



# **POVERTY AND PATRIARCHY AS CONTRIBUTORS TO CHILD SEXUAL ABUSE**

**BY**

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## **ABSTRACT**

This research paper discusses the social and legal aspects of child sexual abuse in South Africa. Two significant contributors namely poverty and patriarchy are considered against a background of a paucity of information. In this regard, a comparative analysis is made between certain developed and developing countries. The legal aspects of child sexual abuse in South Africa are discussed and the relevant legislative provisions are evaluated and criticised in terms of their progressiveness. This research paper further discusses the pitfalls of the lack of medical evidence in establishing child sexual abuse and how this impacts on the prosecution of offenders. This paper concludes with recommendations that mitigate sexual violence against children with particular emphasis on prevention, where concerted efforts are required from both government and society in particular.

## **STATEMENT OF ORIGINALITY**

This is to certify that the work is entirely my own and not of any other person, unless explicitly acknowledged (including citation of published and unpublished sources). This work has not been submitted in any form to the University of KwaZulu Natal or to any other institution for assessment or for any other purpose.

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**Date**

**Approved for final submission:**

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**Rowena Bernard**

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**Date**

## **DEDICATION**

This work is dedicated to my three grandchildren Sheriyana, Jordan and Raheel. Their smiling, loving and innocent faces inspired me to undertake this very emotional and sensitive research.

To my loving husband Leslie, for his encouragement and moral support and to my only son Sherwin for assisting with everything technological. Thank you all for being a part of my life.

## **ACKNOWLEDGEMENTS**

I am forever grateful to my supervisor Rowena Bernard for her unremitting support, encouragement, mentoring and guidance throughout this study. No words can adequately express my gratitude to you.

The support staff at the University of KwaZulu Natal who were ever so willing to assist.

To my editors for a sterling editorial.

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## **LIST OF ACRONYMS**

<b>Acronym</b>	<b>Full word/sentence</b>
<b>ACRWC</b>	<b>African Charter on the Rights and Welfare of the Child</b>
<b>ACRC</b>	<b>African Charter on the Rights of the Child</b>
<b>AIDS</b>	<b>Acquired Immune Deficiency Syndrome</b>
<b>CDC</b>	<b>Center for Disease Control</b>
<b>CJS</b>	<b>Criminal Justice System</b>
<b>CSA</b>	<b>Child sexual abuse</b>
<b>CRC</b>	<b>Convention on the rights of the child</b>
<b>GDP</b>	<b>Gross Domestic Product</b>
<b>GDI</b>	<b>Gender Development Index</b>
<b>HIV</b>	<b>Human Immunodeficiency Virus</b>
<b>IGO</b>	<b>International Governmental Organisations</b>
<b>IPV</b>	<b>Intermit Partner Violence</b>
<b>KZN</b>	<b>KwaZulu-Natal</b>
<b>POCSO</b>	<b>Protection of Children from Sexual Offences</b>
<b>RSA</b>	<b>Republic of South Africa</b>
<b>SA</b>	<b>South Africa</b>
<b>SAPS</b>	<b>South African Police Services</b>
<b>SCA</b>	<b>Supreme Court of Appeal</b>
<b>SONA</b>	<b>State of the Nation Address</b>
<b>UCT</b>	<b>University of Cape Town</b>
<b>UNDP</b>	<b>United Nations Data Poverty Line</b>
<b>UNFPA</b>	<b>United Nations Population Fund</b>
<b>UNICEF</b>	<b>United Nations International Children's Emergency Fund</b>
<b>VAC</b>	<b>Violence Against Children</b>
<b>WHO</b>	<b>World Health Organisation</b>

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## **CHAPTER ONE: INTRODUCTION**

### **1.1 INTRODUCTION AND BACKGROUND**

Child Sexual Abuse (hereafter CSA) is a major challenge worldwide with devastating consequences and significant public health issues. (Ward, Artz, Leoschut, Kassanjee & Barton, 2018). South Africa (SA) has shown an upswing in the incidence of CSA victims. (Leoschut & Kassanjee, 2018). This apparent increase in the incidence of CSA may also be due to increased reporting, because of an increase in awareness. Furthermore, there is a paucity of literature and research about the causal and contributory factors to CSA nationally and internationally. This may therefore explain the lack of effective measures in place to prevent CSA. This dissertation will discuss the sociolegal factors affecting CSA in SA. It will consider two social constructs as significant contributors to CSA, namely, poverty and patriarchy in SA. While the legislative aspect will focus on the laws pertaining to sexual violation of children in SA.

Poverty is defined as a paucity of basic necessities required for the upliftment of a person (World Bank Group). Latvia (1998) states that “poverty is humiliation, a sense of being dependent on them, and of being forced to accept rudeness, insults and indifference when seeking such help”. It is submitted that this has a dual effect on the vulnerability by children and abuse by the perpetrators.

Webster defines patriarchy (p. 340) as: “A social organisation marked by the supremacy of the father in the clan or family, the legal dependants of wives and children, and the reckoning of descent and inheritance in the male line; broadly: control by men of a disproportionately large share of power” (Webster in Patriarchy and women abuse, 2018).

There is a great need to ameliorate the incidence of this scourge, rather than having to rely on remedies provided only by the judicial system. The challenge however is that prevention strategies are less prescribed in poor resource settings and developing countries including SA. Sexual assault in developing countries is particularly pervasive where the resources are limited. It would therefore

seem logical to implement preventative measures to curbing CSA. Whilst this paper seeks to promote preventative strategies, one should also be mindful of the challenges in its implementation. The United Nations Convention on the Rights of the Child 1989 (hereafter CRC) is a treaty designed to protect the child against abusive practises and treat the child with dignity (Article 34, CRC). The African Charter on the Rights of the Child makes it incumbent for the State to protect the child in most facets of the child's life (Article 27). SA has ratified both conventions and has taken legal measures to amend the legislation in line with these Conventions (Constitution of the RSA, Sec. 28, p. 2). This research paper will also consider the effects of current legislation on CSA. However, the critical question remains, is there sufficient implementation of these legislative provisions to have an impact on the prevalence of CSA?

Recognising susceptible groups such as women and children is the responsibility of every society and such efforts will help communities prevent their abuse (Thoringer, Horton & Millea, 1990). Child Sexual Abuse has a long history and is a universal problem. This may be because of the vulnerability of children who assume a subordinate status in society and whose voices can only be heard through an adult. Vulnerability to CSA is more prevalent in the poorest communities and is related to power relationships. In SA reported cases of CSA occur with children 12 years and younger and manifests in 1 in 6 girls (Skosana, 2017). This dates as far back as the international human rights law where children were totally excluded. The Convention on the Rights of the Child took into account the human rights of children.

The sexual abuse of children is highly disturbing and requires some form of amelioration and explanation. Becker (1994) explains an ecological approach to the causative factors in perpetrators where there is no one factor but a multitude of pathways of influence. Guerra & Tolan (1996) also refer to an ecological approach to physical violence which is equally applicable to CSA.

The aim of this research is to integrate the benefits from a social work perspective and a legal perspective. In so doing, recommendations can be made and preventative measures taken against CSA rather than a reliance on punitive judicial measures only. Finkelhor (2009), states that the criminal justice system holds perpetrators accountable but it provides no benefits to the child. Therefore, it will be prudent to include preventative measures in curbing the problem of CSA.

## **1.2 PROBLEM STATEMENT**

The high incidence and the consequences of CSA in SA is devastating. The incidence may even be higher because of under reporting as a consequence of fear of stigmatisation. The judicial system often fails children because of poor evidence which makes prosecution of perpetrators less likely. The cost to government in the management of CSA victims is enormous. In 2015 the estimated cost was a shocking 238.58 billion Rands per annum, 6 per cent of GDP (<http://savethechildren.org.za>). It would make more sense to provide preventative measures to CSA rather than dependence on the legal system to prosecute a sexual assault perpetrator. It is submitted that prevention will be a more cost effective solution in a poverty stricken country whose general economic situation is facing a crisis. It is therefore prudent to look at factors that contribute to CSA and attempt to alleviate and eliminate such causative factors. In so doing, there has to be an in depth understanding of the current legal provisions relating to sexual abuse of children, judicial processes for conviction of offenders and the current prevalence and incidence statistics, previous research on CSA and factors that contribute to CSA in particular poverty and patriarchy. For comparative purposes, this paper focuses on SA in relation to developing countries in Sub Saharan Africa, and some developed countries where there is some relevant data.

SA appears to be the only country in “Sub-Saharan Africa” with research on CSA (Ennew, Gopal, Heeran & Montgomery, 1996). Ennew (1996) concludes that in “terms of academic discourse, or even with non-governmental organisations (NGOs) and international governmental organisations (IGOs) literature on the subject of child sexual exploitation in Sub Saharan Africa consists of an almost total vacuum, in which dispersed and disconnected items of journalistic and project-oriented text are floating aimlessly” (Ennew et al., 1996).

Research in the 1980s by Fraser and Kilbride, in a past survey of physical child abuse in the Bukiri area, describes as few as three recordings of maltreatment among the Samia of Kenya (Fraser & Kilbride, 1980). CSA is not reported in this paper which is a matter of concern. In another earlier study, Loening in 1981 describes the physical, psychological abuse and maltreatment of children in a select Zulu population of SA (Loening, 1981). This survey however, did not reveal any evidence of CSA. The writer notes, “in a society where the absolute taboo of incest includes sexual

contact between any blood relatives, it is unlikely that this, the most disgraceful of misdemeanours, would come to light readily” (Loening, 1981).

Levine in 1981, in their anthropological findings, did report the sexual violation of teenage girls of the Gusii in Kenya: Sexual molestation of girls is a known phenomenon in tropical Africa. Among the Gusii there has been many cases, for example, rape of prepubescent girls by adult men who in many instances are the recognised fathers of their victims (i.e. they are closely related members of their victims’ parents’ generation). In addition, the seduction of pubescent girls by male schoolteachers, is the case for recurrent scandals in Nigeria and Kenya (Levine & Levine, 1981). In Nigeria, in a study by Okeahia on child abuse, the study focused on physical abuse rather than sexual. This included physical punishment, infanticide and female genital mutilation but again CSA was not mentioned (Okeahia, 1984).

### **1.2.1 South African studies on CSA**

18 cases of CSA were reported by Westcott (1984) in the Red Cross Children’s Hospital in Cape Town during a 6-month period in 1982. Eighty per cent of the victims were girls whose ages ranged from the age of two to 12 years. The perpetrator in over 50 per cent of cases were known to the family, a relative or a neighbour, highlighting the fact that perpetrators are often well known to their victims. Jaffe (1988) in a subsequent study examined 88 victims in the very same Red Cross Hospital for children (Jaffe & Roux, 1988). The authors observed an increase of CSA. 18 cases were recorded over a 6 month period in 1982 (Westcott, 1984) and 88 recorded over a 12 month period in 1985 (Jaffe & Roux, 1988). Amongst the 88 children, 90 per cent were girls between the ages of four to six years old. In 57 per cent of cases, the offender was familiar to the victim. A neighbour, followed by the father appeared to be the most significant category of offenders.

Haffejee (1991) studied 37 cases (34 girls and three boys) of CSA, and found that over a six year duration at RK Khan’s Hospital in KwaZulu-Natal most of these children were vaginally or anally abused (Haffejee, 1991). 23 (67%) of the 35 offenders identified, most of them were known to the child namely, stepfathers, fathers or uncles. Seven (18.9%) were strangers. Ten of the 35 children were found to have venereal illnesses (eight had gonorrhoea and two syphilis). AIDS testing had not taken place. It is further submitted, that many of these hospital based studies have dealt with



CSA cases where children were injured or sustained some form of sexually transmitted disease. It may be logical to infer that in the current definition of sexual assault and violation, many children may have been victims of grooming, touching and other forms of sexual exploitation in the past. These studies were small in number and may not be statistically significant, hence the need for more research is evident.

Argent, Bass & Lachman (1995) described 229 cases of CSA in “the Red Cross Memorial Hospital in Cape Town”. These children were less than 15 years, and their average age being seven, were seen at the hospital over one year. The children were mainly English/Afrikaans (58.7%) and Xhosa (41.3%). Venereal disease was found in 17 per cent of the children. Larsen, Chapman, & Armstrong (1998) commented on 99 cases of CSA at Eshowe Provincial Hospital, KwaZulu-Natal during 1985 and 1995. In 34 per cent of victims, the offender was unidentified. The most significant group of familiar offenders was the ‘neighbour or an acquaintance’ (41%), with fathers in particular contributing to 6 per cent and other relatives contributing to 6 per cent of offenders. Of concern however is that 65.9 per cent of the children contracted a venereal disease. Of serious concern is that many of these children may not have been discovered to have been sexually abused, had they not presented with a venereal disease. Again, these are cases of serious contact and possibly penetrative sexual abuse. One has not even considered the cases of sexual abuse where there has been unwanted touching with no clinical evidence of sexual abuse. Research with clinical cases, while documenting findings and descriptive data, does not provide evidence of sexual abuse for other forms of non-penetrative contact. In non-clinical research cases as described, it is more likely to provide prevalence data to include a wider ambit of sexual abuse in its current legislative provision. The Optimus Study conducted in 2016, is a non-clinical interview study based on child sexual abuse, showing a prevalence of 35.4 per cent. Unfortunately, no recent clinical studies on the medical findings on child sexual abuse in SA exists and a greater dependence is thus placed on seminal research (Artz et al., 2016).

### **1.2.2 Non-clinical research on CSA**

A more representative group than the reported hospital research was sampled by Levett (1989), by evaluating 94 female students in their second year of study in psychology (1986) at the University of Cape Town. The group was mainly made up of White (78%), Coloured women

(22%) and an absence of Black students. 43.6 per cent of this group reported sexual violation or an intention to abuse before the age of 18. Of these findings, 47.5 per cent reported some form of contact sexual abuse (the most frequent being unacceptable touching), the remainder being non-contact (the most frequent being stalked by men and harassed by an exhibitionist). In terms of the Criminal Law Sexual Offences and Related Amendment Act, all of these actions of abuse against children would have constituted a criminal offence (hereafter “Sexual Offences Act, 2007”). From this research, it is submitted that the results provide a suboptimal level of the true occurrence of the sexual abuse of children. There is often great fear and upheaval to the integrity of the family when it comes to the reporting of incestuous relationships. Levett, (1989) did not consider other possible reasons for the sexual abuse encountered by her sample. It is therefore very informative for the present study to consider some elements that may contribute to CSA in SA.

