



CORRECTIVE RAPE AS AN ANTI-LESBIAN HATE CRIME IN SOUTH AFRICAN LAW: A CRITIQUE OF THE LEGAL APPROACH

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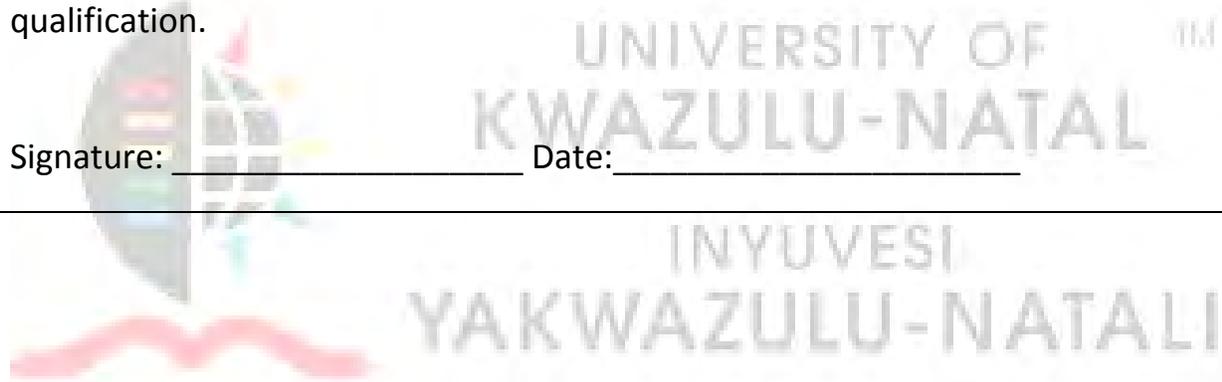
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DECLARATION

I, Nondumiso Tracy Hlongwane certify that the whole Dissertation, unless specifically indicated to the contrary in the text, is my own work. It is submitted as the dissertation component in the partial fulfilment of the requirements for the degree of Masters of Medical Law in the College of Law and Management, University of KwaZulu-Natal.

I declare that this dissertation has not previously been submitted towards my qualification.

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ABSTRACT

'Corrective' rape as an anti-lesbian hate crime in South African Law has not received much attention from authors. 'Corrective' rape is a real practice in South Africa. The need for a closer analysis of the existing legislative framework is necessary to assess the need for further protection for Lesbian women against 'corrective' rape. However, rape in South Africa is a universal issue that does not only affect lesbian women. As this is the case, this thesis proposes the correct implementation of the legislative framework, opposed to enactment of hate crime legislation when it comes to 'corrective' rape, even though 'corrective' rape is a hate crime. Furthermore, the primary issue with 'corrective' rape lies in the nature of the crime, which is the crime of rape recognised and sanctioned under South African Law.

KEY TERMS: 'Corrective' Rape, Rape, Lesbian Women, Sexual Orientation, Human Rights Protection, Constitution, Gender-Based Violence, Hate Crime.

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CHAPTER ONE: INTRODUCTION AND OVERVIEW

1.1 BACKGROUND AND OVERVIEW OF 'CORRECTIVE' RAPE

South Africa has a Constitution that strives for the protection of its citizens from human right abuses.¹ The founding values of the Constitution state that South Africa is founded on; *inter alia*, human dignity, the achievement of equality and the advancement of human rights and freedoms.² South Africa is also a country that upholds international standards of human rights protection. Although violence and discrimination may still exist, the measures in place are purposely sanctioned in order to further these objectives.

Lesbian women, also referred to as “[w]omen who live their lives as lesbians, as lesbian men, as femme and butch mothers, as women loving women who push against the boundaries of who is, and what is, an ‘African’ woman”³ have recently received both media and academic attention due to a crime named ‘corrective’ rape that is purportedly committed against Lesbian women because of their sexual orientation.⁴ ‘Lesbianism’ or a ‘lesbian’ is a woman who is attracted to other women both sexually and emotionally.⁵ Lesbian women belong to a broader community commonly known as the Lesbian, Gay, Transgender and Intersex (LGBTI) community.

¹The Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the Constitution)

²Section 1(a) of the Constitution.

³Z Muholi, ‘Thinking through lesbian rape’ (2004) 117 *Agenda*, 61.

⁴L Mwambene & M Wheal ‘Realisation or oversight of a constitutional mandate? ‘Corrective’ rape of black African lesbians in South Africa’ (2015) 15 *AHRLJ* 58.

⁵ Oxford Dictionaries available on <http://www.oxforddictionaries.com/definition/english/lesbianism> [accessed 23 March 2016].

There is substantial advocacy that South Africa should adopt a separate category of legislation addressing hate crimes or crimes that are motivated by prejudice against an individual, which is not yet a part of South Africa's legislative framework.⁶

The word 'corrective' appears in inverted commas because it is the submission of this thesis that there is nothing 'corrective' about the rape of a lesbian woman, this will be further elaborated in chapter two of this thesis. The motive behind the rape of any victim is effectively a criminal motive deserving of punishment under the law. For example the motive behind raping a baby may be the misconceived idea that having sex with a virgin or a baby will cure the perpetrator from HIV/AIDS.⁷ This motive is no different than that of a person who rapes a lesbian woman in order to punish, cure or correct her sexual orientation. As a result, more particularly for legislative purposes the conceptual distinction between a rape and a 'corrective' rape can be a hindrance to the achievement of rape convictions and the deterrence of rape in society as this will duplicate the law against sexual offences.⁸ However, theoretically 'corrective' rape and rape in the general sense are distinguishable.

This thesis acknowledges that children and men may also be victims of similar offences, but for the purpose of this thesis 'corrective' rape is limited to lesbian women, and more particularly the rape of Black lesbian women as they have become the primary targets of this phenomenon.⁹

⁶ R Brown 'Corrective' rape, a continuing plight despite international Human Rights Response'(2012) *Annual Survey Of International and Comparative Law* 18,1.

⁷ J Flanagan 'South African men rape babies as 'cure' for Aids' (2001) *The Telegraph* available at <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/southafrica/1362134/South-African-men-rape-babies-as-cure-for-Aids.html> [Accessed 21 November 2015].

⁸ Rape Crisis Cape Town trust 'Don't hide Speak Out' (2015.) available at <http://rapecrisis.org.za/rape-in-south-africa/#homophobia-and-rape> [accessed on 16 July 2015].

⁹ Hate Crimes in South Africa; A background paper for the Hate Crimes Working Group, 1 available at <http://www.cormsa.org.za/wp-content/uploads/2010/07/hate-crimes-working-group-background-paper.pdf> [accessed 29 January 2016].

1.2 PROBLEM STATEMENT

The problem with 'corrective' rape is that it is not an isolated crime as it forms part of broader category of the crime of rape.¹⁰ This means that before a 'corrective' rape is considered it is first considered as a general form of rape. Furthermore, 'corrective' rape is located in the broader framework of bias-motivated crimes otherwise commonly termed as hate crimes.¹¹ Hate crimes are not part of the South African legal framework and because of this, 'corrective' rape is not a crime that can be viewed as more than the normal crime of rape.¹²

As a result of the issues that flow from this topic, together with the lack of literature dealing with 'corrective' rape as an anti-lesbian hate crime as well as a gender-based violence in the legal fraternity, this thesis will attempt to answer the following research questions; what is the nature and extent of 'corrective' rape in South Africa? What is the existing legal protection available to victims of 'corrective' rape and whether this form of protection is sufficient or is there a need for hate crime legislation as a number of authors suggest? These questions will be addressed in order to ascertain the adequacy of the existing legislative framework and provide helpful recommendations in addressing 'corrective' rape.

¹⁰ ActionAid. Hate crimes: The rise of 'corrective rape in South Africa. (2009) available at http://rapeoutcry.co.za/home/wp-content/uploads/2012/09/correctiveraperep_final.pdf [accessed 24 March 2014].

¹¹ D Breen & J Nel 'South Africa - a home for all? The need for hate crime legislation' (2011) *South African Crime Quarterly* 38, 1.

¹² Ibid.

1.3 RESEARCH METHODOLOGY

This thesis will use evidence provided in studies conducted by various authors in order to provide a background of 'corrective' rape. The reason behind the researcher's choice of an empirical study is because the nature of the information needed requires evidence in support of the assertions made. Secondly this research is based on experiences of people with the law.

This thesis will use both international and national instruments. The Constitution will be the ultimate source as it embodies both international principles and a national legislation framework addressing crime, which includes 'corrective' rape. Internationally this thesis will use the framework of the Universal Declaration of Human Rights.¹³ This thesis will also gather information from the different conventions that have been formulated as a result, in order to establish the extent of protection afforded to individuals on an international level. Furthermore, this thesis will explore the sufficiency of national legislation, primarily under the framework of the Constitution and the Sexual Offences Act, in order to assess the existing framework and the form of protection that is available to victims of 'corrective' rape. This thesis will also look at regulations and policy documents to assess the adequacy the legal framework. In addition, case law will be used to reinforce the attitude that the courts have on cases that are closely related to 'corrective' rape.

To provide context to the 'corrective' rape phenomenon this thesis will look at the social science discipline found in Criminology, Psychology, Media and Sociology. In addition, media articles such as newspapers and online reports are a great source of information as they carry significant news about the views of the public. Media articles also influence how people think; be it victims or perpetrators. However, it is important to note the limitations that come with the newspapers and news reports such as conflicts of interest, superficial reporting and exaggerated issues to name a few.

¹³ Universal Declaration of Human Rights G.A res 217A (III), U.N Doc A/810 at 71 (1948) (hereinafter referred to as the UDHR).

This research would have reaped better results had there been an existence of legal resources on hate crime and ‘corrective’ rape. Consequently, the analysis is limited by the nature of the resources. Furthermore, the lack of case law which considers ‘corrective’ rape hinders the development of legal resources relating to the ‘corrective’ rape phenomenon.

1.4 LITERATURE REVIEW

‘Corrective’ rape as an issue in South African law has received media attention both nationally and internationally. Although the extent of ‘corrective’ rape has been explored in the sociology and psychology disciplines, there is relative paucity on literature that explores the sufficiency of the existing legislative framework in addressing the nature of the ‘corrective’ rape as a crime of rape.¹⁴ What follows is a framework on ‘corrective’ rape and analysis of a selection of literature dealing with gender-based violence, hate crimes and ‘corrective’ rape in South Africa highlighting the conceptual framework surrounding the issue of ‘corrective’ rape. This section will also discuss research findings on gender-based violence as it relates to ‘corrective’ rape, rape in general and its prevalence in relation to ‘corrective’ rape.

1.4.1 LEGISLATIVE FRAMEWORK

The legislative framework relating to all rape incidences in South Africa is the Constitution and Criminal law (Sexual Offences and Related matters) Amendment Act¹⁵

¹⁴ See K Naidoo & M Karels ‘Hate crimes against black lesbian South Africans: where race, sexual orientation and gender collide (part 1) (2012) *Obiter*, on the different aspects of researches conducted, many of which lend themselves to sociological or psychology studies, 239-241.

¹⁵ Criminal law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (Hereafter referred to as the Sexual Offences Act (2007)).

as well as the regulations and the policy documents that flow from these documents.¹⁶ In addition, the international framework gives a clear indication and a responsibility on the States to act against the abuse of human rights and encourages States to take legislative measures to ensure that these violations are deterred and sanctioned where necessary.

As stated previously, hate crimes, under-which 'corrective' rape falls are not a category of crime under South African law.¹⁷ A number of authors advocate for 'corrective' rape to be labelled under the broader framework of hate crime.¹⁸ Hate crimes are defined as; 'a crime act committed against an individual, organisation or property belonging to an individual or organisation with a motive that is either completely or partially prejudicial.'¹⁹ Another definition defines anti-gay hate crimes as:

"any behavioural expression (verbal and/or physical) that derives from homophobia, prejudice discrimination, stigmatisation or hetero-sexism and is expressed towards homosexual or heterosexual individuals who are erroneously perceived to be gay"²⁰

Hate crimes are distinguished from other crimes because of the motive element that is attached to them.²¹ It is suggested that there are two aspects to a hate crime; firstly when the crime is an incident or an offence on its own without the bias element, this

¹⁶ The Constitution provides for the right to equality (section 9), the right to human dignity (section 10), the right to bodily integrity (section 11) and the right freedom and security (section 12(c)) and the right to bodily integrity (section 14(2)). The Sexual Offences Act (2007) embodies these provisions acting as a form of protection to those who have been sexually violated; there have also been policy documents to effect the rights in the Constitution and the Sexual Offences Act (2007).

¹⁷ S Mayardit 'The state of the state of the world's human rights' (2013) *Amnesty International Report*, 241.

¹⁸ J Thorpe, 'Corrective rape, Hate Crimes and the law in South Africa (2013), 4.

¹⁹ K Naidoo & M Karels 'Hate crimes against black lesbian South Africans: where race, sexual orientation and gender collide (part 1) (2012) *Obiter* at 238.

²⁰ Theron A & Bezuidenhout C 'Anti-Gay Hate Crimes: Need for police involvement to curb violence committed against gays', (1995) paper presented at the Centre for the Study of Violence and Reconciliation Seminar 2, 26 April 1995, available at <http://www.csvr.org.za/papers/papgay.htm> [accessed on 31 January 2016].

