

Crimes against sexual orientation: A critical study of 'corrective' rape within the South African context.

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'The moral high ground belongs to those who oppose violence, victimisation, crime and bigotry, not to those who support it in the name of their personal beliefs or religion'

- KT Berrill & GM Herek (1992)

Mini-dissertation (MND 801)



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Abstract

This article delves into the murky waters of homophobic victimisation within the post-Apartheid South African society. It draws attention specifically to a sub-group within the lesbian, gay, bisexual and transgender (LGBT) community by critically examining the phenomenon of ‘corrective’ rape that has befallen them in the recent past years. The article seeks to achieve a critical examination of ‘corrective’ rape in South Africa a threefold manner.

Firstly, and as a point of departure, the article takes a look at some of the prominent cases of ‘corrective’ rape that have not only captured the attention of the nation, but also that of the international community. It looks not only at the sensational stories published by media but also at the response of the criminal justice system to the cases that have surfaced before it. In so doing the article aims to establish that ‘corrective’ rape is a reality for lesbian women in South Africa.

Once the reality of ‘corrective’ rape has been established, the article seeks to then answer the questions as to whether or not ‘corrective’ rape can be and should be categorised as a ‘hate crime’ offense. These two questions are addressed in a comparative manner, by examining the definition of ‘hate crime’ and the definitional characteristics of the latter. These are then applied to ‘corrective’ rape within the South African context in an attempt to establish whether or not the latter is truly a ‘hate crime’ and should be seen and dealt with as such by the South African legal system. In this part of the examination, the by-question of whether or not the South African legal framework should recognise ‘hate crime’ offenses as a separate category crime filters through. However, the latter question is only addressed as the article progresses.

From the theoretical, the article returns to the current reality to not only comprehensively discuss the national and international legal measures that have been put in place to protect lesbian women from homophobic victimisation but also to discuss the reasons why these legal measures are allegedly failing South African lesbian women – this regardless of the heart and soul that has been poured into the South African constitutional jurisprudence. The aim of this part of the examination is to establish what, if anything at all, can still be done to offer better protection to lesbian women all across the nation, regardless of their social class.

Having completed all three of the above and in the penultimate, the article makes recommendations that touch on both the law and human rights education policies of the nation. The main focus of the author’s submissions is on reform as well as education and awareness. These recommendations are made in the hopes that in the nation’s endeavor to provide better protection for the most vulnerable in our society these will be progressive steps. The article then concludes with final thoughts as to what has been learnt and established in each substantive chapter.

Abbreviations and acronyms

JWG	Joint Working Group
DOJCD	Department of Justice and Constitutional Development
LGBT	Lesbian, Gay, Bisexual and transgender persons/community
NPA	National Prosecuting Authority
SAPS	South African Police Services

Chapter one: Introduction to ‘corrective rape’ in South Africa

1.1 Motivation for study

Undoubtedly one of the pivotal motivators for change in the history of South Africa was the accepted and legalised racial discrimination that mars our past. And though it is indisputable that discrimination on certain grounds has been sufficiently, though non-exhaustively, addressed by law and policy,¹ persons who are deemed fall outside the social norms still suffer at the hands of society. An example of the above are persons belonging to sexual minority groups.

In the 1992 March issue of *Living*, a periodical publication, it was submitted that ‘gay-bashing’ was becoming South Africa’s ‘blood-sport’.² And though the author of the current article cannot stipulate with certainty the correctness of the above submission, the author does submit that there has been a noticeable increase in acts of violence perpetrated against persons belonging to or purporting to belong to sexual minority groups. This, against the back drop of a criminal justice system that allegedly has inadequately addressed the acts of violence committed against sexual minority groups, is the new state of affairs in the South African society – this regardless of all the heart and soul that has been poured into our constitutional jurisprudence.³

The umbrella term ‘gay-bashing’⁴ is the more popular colloquial term intended to refer to the victimisation of homosexual, bisexual and/or transgender persons or persons perceived to be so for reason of the victim’s sexual orientation, perceived or otherwise, and the perpetrator’s homophobia.⁵ Put in other words, gay-bashing (homophobic victimisation) is the outward physical or verbal expression of prejudice based on sexual orientation.⁶