A study of 284 male undergraduate psychology students was done by Collings in 1997 at the University of Natal, with a mean age of 19.7 years. This study was racially broader in selection than the prior study; 60.9 per cent of the study were White, 18.7 per cent Asian, 16.2 per cent Black and 4.2 per cent Coloured. Of the 28.9 per cent that experienced CSA, about two thirds experienced non touching and one third was touching. The survey highlights that 28.9 per cent is significantly greater than the 5 – 14 per cent occurrence rates found in male American students. However, Collings subsequently notes that after controlling for definitional and methodological sources of variation, the prevalence figures for the South African sample were similar to those obtained for American students (Collings, 1991). It is also notable that only 67 per cent of the offenders were male, showing a significant number of male children were also abused by female offenders. Prevalence rates varied within racial groups, with Black subjects being enthusiastic to vocalise abusive sexual encounters in childhood (54.5%), relative to Whites (26.3%), Coloureds (33.3%) or Asians (32.1%). Race (being Black in particular) is reported as a significant predictor for abuse, although the writer does recognise that the select group of Black students (n=46) is statistically insignificant and must be regarded with circumspection. Again, in the apartheid era being Black was generally associated with poverty, and hence a greater vulnerability to sexual abuse of children. Being raised without a father for the greater part of a child’s life is regarded as a risk factor and not having a father-figure at home may be a consequence of migrant labour policies and poverty. Whilst not directly mentioned by Collings (1991), the wide scale use of

migrant employees in SA may predispose young black boys to be abusive, here again, highlighting the issue relating to poverty and the need to seek work away from home.

A group of 640 female university students was evaluated by Collings (1997) about their undesirable sexual encounters involving experiential physical contact during their adolescent stage (17 years or younger). The results were 64 per cent White, 21 per cent Asian, 11 per cent Black, however an evaluation of sexual violation in racial terms is not given. The outcome shows that 223 (34.8%) of the group underwent sexual violation by contact prior to being 18 years old. It is noted by the author that these statistics are in line with those surveys done on adult females in the US (Russell, 1986), Canada (Badgley et al., 1984) and New Zealand (Martin, 1994), but the prevalence rates in surveys amongst female American students of 7 – 24 per cent being higher, (Briere & Runtz, 1987); (Finkelhor, 1979). Most offenders were male (93%) and at least four years older (70%) than the victims. The perpetrators were mainly familiar males (40.4%), unknown (28.7%) and relatives (22.7%). Step-parents made up 3.9 per cent of offenders and parents 4.3 per cent.

Focusing on a more relevant group other than University students, Madu & Peltzer (2000; 2001) studied 414 secondary scholars aged between 14 to 30 from the Northern Province of SA. The average age of the participants was 18.5 years. The study focused on physical sexual encounters prior to 18 years, with an adult or person at least five years older than the child or a person in a position of power. The results of this study highlights the issue of patriarchy. Fifty-four per cent of the respondents had experienced physical sexual abuse prior to 18 years of age. However, both males and females showed a similar prevalence rate of 60 per cent and 53.2 per cent respectively. 15.7 per cent of the respondents (65 of 414) had undergone oral, ano-genital penetration or had fingers or objects inserted anally or vaginally. 16 (3.86%) showing that sexual intercourse was by coercion.

### **1.3 PREVENTATIVE MEASURES IN REDUCING CSA**

It is known fact that CSA in SA is disproportionately high (Leoschut, & Kassanje, 2018). Children are the victims of different forms of sexual abuse, that ranges from minor sexual abuses such as touching of the genitalia or breasts, convincing the child into fondling, attempted rape, to

more vicious abuses such as oral and ano-genital penetration with different objects. (Children's Act 38, 2005, Sexual Offences Act 2007). The South African Police Service (hereafter SAPS) crime statistics show that a high percentage of sexual violations are directed against children with a large proportion of the perpetrators being known to the child. (SAPS Annual Crime Report, 2011/2012). The Judiciary which consistently deals with CSA cases refers to the problem as a cancer in South African society (Germanos, 2019). Sadly, despite the high rates of CSA, conviction rates remain relatively low (Germanos, 2019). There is a clear divide between the reported cases of CSA and conviction rates. This division has been described as a "criminal justice bottleneck" whereby several cases are reported, but the numbers lessen when the offenders are arrested, charged, prosecuted and sentenced. (Richter, 2012; Finkelhor, 2009).

There is a significant and well-established body of empirical research showing that most CSA cases are not supported by clinical medical evidence (Heger, et al., 2002). Yet for most criminal justice systems, the presence of medical evidence is an important determinant in the issue to prosecute. In most CSA cases the absence of medical corroboration infers the absence of either a prosecutable case or of proof beyond a reasonable doubt (Kreston, 2007). Many authors on CSA will concur that the absence of injuries in children does not imply that sexual abuse did not take place. By implication, the current position highlights the critical need for the criminal justice systems to widely accommodate other forms of evidence if sexual offences against children is to be effectively proven. It is well known that some of the offences perpetrated against children leave no signs of injury thereby making it difficult for prosecution. In this regard identifying significant contributory factors will help mitigate against the scourge of CSA. It is known but may not be proven that in many instances the justice system fails children in court when the defence attorneys presents a strong defence because of more effective resources.

It is for this and other reasons that a preventative approach to child CSA may seek to alleviate the enormity of CSA in SA.

The incidence of CSA is on the increase in SA. In 2009, research was done on the incidence of CSA in SA by Arm Helpende Hand (Helping Hand) of the Solidarity trade union, child rape per day of about sixty cases are documented in SA (Solidariteit, 2009: p.1). Extrapolation of these

figures translates to an average of 530 rape victims per day. This means that in “SA, one child is raped every three minutes” (Solidariteit, 2009: p.1).

Considering these horrific results health care professionals including government can make effective interventions to help curb this scourge of society. A strong knowledge base and comprehension of the nature of CSA can go a long way in addressing the impact of CSA. If health care workers are unable to comprehend the devastating effects of CSA, they will not be effective service providers. Tomlinson & Philpot’s (2008: p.11) view is that, in order to be effective and assist hurt children redeem themselves, one must have well defined methods, backed by knowledge and based on an integrated holistic approach. It is submitted that prevention of CSA may be the solution rather than wait for an already traumatised child.

#### **1.4 DEFINING SEXUAL ABUSE**

For the purposes of this study the definition of sexual abuse adheres to the legal definition of CSA. The Criminal Law (Sexual Offence and Related Matters) Amendment Act, 32 of 2007, represents a significant step in a positive direction by safeguarding children against sexual violation and assisting the judiciary to ensure appropriate punitive sanctions on perpetrators. The Act however, has several pitfalls with regard to how sexual violation is defined. In defining sexual abuse it appears limited by stipulating both contact and non-contact forms of sexual behaviour, including the lack of a detailed definition of grooming as an important aspect of sexual abuse.

CSA embraces a broad range of actions pertaining to which relevant professionals appear to disagree, as to when and whether specific sexual actions are contrary to social norms and thus abusive. In the definition of sexual violation certain factors must be considered. There is the issue of sexual abuse and its legal implications, variations in sexual behaviour, parameters of non-abusive and abusive sexual experiences, and the definition of sexual violation in psychosocial terms (Aucamp, Steyn & Van Rensburg, 2012: p. 1-10).

From a legal perspective, sexual abuse perpetrators are defined by the Criminal Law Sexual Offences and Related Matters Amendment Act 32 of 2007, as “any person who engages a child (‘person under the age of 18’) with or without the consent of the child, in a sexual act”.

is defined as “an act of sexual penetration or an act of sexual violation” (Sec. 3 of the Sexual Offences Act 2007). By this definition of sexual abuse, the ambit is widened to include touching, exposure to pornography, penetration and rape. This definition also includes the types of sexual abuse.

## **1.5 RESEARCH QUESTIONS**

This study addresses the following research questions:

- 1.5.1 Does poverty and patriarchy contribute to CSA in SA?
- 1.5.2 Does the current legal framework in South Africa adequately criminalise the sexual assault of children?
- 1.5.3 Does the lack of medical evidence in establishing CSA impact on the prosecution of child sexual offenders?
- 1.5.4 What are the recommendations to the prevention of CSA in SA?

## **1.6 OBJECTIVES OF THE STUDY**

This dissertation will collate literature from SA and compare to other developing countries and determine whether a common thread exists in poverty and patriarchy in contributing significantly to CSA. The current legislative provisions will be reviewed as well as prosecutorial deficiencies. The outcome of these findings can be meaningfully applied to improving the position of CSA victims locally and abroad.

## **1.7 STRUCTURE OF THE DISSERTATION**

Chapter 1 will provide an overview to the research, the aims, objectives, research questions and importance of the research. This chapter will also include definitions of sexual assault on children and the legal provisions, as well as definitions of poverty and patriarchy.

Chapter 2 will provide an in-depth review of the literature on poverty and patriarchy as significant contributors to CSA in SA. Comparisons will be made with other developing and developed countries.

Chapter 3 will provide a review of the international legislative framework and the national legislative provisions in the care and protection of children as well as the impact on the outcomes of CSA.

Chapter 4 will focus on how the criminal justice system deals with child offenders where there is little or no corroborating medical evidence. This is an important aspect for justice since many child victims will present with little or no clinical findings following an abuse.

Chapter 5 will conclude the dissertation with recommendations which will include preventative measures applicable to SA which may also apply to other developing countries with similar demographics.

## **1.8 SUMMARY**

CSA remains a soul dismantling infringement on human dignity. Sadly in SA, the prevalence of CSA remains high but the conviction rate low. Legislative provisions consider punitive sanctions for the perpetrator but little reparative justice to victims. Poverty and patriarchy remain significant social contributors to CSA and if eliminated can help to prevent the scourge of CSA in SA.

## **CHAPTER 2:**

### **POVERTY AND PATRIARCHY AS CONTRIBUTORS TO CHILD SEXUAL ABUSE**

#### **2.1 INTRODUCTION**

This chapter will discuss the significance of poverty and patriarchy in contributing to child sexual abuse (CSA). The first part of this chapter focuses on poverty as a contributor to CSA and the second part deals with patriarchy. There are many factors that cause CSA. The discussion in this dissertation has been narrowed down to two causes which have an impact on CSA in SA and can be ameliorated with meaningful changes to the care and protection of children.

#### **2.2 POVERTY**

##### **2.2.1 Definition of poverty**

Poverty refers to a situation of deprivation where there is little or no income and as a consequence one is likely to suffer other forms of deprivation such as food, shelter, nutrition and security. Children from impoverished societies are more likely to be targets of CSA. Household poverty may be a key contributor to CSA (Hatcher, et al., 2019).

##### **2.2.2 Relationship between CSA and poverty**

SA is a country with a tragic past of apartheid and colonialism which has left behind the scars of inequality and poverty. The effects of apartheid laws, which resulted in separating men from their families, referred to as migrant labour, disrupted the stability of families, leaving children in particular, vulnerable to sexual abuse and exploitation (Van Niekerk, 2007; Bower, 2003). To be a poor child in SA is to be denied access to education, health services, shelter, food, clothing and material conditions, which is a denial of healthy living and self-fulfilment. It is about going to sleep hungry, cold and maybe even homeless for days on end. To end this cycle, a hungry child may be forced to engage in sexual favours in order to obtain money to buy food.

##### **2.2.3 Poverty and CSA statistics**

The SA Child Gauge 2017 survey conducted by the UCT Children's Institute found 12 per cent of children living below the international ultra-poverty line (Jamieson L et al., 2017).



About 37 per cent (2 million) of children living in poverty, have to live in conditions of overcrowding (Hall et al., 2012). Corwin and Olafson (1993) and Brown and Barton (2002), all propose that overcrowding predisposes poor children to incestuous encounters by adults leading to CSA. Associated with poverty and overcrowding is the deterioration of moral and ethical values, and a total denigration of such norms and values are an attraction to perpetrators of CSA.

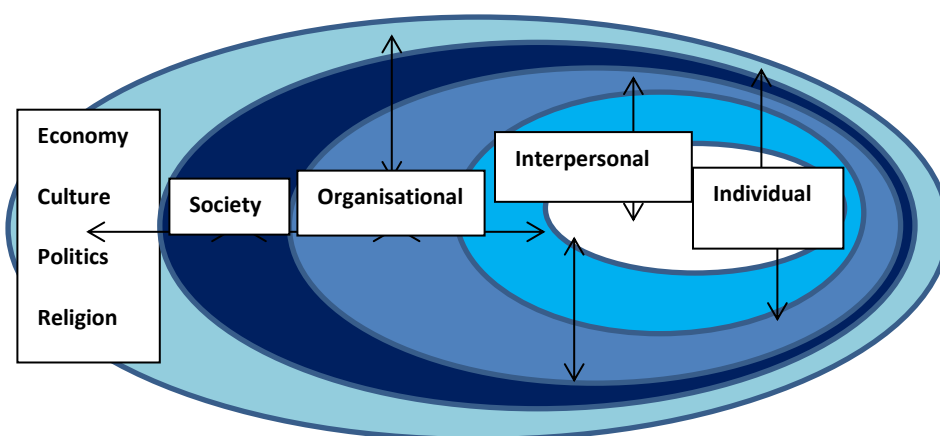
## 2.2.4 A theoretical framework for CSA, the ecological systems model

### 2.2.4.1 Ecological model

In this dissertation the ecological model has been adopted as the best conceptual model in understanding poverty and CSA. This model conceptualises sexual abuse and violence as a multifaceted phenomenon where there is an inter-relationship between individuals, family and community factors (Heise, 1998). This model provides a theoretical approach to understanding CSA (Dahlberg & Krug, 2002).

Whilst sexual violence against children is common in most communities, there is no single factor that explains why individuals behave in a particular way or why individuals are more or less violent (Dahlberg & Krug 2002). Recent research indicates that the behaviour of individuals is determined by their environment (Nikalina & Widom, 2013).

Figure 2.1: The ecological model



Source: Berlo & Ploem 2018

This model shows that individual behaviour with regard to sexual and gender based violence must take into account the broader structures and ideologies reflected in relationships amongst institutions, culture and society as a whole (Berlo & Ploem, 2018).

This model considers various levels of societal organisations, and their symbiotic relationship with each other and their influence on CSA. Figure 2.1, depicts the individual at the centre of the ecological environment and how changes in one level impacts and influences the individual (Bronfenbrenner, 1979). This paper considers how poverty in the community affects sexual behaviour of the individual.

### **2.3 SITUATIONS IN POVERTY THAT CONTRIBUTE TO CSA**

Female headed residences, residential mobility, location of residence, population density and racial diversity are some of the factors common in South African communities that contribute to poverty. Studies by Yahaya (2012), showed that poverty led to high levels of family disruption and CSA.

More than 51 per cent of the population of Sub-Saharan Africa live below the worldwide poverty datum line of 1,25 US dollars per day (UNDP, 2009). The high rate of poverty forces children to work in an attempt to augment the household income. Since children are not qualified to work in the formal sector, this predisposes them towards alternative ways of making a living such as exposure to sexual exploitation (Malow et al., 2006). Prostitution by children working on the streets, predisposes them to abuse (Mandalazi et al., 2013). This type of abuse is the result of the breakdown in cultural norms and values, aggravated by abject poverty (Silbershindt, 2001). A poor community can be vulnerable to high levels of CSA.

### **2.4 CHILD ABUSE IN A POVERTY STRICKEN ENVIRONMENT**

Coulton et al. (2007) reviewed the literature on the relationship between a poor neighbourhood and CSA in SA. These investigators all agree that child sexual abuse and maltreatment are prevalent in impoverished communities. They also considered that in these studies they may have been influenced by selection bias and spatial influences. Goodyear & Brown (2011) suggest that internationally, the issue of CSA has no socio economic boundaries. Whilst this is true, it is

submitted that CSA is more prevalent in situations of poverty simply because the abused have fewer opportunities to seek professional help.

