflict which may arise between rights of women and the harmful effects of certain traditional or customary practices, cultural prejudices and religious extremism".<sup>7</sup> On the international level the issue was further addressed in the Declaration on the Elimination of Violence against Women adopted in 1993 by the UN General Assembly which was also based on Recommendation No. 19.<sup>8</sup> It was later referred to in the Beijing Platform for Action which resulted from the Fourth World Conference on Women and goes even further in urging governments to "[c]ondemn violence against women and refrain from invoking any custom, tradition or religious consideration to avoid their obligations with respect to its elimination as set out in the Declaration on the Elimination of Violence against Women".<sup>9</sup> Within its analysis it concludes that "[v]iolence against women throughout the life cycle derives essentially from cultural patterns, in particular the harmful effects of certain traditional or customary practices and all acts of extremism linked to race, sex, language or religion that perpetuate the lower status accorded

to women in the family, the workplace, the community and society".<sup>10</sup> Again tradition and custom are considered both to explain and being used to justify violence against women. The concept of harmful traditional or cultural practices became especially prominent in describing and criticizing female genital cutting which was first listed as such a practice in the 1998 Resolution on violence against women of the Commission on Human Rights and later joined by other examples.<sup>11</sup>

Besides explaining the continuation of violence against women with cultural arguments, these legal documents describe 'traditional attitudes', 'traditional or customary practices', 'custom', 'tradition' or 'religious consideration' as well as 'harmful traditional or cultural practices' as being characterized by patriarchal structures and the subordination of women which seem to contrast women's rights and gender equality that are depicted as characteristics of the civilized world.

### **South African Law**

Looking into South African Law, I firstly give consideration to the role of customary law and, secondly, shortly touch on national law concerning violence against women. Finally I examine the role of cultural arguments in regional regulations to conclude the description of the broader legal context.

In the South African context one could get the impression that cultural justifications play a more important role, since the Constitution establishes formal structures for traditional authorities<sup>12</sup>, explicitly provides for the application of customary laws<sup>13</sup> and guarantees further cultural rights<sup>14</sup>. Throughout the drafting of the constitution, women's groups were concerned about the relationship between customary law and the right to equality (Kaganas and Murray 1994, 411; Manjoo 2006, 262). The above quoted sections of the Constitution illustrate that customary law was granted the same position as South African civil law and thus remains bound by the Constitution and the Bill of Rights.<sup>15</sup> Justifying human rights violations by reference to cultural or traditional practices should therefore be at least *de iure* impossible. Especially concerning South African customary law both the nature and construction of norms and culture (see part II) play a significant role. It shall suffice here to note that the re-invention of customary law in Southern Africa by traditional leaders together with the colonial authorities has been well documented (Kaganas and Murray 1994, 423) and casts doubt on the unquestioning preservation of cultural practices as 'authentic' ones.

Notably, there are no further references to cultural arguments in relevant national laws. The Domestic Violence Act that was passed in 1998<sup>16</sup> and introduces the possibility of an application of a protection order, does not refer to root causes of domestic violence but only states in its preamble that "there is a high incidence of domestic violence within South African society".

The definition of rape in the Zuma rape case relied on the common law definition which says that "rape consists in intentional unlawful sexual intercourse with a woman without her consent"<sup>17</sup> and obviously doesn't refer to cultural considerations. Nevertheless, cultural beliefs of the accused were considered in deciding on the imposition of a lesser sentence in at least one rape case.<sup>18</sup>

South Africa has ratified CEDAW and its optional protocol as well as several regional agreements like the 1998 SADC (Southern African Development Community) Declaration on the Prevention and Eradication of Violence Against Women and Children and the 2003 Protocol on the Rights of Women in Africa (PRWA) supplementing the OAU (Organisation of African Unity, now African Union (AU)) African Charter on Human and People's Rights (Röhrs 2005, 54-58). Art. 2 para 2 PRWA calls upon states to commit themselves to the "elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men".

Analogous to the discussed references to cultural arguments in International Law, these regional documents depict culture as being one of the root causes of violence against women that have to be eliminated. Again these cultural practices are allegedly characterized by the subordination of women.

These observations reveal a clear rupture between regional and International Law on the one hand and the 'cultural neutral' national laws dealing with violence against women on the other. Against the background of interdisciplinary debates on globalisation (for example Merry 2006, 19) the interaction and interconnectedness of the different levels of regulation would deserve further investigation.

### **Terminology**

Up to now we have encountered several connections that are made between violence against women, culture, tradition and customs without having a clear understanding of what these terms actually mean. There is no definition of 'harmful traditional practices' or 'cultural practices' or 'culture' or 'tradition' or 'customary considerations' in the legal texts discussed above and often they seem to be used interchangeably.