¹ See Promotion of Equality Act and Prevention of Unfair Discrimination Act 4 of 2000 (Equality Act); Employment Equity Act 55 of 1998

² C Mitchell ‘Homophobia and the new aids threat: special report’ (1992) March *Living* 16

³ For examples see *National Coalition of Gay and Lesbian Equality v Minister of Home Affairs and Others* 2000 2SA 1 (CC) (*National Coalition case 2*); *Fourie v Minister of Home Affairs and Others* 2005 3 BCLR 241 (SCA) (*Fourie case*)

⁴ The current author will make use of the less colloquial term of ‘homophobic victimisation’

⁵ C Bezuidenhout ‘‘n Kriminologiese ondersoek na die houdings van geviktimizeerde en nie-geviktimizeerde slagoffers van anti-gay haat misdade teenoor die Suid-Afrikaanse polisie en die regstelsel’ (1993) unpublished thesis, University of Pretoria 13

⁶ As above

And this phenomenon of homophobic victimisation is something not new to our times. It is a practice that has been in play through many centuries and in many societies⁷ - the South African society being no exception to the above. The practices of the past often involved the torture, mutilation and ultimately the death of the victim⁸ and very little has changed in modern day societies. Reportedly, heinous and brutal acts continue to be perpetrated by state officials and private actors of society against anyone whom they suspect of not conforming to society's 'sexual' norm⁹ – the accepted societal norm for purposes of this article being heterosexuality.

The actual acts of victimisation differ from situation to situation. The acts can range from harassment, assault, sexual assault, malicious damage to property, hate speech, torture and unfortunately can and have at times culminated in murder.¹⁰ It is difficult to say that any one of these acts is lesser than the next or greater than the last, nor can it be said that these acts never co-exist in a particular scenario. However, in the recent years one such act has grown in popularity within the South African society – the 'corrective' rape of lesbian women.

This article seeks to take a critical look at the 'corrective' rape of lesbians by contrasting what has allegedly been done to this minority group of society against the current laws in place and those that should be in place to protect all people. The motivation for this study lies not in the fact that the 'corrective' rape of lesbians is an occurrence, but rather in that it is an occurrence under a legal framework that has been carefully constructed to protect members of the national society because of our diversity.

1.2 Significance of study

The Constitution guarantees that equality will be afforded to all.¹¹ Equality is not only a fundamental right, it is also one of the values upon which this new constitutional dispensation is

⁷ B Buvanasundaram 'Violence against homosexual and transgender persons' (2000) 12 *Sri Lanka Journal of International Law* 217

⁸ As above

⁹ A Mises 'Gender inequality and corrective rape of women who have sex with women' (2009) available at <http://www.gmhc.org> (accessed 16 November 2010)

¹⁰ Ertürk, Y (2009) 'Report of the Special Rapporteur on violence against women, its causes and consequences, addendum communications to and from governments' A/HRC/4/34/Add.1 available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/119/48/PDF/G0711948.pdf?OpenElement> (accessed 20 November 2010) para 632

¹¹ Constitution of the Republic of South Africa Act 108 of 1996 section 9

founded.¹² And as such the scenario in which a minority group of society suffers discrimination and victimisation regardless of this guarantee deserves assessment – especially if it has been reported to be a growing trend within the society.¹³

What further makes this study significant is that, though many local authors with legal training have written on equality as a right and as a value, very few have ventured into this specific field of research to give sufficient enough direction to the legal practice.

1.3 Research question

In this article the author will address the following questions:

- What is ‘corrective’ rape and what role does it play in the South African society?
- Does ‘corrective’ rape amount to a ‘hate crime’ offense and if so in what manner?
- How is ‘corrective’ rape being addressed by the current legal framework and is there more that can be and should be done?

1.4 Methodology

This research will be conducted through desktop research methods; using critical, comparative and analytical legal schools of thought. And due to time constraints, the primary method of research will be qualitative rather than quantitative.