Korbin et al. (2000) suggest that poverty leads to family disruption, substance abuse, stress, lack of moral values, and individual negative effects on the self-esteem.

Poverty is a precursor to the family's inability to provide adequate shelter, medical care and nutrition. Poverty has a negative influence on education and literacy (Carson & Chowdhury, 2012). SA is still influenced by the negative effects of apartheid, which has had a detrimental influence on communities and the breakdown of the family unit. This apartheid system resulted in poor education, medical care and limited employment (Barbarin & Richter, 2013). Artz et al. (2016) showed that there is a statistical increase in CSA in SA showing concurrent societal risk factors, like unemployment and poverty.

## **2.5 UNEMPLOYMENT**

There is a high rate of unemployed adults. Statistics show that 32 per cent of children live in households, without any employed adults (Statistics SA, 2012). There is further evidence of parents who work long hours to support their families and who leave their children unprotected and unsupervised. Statistics SA (2009), showed that those areas in relative poverty, lacked adequate street lighting, no security features in their homes, unfenced properties and poor police patrol (Statistics SA, 2009). Children living in these impoverished communities are left vulnerable to sexual predators. The Optimus study, was research conducted in SA in 2016 by the Centre for Justice in SA in the field of sexual violence on children, by providing national data on the incidence and prevalence of sexual violation on children. The Optimus study also confirmed the high risk that such unsafe homes and communities create to the wellbeing of children (Artz et al., 2016).

## **2.6 OVERCROWDING AND CSA**

Statistics SA (2012) showed 63 per cent of SA children lived in extended households and 35 per cent of children lived in nuclear households. "Nuclear households being homes consisting of the head, their members and offspring" (Statistics SA, 2012).

Overcrowding which is a consequence of poverty, results in adults and children sleeping together (Stats SA, 2009). These children are exposed to sexually active adults (Richter & Dowes, 2008). The Optimus study confirmed that a higher sleeping density was related to a greater likelihood of child sexual abuse (Artz et al., 2016).

According to victims of a crime survey (2014/2015) persons residing in large homes are more likely to be victims of CSA because of overcrowding (Statistics SA, 2016). Poverty is a significant contributor to high density households and contributes significantly to CSA in SA (Kaminer & Eagle, 2012).

Ferguson et al. (2013), reported an increasing number of CSA cases that are associated with socio-economic disadvantage determined by younger maternal age, limited maternal education, suboptimal family living standards and reduced family income. Jewkes et al. (2005), conducted a qualitative study in SA and Namibia and found that poor children were especially vulnerable to transactional sexual abuse which meant they will agree to sexual relations in exchange for food and clothing (Jewkes et al., 2005). Similar findings were also confirmed in the Optimus study (Artz et al., 2016).

## **2.7 HIGHER RATES OF CSA IN POORER COMMUNITIES**

The question to be asked is whether child welfare organisations report a higher incidence of CSA because of selection bias in investigating mainly poor families?

Katherine Schumaker (2012), researched this very question in a Canadian study and concluded that in an environment of poverty and neglect, CSA cannot be blamed on poverty alone. Her study does suggest that in investigating this cluster of economically and socially disadvantaged children, they are in a vulnerable predicament for abuse. In trying to remedy the question of CSA, Katherine proposes an intervention programme focusing on alleviating poverty, instead of the current child protection paradigm (Schumaker, 2012). Many children, (Van Niekerk, 2003) will suffer in silence and CSA will continue to be undetected and unreported, simply because poverty precludes them from accessing help. HIV-AIDS is a further contributor to poverty in SA.

## **2.8 IMPACT OF HIV-AIDS IN SA ON POVERTY AND CSA**

According to UNICEF, 49 per cent of orphans in SA are Aids orphans (UNICEF 2009). It becomes a challenge that therefore in the absence of parents, children are accorded little or no status or child protection. Du Plessis & Conley (2009), showed a clear relationship between HIV-AIDS, poverty and CSA. It is estimated that 66 per cent of SA children are living in severe poverty. These children are likely to grow up without parental protection. They are therefore more susceptible to various forms of sexual abuse and exploitation (Jewkes, 2004).

South Africa is unique in its diversity and the Eurocentric model does not lend itself to the understanding of the causation of CSA. The SA culture was shaped by the scars of apartheid and the high rate of HIV-Aids mortality rates have contributed to poverty and a decline in morality. Levelt (1994) so aptly states "...the disruption and dislocation of everyday life in consequence of apartheid labour and social practices has something to do with sexual abuse of children in contemporary SA." Poverty and a decline in moral values have resulted in dysfunctional families.

## **2.9 DYSFUNCTIONAL FAMILIES AND CSA**

As a direct consequence of migrant labour and poverty we have an increasing number of dysfunctional families in SA. Research evidence by Jones & Ramchandani (1999) indicate that children from dysfunctional families more frequently abuse each other.

World Health Organisation calls CSA, a "silent health emergency, and its prevention a public health priority." Research by Pereda et al. (2009) showed that one in five women in 65 countries had encountered childhood violation prior to 18 years of age. One of the highest rates of CSA in the world is recorded in SA by Human Rights Watch (1995). Candice Wallow-Henry (2015) comments that child abuse rates in the Caribbean are similar to SA owing to poverty.

Stokes & Smith (2011) researching aboriginal children in Canada, showed that separation of these children from their parents for a few months are similar to children of migrant workers in SA. This experience of separation from parents causes anxiety in children who are vulnerable to perpetrators of abuse. Stokes & Smith (2011) show a significant correlation between poverty and child sexual violation. Poverty, unemployment, overcrowding, HIV-Aids mortality, absence of parental

supervision are all factors that create dysfunctional families which influence each other in the causation of CSA.

The Ryan Report (Powell 2013) highlights the escalating rates of CSA, occurring in Ireland which is regarded as a first world country and where the implementation of human rights has failed children in institutional care. The conclusion is that poverty results in the institutionalisation of vulnerable children, and also causes CSA. Erving Goffman's (1961) seminal collaborated sociological study found that persons in authority at institutions tend to exploit their positions by abusing children in their care.

## **2.10 THE AFRICAN CHILD AND CSA**

The African child is regarded as a defining member which brings status and completeness to a nuclear family unit. However, in many African countries poverty directly affects CSA and violates the basic human rights of children. The Global Fund for Children (2009), states that children in West Africa for example, are more frequently raped, are unlikely to go to school, or receive adequate health care or nutrition. It is an increasing social problem in Ghana, Nigeria and Togo. Although these countries have an abundance of natural resources, their economy relies mainly on agricultural farming. This leads to poverty and unemployment owing to frequent climatic disasters.

Ghana has widespread poverty, and with the effect of the culture of silence, many parents whose children are sexually abused may settle for minimum compensation and an out of court settlement as negotiated with the offender (Asante et al., 2016).

Whilst sensitisation and education are present in most communities, informal arbitration and monetary compensation more often than not, take precedence over the judicial court systems. This perhaps explains the recruitment of such crimes against children facilitating CSA (Jolly, 2010).

Despite the millennium development goals, and the “United Nations Conventions on the Rights of the Child”, there is little help for these vulnerable children (Asante et al., 2016). Poverty results in children being homeless.

Children who find themselves homeless, because of economic reasons, are more vulnerable to commercial sexual exploitation (Mitchel et al., 2010). Spagenberg (2001) noted that the city's destitute children were often recruited into sexual exploitative relationships within 36-48 hours of being on the streets. Children in foster placement face a greater risk of sex trafficking, Fong & Cardoso (2010) as these children do not have a stable home environment to protect them against sexual predators. Studies of commercial sexual exploitation of children, Roe-Sepowitz (2017), have clearly shown poverty, and lack of economic opportunities, Clawson et al., (2009), as significant contributors to CSA.

A study by Schwartz et al. (2014) showed that homeless youth amongst men created a high risk population for sexual abuse. These youth have in more than 95 per cent of cases engaged in sexual activity around the age 14. The study highlights the fact that the homeless exhibit such sexual behaviour because of socio-demographic factors and a poor family environment.

## **2.11 LIMITATION OF HUMAN AND SOCIOECONOMIC RIGHTS**

The review by Bywaters et al. (2015) in the UK based studies show a strong association between poor socio-economic families and the risk of CSA. There appears to be a link between socio-economic status and rates of abuse. The greater the economic hardship in the home, the bigger the likelihood of poverty, the bigger the risk of unprotected children who are vulnerable towards abuse by outsiders. These factors lead children to seek some form of financial gain to alleviate hardship in the home.

Pelton (2015) concludes that many studies highlight the strong link between family poverty and CSA. The evidence Pelton suggests is more convincing as it occurs internationally with children of different ages, gender and ethnicity. Studies from US, Stoltenborg et al. (2015), and the UK, Radford et al. (2011; 2013) both conclude that a significant relationship exists between socio-economic disadvantages and the extent of the severity of child abuse. Outside the UK studies by Pelton (2015), Conrad-Hiebner & Scanlon (2015), Brandon et al. (2014) all confirm an inverse relationship between poverty and child sexual abuse. Environments of poverty will therefore create higher levels of CSA.

## **2.12 NEIGHBOURHOOD FACTORS AND CSA**

The influence of the economic status of the town or city in which people live impacts on the levels or prevalence of CSA. Poorly resourced towns show lower incidence of CSA reporting. Bywaters et al. (2015) described this as an inverse intervention law. “When we compare equally deprived or disadvantaged neighbourhoods in different local authorities, with low deprivation scores, had higher child welfare intervention rules” (Bywaters et al., 2015). A child in an advantaged local authority had twice the chance of being on a child care plan as compared to a child from a disadvantaged authority.

Section 110 of the Children’s Act 38 of 2005 was enacted to protect children, who are regarded as one of the most vulnerable members of society and are particularly vulnerable to sexual abuse and exploitation. Children should be afforded protection from economic deprivation like poverty. In *De Renack v Director of public Prosecutors (Witwatersrand Local Dunun) and others* 2002 (12) BCCR 1285 (W), the Judge remarked that numerous children in SA are born and condemned into a life of poverty with high levels of vulnerability, lack of parental control and involvement creating the basis for sexual abuse and violation.

## **2.13 COERCIVE SEXUAL ENVIRONMENTS**

Sampson (2012) refers to a coercive sexual environment being one of concentrated disadvantage, where the high poverty and crime rate, are where the chances to a good life are ruined by sexual abuse or violence. There is sufficient evidence to show, that children growing up in this environment, suffer serious physical abuse including sexual abuse (Popkin, Leventhal & Weisman, 2010). Asante et al., (2016) in a Ghanaian study showed poverty to be a major driver in CSA despite the legal provisions.

The link to poverty is often complex, as illustrated in Lesotho, where daughters despite being placed in wealthier homes, are more often raped or abused, and families more likely to reject them if no initiative was made to secure finances by allowing themselves to be sexually abused (Jolly & Hawkins, 2010). In Ghana, Asante et al. (2016) in their research argue that disadvantaged females are generally more exposed to sexual crimes and exploitation, poor housing, suboptimal



socio-economic status, poor access to police and social services and a sense of general vulnerability and powerlessness.

## **2.14 CULTURE OF TOLERANCE AND STIGMATISATION**

At community and societal levels, predisposing factors for the perpetuation of CSA includes poverty and generally higher tolerance levels to sexual abuse within communities. Again the tolerance may be because of failure to access adequate social and other services within communities themselves. Yahaya et al. (2013), showed that poverty reduces the resources to provide and sustain basic human right needs and services. Yahaya et al. (2013) sited neighbourhood poverty, residential instability and a high population density to be significant contributors to sexual abuse (Yahaya, 2013).

## **2.15 FACTORS THAT FACILITATE CSA**

### **2.15.1 The lack of basic needs**

The environment deficient model, together with material deprivation, drawing from sociological theories explains the effects of intergenerational poverty. This overwhelms parents, who are materially and emotionally unable to care for children (Schumaker, 2012).

The UK Leicester study examined 175 young person's, case files and found using data analysis and the t test, logical regression analysis showed only four significant contributors to sexual abuse which were poverty, alcohol abuse, running away, substance abuse or where friends or family work as sex workers (Klatt et al., 2014).

Researchers evaluated 20 articles from 15 studies in Sub-Saharan Africa and found relative risk factors to be poverty, residing with non-biological care givers, stigmatisation and alcohol abuse (Morantz et al., 2013). The conclusion drawn from the study was that intervention measures that focused on promoting education and alleviating poverty was needed to curb CSA (Morantz et al., 2013).

Research by Capri et al. (2013), on children sexually abused in the Helderberg basin of the Western Cape, resonate in some ways with findings elsewhere in the world. It is clear the situation that

gives rise to sexual abuse is poverty. These child victims of sexual abuse are from low income communities, pervasive poverty and deprivation. Under these dire circumstances it is not only the sexual abuse that is a problem, but the abuse of power and violence also.

SA has a high prevalence of CSA with social workers believing that poverty is a major cause of the high incidence among the perceived risk factors of CSA. Poverty causes social disorganisation, families are left destitute and children then become vulnerable targets for sexual abuse by perpetrators (Andipatin, 2014).

Sanders, Reynolds & Luke (2012) in Lambert & Andipatin (2014) state that 67% of South African children are living in poverty. Poverty deprives a child of access to health services, housing, education, safety and security, all of which are essential to a child's right to dignity and well-being. There are convincing views from the social workers discipline, having cited cases where overcrowding such as older siblings sleeping next to younger siblings, have often resulted in cases of incest and sexual abuse (Lambert & Andipatin, 2014).

Urie Bronfenbrenner (1917-2005) developed the ecological systems model to explain the influence of a child in relation to the child's surroundings and how a child develops. According to Bronfenbrenner's Model (1986) stress factors and parental attitudes lead poor parents to punish and sexually abuse children more frequently than non-poor parents. The reason being that poor parents experience higher stress levels, have inadequate housing, are unable to support their children and more likely to continue abusing their children physically, emotionally and socially.

Since CSA is indeed a public health crisis, Veenema et al. (2015), reviewed the literature in 32 developing low income countries and studied 44 articles, and found CSA in all levels of society and in almost all regions. It may be perceived as a new phenomenon, but that is only because of heightened awareness to report these incidents. Poverty is an exacerbating factor because of the strain it imposes on the family.

Grief et al. in (2011) researched the issue of HIV epidemic in Sub-Saharan Africa and how this exacerbated the issue of poverty in capital cities in African countries. This study was further

affirmed across five developing countries in Ghana, Tanzania, Uganda, Zimbabwe and Kenya in which it showed slum residents have a higher risk of sexual behaviour compared to non-slum residents. The research findings showed earlier sexual debut, low to no condom usage, multiple sexual partners, showing a uniform behaviour of sexual abuse among urban poverty.