²¹ *Ibid.*

category applies to all crimes such as rape or murder when there is some form of bias involved in the selection of the victim on the part of the offender for example where the victim is black, homosexual or foreign, meaning that the offender would not have committed that crime if those characteristics were not present.²²

1.4.2 OUTCOMES FROM STUDIES CONDUCTED IN SOUTH AFRICA

While rape in general is a problem in South Africa, the Joint Working Group (JWG) undertook research which aimed to explore the prevalence, consequences and contributing factors to hate crimes, including 'corrective' rape in the Gauteng Province.²³ The focus of this research is relevant to 'corrective' rape because 'corrective' rape is also seen as a homophobic practice.²⁴ This research found that pupils in schools are also experiencing homophobic victimisation including sexual abuse by other pupils, although the prevalence is more among boys than girls.²⁵ The ultimate result of homophobic victimisation is said to be suicide in this study.²⁶ To take these results as they are is will be inconsiderate as one may argue that sexual violence has a similar effect on all victims. However, this study is useful in evaluating the fear of LGBTI community when it comes to rape.

²² J Thorpe, 'Corrective rape, Hate Crimes and the law in South Africa Research Unit: Corrective rape and hate crimes' (2013) 3.

²³ Joint Working Group, 'Hate crimes against gay and lesbian people in Gauteng: prevalence, consequences and contributing factors' This research was commissioned by the Joint Working Group (JWG) and conducted by OUT LGBT Well-being in collaboration with the UNISA Centre for Applied Psychology (hereafter referred to as; Joint Working Group, 'Hate crimes against gay and lesbian people in Gauteng: prevalence, consequences and contributing factors').

²⁴ T Wesley 'Classifying 'corrective' rape as a hate crime in South Africa' (2012) BUWA, 2.

²⁵ Joint Working Group, 'Hate crimes against gay and lesbian people in Gauteng: prevalence, consequences and contributing factors', 2.

²⁶ Ibid.

A similar study which undertook research on anti-gay hate crimes in South Africa looked at the prevalence, reporting practices and experiences with police in Gauteng.²⁷ This study researched the impact of the existing Constitutional protection on the LGBTI Community.²⁸ The study revealed that in spite of the existence of protection provided for in the Constitution, members of the LGBTI community fear victimization.²⁹ The findings further revealed that homophobic victimization affects different individuals depending on race, gender and economic boundaries, Black lesbian women residing in townships being the primary victims of homophobic victimization.³⁰ Although this research provides insightful information on the issue of 'corrective' rape as a hate crime. The author accepted that sexual offences affect many South Africans, the research focused on the LGBTI community. This study was also limited to one province which may or may not represent the general attitude in South Africa as a whole.³¹

Another study commissioned by the Gay and Lesbian Network located in Pietermaritzburg undertook to explore hate crime and homophobia in 2011.³² This study incorporated different aims with a vision to create a non-discriminatory, supportive and accepting environment which sought to uplift and empower the LGBTI community. Although this study was limited to a small city in the broader South Africa it provides insight on the stereotypes of hate crimes and homophobia.³³ Further, this study documented aims that encourage tolerance and education to the broader society. In addition to awareness, this study concedes to the difficulty that exists in the absence of hate crime legislation to curb incidences of hate crimes such as 'corrective' rape. Interestingly this study revealed that there is no general consensus amongst scholars

²⁷ H Wells and L Polders, 'Anti-Gay Hate Crimes in South Africa: Prevalence, Reporting Practices, and Experiences of the Police' (2006) 67 *Agenda*, 21.

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ This study was limited to a township in Gauteng, compared to the whole of South Africa, this view, although relevant cannot be held as conclusive.

³² V Stephen 'An exploration of Hate Crime and Homophobia in Pietermaritzburg, KwaZulu-Natal' A research report commissioned by the Gay and Lesbian Network (2010).

³³ *Ibid.*, 7.

on what exactly constitutes a hate crime.³⁴ In addition, this study revealed that the most prevalent form of homophobic victimisation is verbal abuse and intimidation.³⁵ It is, however, worth noting that although there is 'corrective' rape as a form of homophobic victimisation, this study indicated that 'corrective' rape is not the most prevalent practice against lesbians in Pietermaritzburg. The author also provides important recommendations to hate crime address. The author states that from the study 84% of the participants suggested that education will be a suitable course of action, educating both the LGBTI community and the community as a whole through different programmes.³⁶

The survey conducted in 2003 by the *South African Social Attitudes Survey* undertook to investigate the views of a selected group of South Africans on their belief and feeling towards the same-sex relations between two adults.³⁷ The findings revealed that the majority of the people answered that these relations are always or almost always wrong.³⁸ These findings are crucial in locating the attitudes of the majority of the people which may be a justification for the intolerance among the people.

Analysis of findings

The abovementioned studies all offer a sociological theory relating bias-motivated crimes. Although Wells and Polders and the Joint Working Group provide very useful factors on bias-motivated perceptions and practices, they barely address the issue of 'corrective' rape in the context of South Africa. Emanating from both these studies the existence of 'hate' or bias against homosexual individuals is established, however not as far as they relate to 'corrective rape'. The study commission by the Gay and Lesbian Network seems to provide an insufficient address to bias-motivated crimes as they

³⁴ Ibid, 27.

³⁵ Ibid, 34-35.

³⁶ Ibid, 53.

³⁷ B Roberts & V Reddy 'Pride and prejudice: Public attitudes toward homosexuality' *South African Social Attitudes Survey* (2003), 10.

³⁸ Ibid.

relate to lesbian women, more pertinently corrective rape. The author acknowledges the existence of such a practice through the participants to the study, but the analysis of the legal implications is lacking. The results from the South Africa Attitudes Survey are important in terms of the views of society on lesbian relationships, however, this cannot be the basis to rely on when assessing the prevalence or the existence of corrective rape.

In conclusion, it is clear that through empirical studies, 'corrective' rape is real but is not necessarily the most prevalent form of hate crime against lesbian women in South Africa.

Media Reports and 'corrective' rape incidences

Media articles have exposed the realities of 'corrective' rape and its prevalence within the patriarchal townships in South Africa. One of the cases of 'corrective' rape that received media attention both in South Africa and abroad was the gang-rape and murder of Eudy Simelane, a well-known South African female soccer player who played for the national team called Banyana-Banyana.³⁹ In 2009, it was reported that the soccer player was openly lesbian and was therefore targeted, raped and murdered. It was further stated that the soccer player was a passionate equality rights activist.⁴⁰ *Human Rights Watch* reported that although a case of rape and murder was opened, the judge was not willing to accept allegations that the motive behind the rape and murder were based on the victim's sexual orientation.⁴¹ In the context of this incidence a classic case

³⁹ *Raped and killed for being a lesbian: South Africa ignores 'corrective' attacks* available at <http://www.theguardian.com/world/2009/mar/12/eudy-simelane-corrective-rape-south-africa> [Accessed 16/05/2014]. Also see *Call for action against the brutal rape and murder of Noxolo Nogwaza* available at <https://iglhrc.org/content/call-action-against-brutal-rape-and-murder-south-african-lesbian-noxolo->

⁴⁰ A Kelly 'Raped and Killed for being a lesbian: South Africa ignores 'corrective' attacks' *The Guardian* 12 March 2009 1, available at. <http://www.theguardian.com/world/2009/mar/12/eudy-simelane-corrective-rape-south-africa> [Accessed on 22 May 2014].

⁴¹ Human Rights Watch Report 'We Will Show You You're a Woman - Violence and Discrimination against black Lesbians and Transgender Men in South Africa (2011) 76.

of 'corrective' rape can be concluded, because the sexual orientation of the victim was known to the perpetrators and the circumstances around her rape lend themselves to an anti-lesbian hate crime.

Similarly, the case that initiated the 07-07-07 Campaign involved Sizakele Sigasa & Salome Massooa a lesbian couple who were raped and killed because of their open homosexual relationship.⁴² Sigasa and Massooa were raped in Soweto, a well-known township in Gauteng on the 7th of July 2007.⁴³ Likewise, Sigasa was a well-known activist for gay and lesbian rights; she was also openly opposed to rape and is reported to have on the frontline the campaigns on rape.⁴⁴ It was reported that their rape and murders lent themselves to the on-going 'corrective' rape issue.⁴⁵ These cases have been reported in an International report, which has an effect of exposing to the world the state of the country's gender-based violence issue.

Societal Framework on 'corrective' rape

It is argued that a threat to male dominance is the problem that leads to hate crimes such as 'corrective' rape as some of the lesbian women adopt an appearance and a behaviour that is primarily attributed to men.⁴⁶ Due to the nature of the practice of 'corrective' rape, it has also been a crime that is said to be most prevalent in black lesbian women.⁴⁷ The reported victimisation of black lesbian women is said to be disproportionate compared to victims belonging to other races.⁴⁸

⁴² Human Rights Watch Report 'We Will Show You You're a Woman - Violence and Discrimination against black Lesbians and Transgender Men in South Africa (2011) 75.

⁴³ Ibid

⁴⁴ ActionAid. Hate crimes: The rise of 'corrective rape in South Africa. (2009) available at http://rapeoutcry.co.za/home/wp-content/uploads/2012/09/correctiveraperep_final.pdf [accessed 24 March 2014].

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ A Nel & Judge 'Exploring Homophobic Victimisation in Gauteng, South Africa: Issues, Impacts and Responses' *Acta Criminologica* 21(3) 2008, 23.

⁴⁸ Ibid.

Legislative responses to ‘corrective’ rape

The need for a legislative response in addressing the issue of ‘corrective’ rape has been advanced by a number of authors. More pertinently the Department of Constitutional Development must consider whether the country is at a stage where a new substantive offence can be enacted or the existing legislative framework may incorporate the idea of hate crime.⁴⁹ In considering this the legislature must reconsider the definition of motive and distinguish the pure motive crimes and the bias-motivated crimes to avoid associations, affiliations and mistakes.⁵⁰

These considerations present different predicaments to both the administrators of the law and the adjudicators. *Thorpe* highlighted the strengths and the weaknesses of each consideration and concluded the new substantive offence in a potential ‘corrective’ rape will exacerbate an already distorted issue of sexual offences.⁵¹

It has been suggested that in an instance where the legislature is faced with the predicament of changing the law or the attitudes of people in society, it is preferable and beneficial to change the law.⁵² This follows the idea that changing the law attaches more attention from society and thus penalty enhancement is a better way of addressing ‘corrective’ rape.⁵³ This advancement to enhance the aggravation in sentencing may contain plausibility opposed to an enactment of a new law.

In light of the body of literature, it appears as that the debate whether ‘corrective’ rape should be treated differently from the crime of rape as recognized under the Sexual

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² J Thorpe, ‘Corrective rape, Hate Crimes and the law in South Africa (2013), 4.

⁵³ Ibid.

Offences Act.⁵⁴ This is not settled amongst the authors and moreover, the perspective that is prevalent among authors reflects a sociological and psychological angle. The paucity of a legal approach and evaluation of the law and its sufficiency still requires more in-depth examination, exercising caution and exploring possibilities and alternatives to address the problem of ‘corrective’ rape. This thesis leans more towards the latter view, although without denying the prevalence and the intensity of ‘corrective’ rape and hate crimes as a whole. It thus remains for the purposes of this dissertation that evidence of hate should only be led, if at all after a guilty verdict has been handed down on a perpetrator.

1.5 OVERVIEW OF CHAPTERS

Chapter One

The aim of this chapter was to introduce ‘corrective’ rape as a hate crime in order to provide the reader with the general understanding of the issue and provide the background to the topic. It also intended to contextualise ‘corrective’ rape in South Africa by recognising the problem and the issues that flow from it. Further to this, it has looked at techniques that are employed to aid this research, highlighting the strengths and the weaknesses of the nature of the sources used. This chapter also provided the reader with a theoretical framework on ‘corrective’ rape by reviewing the existing body of literature. Finally, chapter one provides an overview of the chapters that will follow.

Chapter two

Chapter two will explore ‘corrective’ rape in South Africa in depth. As ‘corrective’ rape is a form of a gender-based violence this chapter will provide a brief context of this aspect. This chapter will also draw from previously reported ‘corrective’ rape incidences in the media in order to evaluate the nature and the extent of ‘corrective’ rape in South Africa.

⁵⁴ Criminal Law (Sexual Offences and Related matters) Amendment Act 32 of 2007.

Chapter three

Chapter three will look at the International protection against discrimination. This chapter will draw from provisions of various international instruments in order to establish whether the existing protection against discrimination is wide enough to protect sexual minorities and more specifically lesbian women in South Africa on an international level.

Chapter four

This chapter will explore the Constitution and the Sexual Offences Act, in order to establish the protection of victims of rape. This chapter will also draw from cases dealing with the Act to identify the intention of the legislature in enacting this Act; in addition, there will be an analysis of the extent of protection provided thereunder. This chapter will also look at policies in South Africa that embody the idea of 'corrective' rape as well as an analysis of the sufficiency of the law in this regard.

Chapter five

The final chapter will then draw conclusions from the findings of chapter two, three and four and put forward recommendations that may be effective and helpful in addressing 'corrective' rape.