The arguments we have encountered in the legal texts refer to culture or traditions as immutable givens and call for eliminating them. I argue with the legal anthropologist Sally Engle Merry that this points to a rather narrow understanding of culture. Merry describes two common concepts of culture reflected in the legal documents which mirror essentialist assumptions about culture (Merry 2006). She distinguishes between an understanding of culture as tradition and as national essence or identity (in the sense of the German Romantic) (Merry 2006, 92). Merry continues to contrast both with the prevailing understanding of culture within anthropology. The latter concept of culture is a far more dynamic one, seeing culture "as unbounded, contested, and connected to relations of power, as the product of historical influences rather than evolutionary change" (Merry 2006, 15). This understanding of culture moves away from the binary distinction between tradition and modernity inherent in the aforementioned concepts which assume a cultural evolutionism reminiscent of colonial thought.

This wider understanding emphasizes the active making of culture, society and institutions and can therefore be linked to the concept of culture favoured for the legal discourse by Kaganas and Murray (Kaganas and Murray 1994). They refer to Raymond Williams' perspective of culture that explains heterogeneity of cultural practices in society (Williams 2005, 38). He distinguishes the dominant, residual and emergent forms of culture with the dominant culture being a "central system of practices, meanings and values" that are selected

from a range of possibilities and that is in a process of constant modifications (Williams 2005, 38/39). Therefore culture isn't immutable or sacrosanct. Rather it is argued with Hobsbawm (Hobsbawm 1993) that customs and traditions are "constantly invented to serve the interests of particular groups within culture" (Kaganas and Murray 1994, 422). In addition Ranger confirms Hobsbawm's thesis for the African colonial context by stating that both European and African traditions were invented (Ranger 1993).

Adopting this understanding of culture does not preclude cultural criticism. If one intends to criticize certain cultural practices while recognizing the possible cultural imperialism inherent therein, I agree with Renteln that it is necessary to reveal the standards the criticism is based on. Even when taking a cultural relativist stand, one can voice cultural criticism in three possible forms: either one criticizes a cultural practice for not adhering to standards of their own culture (inner standards), or for violating their own standards that are also part of a universal standard or for contradicting the critic's own standard (external standard) as an ethnocentric one (Renteln 1988, 63/64). If we assume that the aforementioned laws intend to engage in such a cultural criticism and also assume just for arguments sake that Human Rights standards are indeed universal and the criticism against practices violating women's rights are therefore based on inner standards, still the references to culture, tradition or customs in general don't reveal the actual morality or value judgment presumed inherent in these cultures. Naming culture as the root cause of the phenomena therefore seems an easy way out to avoid identifying either the criticized or the own cultural standards and thereby refusing to engage in the complexity of the issue.

An-Na'im's argument for a cultural mediation of human rights seems to point into a similar direction. Based on his concept of cultural dynamism which includes the assumption that "powerful individuals and groups tend to monopolize the interpretation of cultural norms and manipulate them to their own advantage" (An-Na'im 1992, 27/28), An-Na'im argues for an internal cultural discourse challenging certain elements of prevailing perceptions of the culture in question (An-Na'im 1999).

Therefore it appears to be crucial to identify the morality or value judgment believed inherent in cultures one intends to criticize or thinks in need of change, instead of culturalizing the unwanted and thereby assuming and implying a certain unnamed and subordinate content of these cultures.

## **THE ZUMA RAPE CASE**

In the following section of the paper I discuss to what extent cultural arguments have played a role in the rape case against Jacob Zuma thereby analysing what understanding of culture and traditions were assumed and how they entered the formal legal proceedings and judgment. I firstly give a brief overview of the uncontested facts and background of the case and course of events, followed by an analysis of the 'trial outside the courtroom' and a discussion of the testimonies, and finally a look at the judgment.

### **Some uncontested facts**

In November 2005 Ms. K<sup>19</sup>, a 31 year old daughter of a family friend and publicly known AIDS activist, laid a charge against the 64 year old Jacob Gedleyihlekisa Zuma, alleging that he had raped her on the night of the 2<sup>nd</sup> November 2005 which she spent at his house in Forest Town, Johannesburg.<sup>20</sup> The case was then tried at the Witwatersrand Local Division of the High Court of South Africa in April 2006 after the recusal of one judge and the non-availability of two deputy judges in February 2006 (Gordin 2006) and ended with the acquittal of Zuma in May 2006.

It is uncontested that Ms. K visited Mr. Zuma on 2<sup>nd</sup> November 2005 in his house in Johannesburg and stayed over night in their guest room. Both sides agree that sexual intercourse had taken place. The exact course of events regarding where the intercourse took place and whether Ms. K consented was in dispute.

Jacob Zuma became Deputy President of South Africa and Vice President of the leading African National Congress (ANC) party in 1999 where he was once the favourite to succeed President Thabo Mbeki after he leaves office in 2009 (Wines 2006a). He was relieved of his duties as Deputy President of the country in June 2005 after corruption charges were laid against him. He had also stepped down from all political offices for the duration of the rape trial (although remaining chancellor of the University of Zululand (Pityana 2006)). He was back in office as Vice President for the ANC after his acquittal in the rape case, but still waits to be called back in office as Deputy President of the country after his corruption case was struck from the court roll in September 2006 (*Mail & Guardian online* 2006).