Lewis (1961) states poverty was an adaptation to a set of objective conditions of the larger society, but once it comes into existence, it tends to perpetuate itself from generation to generation because of its effects on children (Patterson, 1994). While Lewis argued that “poverty was culturally self-reinforcing”, its incidence was directly connected to “structural conditions in society”. (Massey & Denton, 1993).

Pare & Felson (2014) examined the relationship between poverty and various types of crimes in Britain and concluded that poverty increases the likelihood of criminalised behaviour, but did not specifically mention CSA, it is submitted that this criminalised behaviour is likely to include the sexual abuse of children.

In attempting to understand the contributory factors to CSA, and its complexity it is helpful to keep the work of Bronfenbrenner (2000) in mind. This renowned psychologist states that in an endeavour to comprehend human behaviour one should consider a multi-level influence which includes looking at families and communities in the environment in which they exist. Failure of each structural component as purported by Bronfenbrenner (2000) will result in total collapse of the unit as a whole, and sexual abuse of children, together with other problems as the end result (Fong, 2017).

### **2.15.2 Child marriages a disguise for sexual violation**

In ten countries with high prevalence of child marriages, a significant proportion of between 49 per cent and 75 per cent of girls are married by the age of 18. (Hervish & Feldman, 2011). If present trends are to continue, girls married per year, will escalate to an average of 15.1 million between 2021 and 2030 (UNFPA, 2012). This is a human rights violation, and under this guise permits sexual relations, which under legislation is a criminal offence, which almost legitimises rape.

Socio cultural beliefs sets the stage for people to make decisions as to how to manage poverty. Where there are increased levels of violence, poverty and where the perceived risk of child sexual assault is high, many parents may believe that adolescent marriages are the best way to protect their children (Brown, 2012).

In the absence of any other better systems of social protection, marriage is often believed to be the only guarantee to a girl's future economic security. In particular, poor families see marriage as the best possible chance (Bajracharya & Amin, 2010). Children have no choice, cannot stand up to parental decisions, cannot run away for fear of spoiling the name, and sometimes have to live in this so called 'hell'. There is clear qualitative and quantitative evidence that poorer girls marry younger (Hervish, Feldman, & Jacob, 2011). Child marriage 'hotspots' exist in countries with suboptimal levels of personal development and increased poverty rates (World Vision, 2013). Often, these countries have high levels of conflict and environmental stress, which predisposes to insecurity and poverty.

### **2.15.3 Pathways by which poverty leads to child marriage and abuse**

In situations where there is a strong cultural belief and where child marriage is practised, in the presence of poverty, the forced child marriage seems to be a way to cope with poverty. Getting rid of a daughter in the presence of poverty means one less mouth to feed (Ahmed, 2012). Furthermore, in certain cultures where girls once married do not contribute to her family is often looked at as a poor investment. In certain countries like India, a dowry is paid in exchange for a bride, this is similar to SA, where "lobola" is paid. This can be a significant incentive in the presence of economic family stress. (Brown, 2012).

By contrast CSA for purposes of commercial sexual exploitation, transactional sex, use of child pornography is greatly associated with poverty. As Frederick (2010) states while no child is exempt from the risk of sexual abuse and exploitation, some groups of children are more vulnerable than others. These include children with mental and physical disabilities, children living and working on the street, children in conflict with the law, child refugees, and children separated from

their families, children in places of conflict and natural disasters, sexual minors, children living in slums and the children of sex workers.

Poverty contributes to CSA in various ways including the promotion of transactional sexual manoeuvres by children. On the other hand, patriarchy has promoted a culture that devalues the position of women and placing men and boys on a pedestal thus further contributing to CSA.

## **2.16 PATRIARCHY AND CSA**

### **2.16.1 Introduction**

Having due regard for the multilevel model of risk factors influencing CSA, the issue of patriarchy as a causative agent, relates to individual characters within a patriarchal environment.

### **2.16.2 Definition of patriarchy**

Patriarchy is a social construct where adult males have resolute power and take on a role of domination in spheres of politics, morality, social privileges and control of property (Israel, 2018). In terms of family heads of the household such as a father they have dominion and power over the women and children (Israel, 2018). However, it is still argued that the abuse of women and children, in particular CSA continues to be a crucial issue in SA and other countries. (Mansfield, 2016,). Palm (2018) argues that children are often presented as being at the bottom of a hierarchy of human importance, where a father historically held power of life and death over his household as God's representative. In this authoritarian system, men wielded power over women and adults over children.

### **2.16.3 History of patriarchy**

Patriarchy originates from the Greek word 'patriarkhes' which means "father of a race" (Ademiluka, 2018). Effectively meaning the rule of the father, however, the Webster dictionary defines patriarchy as "a social organisation marked by the supremacy of the father in the clan or family, the legal dependence of wives and children and the reckoning of descent and inheritance in the male line, broadly the control by men of a disproportionately large share of power". (Ademiluka, 2018).

Igbellina Igbokwe's viewpoint is that patriarchy was originally used to describe the position of the father as a household head but it has progressively been used to refer to the systemic organisation of male supremacy and female subordination (Igbokwe, 2013). Patriarchy is a system of social stratification and differentiation on the basis of sex which provides material advantages to males while simultaneously placing severe constraints on the roles and activities of females (Igbokwe, 2013).

In this regard patriarchy is simply male domination of females through a systemic socialisation process. Male aggression against women and children is a key marker of patriarchy (Ademiluka, 2018). Historically patriarchy can be traced back to ancient Greece. Where women were portrayed as "morally intellectually, and physically inferior to men". (Ademiluka, 2018).

In summary therefore, patriarchy is the abuse of women and extends to children especially the girl child. The sexual violence whilst it may occur between same sex individuals is more frequently committed by a male against a female. Patriarchy in an African culture is still prevalent and also contributes to CSA.

## **2.17 AFRICAN CULTURED PATRIARCHY AND CSA**

In Sub-Saharan Africa the male has total control and dominance, and males are born into an accepted elevated societal hierarchy while female children especially, are devalued. Men buy or pay for their brides and therefore own them like property. The women for example in Nigeria take on the name of the husband (Bvukutwa, 2019). Men in many African countries especially in rural areas can have more than one wife, the same is not true for women.

There is much discrimination between male and female children, where females are regarded as expendable and of no value to the household. There is also the question of forced marriages known in rural Eastern Cape called Ukuthwala where girl children as young as nine years old are compelled into marriage. In SA and other countries, patriarchy is so entrenched in society that it is regarded as being normal Mokgata, (2017) and transferred from one generation to another.

## **2.18 TRANSGENERATIONAL PATRIARCHY**

In most cases it is individual factors that substantiates why there is a transgenerational transference of patriarchy. It may be from a personality disorder, which is a psychiatric disorder deeply signified by maladaptive behaviour. This is not necessarily an illness, but a situation sculptured by years of societal indoctrination. This type of disorder predisposes males to behaving in a manner which abuses females and promotes sexual and other types of abuse on children, in which the rights of others are violated (Newman, 2017). This finding of a personality disorder was proven by research on Swedish prisoners, found guilty of rape (Sarkhar, 2013). It is submitted that, this underlying personality type disorder, is brought into expression by a culture of patriarchal normative, in a society entrenched in patriarchy (Sarkhar, 2013). It is therefore certain personality traits together with societal cultured norms and values like patriarchy that promote the culture of sexual abuse on vulnerable children (Sarkhar, 2013).

It is mostly women who are the subjects of patriarchal oppression. When children are abused it is an asphyxiating experience. Children, depending on their ages carry deep hurt for years. This hurt affects their lives in a myriad of harmful ways owing to the biological differences perceived by society towards males and females. (Dagor & Raghav, 2019). Biologic gender differences between men and women reinforces patriarchy.

## **2.19 GENDER DIFFERENCES AND PATRIARCHY**

The inherent biological differences between men and women results in gender based differences from socialisation into different expectations of both males and females. This results in male domination over female counterparts who are in positions of subordination. It is through these gender inequalities and processes of socialisation that the ideals of patriarchy emerge. At the heart of patriarchy emerges the ideology of oppression of women and children (Ademiluka, 2018). It is submitted that individuals are inducted into a hierarchical gender system early in their lives and so this behaviour goes by unrecognised and becomes the norm.

It is against this backdrop that the understanding of patriarchy needs to be seen and how individuals are shaped into a gendered patriarchal belief system. Other factors in different African countries may also contribute to patriarchy and CSA.

## **2.20 A COMPARATIVE ANALYSIS OF PATRIARCHY & CSA IN DIFFERENT JURISDICTIONS**

Children in various regions of the world are exposed to crimes and violence directly through victimisation and indirectly through witnessing. Sexual abuse is one such crime. It is known that certain factors like poverty, patriarchy and stigmatisation contribute towards a culture of under reporting thus allowing the sexual abuse of children to escalate (Afolabi & Deij, 2014).

Whilst the exposure to patriarchy and violence may have different effects on growing children, it certainly has negative effects, be it behavioural or mental. Nevertheless, the end result is exposure to patriarchy and violence resulting in perpetration of the scourge of CSA (Jewkes et al., 2011).

Mueller et al. (2013) confirm that chronic exposure to patriarchy perpetuates further violence and tolerance. There is sufficient evidence therefore that children who are socialised with patriarchal values, diminish their ability for resistance, and women and children remain the attentive audience to aggressive males that are legitimised by gender values and power imbalances (Baloyi, 2014; Burten & Naidoo, 2013, 2016).

Fakunmoju et al. (2018) in their study purport that in both Nigeria and SA, women submit sexually to their spouses and they are often held responsible for enticing violent behaviour by their men. A belief system that enhances patriarchy, and promote the subordination of women and children (Fakunmoju et al., 2018).

In both countries women become the property of their husbands (Lobola in SA). This further promotes a patriarchal mindset. This patriarchal mindset together with cultural beliefs and traditions has promoted a type of sexual abuse in SA that is frightening. For example “Jack rolling” (i.e. a gang rape of teenagers as pay back for wrong doing or disreputable pleasures); “virgin cleansing” (a belief that a man will be healed of his HIV/Aids by having intercourse with a virgin girl) and “corrective rape” (i.e. practice where lesbians are raped in the belief of curing them of lesbianism) is very much prevalent in SA (Koraan & Geduld, 2015). It is submitted that certain cultural practices like female genital mutilation and breast ironing are also patriarchal systems of child sexual abuse.



### **2.21. FEMALE GENITAL MUTILATION**

It is submitted that female genital mutilation, highlights patriarchy as the cause of a degrading and abusive form of sexual exploitation of young girls. This activity is still widely practiced in parts of Africa. In Nigeria for example it is widely practiced (Igbokwe, 2013). The WHO has changed the name of this type of practice from female circumcision to female genital mutilation because this type of abuse is a form of genital mutilation (Okeke, Anyaehie & Enzenyeaku, 2012).

The surprising purpose of all this malpractice is to increase the status of the patriarchal husband who has the honour of securing a virgin wife. The procedure also ensures that this female who is usually a young teen, will have no sexual urges and that her sexual feelings and her genital organs are completely destroyed.

### **2.22 CHINA AND FOOTBINDING PRACTICES**

Certain developed countries also have patriarchal sexually exploitative acts such as footbinding practices in China. Footbinding is another form of repression which existed in Imperial China in the early tenth century and continued up until the 1940's, where young girls between the ages of two to 10 years were abused. They had their feet broken and tightly tied, in a custom called footbinding. This left them deformed and disabled and gave the male counterparts a form of erotic sexual satisfaction. This practice, was cleverly crafted in that it did not involve the genitalia, therefore it was not sexual but it was still patriarchal and abusive (Whitfield, 2008). Unfortunately this practice not only disfigured the feet of these children physically but had a traumatic effect on their minds and emotions. This practice much like female genital mutilation devalued the lives of girls from the outset. (Monagan, 2010.)

### **2.23 BREAST IRONING**

This practice is carried out in some parts of Cameroon, Guinea Bissau, West and Central Africa, including Chad, Togo and Benin (Monagan, 2010). This involves pressing flat the breasts of young girls with a heated object. This is done to halt their physical female development, and prevent them from seducing men or being involved in premarital sex (Monagan, 2010). Whilst this practice is not common in SA, it certainly constitutes sexual abuse in terms of SA legislation.

Female genital mutilation, breast ironing and foot binding are some of the ways in which women and children are forced to conform to patriarchal standards (Monagon, 2010). Most of these practices are male driven atrocities.

## **2.24 PATRIARCHY AND MALES AND CSA**

Boys seem to have stronger views on sexual violence (Jones et al, 2016), (Pollanen et al., 2018). Boys support the view about coercive and forced sex with girls, and believe this to be a good way to inflict hurt on a female for whatever reason (De Vries et al., 2014).

Violent masculinity may be a genetically inherited trait that is moulded by socialisation, but often manifests as patriarchy in all its subtleties (Buiten & Naidoo, 2016). Rasool (2011) held the view that patriarchy is essentially a legal, political, social, religious and economic arrangement very craftily created to boost male domination on the one hand and reinforcing women and girl subordination on the other.

## **2.25 SOCIOCULTURAL INFLUENCE ON PATRIARCHAL CSA**

It is common cause that a society's value and cultural belief systems that favour patriarchy will promote patriarchy.

Metz (2014) proposes that in many Sub-Saharan countries including SA, communities favour collectivism rather than individualism. The results are that societies are influenced by patriarchal beliefs (Makama, 2013). However, SA has some key components that differ from other Sub-Saharan countries. SA for example has a stronger ranking on human rights and is rated as medium risk ranking. This is based on a World human rights data and risk indices which evaluates a country's political, economic, human rights and environmental issues (Maplecroft, 2014). In respect of the HFI (human freedom index), SA (personal 70/159 and economic 105/159), ranked more than most African countries (Vasquez & Porcynnik, 2016). This means that despite SA's slightly better economic and human rights position, patriarchy continues to exist.

In respect of gender parity as determined by the gender development index (GDI), such as equality between men and women (Jahan et al., 2016), SA ranks in the group two category, which is much

better than surrounding countries. SA has progressive legislation, which falls under the most supreme law of the land, the Constitution (Act 108, 1996). However, SA is both racially and ethnically diverse, most Sub-Saharan countries are not. These countries have ethnic/tribal and religious diversity (Human rights watch, 2018).

Most African countries have a past of political exploitation, including SA. In general, there are differential effects of risks associated with different forms and settings of exposure to sexual violence, the differences in patriarchal behaviour is fashioned by these various exposures (Human Rights Watch, 2018). This means that in a highly violent environment such as war and conflict the sexual violation of children is generally more brutal as rape whilst an environment of lesser violence promotes other forms of sexual violation like touching and pornography.

## **2.26 THE EFFECTS OF DEMOGRAPHICS ON PATRIARCHY & CSA**

### **2.26.1 Age**

Older adolescents, who have been socialised into patriarchy for longer periods are more likely to express these views and beliefs. This results in a perpetuation of these behavioural patterns into adulthood. This is because it is considered normal. (Abdulani et al., 2017; Rasool, 2015,). The other aspect is the knowledge that violence and exploitative behaviour creates a sense of power which may be appealing to some adolescent males (Beksinska et al., 2014).