CHAPTER TWO: 'CORRECTIVE' RAPE IN SOUTH AFRICA

2.1 DEFINING 'CORRECTIVE' RAPE IN THE SOUTH AFRICAN CONTEXT

In defining 'corrective' rape it is imperative to explore these two words in order to provide a broader approach to the origin of this term. The word '*corrective*' according to the Oxford Dictionary is an adjective used to describe something that is intended to 'correct' or 'counteract' something harmful or detrimental.⁵⁵ By naming a specific offence as 'corrective' creates an impression that the crime has some positive effect on the victim.⁵⁶

The Criminal Law (Sexual Offences and Related matters) Amendment Act enacted by the legislature in 2007 defines rape as the unlawful and intentional commission of an act of sexual penetration with a complainant by any person.⁵⁷

The South African term 'corrective' rape is given to a sexual offence that is committed particularly against lesbian women. This purportedly perpetuating phenomenon, also known as "curative rape" or 'lesbian rape' is well-defined by Wesley as "... a brutal act of violence in which African women and teenagers who are, or are at least assumed to be, lesbians are raped to 'cure' them of their homosexuality."⁵⁸ Flowing from this definition, the distinguishing factor of 'corrective' rape from a normal crime of rape is that in the commission of 'corrective' rape there is an additional motive to "cure" a lesbian woman's sexual orientation. The apparent presumption from the definition of 'corrective' rape is that lesbian women require sexual experience from the opposite sex to be cured of their lesbianism. In addition, lesbianism appears to be a disease that needs 'curing' and raping the lesbian women will turn her into a heterosexual.

⁵⁵ *The South African Pocket Oxford dictionary*, 2nd ed (1994) 203.

⁵⁶ D Robertson, 'South African Lesbians Targeted for Rape and Violence' (2011) Available at: <http://www.voanews.com/english/news/africa/South-African-Lesbians-Targeted-for-Rape-and-Violence-114495619.html> [Accessed on 21 November 2015].

⁵⁷ Section 3 of the Sexual Offences Act.

⁵⁸ T Wesley 'Classifying 'corrective' rape as a hate crime in South Africa' (2012) BUWA, 2.

Another definition refers to 'corrective' rape as a hate crime exercised to convert lesbian women to heterosexuality which is an attempt to 'cure' them of being gay.⁵⁹ This definition identifies 'corrective' rape as a hate crime aimed at curing the lesbian's sexual orientation. This definition is more preferable in this thesis because it refers to 'corrective' rape as a hate crime.

It is submitted that there are several technical issues that flow from the definition of 'corrective' rape. Firstly it suggests that the perpetrator must have a subjective intention (motive) of punishing, curing or changing the sexual orientation of the women which is a very difficult element to prove.⁶⁰ Since motive, by its very essence, is a word used to refer to the reasons that 'causes' a person to do something, the motive to cure or correct must be the determining factor in a 'corrective' rape, if the motive was a contrary one then the rape cannot be viewed as a 'corrective' rape.⁶¹

Secondly, the definitions of 'corrective' rape come across as gender-specific. The primary perpetrators are described as often African males opposed females, the victims are generally African and identify as lesbian.⁶² This means that heterosexual women are excluded from being potential perpetrators or accomplices of the crime of 'corrective' rape under the definitions provided.

An accomplice is essentially;

⁵⁹ P Strudwick 'Crisis in South Africa: the shocking practice of 'corrective' rape aimed at curing lesbians' (2014) *The Independent*, 04 January 2015 available at [http://independent.co.uk/news/world/africa/ Crisis in-South-Africa: -the-shocking-practice-of-corrective-rape-aimed- at-curing-lesbians- html](http://independent.co.uk/news/world/africa/Crisis-in-South-Africa:-the-shocking-practice-of-corrective-rape-aimed-at-curing-lesbians- html) [Accessed 12 June 2015].

⁶⁰ K Naidoo & M Karels 'Hate crimes against black lesbian South Africans: where race, sexual orientation and gender collide' (part 2) (2012) *Obiter*, 603.

⁶¹ The free dictionary; available on <http://www.thefreedictionary.com/motive> [accessed on 25 January 2016].

⁶² Because the definition of rape in the Sexual Offences Act is not gender specific, it is clear that women are not excluded from being perpetrators.

‘a person who does not satisfy the requirements for liability in respect of a crime, but unlawfully and intentionally furthers the commission of the crime by somebody else’⁶³

The definition’s failure to take this into consideration presents a pitfall as it is clear that a heterosexual woman can also be an accomplice to ‘correct’ rape. Furthermore the definition of penetration in the Sexual Offences Act makes distinction between penetration involving the genital organs of the perpetrator and penetration effected by the use of objects.⁶⁴ It is clear from the definition of rape in terms of the section 3 of the Sexual Offences Act; penetration does not exclude a female from being a perpetrator or an accomplice to rape. This in effect renders the definition inadequate to say the least.

Furthermore, the perpetrator must know or perceive the victim as a ‘lesbian’ and thereafter take action to change her actual or perceived sexual orientation. It is submitted that some women may appear lesbian when they are heterosexual and some may appear heterosexual when they are in fact lesbian, thus making the determination of the sexual orientation of the perpetrator dependent on whether the perpetrator took these factors into consideration before the commission of a ‘corrective’ rape as the perpetrator may or may not know that the victim is a lesbian woman. This then means that if the perpetrator failed to consider the sexual orientation of the victim during the commission of the rape, it cannot be a ‘corrective’ rape.

Thirdly the term ‘corrective’ rape is obstructive because it suggests that there is a remedial effect that flows from rape. There is no such effect and thus, this term is counter-productive and should be revised.⁶⁵

2.2 GENDER-BASED VIOLENCE

‘Corrective’ rape is also a form of gender-based violence.⁶⁶ Various definitions of the term ‘gender-based violence’ highlight different aspects of gender-based violence for

⁶³ C Snyman, *Criminal Law 5 ed Juta* (2008), 258

⁶⁴ Section 1(1) of the Sexual Offences Act (2007).

⁶⁵ Robertson, D ‘South African Lesbians Targeted for Rape and Violence’ (2011).

different underlying reasons. According to the Human Rights Watch report, gender-based violence is defined as:

“Violence directed against a person on the basis of gender or sex. Gender-based violence can include sexual violence, domestic violence, psychological abuse, sexual exploitation, sexual harassment, harmful traditional practices, and discriminatory practices based on gender. The term originally described violence against women but is now widely understood to include violence targeting women, transgender persons, and men because of how they experience and express their genders and sexualities.”⁶⁷

This definition clearly refers discrimination against individuals who express their gender and sexualities, a category in which lesbian women who are sexually violated, fall under. This definition is a gender neutral definition that does not differentiate between gender-based violence against men or women. The term ‘person’ is relevant to all people despite their sexual orientation. Although this definition is important to consider when looking at gender-based violence, the alternative is the definition provided by the United Nations Convention on the Elimination of All Forms of Discrimination against Women⁶⁸ (CEDAW). The CEDAW⁶⁹ provides that:

“Violence against women shall be understood to encompass, but not be limited to, the following:

- (a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;
- (b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;

⁶⁶ K Naidoo & M Karels ‘Hate crimes against black lesbian South Africans: where race, sexual orientation and gender collide (part 1) (2012) *Obiter*, 236.

⁶⁷ Human Rights Watch Report ‘We Will Show You You’re a Woman - Violence and Discrimination against black Lesbians and Transgender Men in South Africa (2011) 76.

⁶⁸ Convention on the Elimination of Discrimination against Women, 18 December 1979, 1249 UNTS 13 (hereafter referred to as CEDAW).

⁶⁹ Declaration on the Elimination of Violence against Women, 20 December 1993, A/RES/48/104.

(c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.”⁷⁰

This definition is comprehensive and elaborative as it outlines a wide range of violence against women including rape. Moreover, this definition forms a foundation for the protection of women against rape as a form of gender-based violence on an international level, however this definition does not directly refer to sexualities and genders compared to the one advanced by the Human Rights report.

Gender-based violence in the form of rape has received considerable research opposed to rape against lesbian women specifically among authors in South Africa.⁷¹ The rape of lesbian women is an issue under the broader framework of rape and thus, an understanding of the nature of rape is important in considering the position of lesbian women as they have not been visible in their identity due to the history of apartheid and patriarchy in South Africa with continuing challenges.⁷² In addition, it has been suggested that gender-based violence is the major marking of South Africa nationally and abroad.⁷³

The victimisation for ‘corrective’ rape is on two levels. Firstly, as defined above the primary victims are females being victimised by males. Secondly, these females identify as homosexual individuals and the perpetrators are identified to be heterosexual African male. According to *Bonthuys*, the sexuality of homosexual people is still difficult to accept by many societies in South Africa.⁷⁴ This is because perceptions on homosexuality are largely influenced by the denotations assigned by class, race, colonialism and religion in different societies.⁷⁵ Although the Constitution embraces

⁷⁰ Ibid.

⁷¹ K Naidoo & M Karels ‘Hate crimes against black lesbian South Africans: where race, sexual orientation and gender collide (part 1) (2012) *Obiter*, 236.

⁷² Ibid.

⁷³ Ibid.

⁷⁴ E Bonthuys & C Albertyn *Gender, Law and Justice* (2007) 25.

⁷⁵ Ibid.

diversity, societies are not as tolerant of sexual minorities as they ought to be under the democratic South Africa.⁷⁶

It has been argued that from a legislative perspective it is not important to distinguish between sex and gender because when dealing with lesbian women, although their gender identity is important, their sex identity is more important as they still identify as female biologically and are thus entitled to the same human rights consideration as their heterosexual counterparts.⁷⁷

Homophobia plays a great role in the perpetration of 'corrective' rape. Whilst homophobia is a relative term that should be used with caution, *Fyfe* suggests that the term 'homophobia' has been defined differently by authors.⁷⁸ Despite this consideration homophobia is defined and commonly understood as "acts of prejudice that are motivated by the sexual orientation of individuals and groups."⁷⁹ This general understanding accommodates bias-motivated crime and is imperative in dealing with human rights issues facing lesbian women, particularly under gender-based violence. 'Corrective' rape is a form homophobic victimisation as the definition of 'corrective' rape is motivated by the sexual orientation of the victim, however in it is best to view or as a gender-based violence in certain instances as those mentioned above.

It is submitted that 'corrective' rape must be viewed as a gender-based violence. Within the complexities of homosexuality and bias-motivated crimes, it is undesirable to isolate 'corrective' rape. This approach will encourage unity in diversity as well as inclusion and tolerance amongst society.

⁷⁶ *South African Social Attitudes Survey*, op cit, 10.

⁷⁷ K Naidoo & M Karels 'Hate crimes against black lesbian South Africans: where race, sexual orientation and gender collide (part 1) (2012) at 238.

⁷⁸ B Fyfe, "Homophobia" or Homosexual Bias Reconsidered' (1983) 12 *Archives of Sexual Violence* 549.

⁷⁹ Ibid.

2.3 DEFINITION OF HATE CRIMES

The American Association defines a hate crime as a crime act committed against an individual, organisation or property belonging to an individual or organisation with a motive that is either completely or partially prejudicial.⁸⁰ Another definition defines anti-gay hate crimes as:-⁸¹

‘any behavioural expression (verbal and/or physical) that derives from homophobia, prejudice discrimination, stigmatise or heterosexism and is expressed towards homosexual or heterosexual individuals who are erroneously perceived to be gay.

A Hate crime requires that the behavioural expression be induced by homophobic discrimination or prejudice. As this is the case, under the South African law, motive is irrelevant as an element in establishing whether an accused person is guilty.⁸² The reason for this is that motive is a subjective element only known to the accused at the time of the commission of the crime. A perpetrator may also have multiple motives in the commission of one crime. However motive does play a role in sentencing to reveal aggravating or mitigating circumstance.⁸³ As this is the case, hate crimes are not part of the South African legislative framework.⁸⁴

There are divided opinions amongst scholars in the recognition of hate crime in South Africa. Supporters for the enactment of hate crime legislation highlight that there is a need to have a separate category of crimes in order to directly address bias-motivated crimes.⁸⁵ The reason put forward for this is that this will provide a separate avenue for all victims of bias-motivated crimes to approach, as opposed to the legislative

⁸⁰ Cf 11 cited in K Naidoo & M Karels ‘Hate crimes against black lesbian South Africans: where race, sexual orientation and gender collide (part 1) (2012) *Obiter* at 238.

⁸¹ A Theron & C Bezuidenhout, ‘Anti-Gay Hate Crimes: Need for police involvement to curb violence committed against gays’ (1995) *Centre for the Study of Violence and Reconciliation* available at <http://www.csvr.org.za/wits/papers/papgay.htm> [accessed 23 March 2016].

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ R Brown, *op cit*, 1

framework that is in place for all victims of crime.⁸⁶ Those who oppose this view suggest that there is no need to enact a separate category of crime as the distinction between the principal crime and the motive is difficult to prove in a country that is already compromised by crime.⁸⁷

Hate crimes are distinguished from other crimes because of the purported motive element that is attached to them.⁸⁸ It is suggested that there are two aspects to a hate crime; firstly when the crime is an incident or an offence on its own without the bias element, this category applies to all crimes such as rape or murder and secondly when there is some form of bias involved in the selection of the victim on the part of the offender for example where the victim is black, homosexual or foreign meaning that the offender would not have committed that crime if those characteristics were not present.⁸⁹

Hate crimes are also regarded as 'message crimes' as the crime committed is not only directed at the victim but also to the community to which the individual belongs to and may be perceived as a threat. 'Corrective' rape falls within the ambit of hate crimes.⁹⁰ This is because 'corrective' rape is a hate crime because it is a 'sexual violence perpetrated for the purpose of correcting or curing the actual or the apparent sexual orientation of the victim'. The main purpose for correctively raping the Lesbian is supposedly to cure her or correct her of her abnormal sexual orientation.⁹¹ This in effect, reveals the hate element to the commission of the rape. It is submitted that this further suggests that the rape would not have occurred had the person been a heterosexual women opposed to a Lesbian.