### **The 'trial' outside the courtroom**

As soon as the official trial began, emotionally charged demonstrations and protests were held outside the courtroom accompanied by a heightened media attention. As the *Mail & Guardian* notes "a few protesters against the abuse of women are drowned out by the noisy Zuma crowd" (Pityana 2006) who focussed some of their attention on humiliating the complainant in the case when burning her picture (Wines 2006d) and holding up placards screaming "Burn this bitch" (Bevan 2006). The power imbalance between the two parties was already reflected in their support and could be well observed in the way the two parties accessed the courthouse: whereas Zuma arrived in expensive state-issue cars accompanied by armed security and cheered by his supporters, the accuser sneaked in under police escort staying anonymous and faceless for her own protection (Pityana 2006). The complainant experienced further private humiliation when her home was burgled and ransacked and she and her mother



were confronted with death threats (Govender 2006), although it is unclear who committed them.

Cultural arguments seem to play a multilayered role regarding Zuma's supporters. By appearing in Zulu regalia, singing traditional Zulu songs while performing traditional dances (Makhanya 2006), the supporters draw on cultural justifications, namely their membership of the same ethnic group, to explain their support. At the same time their support for Zuma as a Zulu-leader relies on an alleged ethnic rivalry between Zulus and Xhosas.<sup>21</sup> Zuma is supposed to represent Zulu interests within the ANC which is alleged to be dominated by Xhosas whose most powerful member is President Thabo Mbeki. A reporter estimated that two-thirds of Zuma's supporters travelled in from KwaZulu-Natal (one of the 9 provinces of South Africa including the areas of the former Zulu "homeland" and founding place of Buthelezi's Inkatha as a Zulu cultural movement in 1922-3 (Worden 2000, 93)). She further reports that many of them were unemployed and all of them convinced that the trial was part of a broader political conspiracy against Zuma led by President Mbeki and his supporters in line with the corruption charges against Zuma (Robinson 2006). Against this background one can understand why the defence team of Zuma asked most witnesses which (ethnic) wing of the ANC they supported as reported by Bevan (Bevan 2006).

Also the crowd's contempt for the complainant seems to be led by this ethnic loyalty where the complainant as a Zulu is reproached by the supporters for not showing solidarity with her Zulu-leader and disregarding her culture with the argument that "[i]n our culture, rape is not a crime." (Bevan 2006). Note that on both sides most supporters were women (Wines 2006c). Vicki Robinson already explains Zuma's supporters in Durban during the Shaik corruption trial, which was related to the corruption charges against Zuma, as being part of an *African traditionalism* referring to the idea of *ukusizelana* ('empathy' or 'mutual help') when supporting their fellow because it is seen as part of an ethnic rivalry and "tradition dictates that helping a friend, as they believe Shaik [the then accused] assisted Zuma, is not a crime" (Robinson 2005).

As cited by Robinson, the independent political analyst Protas Madlala commented on Zuma's speech to his supporters during the Shaik corruption trial: "To the typical Western person, the African person must look very stupid supporting a man charged with corruption. But it's exactly this traditionalism that has been overlooked." (Robinson 2005)

The appearance of T-shirts reading "100% Zuluboy" appearing among the supporters of Zuma outside the courtroom is another manifestation of this traditionalism. They emerged shortly after the intelligence scandal in April 2006 which led to the dismissal of the National Intelligence Agency chief. This scandal involved hoax e-mails that were supposed to reveal a conspiracy of Xhosas against Zuma by pejoratively calling him 'Zuluboy' (Reed 2006).

At least from looking at the trial outside the courtroom, where women's rights activists were opposing Zuma's supporters, the initial notion of culture as being decisive for the case and opposing human rights law could be confirmed. In the usage of the supporters, culture appears to be understood in the sense of tradition, this time used or created by the alleged members of this tradition. Again it is vital to stress the importance of power and interests in creating cultural arguments. It could be asked who the demonstrators actually represent? But it would be beyond the scope of this paper to engage in the controversial discussion among historians about the making of this afore mentioned *African traditionalism*<sup>22</sup>. It is further interesting to note that the supporters were fuelled in their ethnic rivalry by Zuma who often led the crowd



when addressing them in several choruses of an old anti-apartheid struggle song *Awulethu mshini wam* ('bring me my machine gun') (Robinson 2006).<sup>23</sup>

### **Zuma's testimony**

In court Zuma tried to appear as the model of the traditional Zulu man which inspired the journalist Michael Wines to even described him as being "really" Zulu (Wines 2006b). He gave his testimony in Zulu although, as his daughter later confirmed, he normally uses English to communicate and he repeatedly corrected the translator with English terms (Makhanya 2006). One can only speculate on Zuma's reasons for doing so. Since Zulu is one of the eleven official languages recognized by the Constitution (section 6), he had every right to do so. Having to give descriptions of private actions, Zuma turned to a rather patriarchal wording when admitting in Zulu to have entered the accuser's *isibhaya sika bab'wakhe* (her father's kraal) without *ijazi ka mkhwenyana* (the groom/husband's coat) while addressing the judge with *'nkos'-yenkantolo* (king of the court) (Moya 2006).