### **2.26.2 Gender**

Many studies have shown that males are more likely to endorse and readopt patriarchal attitudes as compared to their female counterparts. Very often this is due to a cultural transgenerational transference of a patriarchal belief system. (Adika et al., 2013; Fakunmoju et al., 2016, 2016; Mason-Jones et al., 2016; Pollanen et al., 2018). Furthermore, feminist theories suggest that men are more likely to embrace their patriarchal privilege (Igbokwe, 2013). This empowers them and endorses their abusive behaviour.

Gender roles and male domination continue to exist in many families passed on from generation to generation as part of tradition. Denny & Nwankwo (2015) following on their Nigerian study,

established that occasional hitting of women in the household is considered acceptable, rather than respondents holding a tolerant attitude. Similar findings of violence as an acceptable norm against women and children were manifest in SA (Rasool 2015, 2016).

## **2.27 SOUTH AFRICAN CULTURE OF PATRIARCHY INDUCED VIOLENCE AND SEXUAL ABUSE**

SA is a country with the capacity for high levels of violence. Buiten et al. (2016) conducted a national survey with 9730 adolescents aged 15-17. The findings showed one in five adolescent to have encountered some form of sexual abuse.

Martin et al. (2013) proposes that within a feminist theoretical framework the culture of gender inequality, together with male domination and societal acceptances promotes male oppression of females. It is therefore patriarchal structures that promote a hierarchy of male superiority and domination.

Namy et al. (2017) also states that the type of male domination often blames women and children who fail to submit to a patriarchal belief system. In SA, with high rates of unemployment, researchers have proposed that South African males resort to violence, sexual or physical abuse towards their female counterparts since they may lack the economic advantage to live up to traditional standards. Bruneau (2018) regards this type of economic marginalisation that promotes the patriarchal mindset with abuse of power in the presence of economic deprivation and poverty. Dekel et al. (2019) in their research interviews of South African victims of abuse found that most participants reported a failure by their own parents to protect them against abuse by others and a situation of abandonment.

## **2.28 INTIMATE PARTNER VIOLENCE (IPV) AND CSA**

In many families, violence in the home often culminates in abuse of children. Namy et al. (2017) argue for a feminist analysis of how IPV rooted in power dynamics and gender norms contribute to child sexual abuse and exploitation. Research by Namy et al. (2017) show how this type of violence overlaps in the same households in a study in Uganda. Namy (2017) suggests that the

patriarchal family structures create an environment where violence and abuse is regarded as normal and at the same time reinforcing the subordination of women alongside their vulnerable children. Guedes et al. (2016) confirm that the intersecting of intimate partner violence (IPV) and violence against children (VAC) coexist in households exposed to violence. Bidarra et al. (2016), concur that whilst IPV and VAC appear as distinct yet parallel, there is much in these violence that support each other and perpetuate further acts of violence.

Namy, (2017) purports from this study in Uganda through a qualitative exploration of VAC and IPV and how it intersects with a patriarchal framework from a feminist perspective. Namy, (2017) further states that patriarchy promotes a hierarchy with men as superior in position to women and children.

## **2.29 THE POWER OF PATRIARCHY**

SA is regarded as the “rape capital of the world”, it is reported that there is one rape in every 26 seconds. Masango (2012) purports that the practice of rape in SA, is the result of an endemic, deeply rooted patriarchy.

Dr Zwele Mkhize (Minister of Corporate Governance and Traditional Affairs, writing for the Daily Maverick (2017)), stated “Patriarchy remains deeply entrenched within the fabric of our society to such an extent that most women consider it to be a normal way to live.” Dr Zwele Mkhize further states that while “women have shaken off the shackles of the past”, society still remains bound by another shackle of patriarchy (Mkhize, 2017).

## **2.30 CSA IN SCHOOLS IN SOUTH AFRICA**

SA has extremely inflated levels of crime and appears to be one of the most unsafe countries in the world for children (Abraham et al., 2012). Rape and other forms of sexual exploitation remain pervasive and are unreported. A small but significant study in KZN schools by Mabetha et al. (2018), explored sexual violence from a teacher’s perspective. Several accounts were reported which include learner on learner and teacher on learner sexual abuse. The research showed that most perpetrators were males.

John (2018) writes that this type of sexual violence has its roots in patriarchal systems, which treat women and children as subservient and as the property of men.

It is common knowledge that children in SA are growing up amidst intimate partner violence, gender based violence, political violence and violence from other crimes. There is a compelling body of evidence that shows that the risk of becoming violent is strongly linked to exposure as well as violence at home, community, poor role models, inequality and substance abuse (Lancaster, 2017).

Statistics from a study in 2012, illustrates that schools are not conducive to teaching and learning. This study was a quantitative questionnaire based using 121 randomly selected schools both urban and rural from nine Provinces in SA. From a sample of 5939 pupils it was found that 22.2% were victims of violence or sexual abuse (Barten & Leoschut, 2013). The patriarchal nature of schools and individuals result in the promotion of CSA among school children.

## **2.31 CHAPTER SUMMARY**

This chapter highlights the significant influence of poverty and patriarchy on CSA in SA. Whilst poverty has promoted transactional sexual manoeuvres by vulnerable children, patriarchy has promulgated a hegemonic culture that devalues the position of women and children and advancing the needs and aspirations of their male counterparts.

## **CHAPTER 3:**

### **A CRITICAL ANALYSIS OF LEGISLATION RELATING TO CSA IN SOUTH AFRICA**

#### **3.1 INTRODUCTION**

Effective legislation is one of the ways in which CSA can be reduced in prevalence if not eradicated. For purposes of this discussion legislation that will be considered are the Criminal Law (Sexual Offences and Related Matters Amendment Act, 32 of 2007) (hereafter “The Act”); the Children’s Act 38 of 2005 (hereafter “Children’s Act”); Child Justice Act 25 of 2008 and the Constitution of South Africa Act 108 of 1996 (hereafter the “Constitution”).

This chapter will provide the legal definition of sexual abuse and critically analyse the provisions and functioning of the above legislation in their practical application and evaluate the effectiveness of the legal framework in the criminalisation of sexual assault on children.

### **3.2 DEFINING SEXUAL ABUSE**

Previously in defining sexual abuse it was restricted to the common law and further restricted to rape, indecent assault and or incest (Minnie, 2009). The Act is more specific in definition, significantly broader and includes other modes of sexual abuse such as grooming of a child, pornography, trafficking and touching. The Act redefines rape as “Any person (“A”) “who unlawfully commits an act of sexual penetration with a complainant” (“B”) “without the consent” of “B”, “is guilty of the offence of rape” (Sec. 3 of The Criminal Law Sexual Offence and Related Matters Amendment Act of 2007). The Act also clarifies the issue of penetration to include oral cavity, mouth and or anus to any extent whatsoever, with any object whatsoever (Sec. 1 of the Criminal Law sexual Offences and Related Matters Amendment Act of 2007). The Act also introduces a new legal term of sexual assault where a person (“A”) “unlawfully and intentionally sexually violates a complainant” (“B”) ‘without the consent of” (“B”) “is guilty of an offence”. Furthermore the Act states that a person (“A”) “who unlawfully and intentionally inspires the belief in a complainant” (“B”) that (“B”) “will be sexually violated, is guilty of the offence of sexual assault” (Sec. 5 of The Criminal Law Sexual Offences and Related Matters Amendment Act 2007). A distinction is drawn between contact and non-contact. Contact sexual abuse refers to inappropriate touching or penetration of the genital organ, mouth or anus (Sec. 1 of The Criminal Law Sexual Offences and Related Matters Amendment Act 32 of 2007). Sexual violation and sexual penetration are considered contact sexual abuse (Aucamp, 2012).

With regard to non-contact sexual abuse this involves exposure of the child to pornography, or compelling a child to self-masturbation, and exposure to genital organs (Sec. 16,17,18,19 of The Criminal Law Sexual Offences and Related Matters Amendment Act 32 of 2007). Grooming of children as defined in the Act, refers to “preparing and or training a child for purposes of sexual activities with the child” (Hollely & Minnie, 2008). Section 18 of the Act, describes grooming to include the use of an “article, pornography, publication or film with the intention to facilitate the commission of a sexual act to encourage, persuade, facilitate and or diminish or reduce any resistance or unwillingness of a child, to ultimately engage the child to a sexual act” (Sec. 18 of the Criminal Law Sexual Offences and Related Amendment Act 32 of 2007). Clearly grooming is a premeditated act to the commission of the eventual sexual event. The inclusion of grooming in the Act as an offence is a progressive step in CSA (Minnie, 2009).

### **3.3 SHORT COMINGS OF THE CRIMINAL LAW (SEXUAL OFFENCES AND RELATED MATTERS) AMENDMENT ACT, 32 OF 2007**

Generally the Act is an advancement towards preventing the sexual abuse of children, however, like most legislation there are shortcomings. It is submitted that non-contact sexual behaviour whilst it may be helpful and serves as a deterrent, may incriminate innocent people who may be simply loving towards children. The other shortcomings pertain to the ages of consent and the constitutional rights of children.

#### **3.3.1 Consent**

The issue of consent is confusing, and complex in that between the ages of 12-15, the issue of consensual sexual interaction is no longer an offence (Section 15 of The Criminal Law Sexual Offences and Related Matters Amendment Act, 2015). However, should one of the children be between 16 and 17 years and the other is between 12 and 15 and the difference in age between the children is greater than 2 years, the older child may be prosecuted. In the *Teddy Bear Clinic for abused children and Another v Minister of Justice and Constitutional Development and Another* (2013) it was found that sexual relations between children aged 12-15, may well be sexual experimentation and therefore not illegal (The *Teddy Bear Clinic v Minister of Justice and Constitutional Development*, 2013). The *Teddy Bear Clinic* judgement therefore decriminalises sec. 14 and 15 of the Act and upholds the child’s constitutional rights to personal relationships,



autonomy, dignity and privacy. Furthermore, the decriminalisation of sec. 14 and 15 of the Act avoids the trauma of harm that this age category of children may have to endure as they go through the criminal justice system including arrest and detention.

### **3.3.2 The constitutionality of children's rights to privacy and best interest principle**

The court in *Teddy Bear Clinic* (2013), held sections 15 and 16 of the Act (Criminal Law Sexual Offences and Related Matters Amendment Act), to be unconstitutional to the extent that it decriminalises sexual activity that is consensual amongst children. In this case the applicants argued that sections 15 and 16, infringed on a child's rights to dignity, privacy and bodily integrity. It also infringed on the children's best interest principle (Sec. 28(2) Constitution). The judge concluded that consensual sexual activity in adolescents be considered as childhood experimentation and not a criminal offence. The legislation remains the same in respect of non-consenting adolescents.

With due respect to the Constitutional Court judgement in the *Teddy Bear* case (2013) it is submitted that the matter involving sexual conduct between consenting adolescents, should not rest there. Such individuals involved in such activities should be referred for counselling and evaluation by a psychologist to evaluate whether or not these children have any underlying psychological issues.

McQuoid Mason (2014) argues that sexual penetration that is consensual and consensual sexual violations, in terms of *the Teddy Bear* judgement, places no obligation on the public to report such behaviour (McQuoid Mason, 2014). It is submitted that whilst such court rulings may be legally acceptable, it may not be socially and morally acceptable to many parents. It is submitted that whilst the *Teddy Bear* case promotes teenage sexual experimentation, it certainly weakens the provisions of the Act in criminalising the sexual offences against children.

McQuoid Mason (2014) argues that there should still be obligatory reporting of sexual conduct of children irrespective of their ages (McQuoid Mason, 2014) and in terms of the best interest of the child principle, reporting is beneficial to children (Sec. 7 of the Children's Act 38 of 2005). It is submitted that the issue of compulsory reporting is an important function to deter the element of

promiscuous sexual conduct. Given the high levels of CSA in SA, there has to be some deterring factors in communities. The message in the public domain cannot be that all is well for there to be sexual activity between experimenting adolescents. This requires increased public awareness programs and a vigilant eye from professionals.

From a social science perspective, it is not uncommon that between adolescents, females often deny consent, for fear of reprisal and stigmatisation. This places the male child in an unfair position, when there may have originally been consent and where there may have been familiarity between the couple. One of the main reasons of decriminalising Section 15 and 16 of the Act is to restrict a child's exposure to the criminal justice system and offer alternatives in terms of the Child Justice Act 25 of 2008.

### **3.4 THE CHILD JUSTICE ACT 25 OF 2008 (HEREAFTER JUSTICE ACT)**

One of the guiding principles of the Child Justice Act (2008) is to limit a child's exposure to the criminal justice system and to use incarceration as a last resort. This refers to child on child sexual offenders where there has been non-consensual sexual conduct. The thought is that if CSA perpetrators are dealt with appropriately, most of them will grow up as lawful citizens (Sec. 51 of The Child Justice Act 25 of 2008). This is based on the premise that a child who has an opportunity to change may remedy their ways. It is also noted that a child is not fully a responsible adult and should indeed be referred to diversion centres for rehabilitation.

SA however lacks the capacity to effectively implement such measures due to economic challenges. On 28<sup>th</sup> of May 2018, the national policy framework on child justice was tabled in parliament, some 10 years after the Child Justice Act 2008 was enacted (Gov. Gazette 41796 27/7/2018 no 75 , Amended National Policy Framework on Child Justice,2018). Section 28(1) (g), provides that where children need to be protected and if detained, should be kept in separate facilities (Child Justice Act 25 of 2008). This measure however is currently lacking. Unfortunately the implementation of this Act places a huge burden on the fiscus and it is submitted that it is very likely to fail. The issue is therefore brought back to the question of preventative measures like effective public education and communication.

### **3.5 CRITICAL ANALYSIS OF THE CHILDREN'S ACT 38 OF 2005 AS IT RELATES TO SEXUAL OFFENDERS**

This Act (hereafter “Children’s Act”) provides for the rights of children and relates to the protection and care of children. This means upholding the rights of children, preventing abuse and promoting their overall well-being (Kassan & Mahery, 2009). This Act also provides for compulsory reporting of acts of sexual violation (Sec. 42 (1) of the Children’s Act 38 of 2005). This Act therefore aims to protect children and creates a deterrent to potential perpetrators.

The Children’s Act also makes provision for the reporting of situations that may create a suspicion that a child is being violated (Sec. 154 of the Children’s Act 38 of 2005). Since no details are provided for what may give rise to suspicion it is submitted that common sense should prevail in this matter. This Act, together with the Constitution also recognises that in order for children to be protected, their voices must be heard. Despite legal provisions in the Children’s Act (sec. 10), it is submitted that the voices of the children are often not heard, and often heard by an adult. It is further submitted that children must be given the opportunity to voice their opinions provided there is some level of competency. They must be assessed and evaluated in line with their capacity to do so. It is submitted that this forms part of their basic constitutional human rights. Children’s rights aimed at the protection of children is often subjugated by a patriarchal family unit, further silencing the voice of the child. As alluded to in the previous chapter patriarchy and abuse of children are inexorably linked. However, the question of patriarchy still persists and the child is often never heard. Fortunately, the human rights aspect of children is re-enforced by the current legal provisions.