⁸⁶ Ibid.

⁸⁷ B Dixon & D Gadd 27. Dixon B & Gadd D 'look before you leap, hate crime legislation reconsidered' (2011) SACQ 40, 27.

⁸⁸ Ibid.

⁸⁹ Thorpe, op cit, 3.

⁹⁰ Ibid.

⁹¹ Ibid.

2.4 THE NEED FOR HATE CRIME LEGISLATION

The need for a legislative response in addressing the issue of ‘corrective’ rape has been advanced by a number of authors. According to *Thorpe* the Organization for Security and Cooperation in Europe (OSCE) formulated five enquiries that should be made before formulating a legislative response to hate crime.⁹² The first consideration is that whether the country is at a stage where a new substantive offence can be enacted or the existing legislative framework may incorporate the idea of hate crime.⁹³ This consideration is most relevant in South Africa. *Thorpe* is correct in concluding that South Africa does not have the capacity to adjudicate on hate crime legislation. This however, does not exclude future considerations in addressing hate crimes specifically.⁹⁴ More appropriately, *Thorpe* recommends that sentence enhancement provisions would be appropriate in South Africa.⁹⁵ Although the recommendations by *Thorpe* are commendable, the point of departure must be the correct implementation of the available mechanisms protecting victims of rape, if however, with the correct application there is still a need a need for such crime, sentence enhancement will be most appropriate. In addition to this, it has been suggested that in an instance where legislature is faced with the predicament of changing the law and the attitudes of people in society it is preferable and beneficial to change the law, this follows the idea that changing the laws attaches more attention from society.⁹⁶

According to *Thorpe*, in 2011 the Department of Justice and Constitutional Development (DOJ&CD) announced that it will table a bill to address the issue of ‘hate crime’ as a measure to protect individuals that are vulnerable to hate crimes. *Thorpe* further avers that although this was announced in 2010 this Bill had not yet been tabled. It has been

⁹² Thorpe,op cit,4.

⁹³ Ibid.

⁹⁴ Ibid.

⁹⁵ Ibid.

⁹⁶ Ibid

reported that sexual orientation is not a listed ground under this proposed bill.⁹⁷ This thesis thus proposes that in order to address 'corrective' rape adequately the South African Criminal justice system must implement the available legislative framework. In the chapters to follow in this thesis will provide a critical analysis of the legislative framework.

2.5 PREVALENCE OF 'CORRECTIVE' RAPE IN THE CONTEXT OF RAPE IN SOUTH AFRICA

Sexual offences in South Africa have been on the rise in the recent years. According to the crime statics released by the South African Police Services (SAPS), the total incidences show a decline of reported rape incidences reflecting 4616 to 4585 for the periods 2013/2014 and 2014/2015.⁹⁸ This slight decline could mean one of two things about the CJS of South Africa. It could either mean that there is an improvement in the way in which both society and the CJS understand the gravity of this offence, or it could mean that the state of our CJS has deteriorated to such an extent that victims have withdrawn from reporting rape incidences.⁹⁹

In addition to Constitutional protection, the South African Criminal Justice System (hereinafter referred to as the CJS) is divided into six departments which are established to combat crime:¹⁰⁰ However, although the country appears fully equipped

⁹⁷ Ibid.

⁹⁸ Crime Stats in the Republic of South Africa (released 29 September 2015) available at http://www.saps.gov.za/resource_centre/publications/statistics/crimestats/2015/crime_stats.php [Accessed 30 November 2015].

⁹⁹ Rape Crisis Cape Town trust 'Don't hide Speak Out' (2015.) available at <http://rapecrisis.org.za/rape-in-south-africa/#homophobia-and-rape> [Accessed 15 September 2014].

¹⁰⁰ See National Prosecuting Authority brochure 'Understanding the Criminal Justice System' (2008) for a deeper discussion on the South African Criminal Justice System, available at https://www.npa.gov.za/sites/default/files/resources/justice_system/NPA_eng.pdf [Accessed 30 November 2015].

in resources, the CJS is severely overburdened with high incidences of sexual offences and finds itself limited in its capacity to provide adequate protection and deter criminal conduct.¹⁰¹ Even though this is the situation, South Africa has the potential of a CJS that functions at its highest capacity under the current legislative framework. This means that it is not only possible that justice can be served for all citizens protected by law, but also that in cases such as 'corrective' rape cases, the perpetrators can be deterred from raping lesbians or anyone else for that matter because of the strict arm of the CJS.

It is submitted that the latter view is more probable as rape cases usually go unreported due to a number of factors.¹⁰² These statistics are still alarming since they not only expose the rape crisis in South Africa and they also implicate the justice system as a whole. In addition to this, Action Aid report revealed that a number of cases involving 'corrective' rape have not been documented because of the lack of a separate avenue to address this perpetuating phenomenon.¹⁰³

However, in a country where rape has become a crisis, enacting a separate avenue for 'corrective' rape as an anti-lesbian hate crime, may result in that victims may overburden the institution with different kinds of rapes motivated by different kinds of prejudices.¹⁰⁴ The view of the Triangle Project asserts that rape is a tool to assert power or control over the woman's body despite the presence or the absence of the sexual orientation factor.¹⁰⁵ This, however, does not mean that 'corrective' rape or bias motivated crimes are not worth exposing as this contributed to the development of the law.

¹⁰¹ National Director of Public Prosecutions v King 2010 (2) SACR 146 (SCA) at para 16

¹⁰² Ibid.

¹⁰³ Cf 2 on ActionAid. Hate crimes: The rise of 'corrective rape in South Africa. (2009) available at http://rapeoutcry.co.za/home/wp-content/uploads/2012/09/correctiveraperep_final.pdf [accessed 24 March 2014].

¹⁰⁴ Rape Crisis Cape Town trust 'Don't hide Speak Out' (2015.) available at <http://rapecrisis.org.za/rape-in-south-africa/#homophobia-and-rape> [accessed on 16 July 2015].

¹⁰⁵ ActionAid. Hate crimes: The rise of 'corrective rape in South Africa. (2009) available at http://rapeoutcry.co.za/home/wp-content/uploads/2012/09/correctiveraperep_final.pdf [accessed 24 March 2014].

It is suggested that although it is common cause that heterosexism and homophobia are not specific to one race or nationality, certain African societies seem to hold a strong belief that homosexuality is ‘un-African’ as well as that Lesbianism is both wrong and unnatural, which could be a possible justification for anti-gay crimes like ‘corrective’ rape.¹⁰⁶ These societies believe that homosexuality is a western import that arrived with the colonialists and was non-existent to the African race prior to that. Msibi argues that this view is not well-informed as there are traces of hidden homosexuality in African cultures.¹⁰⁷ Msibi further suggests that the only thing that the colonists did was to expose the existence of homosexuals because during the pre-colonial era there was no such word as ‘gay’ or ‘Lesbian’ or ‘attraction between same-sex individuals’, although such practices existed.¹⁰⁸ However, homosexuality is established to have been hidden and even accepted culturally until legislation was introduced against such practices by the colonialists.¹⁰⁹



¹⁰⁶ T Msibi ‘The Lies We Have Been Told: On (Homo) Sexuality in Africa (2011) 58 Africa Today, 64.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid, 69.

¹⁰⁹ Ibid.

CHAPTER THREE: INTERNATIONAL LEGAL APPROACH

3.1 INTRODUCTION - SOUTH AFRICA'S OBLIGATIONS UNDER INTERNATIONAL LAW

'Corrective' rape has been identified as a crime particular to South Africa and has not received specific address by international documents. However, 'corrective' rape is a human rights issue that lends its protection from international law, trickling down to its incorporation into domestic law. In light of the above, this chapter will look at the human rights that are entitled to victims of 'corrective' rape as bearers of inalienable rights. This will be done in order to establish the extent of protection incumbent on South Africa as a result of being a signatory and endorser of international law principles. This chapter will begin with a discussion of international documents that South Africa is a party; in addition, this chapter will consider the efficacy of international law in addressing 'corrective' rape, as well as the influence of the international community in condemning such practices.

3.2 THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

The Universal Declaration of Human Rights¹¹⁰ (UDHR) is an international document that provides for both first generation rights and second generation rights.¹¹¹ This declaration was adopted in order to deter any future occurrence of the atrocities that were committed against humanity.¹¹² The UDHR is a common standard that all people and nations must obtain as it embodies the basic civil, political, economic and social and cultural rights. The UDHR is not necessarily binding but UDHR is now considered a customary international law and embodies the fundamental human rights and freedoms and regards every human being as a bearer of inalienable human rights, thus born free

¹¹⁰ Universal Declaration of Human Rights G.A. 217A (III), U.N. Doc A/810 art 1 (1948), (UDHR).

¹¹¹ J Dugard, *International law: A South African perspective*, 4 ed (2011) 314.

¹¹² Ibid.

and equal in dignity and rights notwithstanding their characteristics. This will be discussed in detail below.¹¹³

The UDHR embodies the right to equality of all persons and entitles all individuals to all the rights articulated in the document, without distinction on the basis on the grounds listed which include inter alia sex, race and other status.¹¹⁴ Although sexual orientation is not specifically addressed, ‘corrective’ rape victims may still vindicate the grounds of sex as this form of crime is still a rape as articulated in the preceding chapter.

Most significantly, especially when looking at the patriarchal nature of ‘corrective’ rape, the UDHR does not preclude any person from having an opinion or from being part of a culture or cultural community.¹¹⁵ However, the UDHR makes it clear that it does not promote any activities that are aimed at the obliteration of any rights that are bestowed on individuals.¹¹⁶ Thus, the opinion of a person or a group of persons that homosexuality is un-African or unacceptable is limited to the extent that the lesbian woman is able to freely enjoy the human rights provided in the UDHR.

3.3 INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)

As a result of the UDHR, the UN enacted the International Covenant on Civil and Political Rights¹¹⁷ (ICCPR) in 1976.¹¹⁸ South Africa signed in 1994 and ratified this treaty in 1998. This treaty provides for first generation rights looking at Civil and Political rights of the individual that do not require positive intervention by the state.¹¹⁹

¹¹³ J Dugard, *International law: A South African perspective*, 4 ed (2011) 315/314.

¹¹⁴ Article 2.

¹¹⁵ Article 2 and Article 27 of the UDHR.

¹¹⁶ Article 30 of the UDHR.

¹¹⁷ International Covenant on Civil and Political Rights, 16 December 1966, UNTS 999.

¹¹⁸ J Dugard, *op cit* 316

¹¹⁹ *Ibid* 317.

Right to equality

Article 26 of the ICCPR provides that:

“All persons are equal before the law and are entitled, without discrimination, to equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”¹²⁰

Although sexual orientation is not explicitly provided for in this article a conclusion may be deduced that the word ‘other status’ accommodates the protection of lesbian women or any other group that may be potentially discriminated against.¹²¹ Further to this, it was suggested by the UN Human Rights Committee in the case of *Nicholas Toonen v Australia* that sexual orientation was covered by the ICCPR because the reference to ‘sex’ as a ground is to be taken to include sexual orientation.¹²² Although the decision by the court, in this case is a foreign judgement and is not necessarily binding to South Africa, it has been suggested that the court used it as a persuasive source in deciding to abolish laws against sodomy in the Constitutional Court of South Africa.¹²³

Moreover, the Committee On Economic, Social and Cultural Rights on their forty-second session Geneva, in May 2009 agenda item 3 provides the following in relation to ‘other status’:

“The nature of discrimination varies according to context and evolves over time. A flexible approach to the ground of “other status” is thus needed in order to capture other forms of differential treatment that cannot be reasonably and objectively justified and are of a comparable nature to the expressly recognized grounds in article 2, paragraph 2. These additional grounds are commonly recognized when they reflect the experience of social groups that are vulnerable and have suffered and continue to suffer marginalization. The Committee’s general comments

¹²⁰ ICCPR Article 26.

¹²¹ Ibid.

¹²² *Nicholas Toonen v. Australia*, Human Rights Committee, 50th Session, Case no. 488/1992, UN Doc. CCPR/c/50/D/488/1992, at 8.7, cited in Brown R, ‘op cit. 18.

¹²³ Ibid.

and concluding observations have recognized various other grounds and these are described in more detail below. However, this list is not intended to be exhaustive. [...]"¹²⁴

In light of the above, the committee gave a clear indication on the definition of 'other' status, allowing lesbian women to be protected.

Furthermore, States have an obligation to refrain from interfering with the enjoyment of the right to equality and to also protect individuals by taking steps in order to facilitate that this right is fully exercised. Discrimination has been taken to include all conduct and policies that have the effect of discrimination.¹²⁵ This means that no one has less moral standing as all human beings must be treated with equality, both legislatively and socially. In South Africa, the embodiment of the principle of equality is well documented legislative but poorly executed on a societal level.