To sufficiently address the listed research questions the author will employ three social sciences (journalism, criminology, sociology) and three branches of law (Constitutional Law, Human Rights law and Criminal law).¹⁴

The aim of looking to journalism to assist in answering the research questions is to establish what has reportedly been committed against the lesbian women of the nation. The author

¹² As above section 1

¹³ A Martin *et al Hate crimes: The rise of ‘corrective rape’ in South Africa* (2009) 13

¹⁴ Both the formal and the material criminal Law will be employed in this article. See CR Snyman *Criminal law* (2008)3 for the definition of formal criminal law; See J Burchell & J Milton *Principles of criminal law* (2007) 1 for the definition of material criminal law.

intends to use newspaper publications to provide examples of the 'corrective' rape of lesbian women.

Criminology and sociology assist the reader in understanding the concept of 'hate crimes' and the rationale behind the enactment of legislation specifically aimed at preventing, prohibiting, combating and punishing 'hate crime' offenses.

Constitutional and Human Rights law are consulted in order to establish the constitutional and legislative protection offered to homosexual, bisexual and transgender persons, both within the national legal framework and at the international level. This will be done to understand the obligations that have been placed on the state both by the international community and the Constitution itself with regard to protecting the equality of all persons.

The Criminal law is used to establish whether or not the South African justice system has done all that can be done, within the confines of the law, in addressing the matter of homophobic victimisation.

The aim of collecting all the necessary information in the abovementioned manner is to critically assess the situation in South Africa as it currently stands and to find a way forward from there.

1.5 Literature review

This article is premised on the constitutional obligations that arise out of the fundamental values of equality, dignity and freedom.¹⁵ At the heart of this article are the constitutional obligation placed on state and all persons to not unfairly discriminate against any person on any of the listed grounds – one such ground being sexual orientation¹⁶ – and the obligation placed on the state to enact, enforce and apply national legislation that prevents and prohibits unfair discrimination.¹⁷ Also central is the state's obligation to prevent third parties from interfering with the physical integrity and security of members of the public.¹⁸ This obligation although not

¹⁵ Constitution (n 11 above) section 1

¹⁶ As above section 9(3)

¹⁷ As above section 9(3) and 9(4)

¹⁸ As above section 12(1)(c)

expressly mentioned in the Constitution is the result of the Constitutional Court's development of the common law.¹⁹

As already mentioned the article aims to take consideration of homophobic victimisation and how it flies in the face of the above obligations. In this regard K T Berrill, although not naming it such, explains that homophobic victimisation can be described as, acts of harassment or violence in which the sexual orientation of the victim plays a role of relevance. She includes defamation, harassment, acts of intimidation and acts of violence such as assault, malicious damage to property and murder in, into the scope of homophobic victimisation.²⁰ Berrill's submission is supported by many other authors and academics,²¹ including Sri-Lankan based B Buvanasundaram, who explains that practices of homophobic victimisation have been a part of societies reaching as far back as the 13th century.²² Eliason adds to this by saying that, the more visible that the lesbian, gay, bisexual and transgender (LGBT) community becomes, the more frequent the victimisation becomes within a society.²³

Though Berrill's contribution is key to many international works on the topic of homophobic victimisation, it is specifically aimed at the American society. The South African viewpoint is well expressed by Wells & Polder of the Joint Working Group (JWG). The latter two authors support Berrill's submission, stating that homosexual, bisexual and transgender persons experience verbal, physical and sexual abuse as well as damage to property and domestic violence for reason of their sexuality.²⁴ They include that the most prominent of the above acts of victimisation, especially for women in the LGBT community are sexual abuse and domestic violence.²⁵ Wells & Polder further submit that, depending on the gender and the race of the victim, the victimisation is mostly likely to occur in areas of public access (for black LGBT's) and in places where the right of entrance is reserved such as homes and workplaces (for white

¹⁹ *Carmichele v Minister of Safety and Security and Others* 2001 4 SA 938 (CC)