As Justice Albie Sachs in *S v Manqaba* 2005 2 SACR 489 (W) states that “the comprehensive and emphatic language of sec. 28 indicates that just as law enforcement must always be gender sensitive, so must it always be child sensitive, that statutes must be interpreted and the common law developed in a manner which favours protecting and advancing the interests of the children.”

Section 19 also provides for parental rights and responsibilities towards children (Children’s Act, 38 of 2005). In this regard children must be protected from harm. It is time parents are held liable for harm that occurs to children in circumstances of neglect. The Children’s Act clearly promotes

the criminalisation of any form of abuse against children to the extent that it makes mandatory the reporting of crimes against children. The Children's Act promotes protection and care of children and therefore criminalises sexual assault on children.

### **3.6 THE CONSTITUTION AND SEXUAL OFFENCES AGAINST CHILDREN**

With the realisation of the Constitution the human rights culture was given more priority so as to change many existing legislation. The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 was one of those progressive legislation. This Act replaced various forms of common law crimes including rape and indecent assault, with statutory crimes and creating a definition for rape that was gender neutral (Artz, 2012). The aim of the Act was to address the vulnerability of children with regard to sexual abuse and exploitation.

It must be realised that the Constitution is the highest legislation of the land and that all legislation must be in line with the Constitution (Act 108 of 1996). Sec. 28 (2) of the Constitution is of significance as it relates to children, this section provides for the best interests of the child principle which must be given paramount importance in all matters concerning the child. Children cannot be denounced and degraded on account of their consensual sexual behaviour (Sec.28 (2) of the Constitution, Act 108 of 1996). The Constitution further upholds the fact that children are human subjects and should enjoy all benefits accorded by the Constitution. Furthermore, human rights such as human dignity, privacy, bodily and psychological integrity, must all be equally applicable to children irrespective of whether they are offenders or victims. These rights are afforded to all children including child sexual offenders. This constitutional provision is what is likely to create a conflict in law. Children in particular who may be sexual offenders are also protected by the Constitution which in turn may mitigate against the provisions by the Act rendering the Act less punitive. This may result in a conflict between the Act and the Constitution.

The best interests of the child principle is a concept known to South African law even prior to the new Constitutional dispensation. However, the scope in the application was limited. Article 3 (1) of the CRC (CRC, 1989) extended the scope of application of the best interests of the child significantly, by providing that in all actions concerning children, the best interests of the child shall be a primary consideration. Similarly, the ACRWC (ACRWC, 1999), in article 4 (1),

provides that “in all actions concerning the child undertaken by any person or authority the best interest of the child shall be the primary consideration.” These two conventions clearly widened the scope of best interests to include all actions. This principle is embodied in the South African Constitution and all other legislation referred to regarding children.

Section 28 (2) of the Constitution provides that “A child’s best interests are of paramount importance in every matter concerning the child.” It is submitted, that the best interests principle is “critical in matters concerning children who are victims of abuse”, and in particular those that perpetrate sexual abuse. Given in some instances that the perpetrators are children, professionals should have their best interests considered for purposes of rehabilitation and re-integration into society.

### **3.7 REGISTRATION OF CHILDREN IN THE SEX OFFENDERS REGISTER**

*J v National Director of Prosecutions and Another* 2014 (2) SACR 1 (CC) clearly highlights the courts view on the mandatory registration of child sex offenders. In this case the constitutional validity of section 50 (2) of the Sexual Offences Act was questioned. The court found that the mandatory registration of child sex offenders was opposed to the best interest of the child principle. The mandatory registration of the child offender was incompatible with the best interest principle (*J v NDPP*, 2014). It is submitted that by placing the name of a child on the sex offenders registry tarnishes the child for life with sanctions and exclusions from areas of life and livelihood which becomes relevant as the child enters adulthood. This prevents a child from reintegration into society. However this child offender is likely to pose a risk to other vulnerable children in other environments if a less stringent approach be used. This situation, it is submitted, makes the compulsory registration of child sex offenders less effective as a legal provision. It remains unclear though, what the courts regard as the “best interest principle”. Is it a “portmanteau” concept, in that it considers the outcome to be of the best interests to the child or to have the best interest of the rights of the child considered?

### **3.8 INTERNATIONAL LEGISLATION AND CSA**

For comparative purposes only generalisations can be made, since legislative provisions differ throughout the world. Most countries will focus on some form of age of consent, define the sexual

contact and provide appropriate penal sentences. Some countries are also signatory to the CRC (Article 34 and 35), wherein children will need to be protected from sexual exploitation and abuse. In comparing international legislations it is prudent to compare developing and developed countries.

### **3.8.1 CSA in India**

The Protection of Children from Sexual Offences (POCSO) Act 2012, was enacted in India to provide a sturdier framework for the protection of children. The drafting of this Act gave priority to the welfare of children because of high prevalence of CSA in India. This Act has widened the ambit for criminal offences. The POCSO Act is similar to SA Criminal Law and Sexual Offences Amendment Act 2007 because it is gender neutral and includes all forms of sexual contact from penetration to sexual exploitation.

The Indian legislation (POCSO) presumes all forms of sexual abuse with children under the age of 18, an offence. Therefore two adolescents engaged in consensual acts of sexual experimentation will be punished under this law. Clearly, this legislation differs from SA in light of the *Teddy Bear Clinic* case. The patriarchal nature of Indian society often requires punitive measures and parents often have the main say in issues pertaining to their children. It is submitted that South African society is seemingly more progressive in advancing the autonomy of children. The question however, is what line of progression results is the best outcome for abused children?

### **3.8.2 CSA in Malaysia**

By stark contrast to other countries including SA, few forms of child abuse are considered a crime in Malaysia. Malaysia as a country highlights the fact that when legislation is limited, prosecution is restricted. In Malaysia for example the definition of rape in terms of the Sexual Offences against Children Act 792 of 2017, only refers to penile penetration and incest. Since the legal definition is limited, the police are restricted in applying criminal sanctions. The courts in Malaysia seldom convict people and there are no official statistics (Ananthalakshami & Sipalan, 2016). There is therefore a high risk for sexual exploitation of children in Malaysia where the legislation seems very weak in protecting the fundamental human rights of vulnerable children.

### **3.8.3 CSA in USA**

The legislation in most states in the US are similar. The US legislation is clear on ages of consent in that children who are minors cannot agree to sexual relations. However children between the age of 16 and 18 are able to consent. In the US the sexual abuse of children also includes contact and non-contact abuse. However, many states in the US include the so called “Romeo and Juliet” exception for consenting minors and bars them from being charged with a sexual offence (Child sexual abuse laws US, 2019). In most states more severe punishment exists for the sexual abuse of younger children (Andrew, 2006). The situation in SA is similar and sentencing is variable. It is submitted that in SA there seems to be much confusion around the issue of the ages of consent. There are differing ages to consent for medical treatment for example. Then a different age for consent to surgical procedures. Furthermore, the question of pregnant girls further complicates the issue of consent in terms of the Choice of Termination of Pregnancy Act 92 of 1996. In the US for example if there are loopholes in the legislation it is looked at immediately and remedied. Furthermore, in the US there are sexual offences preventative laws such as the Illinois Child Abuse Prevention Act 2011 (Bernier, 2015). It is submitted that SA falls short because we have failed to implement child sexual abuse prevention measures.

It is further submitted that the variability of ages for consent to various aspects of procedures and circumstances creates more room for confusion than clarity in SA. It is the common pitfall of most legislation around their inconsistencies and confusing nature that makes their application subject to debate and further confusion. In recognising loopholes in the legal system there is more room for a strong defence by advocates in respect of the offender. Sexual predators may sometimes carefully choose their countries to perpetrate crimes against children. They choose countries where legislation is less stringent and where they are less likely to be prosecuted.

### **3.8.4 CSA in Nigeria**

In evaluating any legislation, a major determinant is how effective are the laws in combating the scourge of sexual violence against children. The Constitution of Nigeria (1999 as amended 2011) and the Violence against Persons Prohibition Act (2015) provides the legal framework for the prevention of sexual violence. Both Acts acknowledge the rights to privacy, human dignity and the prevention of inhumane and degrading treatment against children. These provisions also

acknowledge the broader definition of rape and issues of consent. All of which are similar in SA. The legislation however, is different to SA in that the award of appropriate compensation is made to the victims in Nigeria. It appears as a humanitarian act. However, it is submitted that in an economically poor country this provision may have the potential to create false accusations of rape for purposes of financial gain. In SA the government provides free medico-legal services. Compensation has the potential to create unjustifiable claims against innocent people.

In Nigeria for example, corroborating evidence for the crime of penetrative sexual abuse is often important and needed by the judiciary to prove the case (Akpoghome, 2016). However, this requirement is likely to fail in the prosecution of perpetrators, where corroborating evidence may be lacking (Akpoghome, 2016). More attention must be given to the validity of the evidence given. It is submitted that judicial officers should be adequately trained in attempting to determine the truthfulness of witnesses.

Nigeria has the Childs Rights Act of 2003, which is similar to South Africa's Children's Act of 2005. Both legislation recognise the care and protection of children and uphold the best interests of the child principle. However, whilst a child is defined to be 18 and under, many states in Nigeria allow for the early marriage of children. These children are legally married before 18 years old. Nigerian law thus legitimises sexual violence against children who are compelled to consent or agree to their first sexual encounters (Akpoghome, 2016). This form of sexual violation is rampant in many parts of Africa. It is submitted that this type of practice is archaic, degrading and abusive with total disregard for the rights of children. SA is progressive in this regard and has legislation prohibiting the marriage of children under the age of 18. In 2003 Nigeria promulgated the Comprehensive "Child Rights Act" which prescribed 18 as the minimum age for marriage. However, not all Nigerian states adopted this protective measure.

The US and SA legislations on child sexual abuse are similar in that both countries criminalise the sexual violation of children under 18 years, and both countries accept the consensual sexual relations between minors aged 12 to 15 years. In India any sexual abuse on a child under 18 years is an offence. In India there is no room for childhood sexual experimentation which makes the sexual assault legislation highly criminalised. In Nigeria the sexual assault legislation is in line with US and SA but further provides for compensation of victims. It is submitted that in order to



strengthen the legislation that criminalises the sexual assault on children in SA, legislation should be amended to provide for social work intervention in cases of childhood sexual relations, promulgate sexual assault prevention laws and make possible compensation to the victims.

### **3.9 SUMMARY**

The scourge of sexual abuse against vulnerable children in SA, needs to be confronted with vigour and haste in order to affirm the rights of children to safety, security and equality. Chapter 2 of the Constitution, protects the rights of all South Africans, inclusive of children. The various legislations have been enacted to empower victims of abuse and has been progressive in criminalising many aspects of sexual abuse. Although it is reasonable to assume that there is often a lag between drafting Acts and their implementation, action is often limited by the current socio-cultural practices and political discourse (Naidoo, 2018). Whilst it is known that the legislation and infrastructure of available policies are strong, the implementation of these policies are barriers that need to be addressed as a matter of urgency.

## **CHAPTER 4:**

### **DOES THE LACK OF MEDICAL EVIDENCE IN ESTABLISHING CSA IMPACT ON THE PROSECUTION OF CHILD SEXUAL OFFENDERS?**

#### **4.1 INTRODUCTION**

Studies have shown that the presence of medical evidence is rare in CSA cases. This is so because children often present late, by which time, healing is complete and such evidence is unlikely to point to any perpetrator (Lewis et al., 2012).

The findings by Lewis et al. (2012) also suggest that medical evidence increases the likelihood of prosecution. Furthermore, sexual assault on children takes various forms as defined in the Act. In cases where there are acute injuries, the documented medical evidence increases the likelihood of prosecution because of the objective evidence that is gathered. (Jina & Kotze, 2016).

Lubaale (2016), emphasises the numerous challenges in proving CSA especially in the absence of clinical medical findings. False allegations of CSA is possible in the absence of medical evidence. Findings seem justifiable as young children lack the necessary communication skills required as a single witness (Lubaale, 2016). With the widened definition of sexual abuse and heightened public awareness, it is possible that children and parents may even misinterpret affection for sexual abuse (Lubaale, 2016). Thus, although CSA is a heinous crime that perhaps justifies the criminal justice system's efforts to hold perpetrators accountable, it is equally important to safeguard the innocent against false prosecutions.

The judiciary often depends on other evidence like eyewitness testimony. This is significant because in the widened definition of rape (Criminal Law Sexual Offences and Related Amendment Act 52 of 2007) even penetration of the labia amounts to the crime of rape. Yet this type of penetration is unlikely to provide any medical evidence. So expert witnesses often report that the paucity of medical findings does not exclude rape. The burden to determine the truth lies squarely on the judiciary.

The question of rape is therefore dependent on the credibility of the child and perhaps the absence of credibility on the part of the accused. It is submitted that the presence of medical evidence

makes the determination of sexual assault by judicial officers that much easier. Furthermore, the lack of medical evidence but with a reliable child witness where the crime of penetration cannot be proven, leaves the judiciary the option to charge the offender with attempted rape, or arrive at a verdict of sexual assault which carries a lesser sentence than rape. Oral penetration for example, which is the crime of rape, again is associated with little to no medical evidence, yet it is likely to attract life imprisonment if proven. In this instance it is only through verbal testimony and the credibility of witnesses that such a case is proven.

There is no legal requirement in South African law that a child's evidence must be corroborated (Joubert et al., 2004). The issue which the trial court must consider is whether the child witness is reliable or not. To be truthful, as pointed out by Pantell (2017), this will depend on the child's potential for observation, recollection and narration. It is submitted that a particular age group of children is likely to lack the power of observation and narration. It is therefore presumptive that such children are also likely to be disadvantaged by the judiciary where decision making becomes extremely challenging. This age group is likely to include children of four years and younger (Pantell, 2017).

## **4.2 CAUTIONARY RULES**

“Cautionary rules” are stereotypical rules which require judicial officers to be cautious against women and girl children in assuming the lack of possible credibility in their witness testimony (Zeffet & Paizes, 2010). The joint decision of judges found certain evidence can be reliable unless accompanied by some element of “trustworthiness” which is corroboration (Tlakula, 2002). Therefore, it is submitted that in the absence of medical evidence there may be a predisposition to disregard the evidence of children where medical corroboration is lacking.

According to The South African Law Reform Commission, rape usually takes place in secret and it is easy to lay a false charge and difficult to refute it. Furthermore, a complaint could be motivated by an emotional reaction or an eminent man may be falsely accused because of his wealth, and the complainant may be forced by circumstances to admit that she had intercourse and then willingly represent intercourse as rape (Bekink, 2018). In *S v Jackson* 1998 (1) SACR 470 (SCA) the court ruled against the notion about unreliability of women. Although the *Jackson* judgement is noted

for disregarding the cautionary rule in sexual assault cases, there is still latitude for its continued application by using the English judgement of evidence of an unreliable witness. Similarly, the evidence of children is treated with caution because children do not comprehend the duty to be truthful. Judge Fagan in *Jackson* (Fagan, 2000) noted for his progressiveness, states that “there is no justification for treating children as being less reliable than adults and such differential treatment violates the child’s rights to equal protection before the law”.