Torture, Cruel and degrading treatment

'Corrective' rape by its virtue amounts to cruel and degrading treatment as it falls under rape. Article 7 of the ICCPR provides that "No person shall be subjected to torture or to cruel or degrading treatment or punishment..."¹²⁶ Internationally it is clear that there is protection against crimes that infringe on the dignity of any individual belonging to a country that has signed and ratified this covenant. It has been suggested that sexual violence may constitute torture when "it's carried by or at the instigation of, or with the consent of public officials".¹²⁷ Furthermore, it has been argued that sexual violence

¹²⁴ Committee on Economic, Social and Cultural Rights on their forty-second session Geneva, in May 2009 agenda item 3.

¹²⁵ General Comment 18: Non-discrimination, Human Rights Committee, 37 Session, 1989, UN Doc. HRI/GEN/1/Rev.1,7.

¹²⁶ ICCPR article 7.

¹²⁷ Born free and equal, 26 Office of the High Commissioner on Human Rights (2012) available on <http://www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf> [accessed 04 January 2016].

against LGBTI persons is often motivated by discrimination, one of the prohibited grounds under the definition of torture.¹²⁸

Freedom of culture and religion

Article 1 of the ICCPR also provides that every person has the right to self-determination which includes the right to freely pursue *inter alia*, their social and cultural development.¹²⁹ This provision affords all individuals the liberty to practice their preferred lifestyles. 'Corrective' rape violates this provision because it deprives lesbian women the chance to live in their chosen lifestyle.

In addition to this article 20 provides for the freedom of individuals to expression and prohibits any conduct that serves as advocacy for national, racial or religious hatred that also constitutes the encouragement of discrimination, hostility and violence.¹³⁰ This provision addresses direct issues that flow from 'corrective' rape. Firstly, it recognises the freedom of individuals to express themselves without fear of persecution or violence. 'Corrective' rape takes away this liberty from lesbian women and thus falls under the prohibited conditions mentioned above. Secondly, the right to expression of a 'perpetrator' is also protected to the extent that it does not infringe on the right of the lesbian woman to enjoy their preferred lifestyle.

¹²⁸ Ibid.

¹²⁹ ICCPR, Article 1.

¹³⁰ ICCPR, Article 20.

3.4 CONVENTION TO ELIMINATE ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW)

The Convention to eliminate all forms of Discrimination against Women ¹³¹(CEDAW) was adopted to specifically protect women, as a previously disadvantaged group.¹³² This convention was adopted in 1979 by the United Nations General Assembly and South Africa signed the convention in 1993 and ratified it in 1995. This convention defines discrimination against women as

"...any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."¹³³

This definition identifies any distinction made that results in, inter alia the impairment of the enjoyment of human rights and fundamental freedoms in, inter alia, the social field as discrimination against women. Because of the fact that lesbian women are also women by definition in a rape, whether or not the rape was intended to be 'corrective' should not be the first point of enquiry. It must be clear that this distinction does not emanate from the law, it emanates from the perpetrator who may, or may not have intended to 'correct' or 'cure' the victim.

The consequences of rape on a victim are dire. According to *Breen and Nel*, a victim of hate crimes which includes 'corrective' rape, experiences more emotional and psychological impact compared to the rape of a heterosexual counterpart.¹³⁴ However this contention has not found much support as there is generally no proof that the effect of [rape as] a hate crime is worse than that of [rape as] a crime in general.¹³⁵ Because it

¹³¹ Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1249 UNTS 13.

¹³² Ibid.

¹³³ Article 1 of CEDAW.

¹³⁴ D Breen & J Nel 'South Africa - a home for all? The need for hate crime legislation' (2011), 34.

¹³⁵ Ibid.

has been generally established that rape has traumatic consequences, victims require counselling and support.

Therefore, it may be argued that the intention of the protection of women under CEDAW was meant to protect women despite their social belonging as the traumatic effects of discrimination cannot be differentiated. Women are a political minority and have been treated in a dehumanising manner in the past; a provision like this sends a clear message that using rape as a tool to exercise power will not be tolerated.¹³⁶

Article 2 of CEDAW highlights that all states that are party to the convention are under an obligation to condemn all forms of discrimination against women.¹³⁷ This provision further envisages that the states agree to act against discrimination by using all mechanisms to create a policy that combats discrimination against women. This must be done by incorporating the principle of equality between men and women in the constitutions and other legislation.¹³⁸ Thus, member states must consider the equality of men and women and avoid any form of discrimination emanating from the law.¹³⁹ States must also, in addition to legislative measures adopt additional sanctions to prohibit all discrimination against women.¹⁴⁰ The provisions that follow similarly emphasise the measures incumbent on the states to ensure that women are not discriminated against at all levels.¹⁴¹ This protection is provided for all women regardless of the identity.

International response to 'corrective' rape

Notwithstanding the reports by the *Human Rights Watch* creating awareness on 'corrective' rape and its undermining of human rights, the *UN CEDAW* committee has expressed its concern on laws that refer to sexual orientation, more pertinently the UN CEDAW Committee expressed on the practice of 'corrective' rape and murders that

¹³⁶ Ibid.

¹³⁷ Article 2 CEDAW

¹³⁸ Ibid.

¹³⁹ Ibid.

¹⁴⁰ Ibid.

¹⁴¹ See all subsequent articles in CEDAW.

occur in South Africa as a result of the sexual orientation of lesbian women.¹⁴² The Committee recommended that the State party abide by the provisions of the Constitution and afford effective protection to lesbian women from violence and discrimination due to their sexual orientation.¹⁴³

The CEDAW Committee further recommended the enactment of anti-discrimination laws that would prohibit the multiple forms of discrimination, with sexual orientation as a prohibited ground, in addition to the legislative intervention the UN CEDAW Committee recommended a continual advocacy aimed at sensitising the general public, including the training of public officials and all other actors that come into play.¹⁴⁴

It is the submission of this thesis that CEDAW and the UN CEDAW Committee are aware and condemn the practice of 'corrective' rape both in their provisions and in their general comment. It is further submitted that the protection of victims of 'corrective' rape is clear and unequivocal under CEDAW. Furthermore, the principles recommended are worth auctioning as they are an excellent measure to prevent and sanction crimes like 'corrective' rape.

3.5 THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS (ACHPR)

The African Charter on Human and Peoples' Rights¹⁴⁵ (ACHPR) is an international instrument specific to addressing the protection of human rights within the African continent.¹⁴⁶ From the preamble of this charter, it clearly articulates the fundamental human rights to be embodied being civil and political rights, the economic, social and

¹⁴² UN Committee on the Elimination of All forms of Discrimination Against Women, 48th session (2011) 10 para 39-40 (CEDAW / c/ZAF/CO/4).

¹⁴³ Ibid.

¹⁴⁴ Ibid.

¹⁴⁵ African Charter on Human and Peoples' Adopted June 27, 1981, OAU Doc.CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

¹⁴⁶ R Brown 'Corrective' rape, a continuing plight despite international Human Rights Response' (2012) 59.

cultural rights. The preamble also contextualises the rights of people in the African continent taking into account the significance attached to these rights in Africa. This Charter applies to all States that are part of the African Union.

Furthermore, articles 1 to article 24 embody the civil and political rights including the enjoyment of freedoms and rights recognised in the charter on the listed grounds with the exception of sexual orientation.¹⁴⁷ Because sexual orientation is excluded from these grounds, it appears that sexual orientation is excluded from specific protection under the charter.¹⁴⁸ It has been suggested by Rudman that just like sexual orientation is not a listed ground under the ICCPR it does not mean that sexual orientation is not protected.¹⁴⁹ This is because sexual orientation fell under the scope of 'sex' and 'other grounds' as articulated in the case of *Toonen v Australia* and has become soft law.¹⁵⁰ It is submitted that although the ACHPR requires states to take legislative and other measures to address issues of discrimination, the protection provided is not as strong worded as that provided in the domestic law of South Africa.

3.6 SOUTH AFRICA'S RESPONSE TO INTERNATIONAL OBLIGATIONS IN PREVENTING AND SANCTIONING 'CORRECTIVE RAPE'

Since South Africa is a signatory to all the conventions mentioned above, the principles contained therein are enshrined in the Constitution and in other legislative documents. Section 30 of the Constitution provides that everyone has a right to participate in a cultural life of his or her choice. However, this is subject to the limitation in section 36 of

¹⁴⁷ Preamble of the ACHPR.

¹⁴⁸ Article 2 of the ACHPR provides that 'Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status.' Sexual Orientation is not one of the grounds that are explicitly listed.

¹⁴⁹ A Rudman 'The protection against discrimination based on sexual orientation under the African human rights system' (2015) 15 *African Human Rights Law Journal*, 10.

¹⁵⁰ Ibid.

the Constitution.¹⁵¹ This means that all people have the right to believe what they want to believe about homosexuality and lesbian, although their beliefs are limited by the other person's right to participate in a culture that the person wants to. Thus in the context of 'corrective' rape, this internationally supported right is infringed as perpetrators are using their beliefs to cause harm and limit the rights of lesbian women to be lesbian if they wish to be. The Constitution has embodied the right to freedom and security,¹⁵² the right to dignity¹⁵³ and the right to equality¹⁵⁴ in furtherance of the international obligations.

South Africa signed and ratified the ICCPR, ICESCR and CEDAW and is thus bound by them. In terms of the Constitution any court, tribunal or forum must consider international law when adjusting on matters.¹⁵⁵ This is a peremptory provision as the language used is that of 'must' and not 'may'.¹⁵⁶ This means that the international framework plays a considerable role in matters that are taken to the courts. Thus, victims of rape and 'corrective' rape are entitled to trials that are in line with international standards of human rights.

To this effect, the Constitution, in terms of section 231, provides for the mechanism and procedures in which international law becomes part of South African law and clearly recognises the obligation that is incumbent on it once the treaties have been ratified and subscribed to and all the conventions that have been ratified by the National Assembly must be incorporated in South African legislation. Furthermore, the constitution requires that the courts or tribunals must prefer an interpretation that is consistent with

¹⁵¹ Section 36 of the constitution provides that all rights are not absolute and they are subject to be limited by the following considerations: (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.'

¹⁵²Section 11 of the Constitution.

¹⁵³ Section 10 of the Constitution.

¹⁵⁴ Section 9 of the Constitution.

¹⁵⁵ Section 39(2) of the Constitution

¹⁵⁶ Section 39(2) provides that when interpreting the Bill of Rights, a court, tribunal or forum [...] must consider international law.

international law when interpreting legislation opposed to an interpretation that is not consistent with international law

The Constitution does not only provide that for the enactment of legislation that embodies the provisions in the covenants but goes further and requires that international preference must be given to the international standard.

It is clear from the provisions of the UDHR and subsequently the ICCPR, CEDAW ICESCR that on an international level human rights abuse will not be tolerated. The rape of all individuals is a direct violation of this covenant as it infringes on an individual's rights to equality, human dignity and freedom and security. The ICESCR condemns any interference with these rights. Furthermore 'corrective' rape undermines these rights even more as the commission of the crime does not only emanate from criminal conduct but also includes homophobia and undermining treatment. Degrading treatment is expressly condemned internationally and there is a call to address it most effectively.

3.7 CONCLUSION

This chapter has shown the broader protection of human rights of human beings in general which clearly and fully accommodates lesbian women. The International legislative framework is a rich source of human rights which sets a standard for domestic laws against human rights abuses. The South African Constitution has effectively incorporated such rights in the law of the land and thus several cases have recognised the protection of all human beings especially women in general and including lesbian women in particular. The law is an available framework that affords all people who seek justice from its considerable protection. However, the law only interferes after a human right abuse and thus the deterrence factor should come from effective education and awareness initiatives. The chapter that follows will explore the Constitution and the Sexual Offences Act and its regulations and policies to unpack the depth of legislative protection afforded to women in general and lesbian women in particular.

CHAPTER FOUR: NATIONAL LEGAL APPROACH TO 'CORRECTIVE' RAPE

4.1 INTRODUCTION

'Corrective' rape signifies that, in some communities, perceptions on homosexual, more specifically lesbianism. The chapters above have undeniably established the existence of a practice where lesbians are recently becoming raped purportedly because of the views of those who think that homosexuality is either wrong, un-African or that a certain appearance that can be associated with lesbianism is wrong. The individual's or societal beliefs seek to correct this by punishing lesbians with raping them as discussed in the preceding chapters. What follows will be an analysis of the current legislative framework. This thesis maintains that the law is sufficient in sanctioning rape and its different aspects; however, society has not caught up with this. Therefore, continuing to enact more legislation will frustrate an already overwhelmed system. Firstly, this chapter will analyse the Constitutional provisions indirectly protecting individuals from rape, and more specifically, a critical analysis of the right to equality will be made in the context of 'corrective' rape. Secondly, this chapter will look at the Sexual Offences Act as it is the basis of all rape cases. In assessing the legislative and executive initiatives, this section will analyse the regulations under the Sexual Offences Act and assess whether the policies in place are wide enough to cover potential 'corrective' rape cases. Finally, this chapter will explore practical ways to ensure that society is a reflection of the values in the South African Legislative framework.