²⁰ K T Berrill 'Anti-gay violence and victimisation in the United States: An overview' in GM Herek & KT Berrill (eds) *Hate crimes: confronting violence against lesbians gay men* (1992) 19, 25

²¹ JA Nel & M Judge 'Exploring homophobic victimisation in Gauteng, South Africa: Issues, impacts and responses'(2008)21 *Acta Criminologica* 19; A Martin *et al Hate* (n 13 above); EP Cramer 'Hate crime laws and sexual orientation' (1999) 26 *Journal of Sociology and Social Welfare* 5

²² Buvanasundaram (n 7 above)

²³ MJ Eliason *Institutional barriers to health care for lesbian, gay and bisexual persons* (1996) National League of Nursing Press as in Nel & Judge (n 21 above) 22

²⁴ H Wells & L Polders *Hate crimes against gay and lesbian people in Gauteng: Prevalence, consequences and contributing factors* (2004) 2

²⁵ As above

LGBT's).²⁶ And though the research was focused on the general Gauteng area, it reflects the situation within other areas of the country as well.

Lesbian women – the focus of this paper – experience the same forms of victimisation as any other sub-groups of the LGBT's. However, as already mentioned there has been a noticeable increase in the acts of sexual assault, especially, against lesbian women.²⁷ According to Mieses, an explanation for this increase can be found in the socio-cultural attitudes of our national society as a whole.²⁸ Mieses singles out the homophobic and misogynist attitudes of communities²⁹ where patriarchy still plays a foremost role, as some of the leading causes for this increase in sexual assaults.³⁰ Garnets, Herek and Levy implicitly contribute to this argument by stating in passing that some sexual attacks against lesbian women are due to 'male rage at their (the victims') life-style' choices.³¹

Within the South African context very few research pieces have specifically focused on 'corrective' rape. However Action Aid, a non-profit, British based organisation, in association with some of South Africa's leading non-governmental and constitutional organisations, has produced a report that gives an in-depth discussion on 'corrective' rape.³² The most significant aspects of the report are that it categorises 'corrective' rape as a 'hate crime' and points out the disappointment and mistrust expressed by victims and potential victims of 'corrective' rape, at the failures of the criminal justice system.³³

However the report falls short in that it presupposes that 'corrective' rape is a 'hate crime' but fails to explain why it progresses on this presumption. It, and much of South African literature in this regard, appears to take the international comparative literature available on the topic and accepts it as similarly applicable to the South African context. The report makes it a responsibility of the legislature to make the necessary amendments to the law without offering sufficient proof that 'corrective' rape or any other form of homophobic victimisation actually

²⁶As above

²⁷Nel & Judge (n 21 above) 24; Wells & Polders (n 24 above) 2

²⁸Mieses (n 9 above)

²⁹As above

³⁰Nel & (n 21 above) 24

³¹L Garnet *et al* 'Violence, victimisation of lesbians and gay men: mental health consequences' in Herek & Berrill (n 20 above) 213

³²A Martin *et al* (n 13 above)

³³As above 13

amounts to a 'hate crime' offense nor does it make any suggestions as to how the court would determine whether an offense of rape would amount to 'corrective' rape.

This article aims to remedy the situation by applying the defining characteristics of 'hate crimes' to a case study in order to establish whether or not 'corrective' rape amounts to a 'hate crime' offense. Furthermore the article attempts to put forward practical principles to be used in determining whether the rape of a lesbian amounts to 'corrective' rape or just rape as defined by our law.

This article, while taking consideration of the fact that socio-cultural attitudes affect the manner in which society operates, refocuses the attention on human rights education in the country and lays out practical steps that can be taken to enlighten and educate members of the public about the plight of social groups that suffer victimisation due to their membership to such groups.