#### **4.3 FAILURE TO PROCEED WITH PROSECUTIONS**

The closure of many specialised sexual offences courts and the closure of SAPS specialised sexual offences units has been a major blow to vulnerable children and a big gift for child sexual offenders. There are various reasons and factors that result in the failure to proceed with the prosecution of sexual abuse cases. The first relates to the lack of medical evidence, the second is the failure to obtain adequate evidence for prosecution. In addition maintaining the chain of evidence that is so crucial to effective prosecutions is lacking in many sexual abuse cases (Brits, 2018). Medical evidence in this respect not only refers to the clinical medical findings but also refers to evidence and sample collections. To this end it is unclear what the procedural mechanisms involved in collecting, storing and the forensic evaluation of evidentiary samples are.

The other issue says Van Niekerk (2007) is that prosecutors for example tend to select strong cases to prosecute. In other cases where prima facie evidence seem to be inadequate, these cases were thrown out. This is an unjust and subjective practice which fails children and marks the end of justice for children. Furthermore, the lack of skilled staff at SAPS is a problem, as they lack the ability to assist with complaints when a sexual abuse matter is reported. This is a serious violation of justice (De Wet, 2013).

#### **4.4 THE COURTROOM INTERROGATION OF CHILD VICTIMS**

When a child witness of a reasonably competent age appears as a single witness, Section 208 of the Criminal Procedure Act 51 of 1977 is invoked. This requires that the courts approach the single witness with caution based on his or her merits (*S v Stevens* (2005) 1 ALL SA 1 (SCA)). The correct approach to such cautionary rule was stated in *S v Sauls and Other* 1981 (3) SA 172 (A). There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the

single witness (*S v Webber*, 1971 (A) SA 754 (A)). The trial judge will weigh his evidence, consider its merit and demerits having done so will decide whether it is trustworthy.

The evidence of children to be treated with caution was summarised again in *S v Dyira* 2010 (1) SACR 78. According to the trial court judge:

The courts should be aware of the danger of accepting the evidence of a little child because of potential unreliability or untrustworthiness, as a result of lack of judgment, inability, inexperience, imagination, susceptibility to influence and suggestion and the beguiling capacity of a child to convince itself of the truth of a statement which may not be true or entirely true, particularly where the allegation is to sexual misconduct, which is normally beyond the experience of small children who cannot be expected to have an understanding of the physical, social and moral implication of sexual acting.

It is submitted that the importance of the trustworthiness of a child witness is vital because in many instances there is a paucity of medical evidence to corroborate the alleged offence.

#### **4.5 ALLEGATIONS OF CSA - TRUE/FALSE**

When allegations of sexual abuse of children are disregarded, they are victimised by both their perpetrators and society. The converse holds equally true, when allegations by children have no basis but results in the conviction of an innocent man (Shanks, 2010). Where there are wrongful convictions it means that the pendulum has swung too far and the question is why? Where there is lack of medical evidence in CSA there is also the possibility that there may be false accusations, notwithstanding the fact that the lack of medical evidence does not exclude sexual assault.

The challenges to proving CSA, is myriad. Equally challenging is the ability of the accused to show that the accusations held against him are false. There has to be a balance ensuring the prevention of wrongful convictions and the ability to convict those found to be guilty. Yuille et al., (1995), summarises false allegation by a child as:

- (a) An allegation that is wholly untrue.
- (b) An allegation where an innocent person is accused but the real perpetrator is not.
- (c) An allegation containing a mixture of true and false.

In widening the legal definition of sexual violation, and with high levels of public awareness, one may misinterpret the showing of affection towards a child, as abuse (Brongersma, 1980). Research has shown that parental antagonism during custody, divorce and separation proceedings may also result in the use of CSA allegations. Here the child is used as a power tool to fulfil one or the other parent's deviant wishes. Whilst it is acknowledged that CSA is a horrendous crime, it is important to ensure that the innocent are not punished. The problem, it is submitted, is that in the absence of clinical evidence, the court depends on witness testimony which can be falsified should there be any hidden benefits to one or the other parties concerned. It is in this instance that the trustworthiness of the complainant is so vital.

#### **4.5.1 Case law on false allegations**

The punishment of the innocent may be one of the worst injustices society faces. Sutherland J (Lubaale, 2016), in the case of *Evans Michael v State* no (2011/A46) 2012 ZAGP JHC 142 unreported referred to the importance of holding child sexual offenders to account (*Evans v S*, 2011), but cautioned that:

There is however a real danger that our indignation at the violation of the right to dignity of the vulnerable people can cripple our critical faculties. When that happens, there is a danger that one reaches for what is thought to be the right outcome without having properly conducted the fact finding exercise upon which to create a platform to stand and assert ones value.

This problem requires a more meaningful process of cross examination and enquiry. The dilemma as mentioned earlier is very often the lack of medical evidence or a reliable witness in CSA to corroborate the accusations. Many CSA cases are in fact not simple and any decisions by the judiciary are not a simple one.

Myers et al. (1989), therefore states that judicial officers need to recognise the complexity and degree of expertise required to evaluate and pass judgment in CSA. Based on this premise judicial officers can often arrive at uninformed decisions. This uninformed decision has the negative effect

of predisposing children to further abuse when they fail to hold offenders accountable or hold innocent people falsely accused.

#### **4.5.2 Meaningful cross examination procedures**

Cross examination can play a pivotal role in testing the evidence provided by child witnesses. However, lawyers fail to make good of this principle. Presently, the cross examination of child witnesses is looked upon negatively. It is looked upon as failing to recognise vulnerable witnesses (Myers et al., 1989). What the seminal works of Wigmore (1940) termed the “greatest engine ever invented for the discovery of truth has in some cases, turned out to be the greatest engine for distorting the accuracy of evidence by child witnesses”. Muller (2009), correctly argues that cross examination is generally a fight between two opposing parties and very little to do with eliciting the truth. Ideally cross examination must elicit the truthfulness of the child’s evidence. In so doing the archaic cautionary rule is set aside, sympathy on account of age would not conceal the need for objectivity and common sense.

It is often difficult to communicate with little children. Sometimes they cannot be coaxed to say anything meaningful, though they spoke clearly during the video interview that now has taken the place of their evidence in chief (Spencer & Lamb, 2012). Cross examination is always a challenge for children because as time elapses they have forgotten all about the incident. The fear of being cross-examined also renders them inarticulate and dumbstruck.

In *S v Manqaba* 2005 2 SACR 489 (W) the magistrate halted the cross questioning of a child witness on grounds of possible traumatisation and secondary victimisation. However, Satchwell J found this refusal irregular as it protected the complaint at the expense of the accused. The issue of cross examination is constantly being questioned in view of the procedural rules of law applied.

## **4.6 THE PATHWAY OF RAPE PROGRESSION IN THE CRIMINAL JUSTICE SYSTEM**

Wrongful conviction even though it may be uncommon can blemish public respect for the judiciary and trust in the legal situation. No criminal justice system (CJS) can be perfect but the aim is to improve the situation by all means possible.

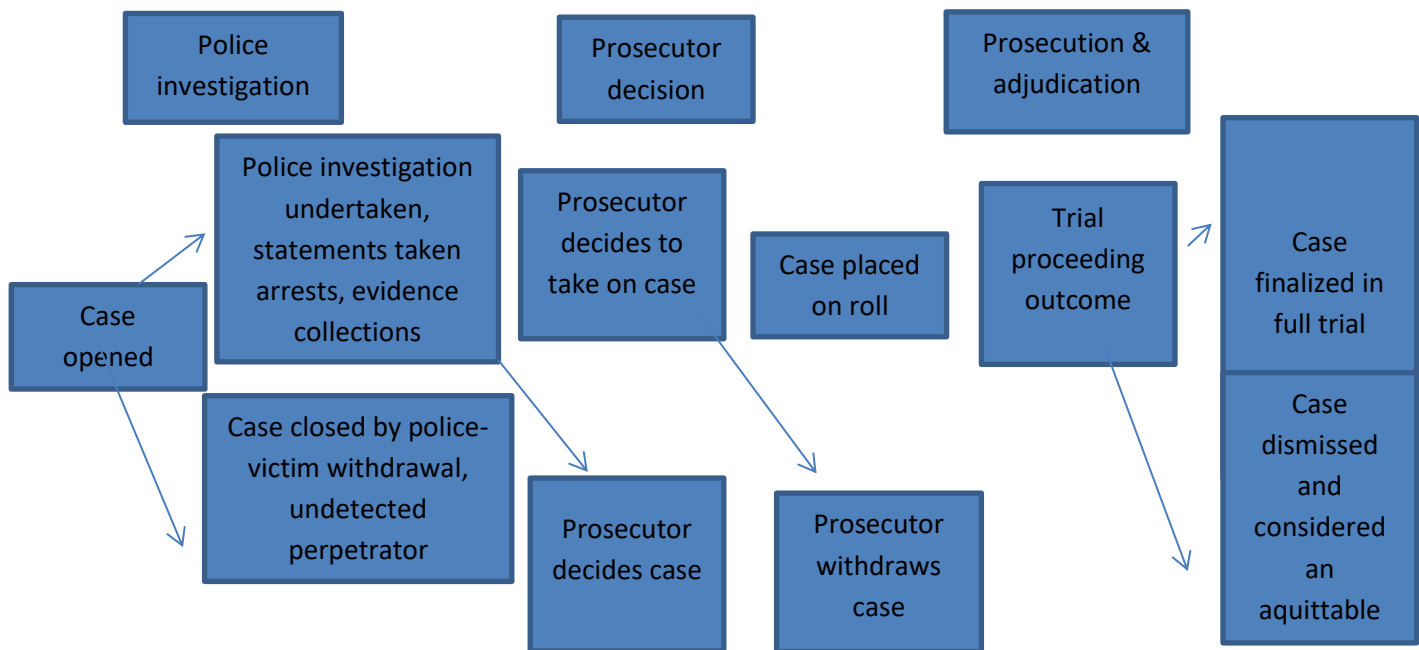
In CSA cases there is often a paucity of clinical objective medical evidence. There is therefore an exigency for forensic psychologists and social workers to evaluate children and serve as expert witnesses, thus being of assistance to the courts. There should be a more inquisitorial approach to cross-examination of child witnesses in an endeavour to bring about the truth. The role of prosecutors should not serve to gain convictions only, but as administrators of justice they should ensure that justice is done.

Increasing the prosecution rates in cases of CSA, is generally the goal of the CJS, successful convictions can provide victims and societies with a sense of confidence. However, it is the type of evidence together with corroborative witnesses and physical evidence that results in a strong case for conviction. Furthermore, it is the cross-examination of single witnesses with little to no physical medical findings that is crucial in separating the truth from false accusations (Walsh et al., 2008).

The South African prosecuting authority publishes conviction statistics for the wider categories of sexual violations. However, it does not provide disaggregate conviction data for rape and does not break it into child rape categories. So without this data it cannot state what percentage results in conviction. Moreover, conviction rates are an unreliable determinant of the success of the justice system. It is submitted that the lay public may not think this to be so. In a study done by South African Medical Research Council gender and health research unit in 2012, a nationally representable sample of 3952 rape cases opened by SAPS in 2012 and analysed, it was found that an arrest was made in 2283 (57%) of cases and 2579 (65%) were referred for prosecution. Prosecutors accepted 1362 cases (34.4%) and these were enrolled for trial. Only 340 of the original cases (8.6%) were found guilty in cases of alleged rape (Wilkinson, 2016) a disappointing outcome, indeed.



**Figure 4.1: The process followed in the reporting of rape cases.**



*Source: Vetten L, et al., (2008).*

The question of following procedure is critical in the investigative summation of cases. The aim of evaluating convictions are to determine:

- (a) The rate at which CSA offenders are prosecuted and the factors associated with a successful prosecution.
- (b) The role of administrative issues, including expert witnesses.
- (c) The influence of the prosecutor's decision making on the outcome of cases (Jewkes, et al., 2009).

The quality of medical evidence must be objective and reliable, unaffected by the exigencies of the litigation. It is submitted that whilst there is a strong reliance on medical evidence, it can also serve as a miscarriage of justice, if presented falsely or wrongfully by inexperienced forensic examiners. Medical evidence in itself has the potential to be challenged in court, since there may be other medical causes which may mimic sexual abuse or injury.

#### **4.7 SHOULD MEDICAL EVIDENCE BE RESTRICTED TO PHYSICAL FINDINGS OF ABUSE?**

Can the examiner, by evaluating the demeanour of a child, state if he or she is telling the truth? Medical doctors look at a patient holistically by listening, examining/observing and establishing a diagnosis based on findings and the patient's history. Doctors may sometimes lose objectivity and document evidence that support the findings of sexual assault. Lewis et al. (2012) also showed that the behaviour of the child was a significant predictor on a verdict. Doctors who are presented with findings where there is a history of rape tend to favour the findings to be consistent with rape, whilst if there is no history of rape, their findings may favour other natural causes for the findings. A good example is lichen planus et atrophicus of the vulva which is a medical disorder that may mimic vaginal injuries (Isaac, 2007). The medical profession owes it to the courts, to the lawyers, to all parties involved in criminal cases and to the public in general, that standards of integrity and expertise are upheld and maintained. The purpose of the clinical forensic examination is to contribute to the body of evidence and improve the identification, and conviction of perpetrators in CSA cases.

The sexual assault-examination of children in SA varies from region to region (AB van AS, 2016). SA has located various hospitals and clinics, either a normal clinic; crisis care centre or a Thuthuzela care centre. These institutions are facilities to deal with victims of sexual abuse. The clinical forensic examiners are medical doctors, who are not necessarily trained to perform these examinations (AB van AS, 2016). Hence the recording of findings will lack essential detail due to the inexperience of the examiner.

The sad truth is that the judiciary, which depends a great deal on medical findings are likely to misjudge these cases. Therefore in SA it is likely to fail children in light of poorly trained forensic examiners and poor documentation of evidence, thus resulting in a low conviction rate when medical evidence is lacking (Jina & Kotze, 2016).

#### **4.8 CHAPTER SUMMARY**

How well trained are the prosecutors in understanding the issue of child rape, given the fact that prosecutors receive six weeks training at a justice college, before they begin practice after obtaining their law degree (Gerber, 2016). However, some prosecutors are slightly more experienced in regional courts, where rape trials are held. It is therefore recommended that prosecutors consult with medical experts prior to the case to clarify issues of medical evidence. In SA, defence attorneys conduct a vigorous cross examination of expert witnesses. This means that the clinical forensic examiners must be experienced and qualified. It is only through an experienced and appropriately trained examiner that the medical evidence can be correctly reproduced in the J88 document (Jina & Kotze, 2016). It is submitted that there needs to be adequate training and education for both the medical and legal fraternities. There may be prosecutors who in the absence of adequate medical evidence, are likely to drop criminal charges (Lu, 2012). Medical evidence is potentially useful to positive findings of genital injuries.