4.2 CONSTITUTIONAL PROTECTION

4.2.1 FREEDOM AND TOLERANCE

The Constitution of South Africa is hailed as being the most progressive Constitution in the African continent. This is because it provides citizens with a number of rights including the right not be discriminated against on grounds of sexual orientation.¹⁵⁷ This is profound because other African countries like Uganda, homosexuality is a crime punishable by law.¹⁵⁸ The purpose behind the enactment of the Constitution was to move away from a society that promoted inequality and discrimination.¹⁵⁹ The Constitution introduced the notion of equality, dignity, freedom and security in the new democratic state. The preamble of the Constitution demonstrates that the intention of the Constitutional Assembly was to create an atmosphere of tolerance among the citizens of South Africa; hence, the Preamble of the Constitution affirms that: -

“We, therefore, through our freely elected representatives, adopt this Constitution as the Supreme Law of the Republic so as to [...] heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights...”¹⁶⁰

This intentional affirmation of moving from a society that promoted discrimination against others clearly places the state under an obligation to further this objective. The court in the case of *Hoffmann v South African Airways*¹⁶¹ correctly remarked that the Constitution is shaped in such a way that prejudice should not be tolerated in any form as a goal towards equality.¹⁶² The Constitution therefore, holds a strong position when it comes to the eradication of intolerance as it maintains an underlying objective of

¹⁵⁷ Section 9(3) of the Constitution

¹⁵⁸ See Anti-Homosexuality Act, 2014 (Uganda). According to this Act, homosexuality is a crime and which could lead to life imprisonment in terms of section 2(2) of the Act.

¹⁵⁹ Preamble of the Constitution

¹⁶⁰ Ibid.

¹⁶¹ *Hoffmann v South African Airways* 2001 (1) SA (CC) 1 (hereafter referred to as the Hoffmann v SAA (2001)).

¹⁶² Hoffmann v SAA (2001) at para 37.

bringing justice to all persons, especially those who have been affected by South Africa's history of apartheid and colonialism.¹⁶³ In achieving this objective provisions protecting the equality, dignity and freedom of all individuals elaborate.

In light of the above, the Constitution is the ultimate refuge for victims of 'corrective' rape as it promises protection. Moreover, as stated above, the Constitution is against the intolerant treatment of individuals, which means that a person does not have a right to claim that the reason for violating fundamental human rights is because they cannot accept or tolerate another.

4.2.2 THE RIGHT TO EQUALITY

The Constitution affords the right to equality to all its citizens.¹⁶⁴ Because of South Africa's apartheid history, the issue of gender inequality and gender-based violence is of grave concern.¹⁶⁵ Discrimination still threatens the integrity of the theoretical progress that South Africa has made through Constitutional and other legislative means.¹⁶⁶ The achievement of equality in South Africa is, however, a progressive initiative and depends heavily on society's adherence to the law. However, in furthering the provision of the right to equality, caution must be exercised as all legislative measures that should be taken must not amount to discrimination.¹⁶⁷ This means that the protection of a certain group should not affect other groups in a manner that is discriminatory. Uniformity in protection in the law must be exercised to avoid ambiguity in the law.

¹⁶³ See the Preamble of the Constitution.

¹⁶⁴ Section 9 of the Constitution.

¹⁶⁵ L Di Silvio 'Correcting Corrective Rape: Carmichelle and Developing South Africa's affirmative obligations to prevent violence against women' (2011) Vol 99 The Georgetown Law Journal ,1472

¹⁶⁶ Ibid.

¹⁶⁷ This is important because section 9 of the Constitution provides that everyone is equal before the law and thus must be afforded equal protection before the law, anything less amounts to discrimination which if proved to be unfair is deemed unconstitutional.

Although a number of hate crime legislation advocates argue that the rape of lesbian women is largely an issue of discrimination on the basis of sexual orientation, it is important to understand what form of discrimination ‘corrective’ rape amounts to in terms of South African law and to understand the nature of the right to equality in relation to ‘corrective’ rape. It is thus vital to consider whether it is just and equitable to sanction one form of rape over another.

It is important to note that although it is clear that the lesbian women are a vulnerable group worthy of intense sensitivity for their fundamental human rights, more caution should be exercised because the law does not deny any protection nor does it promote the discrimination of any individual, in fact, any discrimination is prohibited. In terms of section 9(1) of the Constitution; everyone is equal and is entitled to equal protection and benefit of the law.¹⁶⁸

Equal protection by the law

An analogy may be drawn that although human beings are different, the law must protect them equally in their difference as all individuals are equal bearers of human rights and should be afforded equal dignity.¹⁶⁹ The fact that a rape victim’s vulnerability is increased by the virtue of that the victim is an African, poor lesbian woman or, that the victim is an African, poor, disabled woman, makes both these women victims of a violation of fundamental human rights which includes the right to equality if they are raped by a perpetrator who is either male or male and rich by way of example, because rape is a tool to exercise power and control.¹⁷⁰

This is because the reference to ‘all rights’ suggests that everyone must be able to enjoy all the rights including the right to dignity in section 10, the right to freedom and security in section 11, the right to bodily integrity in section 12 and all the other rights

¹⁶⁸ Section 9 of the Constitution.

¹⁶⁹ Hoffmann v SAA (2001) at para 27. See also *Minister of Home Affairs and Another v Fourie and Others 2006 (1) SA 524 (CC)* para 60.

¹⁷⁰ M. Morrissey ‘Rape as a Weapon of Hate: Discursive Constructions and Material Consequences of Black Lesbianism in South Africa’ (2013) *Women’s Studies in Communication*, 88.

that lend themselves to these fundamental rights. The Constitution requires that legislative and other means to be taken in order to promote these rights and to protect or improve the categories of persons that are disadvantaged by unfair discrimination.¹⁷¹

This provision also requires that neither the state nor any individual may unfairly discriminate against another person on grounds of 'race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.'¹⁷² These listed grounds suggest different forms of vulnerability; a person is likely to possess more than one of these grounds, which could have the effect of increasing their vulnerability.

It streams for this that a violation of this provision will come about when the law or an individual is being treated differently from another because they possess one or more of the characteristics listed in section 9(3) of the Constitution. The Constitution condemns differentiation and holds a firm foundation of equality that protects all vulnerable individuals. It is thus noted that lesbian women are certainly a political minority; however, they are also part of a wider community with individuals similarly challenged and protected by the Constitution and laws alike.

It is submitted that it is beneficial to view 'corrective' rape as a crime of rape than to view it as a discrimination issue because the potential discrimination does not emanate from the law but it emanates from the deeply rooted beliefs of patriarchy amongst the people from different societies in South Africa.¹⁷³ Although it is a relative fact that lesbian women are targeted because of their sexual orientation, it is imperative that the response to 'corrective' rape is one directed at the real issue.¹⁷⁴

¹⁷¹ Section 9(3) of the Constitution.

¹⁷² Ibid.

¹⁷³ A Nel & M Judge 'Exploring Homophobic Victimisation in Gauteng, South Africa: Issues, Impacts and Responses' (2008) 21(3) *Acta Criminologica*, 21.

¹⁷⁴ See the National Policy Framework, Management of Sexual Offence Matters (2012) under vulnerable person's lesbian women are among a number of different categories of individuals that are vulnerable to hate crime. (Hereafter cited to as the National Policy Framework (2012)).

It is submitted that it appears from the advocacy of many authors that ‘straight’ women are less vulnerable to rape opposed to lesbian women which are not entirely the case.¹⁷⁵ The assumption is that the law protects the ‘straight’ women and leaves the lesbian women to some extent vulnerable to rape and, therefore, this warrants further protection for such victims.¹⁷⁶ However, it must be borne in mind that the crime of rape, more often, than not is associated with some sort of selection of the victim. Thus, in effect means that the rape of any victim is associated with a certain element of ‘hate’. It is, therefore, difficult to single out sexual orientation as a factor of vulnerability that requires special protection in instances of rape.

In the case of *Carmichelle v Minister of Safety and Security*¹⁷⁷ the court held that the state is under an obligation to protect women from gender discrimination and to protect the dignity and freedom of women.¹⁷⁸ The court further remarked that the issue of the Constitution places an obligation on primary state agencies to protect the public, and more especially women and children against violent crimes.¹⁷⁹ This case depicts that women and children are vulnerable to gender-based violence. It is submitted that, at the time that any person is raped, that person is vulnerable in one way or another which includes sexual orientation, age, social standing and many others.

It is submitted that the enactment of legislation that addresses ‘corrective’ rape specifically is undesirable in a democratic society such as South Africa. The court in the case of the *President of the republic of South Africa v Hugo*¹⁸⁰ correctly remarked as follows regarding unfair discrimination:

The prohibition on unfair discrimination in the interim Constitution seeks not only to avoid discrimination against people who are members of disadvantaged groups. It seeks more than that. At the heart of the prohibition of unfair discrimination lies recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human

¹⁷⁵ D Breen & J Nel ‘South Africa - a home for all? The need for hate crime legislation’ (2011), 34.

¹⁷⁶ Ibid.

¹⁷⁷ *Carmichelle v Minister of Safety and Security* 2001(4) SA 938 (CC).

¹⁷⁸ *Carmichelle v Minister of Safety and Security* 2001(4) SA 938 (CC) at para. 62.

¹⁷⁹ *Carmichelle v Minister of Safety and Security* 2001(4) SA 938 (CC) at para 57.

¹⁸⁰ *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC).

beings will be accorded equal dignity and respect regardless of their membership of particular groups.¹⁸¹

Firstly all rape victims in South Africa may be feeling like they are not being fully protected by the law.¹⁸² The underreporting of rape and loss of confidence in the justice system will exacerbate further because of this.¹⁸³ The conviction rate for rape cases take a while to be finalised and knowing that others are better protected may discourage heterosexual individuals from reporting.¹⁸⁴ Therefore, the hate crime legislation could create an impression lesbian women are treated 'favourably' compared to their heterosexual counterparts and this may amount to unfair discrimination and thus be inconsistent with the spirit and purport of the Bill of rights.

All cases must be treated on a case by case approach as homosexuality for some is a private matter that should be kept confidential.¹⁸⁵ Other victims may feel humiliated when everybody knows about their sexual orientation. South Africa is still in a state of transition which means that patriarchy is still a reality.¹⁸⁶ If a victim feels compelled to disclose their sexual orientation in a court or when reporting such a crime, the victim may be intimidated and refrain from reporting in its entirety.¹⁸⁷ The reality in South Africa is that homophobia and the fear of discrimination are real, that is the reason why a person may want to keep their sexual orientation from family and other people. Others are financially dependent on the people whom they may be keeping such information confidential.

¹⁸¹ President of the Republic of South Africa v Hugo 1997 (4) SA 1 (CC) at para 41

¹⁸² Rape Crisis Cape Town trust 'Don't hide Speak Out' (2015.) available at <http://rapecrisis.org.za/rape-in-south-africa/#homophobia-and-rape> [accessed on 16 July 2015].

¹⁸³ South African Law Commission report, Project 107, discussion paper, 64.

¹⁸⁴ Ibid.

¹⁸⁵ ActionAid. Hate crimes: The rise of 'corrective rape in South Africa. (2009) available at http://rapeoutcry.co.za/home/wp-content/uploads/2012/09/correctiveraperep_final.pdf [accessed 24 March 2014] found that some lesbian women do not want to disclose their sexual orientation to the police due to fear of secondary victimization.

¹⁸⁶ Ibid.

¹⁸⁷ Ibid.

Other victims of rape who may not identify as homosexual may lie and say they are homosexual for the sake of further protection under the law. This is a clear violation of justice. It is difficult to prove that a person is lesbian or not especially in circumstances where they say they are. Those who are raped and are not lesbian may plead that they are lesbian in order to be further protected by hate crime legislation.

In furthering the right to equality, Parliament enacted the Promotion of Equality and Prevention of Unfair Discrimination Act¹⁸⁸ (PEPUDA). PEPUDA does not have sexual orientation as a listed ground, but prohibits any unfair discrimination on the grounds of gender.¹⁸⁹

Advocates for hate crime legislation claim that sexual orientation must be a ground listed in PEPUDA so as to protect the LGBTI communities who are vulnerable to being treated discriminatorily.¹⁹⁰ The Constitutional Court in *S v Makwanyane*¹⁹¹ made an important point when it stated that:

“Our Constitution protects the weak, the marginalised, the socially outcast, and the victims of prejudice and stereotyping. It is only when these groups are protected that we can be secured that our own rights are protected.”¹⁹²

This statement which was *obiter* made by the court shows the extent of the purpose of the Constitution and also highlights the fact that it is an avenue that may be utilised by all citizens who are vulnerable to crime.

The progression of tolerance and acceptance of the sexual minorities took a positive direction for the LGBTI groups when same-sex marriages were recognised in the enactment of the Civil Union Act. This was subsequent to the challenge of the Marriage

¹⁸⁸ Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) Act 4 of 2000 (hereinafter referred to as PEPUDA).

¹⁸⁹ The objects of PEPUDA provide for inter alia, the prohibition of unfair discrimination as well as the prohibition of hate speech under the grounds of race, gender and disability.

¹⁹⁰ Section 8 of PEPUDA, see c/f K Naidoo & M Karels ‘Hate crimes against black lesbian South Africans: Where race, sexual orientation and gender collide (part 2)’ (2012), 616.