On several occasions Zuma did refer to Zulu culture when explaining his behaviour. In one of his most contested statements, Zuma turned the well-known and well-trying 'she wanted it argument'(Coughlin 1998, 11/40) into a cultural argument (Wines 2006c). He insisted that the complainant gave him sexual invitations through ending text messages with "love, hugs and kisses"<sup>24</sup> and only wearing a kanga without underwear<sup>25</sup> when going to bed in his house. According to the journalist Wines he also testified that "in the Zulu culture, you cannot just leave a woman if she is ready" and added that denying sex would have led to a high chance of her accusing him of rape (Wines 2006c). This second argument also contains a well-known and age-old rape myth that reminds of the famous story of Potiphar's wife that is, according to Brownmiller, an important morality lesson found as legends in many different cultures (Brownmiller 1975, 22)<sup>26</sup>. Michael Wines even claims that Zuma is arguing here that he is actually persecuted for his cultural beliefs (Wines 2006c). Thereby Wines devotes himself to the image of a clash between culture and human rights by stating that "[i]n South Africa, by far the most Western of African nations, the accord between centuries-old cultures and newer, more European notions of science and law has been both uneasy and unspoken."

In Zuma's usage culture is understood to be fixed, unchangeable and opposing 'modernity' with its human rights laws. Thereby ignoring that the usage of so called modern laws are also part of a culture, maybe a so-called 'human rights culture'. If one recognizes earlier that Zuma changed well-known arguments into cultural ones, then it appears more to be an exploitation of cultural arguments. By understanding culture and traditions as constructs used by particular groups this would then seem to be an attempt by Zuma to create cultural beliefs for his own benefit. The Mail&Guardian seems to share this opinion in its headline "'Zuma culture' not 'Zulu culture'" (Mail & Guardian April 7 to 12 2006).

Although this case of rape does neither fit the assumed specific South African forms of rape (like gang rapes) nor the alleged specific violent appearances of rape<sup>27</sup>, still specific cultural contexts are used for its justification. And it's not the first occasion that Zuma takes part in upholding Zulu culture in order to "shield African values against the corrosive effects of Western civilization", as he emphasized when attending a virginity-testing ceremony last year (LaFaniere 2005).

### **The complainant's testimony and prosecution's strategy**

Part of the state prosecutor's strategy was to establish that the complainant and the accused had a father/daughter relationship. Since the complainant referred to the accused as *umalume* (uncle)<sup>28</sup> one could interpret this argument as a cultural one, although neither the complainant nor the prosecutor explicitly framed the argument as such. Later she explained that she regarded him as a "father" and "big source of support"<sup>29</sup> and that she felt that if she would get married at all, he would be the one in charge of *lobola* negotiations<sup>30</sup>.

When one of the advocates for the state, de Beer, asked Zuma whether in Zulu culture it wasn't inappropriate for the complainant to sleep in the guest room instead of with Zuma's daughter in her room, according to reports Zuma answered that this cultural norm only applied when there was no guest room available (Musgrave and Evans 2006) which is another example of the way in which Zuma created cultural norms suiting his purpose.

There were no further references to cultural arguments when the complainant established that she would not have consented to intercourse without a condom<sup>31</sup>, that she said "no" twice<sup>32</sup> and in cross-examination she replied that she considered herself a lesbian<sup>33</sup>.

## **THE JUDGMENT**

Before looking at the role cultural arguments have played in the judgement, I give a brief overview of the outcome and argumentation of Judge van de Merwe followed by a critical assessment.

### **Summary**

In his final analysis Judge van de Merwe established that he did not "accept the complainant's evidence that there was a father/daughter relationship"<sup>34</sup>. Overall van de Merwe rejected the complainant's version of the events by doubting her credibility on many occasions. Instead, he found the defence's story more compelling and reasonable.

It was the complainant's sexual and mental history that made her claim appear dubious (Wines 2006b). Judge van de Merwe granted leave to the defence to cross-examine the complainant on her sexual history<sup>35</sup> and found the evidence convincing that the complainant had previously made false accusations of rape and furthermore that her sexual past showed that she was (hetero-) sexually active ("She was prepared to have penetrative sex with men on various occasions"<sup>36</sup>) and "not scared to tell men of her sexual needs"<sup>37</sup>. The judge concluded that the complainant was a strong person well able to defend herself and by far not the submissive person she was made out to be.<sup>38</sup>

In conclusion the judge found that consensual intercourse took place and therefore didn't instigate the question of *mens rea*<sup>39</sup>. The accused was found not guilty and was discharged.