According to a study by Hedger et al. (2002), 96.3 per cent of children who were referred for alleged sexual abuse had a normal medical examination. Investigations has shown that the criminal justice system relies heavily on the medical report to effect a prosecution. Given the fact that there may be no signs of injuries, does not mean that there has been no sexual assault. Lewis Klettke (2012) clearly state that whilst medical assessment is important for the conviction rate, the child's disclosure and behaviour are equally important. It is submitted that the testimony of the perpetrator is equally important in evaluating his or her trustworthiness. Ultimately it is a multitude of factors that will influence the conviction rate.

## **CHAPTER 5**

### **RECOMMENDATIONS AND CONCLUSION**

#### **5.1 INTRODUCTION**

The abuse of children is serious with lifelong consequences affecting individuals, families and societies. SA has a high CSA prevalence rate despite effective legislation. In fact the legislation is continually evolving favouring the best interest of the child principle. Implementation of legislation requires funding and so in an environment of economic challenges as is the position in SA, it is submitted that more significance be placed on preventative measures to CSA.

Government, law enforcement agencies, health, education systems, civil society and private sector must acknowledge the responsibilities towards children. The sexual abuse of children occurs within homes, schools, communities, public spaces and even cyberspace. Therefore, intervention programs must address all of these spaces.

Studies have shown that less wealthy countries can make significant progress in preventing CSA and is not necessarily contingent on the availability of resources. There is general consensus that CSA is preventable. Evidence based strategies to end CSA is represented by the “Inspire” framework, a set of actions that include the implementation and enforcement to creating safe environments, enhancing caregiver and parent income, economic upliftment, delivering support services, education and life skills training (WHO, 2016).

This chapter will aim to conceptualise and implement preventative CSA strategies. The emphasis is on public health measures and responsibility of adults, rather than expecting children to learn to protect themselves. Whilst the perpetrators, in most instances of CSA are known adults, the focus therefore should be on prevention methods within the immediate environment.

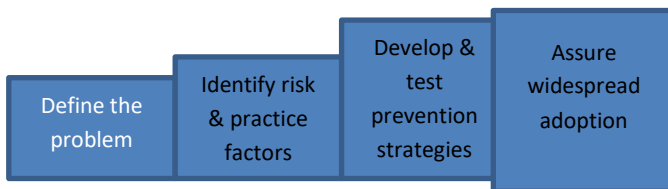
#### **5.2 DEFINITION OF PREVENTION**

Bloom (1996) refers to an inter-disciplinary approach to prevention at various levels. Understood more broadly, prevention can be conceived as a path to limiting potential injuries to body and soul and concurrently encouraging positive interactions and contacts. With respect to sexual violence

this means critical evaluation of preventative work and measures. The US Centre for Disease Control and Prevention refers to prevention as largely reducing the risk factors and increasing the protective factors, the goal which is to prevent sexual violence from occurring in the first place (CDC, 2012).

### **5.2.1. The public health model (according to CDC and prevention)**

Figure 5.1 CDC prevention model



Source: <http://www.cdc.gov/violenceprevention>

This model outlines four levels defining the issue, identifying risk and protective factors, development and evaluation of prevention strategies and assuring large scale adoption of these strategies. Furthermore, preventative measures can be looked upon as primary secondary and tertiary preventative measures (CDC, 2012).

### **5.2.2 Primary prevention measures**

These refer to all measures used to prevent sexual violence from the outset. The universal prevention measure refers to alleviation of a country's poverty as described in chapter 2. SA faces huge economic challenges and disparities. These measures need to be addressed at governmental level, where there has to be job creation, improvement of living conditions, greater support strategies for the unemployed and possibly a basic living stipend for all adults in the country. The clear link between poverty and CSA means a concerted effort is needed by government for the eradication of corruption and a meaningful direction of funds.

### **5.2.3 The ecological model and intervention**

The ecological model as outlined in earlier chapters refers to societal contributors to poverty and CSA. In this respect, public health measures must be implemented to alleviate the abuse of children, by identifying the risk factors and implementing measures to remedy the risk. The creation of a safe environment which protects children from sexual exploitation is required. To

this end and in line with the ecological model there must be safety nets built into families, schools and communities and all other environments to make children safe and protected. Therefore, ensuring the protection of children and alleviation of poverty requires a team effort.

Another important primary prevention strategy is to educate men and boys to be part of the solution, not the problem.

### **5.3 SECONDARY PREVENTION FOR AT RISK GROUPINGS**

Certain circumstances require secondary preventable measures as prescribed by the Public Health model of CDC (CDC, 2012). Secondary prevention measures are aimed at certain target groups namely vulnerable children living on the streets, in so called “red light” areas, children engaged in child labour, runaways, migrating children, child brides, minority communities and other such groups. There has to be cost effective shields to keep these vulnerable children from situations that are potentially abusive. To this end, there must be a plans or intervention programs to deal with these issues.

At a secondary prevention level, vulnerability specific interventions and specialised methodologies must be designed to cater for special needs of children prone to sexual exploitation. In parallel to this intervention, potential offenders must be warned of the stringent repercussions for those who may want to take advantage of children in a vulnerable situation.

### **5.4 PRE-PRIMARY PREVENTION**

These are situations that make sexual exploitation of children that much easier. Under such conditions the measures to adopt will include alleviation of poverty, addressing abuse gender norms, issues of patriarchy and this starts by transforming the environment and mindset of potential offenders.

### **5.5 CHANGING THE PATRIARCHAL MINDSET AND SEXUAL ABUSE ALLEVIATION**

Changing patriarchal attitudes is a difficult task, since it is a generational transferred mindset and faces much resistance in transformation. This change needs to be done along with government

policies, firm implementation of laws, effective justice, and committed social actions. This goes along with educating girls and boys in achieving gender justice.

In this respect education is the most powerful transformative force. To achieve a gender just society devoid of patriarchy, the girl child must feel secure, empowered and free, and both boys and girls must learn to evaluate the role of gender in patriarchal societies. Girls must view themselves as equal and non discriminatory, whilst boys must learn to undo a patriarchal notion of masculinity that encompass an egalitarian belief system. Schools are the most ideal platforms to implement this change in mindset.

In line with this strategy SA is moving towards a “cutting edge” curriculum in schools where sex education as early as grade four will be introduced (Govender, 2019). Sex therapist Marlene Wasserman (Dr Eve, 2019), states that “masturbation is normalised and it is treated through the curriculum from grade 4. It begins with self-pride, self-image, body diversity, genital differences and touching oneself for pleasure”. It is submitted that educating children is an important step towards curbing child sexual abuse by creating an awareness.

Boys must be taught and must learn to develop a feminist conscience, which should be their guiding principle. They must realise that the current patriarchal system is unjust, they must recognise it has historical misconstruction and consider alternative systems that are fair and less cruel.

The emphasis on prevention of sexual assault on children is critical because once the act is already committed, it confirms a failure by the state to safeguard children. The punishment provided by the legislative provisions is merely an expression of a situation of helplessness and frustration. It is for this reason that the emphasis on prevention is stressed.

The basis of changing this patriarchal mindset therefore is dependent on “rebuilding society”, “reconstructing communities”, and “moral regeneration”, says Minister Bathobile Dlamini (Dlamini 2016).

Despite a myriad of human rights movements, the change has to be from men itself. There must be the creation of a society that has a value system that all people are equal. It is not only about legislation but about moral regeneration and educating society. It is not only about legal reform but about finding new consciousness among people. This includes the development of an effective women's movements and strong civil society organisations that will lead society into a new mindset of gender equality and removal of patriarchal values.

### **5.5.1 Patriarchal changes in South Africa**

SA since 1994, has made significant progress towards empowering children through its legislative provisions.

A further recommendation is to include adult men and growing boys in progressive programmes so they understand what patriarchy is and what the abuse of women is all about. The Honorable President Ramaphosa in the "State of the Nation address" (SONA 2018), stated, "Radical Economic Transformation requires that we fundamentally improve the position of black women and communities in the economy, ensuring that they are owners, managers, producers and financiers." (Ramaphosa, 2018).

## **5.6 LEGISLATION AS IT RELATES TO CSA**

Following the advent of democracy in 1994, SA has aligned itself to progressive policies and reform initiatives, especially for children. The SA government in its legislative provisions has aligned itself with the Convention on the Rights of the Child (UNCRC, 1989). Furthermore the historic apartheid era has created great disparities of poverty and living conditions which promoted a culture of abuse, especially that of sexual abuse.

Nonetheless, SA has generated one of the most progressive constitutions in the world. Section 28 in particular refers and acknowledges the best interest of the child principle, and recognises that children must be protected from abuse, maltreatment, neglect and degradation.

In line with the Constitution, SA has promulgated the Criminal Law Sexual Offences and Related Matters Amendment Act, (2007) which widened the legal definition of sexual violation, and made



it gender neutral. The Act provides for sexual experimentation on a consensual basis among certain age group of children. This is also in keeping with the Child Justice Act 25 of 2008 which purports to treat offenders with dignity and respect by providing for divergent systems of rehabilitation. In addition the names of children who are found to be sexually experimenting are not logged into the sexual offences register.

Furthermore the Children's Act 2005 (Act 38 of 2005), provides for the best interest of the child principle and clearly defines ages for consent, in particular sexual contact. It is submitted that there are certain contradictions and lacunae in these legal provisions, such that the age for consent is somewhat blurred for different situations. For example it is legal for a 12 year old to consent to medical treatment and access contraception, but sexual intercourse is prohibited up until 18 years and older. These conflicts in the law are certainly an impediment to effective judicial functioning.

It is submitted that heavy cautionary rules still apply to children. Very often the child is the only witness. It is also submitted that the competency of children are often tested by the presiding officers who may be inexperienced and unskilled to determine the level of competency of children. Children for example are rarely placed under oath because they do not understand the religious sanctions of the oath, again this is not the optimum situation.

A rather sad situation occurs when children become the pawns in acrimonious divorce matters, for example blame is often placed on the father for sexual abuse. It is entrusted however, by the courts to act as the upper guardian of all children, and to enlist the services of child advocates, psychologists, social workers and others to act in the child's best interest. It can give rise to situations where children are schooled into making false accusations but the astute questioning of the courts will seek to reveal the truth. This can only be done in the presence of competent and adequately trained prosecutors.

In respect of sentencing, it is the courts discretion that is applied depending on the severity of the crime and other mitigating factors. The concern for prosecutors was often a paucity of clinical medical findings in many CSA cases. However, whilst a child is subject to a double cautionary rule, Sec. 208 of Criminal Procedure Act of 1977 permits a conviction on the evidence provided

by a single witness so long as the court is satisfied and the evidence is considered together with the whole factual matrix, i.e. whether a report was made about the rape, when it occurred, to whom and under what circumstances the report was made. Generally forced reports from children have no probative value, however, the courts will always consider circumstantial evidence as well.

It is however, unfair and it is submitted that if a child fails to come across as one who provides clear evidence, especially penetrative rape, then the judiciary may apply punitive measures such as attempted rape or the competent verdict of sexual violation.

The huge challenges facing SA, and the legislative provisions is the implementation of these laws. All is good on paper but for any law to be effective it has to be implemented. The implementation regulation require further resources to effect the regulations. In a country with economic difficulties this is indeed a challenge.

SA is lacking in the provision of sexual offences services. There is poor education and training of competent medical officers to provide adequate reports of CSA victims (Naidoo, 2013). Furthermore, the child sexual assault unit seems to be non-existent in the current environment with a paucity of specially trained police officials (Naidoo, 2013). It is further submitted that there must be properly trained judicial officers who deal with sexual offences of children, specifically those who are able to completely evaluate child witnesses.

Furthermore the provisions of crises centres for dealing with victims of CSA must be run by adequately trained officials who specialise in each aspect of a child's examination namely counselling, and rehabilitation (Naidoo, 2013).

Emphasis should therefore be on the prevention of CSA by eradicating poverty and patriarchy, and for those that are victims, the team approach by suitably trained individuals, experts in the field should be from SAPS, through to nurses, medical officers and the judiciary.

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## SECTION 1: PERSONAL DETAILS

Surname of Applicant : Ramiah  
 First names of applicant : Vanitha  
 Title (Ms/ Mr/ Mrs/ Dr/ Professor etc) : Mrs  
 Applicant's gender : Female  
 Applicant's Race (African/  
 Coloured/Indian/White/Other) : Indian  
 Student Number (where applicable) : 7812354  
 Staff Number (where applicable) : n/a  
 School : Law  
 College : Law and Management Studies  
 Campus : Howard College Campus  
 Existing Qualifications : BA(SOCIAL WORK)  
 Proposed Qualification for Project : LLM in Child Care and Protection  
 (In the case of research for degree purposes)

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### Supervisor/ project leader details

NAME	TEL NO.	EMAIL	SCHOOL / INSTITUTION	QUALIFICATIONS
Rowena Bernard	031260 1534		Law UKZN	LLB LLM

## **SECTION 2: PROJECT DESCRIPTION**

### **Project title**

socio-legal perspective of child sexual abuse in South Africa.

### **1. Questions to be answered in the research**

This dissertation seeks to address the following questions:

- 1.1 Does poverty and patriarchy contribute to child sexual abuse in South Africa?
- 1.2 Does the current legal framework in South Africa adequately criminalise the sexual assault of children?
- 1.3 Does the lack of medical evidence in establishing child sexual abuse impact on the prosecution of child sexual offenders?
- 1.4 What are the recommendations to the prevention of child sexual abuse in South Africa?

### **2. Research approach/ methods**

The main approach that will be employed in this dissertation is desktop research. The desktop research approach will require an extensive reliance upon both primary and secondary sources including case law, legislation, the codes attached to the latter, journal articles as well as textbooks.

### SECTION 3: FORMALISATION OF THE APPLICATION

#### APPLICANT

I have familiarized myself with the University's Code of Conduct for Research and undertake to comply with it. The information supplied above is correct to the best of my knowledge.

DATE 21/05/2019 SIGNATURE OF APPLICANT [Signature]

#### SUPERVISOR/PROJECT LEADER/DISCIPLINE ACADEMIC LEADER

DATE 17/05/19 SIGNATURE OF SUPERVISOR [Signature]

#### RECOMMENDATION OF SCHOOL RESEARCH ETHICS COMMITTEE/HIGHER DEGREES COMMITTEE

The application is (please tick):



Recommended and referred to the Human and Social Sciences Ethics Committee for further consideration

☐ Not Approved, referred back for revision and resubmission

NAME OF CHAIRPERSON

S.P. Phungson

SIGNATURE

[Signature]

DATE

31/05/2019

#### RECOMMENDATION OF UNIVERSITY RESEARCH ETHICS COMMITTEE (HUMAN AND SOCIAL SCIENCES)

The application for Exemption is (please tick):

☐ Approved by Chairperson

☐ Not Approved. Sent back for further clarity and resubmission

If approved, the Exemption Number to be recorded: \_\_\_\_\_

NAME OF CHAIRPERSON: \_\_\_\_\_

SIGNATURE \_\_\_\_\_

DATE \_\_\_\_\_