¹⁹¹ *S v Makwanyane* 1995 (3) SA 391 (CC).

¹⁹² *S v Makwanyane* 1995 (3) SA 391 (CC).at para 88.

Act in the Constitutional Court Judgement in *Fourie v Minister of Home Affairs*.¹⁹³ This decision by the Constitutional Court caused this positive step that the law was taking to accommodate the sexual minorities who were previously excluded from the law. The emancipation of same-sex couples who desired to marry in South Africa marked a turning point in South African law and in the words of Sachs J:

“I believe that Parliament is well-suited to finding the best ways of ensuring that same-sex couples are brought in from the legal cold. The law may not automatically and of itself eliminate stereotyping and prejudice. Yet it serves as a great teacher, establishes public norms that become assimilated into daily life and protects vulnerable people from unjust marginalisation and abuse. It needs to be remembered that not only the courts are responsible for vindicating the rights enshrined in the Bill of Rights. The legislature is in the frontline in this respect. One of its principal functions is to ensure that the values of the Constitution as set out in the Preamble and section 1 permeate[s] every area of the law.”¹⁹⁴

As much as the point put forth by the court may be true, legislative measures to accommodate a community must be effective and proportionate. Homophobia is a societal ill that must, as a point of departure, be dealt with through policy making and social awareness of the existing protection.¹⁹⁵ The issue with ‘corrective’ rape is not that the law is not available to protect individuals who are victims of rape but the issue is that certain individuals hold certain views that are not necessarily rectifiable by the law.

4.3 ‘CORRECTIVE’ RAPE AND THE SEXUAL OFFENCES ACT IN SOUTH AFRICA

The Sexual Offences Act defines a complainant as the alleged victim of a sexual offence.¹⁹⁶ This definition is not gender-specific and covers all complainants despite

¹⁹³ *Minister of Home Affairs and Another v Fourie and Others 2006 (1) SA 524 (CC)*. The Marriage Act was challenged by the appellants because it relied on the common law definition which defined marriage as ‘a union of one man with one woman, to the exclusion, while it lasts, of all others.

¹⁹⁴ *Minister of Home Affairs and Another v Fourie and Others 2006 (1) SA 524 (CC)* at para 138.

¹⁹⁵ The Preamble of the Sexual Offences Act acknowledges that the commission of Sexual Offences in South Africa is primarily a social a social issue which reflects the underlying systematic dysfunctionality in South Africa the law is restricted to being reactive in its nature.

¹⁹⁶ Section 1 of the Sexual Offences Act (2007).

their sexual orientation. Although this is the case the National Policy Framework¹⁹⁷ implemented in terms of Chapter 5 of the Sexual Offences Act fleshes out the circumstance of the victim. The National Policy Framework gives a more elaborative strategy in dealing with sexual offences for all persons vulnerable to sexual offences which inevitably include 'corrective' rape victims.

Vulnerability

The following persons as particularly vulnerable to sexual offences under the National Policy Framework:

- Women: mainly due to gender power imbalances in society, as well as the prevalence of discrimination against women;
- Children: mainly due to their young age relative to the age of the sexual offender, as well as their immaturity and gullibility;
- Elderly persons: mainly due to their elderly age relative to the sexual offender, as well as their compromised physical strength due to age;
- Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) persons: mainly due to discriminatory societal perceptions that this group practices unacceptable sexual behaviour. The LGBTI persons also suffer as they challenge the societal gender roles.
- Immigrants and refugees: mainly due to their insecure and uncertain status in the country; and/or¹⁹⁸

Because the National Policy Framework was drafted in the year 2012 and the issue of 'corrective' rape was already a recognised predicament. The National Policy Framework was drafted in light of the plight of both national and international media responses to the crisis of sexual offences in South Africa and was drafted in such a way that homosexual individuals are accommodated in policy responses to sexual offences.¹⁹⁹

¹⁹⁷ National Policy Framework (2012).

¹⁹⁸ National Policy Framework (2012), 14.

¹⁹⁹ Ibid.

Moreover, there is an intentional allusion to LGBTI individuals under the list of vulnerable persons.

This does not only highlight the existence of such sexual minorities in the South African society but also presents a conscious effort to acknowledge 'corrective' rape as a real experience for the lesbian community. Similarly, the insertion of the LGBTI community to the National Policy Framework is an indication that sexual offences against vulnerable persons are taken seriously by the legislature.

The perpetrator

An alleged perpetrator of a sexual offence is defined as a person accused for committing a sexual offence in which the victim may have been exposed to body fluids belonging to that person.²⁰⁰ According to the Constitution, all alleged offenders have the right to be presumed innocent until proven guilty.²⁰¹ This is a practical right for all alleged offenders because false accusations are still a threat to the administration of justice.²⁰²

Neither the Act nor the regulations make mention of the subjective intention or motive of the alleged offender during the commission of a crime of rape. This is because, as previously stated, the motive of the alleged offender is irrelevant in a criminal offence although it has been suggested that motive precedes the formation of an intention to committing a crime.²⁰³ However, this motive may be admissible evidence because it may be vital in implicating the accused in the commission of the crime.²⁰⁴ Another complexity with motive is that a person's motives are 'too complex and obscure to provide a reliable basis for determining liability for punishment.'²⁰⁵ There is ample possibility of multiple motives behind a commission of a sexual offence, charging an

²⁰⁰ Section 27 of the Sexual Offences Act.

²⁰¹ Section 35 of the Constitution.

²⁰² Ibid.

²⁰³ J Burchell *Principles of Criminal Law* 4th edition Juta 2013, 348.

²⁰⁴ Ibid.

²⁰⁵ Naidoo & M Karels 'Hate crimes against black lesbian South Africans: Where race, sexual orientation and gender collide (part II)' 2012, 604.

alleged offender with a bias-motivated offence instead of purely the offence committed makes the crime of 'rape' a lesser offence than that of 'corrective' rape.²⁰⁶ As mentioned in preceding chapters, the sexual orientation of an individual may motivate a person to commit rape but motive is not limited to one characteristic as a victim may be raped because they are female, poor, black, old or young. In proving that a case is a 'corrective' rape the prosecution will have to establish the motive of the offender, being to cure or correct the sexual orientation of a lesbian which is a difficult task for the overburdened CJS in South Africa.²⁰⁷

Presuming that the alleged offender was motivated by the 'hate' of the victim's sexual orientation before establishing such a motive does not display the perpetrator's right to a fair trial may amount to an obstruction of justice.²⁰⁸ This approach also presents a challenge to the prosecution as the standard used against the alleged perpetrator will be more complicated than that of an ordinary case of rape.²⁰⁹

The Sexual Offence Act is not only reactive piece of legislation but carries principles of being a deterrence of all sexual offences as expressed in the Preamble of the Act.²¹⁰ The extensiveness of the Act creates hostility against those who are perpetrators or even alleged perpetrators. The existence of provisions like the compulsory HIV testing of alleged offenders clearly serves as an intention to deter potential offenders from committing sexual offences.

²⁰⁶ Ibid.

²⁰⁷ J Thorpe, 'Corrective rape, Hate Crimes and the law in South Africa (2013), 3.

²⁰⁸ M Mthembu 'The constitutionality of presumptions in South African law' (1998) XXXI *CILSA*, 215.

²⁰⁹ J Thorpe 'Corrective rape, Hate Crimes and the law in South Africa (2013), suggests that the definition of motive must be redefined in consideration of hate crimes.

²¹⁰ The preamble of the Sexual Offences (2007) notes that; 'Whereas the prevalence of the commission of sexual offences in our society is primarily a social phenomenon which is reflective of deep-seated systemic dysfunctionality in our society, and that legal mechanisms to address this social phenomenon are limited are reactive in nature, but nonetheless necessary'

4.3.1 MECHANISMS IN PLACE FOR ALL VICTIMS

National policy framework

The National Policy Framework mandates the establishment of specialised services to assist victims of sexual offences.²¹¹ Accepting that the situation of sexual offences in South Africa is exacerbating, the NPF highlights the impact that these offences have on the victims. Therefore, professionals are required in dealing with these types of offences.²¹² The provision of these services is in accordance with the Sexual Offences Act. Another important establishment is the provision of services for victims that have special needs which includes vulnerable individuals, disabled individuals and children.

The National Policy Framework extensively highlights the available avenues for rape victims to assist them in healing and moving on with their lives after the trauma of being raped. In a sexual offence, all victims are afforded services that are specialised and particular to sexual offences commonly termed as 'specialised services'. The National Policy Framework creates a particular focus on training professionals that are involved in the management of sexual offences so that they are fully equipped in addressing the adverse views of victims of sexual offences. In doing this these professionals will impart information to those executing justice so as to prevent secondary victimisation.²¹³ Another objective of this is that there will be measures in place to ensure that the information on sexual offences is available and collected in a manner that makes it accessible.²¹⁴ This objective will also ensure that witnesses and victims are protected because of their vulnerability. Finally, the National Policy Framework provides for an acknowledgement of cultural differences that exist affecting the victims of the sexual offence, the aim is that in training the professional, the consideration of the impact that diversity, gender and culture to be part of the service standard.²¹⁵ Information

²¹¹ The National Policy Framework (2012), 18.

²¹² The National Policy Framework (2012), 1.

²¹³ The National Policy Framework (2012).14.

²¹⁴ Ibid.

²¹⁵ Ibid.

management and the recognition of cultural differences are clearly intertwined in all the framework proposes.²¹⁶

‘Corrective’ rape being primarily a crime of rape, lends its victims to the available initiatives that the National Policy Framework has been established in the preceding chapters. It is submitted that the society has not reached the standard put forward by the National Policy Framework. Because the rape of a lesbian presents different considerations in managing the offences, the professional personnel should be considerate of the circumstances of lesbian women.

4.3.2 SPECIALISED PERSONNEL TO DEAL WITH SEXUAL OFFENCES

‘Corrective’ rape victims are also exposed to the terms of the 5-year plan on the management of sexual offences. The specialisation of services can be defined as ‘the provision of services, infrastructure, resources and training for all role-players in order to achieve expertise in the field of sexual violence, with the purpose of reducing secondary traumatisation for victims and eradicating sexual offences.’²¹⁷

In a crime scene, especially the crime of rape, there are many different aspects that come into play. The police are usually the first point of contact. According to the findings that were presented by Rohr’s the South African Police Services has failed to correctly implement the standards that are set out in the Sexual Offences Act.²¹⁸

²¹⁶ Ibid.

²¹⁷ The National Policy Framework (2012), Specialisation of Services for Victims of Sexual Offences, 4

²¹⁸ S Röhrs ‘I feel for rape survivors, but I don’t have the time, I’m always running, barriers to accessing post-rape health care in South Africa’. 2011 (Research Report) Gender, Health and Justice Research Unit: Cape Town, 66.

However, an alleged victim of a sexual offence also requires speedily medico-legal services in order to preserve evidence during court proceedings. Regulation 2 on Sexual Offences provides that:

“...A medical practitioner or nurse to whom a sexual offence, where the victim may have been exposed to the risk of being infected with HIV as a result of that offence, is reported by a victim or an interested person must complete the J88 form ('Report by the authorised medical practitioner on the completion of a medico-legal examination').²¹⁹

Even though the victim may not be seriously physically injured, the victim needs professional counselling due to the emotional and psychological trauma. In addition to this the prosecution and the court personnel come into play in adjudicating the case. All these professionals need to be specialised and trained to be sensitive to the issues surrounding rape. They need to understand the nature of the rape in a manner that will enable them to reach a fair and just decision in relation to the rape. These specialised professionals are in a better position to assist all persons taking into account the person's circumstances. This includes the sexual orientation of the victim.

The aftermath of a reported rape case does not need a legislative response as all mechanisms are available to all victims. Specialised personnel are trained to deal effectively with different kinds of vulnerable groups. However, the availability of these specialised services depends on those encumbered with a task to execute them. If specialised personnel treated every sexual offence with the correct sensitivity and urgency, the confidence of all victims in the criminal justice system would be gained. It is a common allegation that victims of sexual offences are not treated with the dignity they deserve and this leads to secondary victimisation and discourages other victims from reporting.²²⁰ The specialised services are not based on the sexual orientation of the victim. Therefore, this means that from a policy point of view 'corrective' rape can be dealt with without legislative intervention.

²¹⁹ Criminal Law (Sexual Offences And Related Matters) Regulations (2008), 2(1).

²²⁰ The National Policy Framework (2012), 15.

4.3.3 VICTIM EMPOWERMENT AND POST EXPOSURE PROPHYLAXIS (PEP)

Victim Empowerment

All victims of sexual offences have to undergo a medical examination in order to preserve evidence relating to the sexual offence.²²¹ In addition to the preservation of evidence, the medical examination establishes the existence of any potential injuries or conditions that may need immediate attention for example sexually transmitted infections (STI's) or the potential infection with HIV.²²² The Post-Exposure Prophylaxis (PEP) is administered if the victim presented within 72 hours of potential exposure to HIV. PEP is an intervention that benefits someone who knew that they did not have the virus or were not previously exposed to HIV.²²³ This treatment is available to all victims despite the sexual orientation which means lesbian women are also eligible to receive such treatment.²²⁴ The Sexual Offences Act has specifically provided that all victims receive this treatment.