### **Critical assessment**

There are a number of statements and arguments in the judgment that are open to criticism. But since I am most interested in the role of cultural arguments, I only briefly hint at those issues that deserved further investigation.

The way in which the complainant was put on trial, treated as a criminal and disempowered is questionable. It is particularly interesting to note that the defining power was taken away from the complainant, especially in regard of her sexual orientation. Although she defined herself as lesbian, the judge repeatedly stated that because of her sexual history "[i]t is clear that the complainant is bi-sexual with a lesbian orientation"<sup>40</sup> and "it cannot be said that the complainant is a lesbian"<sup>41</sup>. Similar, the power to define the relationship between the complainant and the accused, the claimed 'father/daughter'-relation, seemed to lie with the accused or the judge rather than with the complainant.

The important argument that the complainant was found to be prone of making false allegations is further questionable. Without questioning the judge's discretion on what is a proof beyond reasonable doubt, it is unclear why the judge preferred to believe the witnesses who testified that the complaint had made false allegations against them although there were no separate investigations and trials in those cases and in two of the incidents the complainant was still a minor.<sup>42</sup>

It would also be instructive to further analyse the implicit bias against the complainant which could be read in light of the intersection of gender, class and race biases. The complainant

seems to be depicted as having a low level of education (the judge found it noteworthy to stress that the complainant wasn't able to produce a matric certificate<sup>43</sup>) as not having proper employment and furthermore in need of psychological treatment that seems to hint to her lack of credibility for the judge. Otherwise, the judge made no investigation into either Zuma's sexual history, nor into his behaviour towards women nor into his attitude towards using his authority.

Furthermore, the judge seems to rely on several rape myths and assumptions about women, sexuality and rape that also deserve further consideration. The judge agrees with Zuma's daughter in judging the complainants clothing (a skirt without underwear that she seemed to wear for the night) as inappropriate<sup>44</sup> which feeds into the 'she wanted it argument'. The fact that the complainant was not a virgin<sup>45</sup> was brought up, although according to Bruchell/Milton this is irrelevant for defining rape<sup>46</sup>. Reproaching the complainant for not objecting and fighting back against the actions of the accused (although seeming physically able to do so), the absence of physical violence or threat and the failure to make an immediate claim of rape<sup>47</sup> are reminiscent of distinctions between adultery and rape<sup>48</sup> and the 'hue and cry rule'. Also the judge's use of the cautionary rule<sup>49</sup> seems critical.

Many of these issues remind one of critique that has been brought forward against rape law and adjudication since the 1970s that termed this strategy of blaming the women as 'secondary victimization' (Menzel 2003, 205) and might be considered to be overcome in most parts of the world. Recent studies, however, reveal that this secondary victimization still takes place and has not been eliminated by the different rape law reforms.<sup>50</sup>

Last but not least, I want to shortly touch on the fact that the sexual intercourse was unprotected although the complainant was known to be HIV positive and therefore risked a super infection<sup>51</sup>. Zuma used to head the Moral Regeneration Campaign and the South African Aids Council whose prominent message was ABC (Abstain, Be faithful and Condomise) (Govender 2006). Against this background one can understand the public outcry after he claimed that taking a shower afterwards would have helped to prevent him from an infection. Although Judge van de Merwe expressed his disapproval of Zuma having unprotected sex especially with a HIV positive person and thereby putting himself and his multiple wives at risk, he did not consider the gender and power implications of condom usage and the connections between rape and HIV in general<sup>52</sup>.

Some commentators have suggested that a reform of the sexual assault and rape laws that has been discussed and postponed since 1998 would have made an important change for the trial to the benefit of the complainant (Dawes 2006). Without adding to this debate, I want to point out that the Sexual Offences Bill was finally introduced shortly after the trial in June 2006 and has been deliberated till November when it was approved for submission to parliament but not voted on yet<sup>53</sup>. As the final draft bill reversed many of the promising changes suggested in the first draft, the possible improvements remain unclear.

### **A cultural defence?**

Coming back to my starting question on the role of cultural arguments, we do not find any reference to 'culture' in the judgment.

Besides engaging what has been identified earlier as secondary victimization, Judge van de Merwe heavily relied on what he established to be a 'real' and 'reasonable' rapist. In contrast to what Estrich describes as the construction of the 'real rape' by the criminal justice system (Estrich 1987, 3f), van de Merwe works with a construction of the 'real rapist' by deciding that acting like the complainant suggested the accused did would be "foolish for any man"<sup>54</sup> and "even more foolish for a rapist"<sup>55</sup>. Throughout his analysis van de Merwe assumes the accused acted in a rational and logic way appealing to the judge. This reflects the laws attitude to rely on an assumed 'reasonable person'.

It is at this stage of legal considerations that Renteln suggest introducing a formal cultural defence as a partial excuse into criminal law<sup>56</sup>. Without a final decision in favour or against her suggestion, I believe that by ignoring the cultural arguments raised throughout the trial, Judge van de Merwe lost the opportunity to actually engage in an examination of a possible cultural practice and the stance law takes in such a case. By suppressing cultural argumentation and declaring cultural considerations irrelevant, understandings of gender roles and sexuality are more subtly discussed.

Excluding cultural considerations and using 'culture-free' language supports the notion that law is neutral and objective. It thereby hides the fact that the adopted line of argumentation also belongs to a specific understanding of law that represents reflections of 'culture' in the more dynamic understanding that doesn't culturalize the 'other' and can also be termed 'legal culture'<sup>57</sup>. And at the same time, cultural criticism in the above outlined way remains impossible.

For the Zuma rape case this meant that there were no expert witnesses on cultural behaviour (and no other detailed assessment) regarding forced intercourse and any debate about the law's cultural intervention therefore remained speculative. Any informed cultural criticism couldn't be voiced either directed at Zuma's supposed Zulu culture or at the legal culture adopted by Judge van de Merwe. The fact that the judgment did not touch on the question of *mens rea* does not represent a convincing reason for not taking cultural considerations into account.

This absence of cultural arguments in the judgment seems to parallel the observed national law's 'cultural neutrality'. It would be productive to further investigate these ruptures and the similarities between the two levels of regulation (international versus national law) and between the outside and the inside of the courtroom. We therefore need to turn more attention to how legal anthropology makes its subjects in both spheres.

After all, the judgment does not appear to be a reflection of specific South African culture but rather shows a tendency in rape laws experienced around the globe. And therefore present and former critiques of rape laws that are directed against a patriarchal understanding and interpretation of the law and facts in court can be both applied and also understood to represent a form of cultural criticism.

## CONCLUSION

To sum up, we have encountered various different forms in which cultural arguments appear, both in International Law and South African Law, as well as in public debate and the trial testimonies, which were contrasted by the absence of cultural considerations in the judgment and decisive national laws. I have pointed out several risks of these approaches, which are: the risk of culturalizing the unwanted, of essentializing and possibly imposing cultural definitions through the legal texts, the production of cultural arguments and the risk of instrumentalizing these arguments by powerful people or groups of people, while the irrelevance in formal legal proceedings and laws bear the risk of ignoring and neutralizing cultural considerations and influences. I have revealed a parallel in ruptures concerning the appearance of cultural arguments in the laws as well as during the trial and proposed to further examine these observations in the context of studies and concepts on the interface between the global and the local.

Confronted with a static understanding of culture both in using and ignoring cultural considerations, I have argued for a more dynamic understanding of culture in the law that moves away from the binary distinction between tradition and modernity and which assumes a cultural evolutionism reminiscent of colonial thought. Instead of using cultural arguments, it is the value and morality judgments that need to be identified and negotiated.

As for the trial and final judgments, some positive conclusions remain to be added. The case appears to be an exceptional one in many ways. For one it is not representing one of the claimed 'specific' South African forms of rapes that are perpetrated by more than one offender and of particularly brutal nature (Smythe 2005, 168). Concerning the handling of rape allegations in South Africa, official data estimate that only one in 35 rapes is reported (South African Police Service Crime Information Analysis Centre 2004) and Smythe notes that not only a substantial number of cases go unreported but of those reported only 15% are prosecuted of which fewer than half result in guilty verdicts (Smythe 2005, 168).<sup>58</sup>

Against this background the case appears to be a success for South Africa's judiciary (even if it took several judges until the trial could start). Especially in light of the standing of the accused, the fact that the matter came to trial and was tried until a formal judgement and that the application for the discharge of the accused was refused, adds to the positive aspects of the case. From this point of view, the case could even be read in line with the observation of an advancement of both women's rights and gender equality in the last decade of South Africa's new democracy as argued for in the recent essay collection of Murray and O'Sullivan (Murray and O'Sullivan 2006a).

The opposition leader Tony Leon suggested that the trial showed a positive development of South Africa towards a post-racist judiciary, because it has not been doubted that Zuma could receive a fair trial in a white court (Pressly 2006). In light of above mentioned multi-faceted biases, this conclusion remains open for further examination.

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<sup>1</sup> To name just one example reflecting this idea refer to LaFaniere, S. (2005) 'Women's Rights Laws and African Custom Clash', *New York Times*, 30/12/2005: 1.

<sup>2</sup> Art. 7 I g, 7 II f, 8 lit.2 b (xxii) Rome Statute of 1998.

<sup>3</sup> Rape is not explicitly mentioned in the CAT. See United Nations (1998) *Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, Ms. Radhika Coomaraswamy* (submitted in accordance with Commission resolution 1997/44, U.N. Comm'n HR., 54th Sess., Provisional Agenda Item 9(a), pt. III.B.1, U.N. Doc. E/CN.4/1998/54). New York: United Nations, recognizing that gender-based violence violates the right to be free from torture and other cruel, inhuman or degrading treatment.