The regulations also require that the victim is fully prepared for court and all proceeding thereunder.²²⁵ The victim is and should be able to freely and fearless testify to effectively bring to justice the offender.

However, in a flawed society filled with people who are patriarchal and heterosexist there is potential for homophobic attitudes against Lesbian women who are victims of sexual abuse and the law does not condone such behaviour. A victim of a sexual offence still has the right to report secondary victimisation so that it can be addressed and prevented for future purposes.²²⁶

²²¹ Section 2 of the Criminal Law (Sexual Offences and Related Matters) Regulations, 2008.

²²² Ibid.

²²³ Ibid.

²²⁴ Ibid.

²²⁵ The National Policy Framework (2012), 15.

²²⁶ Ibid.

It can be deduced from this provision that the intention of the legislature in the regulations is to ensure accuracy and compassion towards all victims.²²⁷ Therefore, even victims who are lesbian are afforded these services without discrimination.

Victim Empowerment Programme

The Victim empowerment programme (VEP) recognises that discrimination and prejudice against minorities is still prevalent in South Africa. In light of this, victims of hate-motivated crimes are specifically addressed.²²⁸ Furthermore, victims of sexual offences and women are also given priority under this programme.²²⁹ This means that 'corrective' rape victims are prioritised on three levels. The first level is the fact that they are women, the second is that they are victims of sexual offences and third is that they are lesbian women that were possibly victimised due their sexual orientation.

The VEP seeks to promote the human rights of victims of crime and also take measures to prevent future victimisation.²³⁰ The VEP functions under the Batho Pele principles as a guideline.²³¹ These principles advocate for the empowerment of victims, to enable them to make informed decisions. In addition, they promote the basic human rights of victims, including respect for the victim's dignity and privacy.²³² The victims are allowed participate in activities that will empower their lives as well as to obtain support from family and relatives, as well given the right to self-determination. The accountability of perpetrators and restorative justice is also under this prerogative.²³³

²²⁷ Section 2 of the Sexual Offences Act (2007).

²²⁸ Victim Empowerment Programme, 11.

²²⁹ Ibid

²³⁰ National Policy Guidelines For Victim Empowerment,8 available at

http://www.dsd.gov.za/index2.php?option=com_docman&task=doc_view&gid=84&Itemid=3 [accessed 04/01/2016).

²³¹ I A Nel & Judge 'Exploring Homophobic Victimisation in Gauteng, South Africa: Issues, Impacts and Responses' *Acta Criminologica* 21(3) 2008, 30.

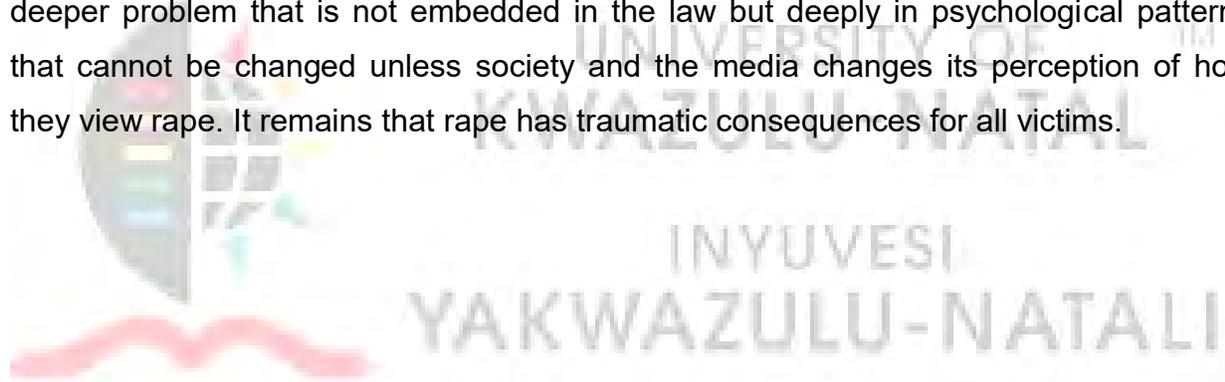
²³² Ibid ,9.

²³³ Ibid.

In light of the provision of the VEP and the Batho Pele Principles victims of 'corrective' rape are catered for in the legislative and policy framework.

4.4 CONCLUSION

The Sexual Offences Act was enacted with a purpose of dealing with kinds of sexual offences in South Africa. The Act, together with the regulations and policies, are interlinked as they advance the protection of all vulnerable persons who have been raped. This chapter has shown that the law is available to protect victims of rape, which includes the rape of lesbian women. This chapter has also shown that society has a deeper problem that is not embedded in the law but deeply in psychological patterns that cannot be changed unless society and the media changes its perception of how they view rape. It remains that rape has traumatic consequences for all victims.



CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

'Corrective' rape is a form of gender-based violence that shows the depth of societal ill amongst certain individuals in South Africa and cannot be tolerated or ignored. 'Corrective' rape is a growing phenomenon in South Africa. It has been established that 'corrective' is a real practice that is committed by individuals who refuse to tolerate lesbian women for their preferred sexual orientation. It has been further established that 'corrective' rape is primarily a crime of rape that should not be disguised under a different category as the consequences of 'correct' rape is no different from any other rape and the circumstances around it, although different, are of a similar nature. As a result, the definition of 'corrective' rape remains unclear and renders it a questionable form of crime. Therefore, this thesis was an attempt to show that 'corrective' rape must not be exaggerated to be outside the realm of the existing criminal justice interventions dealing with sexual offences in South Africa.

Gender plays an important role in 'corrective' rape, as discussed in chapter two and four and considering every single factor in a rape incident may result in confusion as to what crime was eventually committed. Further, because hate crime legislation does not exist in South African law it is suggested that labelling a crime as 'corrective' is not necessarily helpful under the current legislative framework. However, the legislature must consider addressing hate crime sanctions in the future.

The Constitution embodies the right to equality, cultural life, freedom and security. All these rights are important for every individual, including lesbian women; 'corrective' rape undermines these rights. Although all rights are limited, the limitation of these rights must be justifiable in an open democratic society.

Victims of sexual offences which include victims of 'corrective' rape are also entitled to the mechanisms available for victims under the Sexual Offences Act, National Policy framework and the regulations under the Sexual Offences Act.

This thesis has established that 'corrective' rape is real in South Africa. Different incidences of 'corrective' rape were identified and analysed in the preceding chapters,

for example, the rape and murder of Eudy Simelane who was a well-known lesbian woman and the circumstances around her death fit into the definition of ‘corrective’ rape, amongst others. Secondly, this thesis has established that there is a Criminal Justice system that seeks to punish and deter the future commission of cases of rape, which includes ‘corrective’ rape. Furthermore, this thesis has shown that ‘corrective’ rape does not necessarily require a legislative response, the issue lies with society and not necessarily with the law. However, it may still be worth exploring the different possibilities in law as a possible response to ‘corrective’ rape.

This thesis was limited by a lack of reported judgements in ‘corrective’ rape incidences, and as a result, the stance of the courts is not necessarily available when it comes to ‘corrective’ rape. Further, this thesis was limited to the scarcity of literature dealing with ‘corrective’ rape.

The contribution of this thesis is more pertinently useful in realising the danger of believing that the country has not done anything to combat crimes like ‘corrective’ rape, more especially from a legislative point of view.

5.1 SUMMARY OF CHAPTERS

Chapter one introduced the topic of ‘corrective’ rape, as a within the broader framework of gender-based violence. This chapter provided background on ‘corrective’ rape, by recognising its gravity and the need for it to be explored. This chapter proceeded to highlight the problem of ‘corrective’ rape and locating it in the broader framework of hate crimes, which are not yet a part of South Africa’s legislative framework.

The methodology adopted in this thesis was empirical research, as this thesis drew from a number of resources to collate information on ‘corrective’ rape in South Africa. It is noted that ‘corrective’ rape is a practice that is largely addressed through media reports emanating from South Africa and abroad. In the literature review on chapter one of this thesis, it was clear that not many authors considered ‘corrective’ rape as a crime that is still protected under the legislative framework in South Arica. However, a few

authors touched on the topic of hate crime legislation and the need for such law in South Africa.

Chapter two honed into the issue of 'corrective' rape in South Africa. This chapter looked at the nature and extent of 'corrective' rape as well as the causes and explanations put forward for the worsening of this practice. It is noted that the reasons that 'corrective' rape is becoming an increasing concern are because of the frequency of lesbian women coming out with their sexual orientation, something that was not so common in the previous years. It is further noted that 'corrective' rape is prevalent among black communities, living in townships, against mostly economically challenged lesbian individuals. Furthermore, the perpetrators are usually from the township, presumably black, and hold a deeply rooted patriarchal belief that homosexuality is unnatural or un-African. It is submitted that none of these views justify the rape of lesbian women and no cure or correction is made through this as discussed in chapter two.

Chapter three aimed at looking at the available international and Constitutional protection of lesbian women. This was done so as to counter the argument that there is a need for legislation that related to equal protection of Lesbian women. The chapter looked at international instruments to highlight the extent of the protection of human rights at the international level. It was established that the national legislative framework is largely influenced by the international requirements. The violation of lesbian rights is rebuked and legislated against with the existing framework that protects women as a whole.

Chapter four sought to explore the available legislative framework in protecting lesbian women against rape. This chapter looked at the nature of the law against rape in order to evaluate the distinguishing factor between rape and 'corrective' rape as a hate crime. Although a number of authors advocate that 'corrective' rape is different from rape, in general, this assertion remains a theoretical observation that still reaps the same results. Further to this, the chapter highlighted the most important address to 'corrective' rape as a societal issue that must be addressed under the available legislative framework on a case by case basis as not all cases are the same. The Sexual Offences

Act was explored and it can be concluded that it is the most appropriate legislative intervention in light of South Africa's stage at the current time. In light of the above, this thesis proposes an approach that is not new but is however worth reiterating as it is more effective than making new laws. The recommendations are provided below.

5.2 RECOMMENDATIONS

5.2.1 STATE INTERVENTION AND EDUCATIONAL PROGRAMMES

Firstly, the country as a whole must take an initiative in opposing prejudice by changing the views of people on the issue of homosexuality and 'corrective' rape as raping a lesbian woman does not in any way change the sexual orientation of the woman and still amounts to rape. Through education awareness must be mobilised for the shunning of practices such as 'corrective' rape and rape as a whole. This education must be infiltrated into all sectors where people convene and interact such as schools, and other training institutions, businesses and social gatherings. The municipalities must also implement programmes to ensure that people are made aware that homophobic victimisation is unacceptable.

The issue that still remains with certain individuals is the issue of unwillingness to live in harmony without interference with other people's basic human rights. Society requires more than just a law to discontinue homophobic victimisation. Society must be educated about the real consequences of their actions. Society must be sensitised on who and what is a lesbian woman and why raping them will not cure the person's sexual orientation. Society must be educated on the importance of inherent human rights such as the right to dignity and equality and the need to respect each other's rights.

Lesbian women must also be taught how to live freely in South Africa without fear of being victimised. They must be taught of the nature of the law and its availability to them as well. They must be able to blend in society owning their preferred lifestyle and live in

confidence. Further lesbian women must be taught and also sensitised of the reality of sexual offences against many individuals not just lesbian women. They must be taught how to identify with other rape victims in their difference, and brought to the understanding that rape is not just a homophobic attack, but is, in fact, a deeper and more intensive societal ill that can never be minimised, disguised or intensified.

In addition, lesbian women must also be encouraged to report incidences that they feel are prejudiced on, on a monitored system that will ensure that they are protected and are assured of such protection.

5.2.2 LGBTI AWARENESS

The LGBTI society must continue to mobilise and expose practices like 'corrective' rape committed against black lesbian women, and to create awareness among the public of the offensives of this behaviour. The LGBTI must also work with organisations that are going to educate and train individuals in order to integrate the LGBTI into society and to stop homophobic victimisation.

5.2.3 STRICT APPLICATION OF THE LAW

The CJS must adhere to the correct implementation of the available legislative framework being the Sexual Offences Act as contemplated in the preamble of the Act. Draft policies have been published requiring that the service personnel are trained using the standards proposed on sexual offences by the National Policy Framework. The existence of the Regulations and the National Policy Framework must not be ignored as it is an avenue for all sexual offences in South Africa. Potential perpetrators must also be warned using the existing legislation as a form of deterrence and SAPS must be fully equipped to deal with these offenders. In addition, in the sentencing phase, if there is a clear 'corrective' rape motive, the court must consider it as an aggravation of sentence.

Management personnel need to gather information and seek ways to campaign against rape. Rape must be something that everyone is fighting against. At work, school,

Universities, Rural Areas, Townships, towns and everywhere people meet and relate. Televisions may also be an avenue to reach many people in South Africa regarding 'corrective' rape. It remains the position of this research that a legislative response of any kind is unnecessary at the moment as this will not change views of the society on rape in general and on 'corrective' rape in particular.

5.2.4 HATE CRIME LEGISLATION WITH RAPE AS A HATE CRIME

In the future, there is a potential for hate crime legislation in South African law. This thesis recommends that if this avenue is taken as an address to 'corrective' rape, the Department of Constitutional Development and Justice must clearly define what will be covered. In addition, the Criminal Justice system must provide comprehensive guidelines to employees on how to treat a possible 'corrective' rape case. However, it still remains that South Africa must fight against all forms of gender-based violence.



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