<sup>4</sup> The Committee was established by the Optional Protocol to CEDAW which entered into force in 2000. Since then the Committee has only received 3 communications from individuals of which the first (July 2004) and third (January 2006) were declared inadmissible. The second one concerned violence against an author from Hungary where the Committee issued views on the violation of Art. 7 para. 3 CEDAW. See for more details <http://www.un.org/womenwatch/daw/cedaw/protocol/dec-views.htm>.

<sup>5</sup> Refer to <http://www.un.org/womenwatch/daw/cedaw/recommendations/index.html>.

<sup>6</sup> United Nations World Conference on Human Rights (1993) *Vienna Declaration and Programme of Action June 1993* (UN Doc. A/Conf.157/24). New York: United Nations.

<sup>7</sup> Ibid. at 38.

<sup>8</sup> United Nations General Assembly (1993) *Declaration on Violence against Women* (GA RES 48/104 (1994), UN Doc A/48/49). New York: United Nations.

<sup>9</sup> United Nations (1996) *The Beijing Declaration and the Platform for Action: Fourth World Conference on Women, Beijing, China, 4-15 September 1995*. New York: United Nations: Strategic Objective D.1. par. 124 lit.a.

<sup>10</sup> Ibid. part D.I. par. 118.

<sup>11</sup> See the latest resolution of the Human Rights Commission on the Elimination of Violence against Women 2005, E/CN.4/RES/2005/41.

<sup>12</sup> Refer to Chapter 12 s 211 and s 212 SA Constitution.

Section 211 SA Constitution reads:

(1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.

(2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.

(3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

Section 212 SA Constitution reads:

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- (1) National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities.
  - (2) To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law
    - a. national or provincial legislation may provide for the establishment of houses of traditional leaders; and
    - b. national legislation may establish a council of traditional leaders.

Section 39 SA Constitution reads:

- (1) When interpreting the Bill of Rights, a court, tribunal or forum
  - a. must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
  - b. must consider international law; and
  - c. may consider foreign law.
- (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
- (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

<sup>13</sup> Refer to s 211 (3) and s 39 (2) and (3) SA Constitution.

<sup>14</sup> Section 30 SA Constitution enshrines rights to language and culture and Section 31 the right to cultural, religious and linguistic communities.

<sup>15</sup> See Felicity K. and Murray, C. (1994) 'The Contest between Culture and Gender Equality under South Africa's Interim Constitution', *Journal of Law and Society*, 21(4): 411; for an explanation of this view in the recent decision of the Constitutional Court (*Bhe v Magistrate, Khayelitsha and others of 2005 1 SA 580CC*) refer to Sibongile N. (2005) 'Human rights, gender and culture – a deliberate confusion?', *Agenda, Special Focus: Gender, Culture and Rights*, 68: 41.

<sup>16</sup> Act 116 of 1998.

<sup>17</sup> See Burchell, J. M. and Milton, J. (2002) *Principles of criminal law*. Lansdowne: Juta: 28 as cited in Röhrs, S. (2005) *Vergewaltigung von Frauen in Südafrika : Primäre, Sekundäre und Tertiäre Viktimisierung*, *Würzburger Schriften zur Kriminalwissenschaft*. Frankfurt am Main: Peter Lang: 76.

<sup>18</sup> *S v Mvamvu* 2005 (1) SACR 54, see Murray, C. and O'Sullivan, M. (2006) 'Brooms sweeping oceans? Women's rights in South Africa's first decade of democracy', in Murray, C. and O'Sullivan, M. (eds) *Advancing Women's Rights - The first decade of democracy*. Cape Town: Juta: 10.

<sup>19</sup> Her name wasn't disclosed by the judge but she is referred to as 'complainant' throughout the judgment. Within the context of violence against women and rape cases in particular, the term 'victim' has often been contested as disempowering and therefore been substituted with 'survivor'. I believe the analysis of language and its role in constructing norms to be an important one and refer to Rayburn's comments on the 'victim/survivor' debate with further references in Rayburn, C. (2004) 'Better Dead Than R(ap)ed?: The Patriarchal Rhetoric Driving Capital Rape Statutes', *St. John's Law Review*, 78(4): 1122.

<sup>20</sup> See *S v Zuma*, JOL 17305 (W), not reportable, 4/6/15 (2006).

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<sup>21</sup> As Desmond Tutu put it, South Africa is a "rainbow nation" with multiple ethnic groupings. Zulu and Xhosa are both ethnic groups considered to belong to the Nguni, one of the four major Bantu groups. See Pabst, M. (1997) *Südafrika, Beck'she Reihe Länder*. München: C. H. Beck: 26.

<sup>22</sup> For an introduction with further references refer to Worden, N. (2000) *The Making of Modern South Africa: Conquest, Segregation and Apartheid*. Malden/ Oxford/ Carlton: Blackwell Publishing: 107f.

<sup>23</sup> Politically it would be highly interesting to closely examine the concepts of state the different groups adhere to. Do their positions mirror the difference between an institutional territorial understanding of state and that of a state of people and groups essentially founded on personal ties, on authority and subordination, leadership and followings?

<sup>24</sup> *S v Zuma*, 70.

<sup>25</sup> *Ibid.* 73.

<sup>26</sup> 1 Moses 39 tells the story of Potiphar's wife who wanted their servant Joseph "to lie" with her. When he refused she accused him of wanting to rape her for what he was taken to prison from where he was freed later with God's help; According to Brownmiller, S. (1975) *Against Our Will: Men, Women and Rape*. London: Secker & Warburg: 22 this legend finds its equivalents in many different cultures and texts like in the Quran, Celtic Myths and others.

<sup>27</sup> Studies suggest that about a third to half of all rapes occurring in South Africa are perpetrated by more than one offender, see Smythe, D. (2005) 'Moving beyond 30 years of Anglo-American rape law reforms: Legal representation for victims of sexual offences', *South African Journal of Criminal Justice*, 2: 167/68. Smythe also stresses the particularly brutal nature of sexual offences in South Africa.

<sup>28</sup> *S v Zuma*, 6.

<sup>29</sup> *Ibid.*, 7.

<sup>30</sup> *Ibid.*, 8.

<sup>31</sup> *Ibid.*, 15.

<sup>32</sup> *Ibid.*, 12.

<sup>33</sup> *Ibid.*, 36.

<sup>34</sup> *Ibid.*, 110.

<sup>35</sup> *Ibid.*, 27.

<sup>36</sup> *Ibid.*, 123.

<sup>37</sup> *Ibid.*, 120.

<sup>38</sup> *Ibid.*, 124.

<sup>39</sup> *Ibid.*, 122.

<sup>40</sup> *Ibid.*, 36.

<sup>41</sup> *Ibid.*, 78/67/122/23.

<sup>42</sup> Makgetla discusses these events in the broader context of violence against women in exile and the ANC's and Truth and Reconciliation Commission's handling of these in Makgetla, T. (2006) 'Zuma trial lifts the lid on gender-based violence during exile', *Mail & Guardian*, 17-23/05/06: 4-5; for a general assessment on women and the TRC refer to Ross, F. (2003) *Bearing Witness: Women and the Truth and Reconciliation Commission in South Africa*. London: Pluto Press.

<sup>43</sup> *S v Zuma*, 119.

<sup>44</sup> *Ibid.*, 114.

<sup>45</sup> *Ibid.*, 42.

<sup>46</sup> Burchell and Milton 2002, 492 cited in Röhrs 2005, 77/78.

<sup>47</sup> *S v Zuma*, 115.

<sup>48</sup> For an informative assessment of the history of rape law and its legacies refer to Coughlin, A. (1998) 'Sex and Guilt', *Virginia Law Review*, 84: 1-41.

<sup>49</sup> *S v Zuma*, 107f.

<sup>50</sup> For a case study on New Zealand and international developments of reform and resistance refer to Jordan, J. (2005) 'Rape, Reform and Resistance, paper represented at the Fourth Australasian women and policing conference : Improving policing for women in the Asia Pacific region, 21-24 August 2005', available from <http://www.aic.gov.au/conferences/2005-policewomen/jordan.pdf> (accessed 05/05/06); for the German context refer to Menzel, B. (2003) 'Vergewaltigung in Urteilen der Strafjustiz von 1979 bis 1996', in Künzel, C. (ed) *Unzucht - Notzucht - Vergewaltigung: Definitionen und Deutungen sexueller Gewalt von der Aufklärung bis heute*. Frankfurt/ New York: Campus Verlag: 217.

<sup>51</sup> *S v Zuma*, 59.

<sup>52</sup> The connection between HIV/AIDS infections and rape are discussed by Leclerc-Madlala, S. (2006) 'The beliefs and behaviours that are driving Aids have to change', *The Sunday Independent*, 12/05/06: 8 and in Röhrs 2005, 192f.

<sup>53</sup> For an overview of the process refer to the Parliamentary Monitoring Group on <http://www.pmg.org.za>.

<sup>54</sup> *S v Zuma*, 112.

<sup>55</sup> *Ibid.*; similar reference to a "foolish rapist" on p. 113.

<sup>56</sup> Renteln argues that the "reasonable person test" needs to be applied in a culturally specific way in Renteln, A. D. (2004) *The Cultural Defense*. Oxford: Oxford University Press.

<sup>57</sup> On the term 'legal culture' refer to Mohr, G. (2004) 'The Concept of Legal Culture. Some Programmatic Thoughts', in Sandkühler, H. J. and Lim, H.-B. (eds) *Transculturality - Epistemology, Ethics, and Politics*. Frankfurt a.M.: Peter Lang: 101-09

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<sup>58</sup> Although South Africa is repeatedly referred to as having the highest rape rate in the world (for example Rayburn 2004: 1142; Smythe 2005: 168), I would like to stress that quick inferences from the high total number of rapes in South African statistics to a South African society that is exceptionally patriarchal in subordinating and violating women have to be dealt with cautiously and are in need of further examination.