1.6 Limitations of study

For purposes of this article the term 'sexual orientation' is limited to the definition as given in the *National Coalition for Gay and Lesbian Equality v Minister of Justice and Others (National Coalition case 1)*³⁴, that is, meaning to include homosexual, bisexual and transgender erotic attraction.³⁵

Furthermore, and on a more practical note, due to the fact that the primary method of research for this article is desktop research, the argument is limited to what research material could be gathered in this manner. And lastly this article is compiled at a time when the author is juggling between being a student and a young professional, which could also affect the outcome of this article.

³⁴ 1999 1 SA 6 CC

³⁵ As above 25 para 20

1.7 Chapter outline

Chapter one seeks to set out the research questions and the methodology that will be employed to answer the set out questions. It also sets out the literature that has been reviewed in preparation for this article.

Chapter two sets out to accomplish two things. The first is to ease the reader into the subject matter by defining and expounding on the concept of ‘corrective’ rape. The second is to lay out reports of corrective rape that have caught the attention of the nation and the international community and through these understand what is meant by primary and secondary victimisation.

Chapter three delves into the discussion of ‘hate crimes’ by exploring what is meant by the term ‘hate crime’ and the defining characteristics of ‘hate crime’ offenses. The chapter concludes with a discussion as to whether or not, based on the characteristics of ‘hate crimes’, the ‘corrective’ rape of lesbians can be categorised as hate crimes.

Chapter four analyses the standards to which South Africa is bound at the international level as well as the legal protection offered to homosexual, bisexual and transgender persons under the supreme law and laws of the state. Then, based on the research of chapter three and the already existing laws and standards, the article considers whether or not anti-hate law legislation is required within the South African legal framework.

In the chapter five the author sets out her recommendations as to what more can be done to fortify the protection already offered to women belonging to sexual minority groups before laying out the findings of the author in conclusion to this article.

1.8 Conclusion

Having placed out the research questions to be addressed in this article and the methodology to be employed herein, the author will now direct the reader to the first research question: what is ‘corrective’ rape and what role does it play in our national society?

Chapter two: An introduction to ‘corrective’ rape in South Africa

2.1 Introduction

As a point of departure the reader needs to understand that most victims of crime – any crime – experience the crime in a twofold manner.³⁶ The first part of the experience is always the actual criminal act perpetrated against the victim and is the experience with which we legal scholars are most familiar. This is the ‘primary victimisation’ of the victim. The second part of the experience – the part of which we (and most members of the public) are unaware is the indirect result of the act and stems from the reaction of people to the victim.³⁷ This is referred to as secondary victimisation.³⁸

The experience of the victim and therefore the division of the victimisation into two parts is significant in that it should inform the law as to the severity of the act and what is lacking on the side of the authorities of state in dealing with victimisation. For this reason the primary and secondary victimisation of ‘corrective’ rape victims are both discussed in this chapter.

2.2 Primary victimisation

Before we can discuss the victimisation of lesbian women, we need to define the act. The term ‘corrective’ rape is made out of two components that inform us as to what exactly is being perpetrated, namely, the act and the intention or motive behind the act. Therefore in an effort to provide a holistic picture both components are now discussed.

The act itself is rape – an act prohibited by statute.³⁹ Now much can be said about the development of the definition of rape under the South African law,⁴⁰ but as it stands currently

³⁶ P Schulz review of R Campbell & S Raja ‘Secondary victimisation of rape victims: insights from mental health professionals who treat survivors of violence’ (1999) 14 *Violence and Victims* available at: <http://www.musc.edu/vawprevention/rsearch/victimrape.shtml> (accessed 16 November 2010)

³⁷ UN General Assembly, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power : resolution / adopted by the General Assembly, 29 November 1985, A/RES/40/34, available at: <http://www.unhcr.org/refworld/docid/3b00f2275b.html> (accessed 12 May 2011)

³⁸ Department of Justice and Constitutional Development *Understanding the South African victims charter – A conceptual framework* (2008)

³⁹ Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007

rape is defined as the unlawful and intentional act of penetration of one person by another without the former's consent.⁴¹ This current and non-gender specific definition, although a breakthrough step in the development of South African common law, has little effect on this article as the rape of a lesbian would have been and was a prosecutable offense in terms of the common law definition as well as the definition given in the *Masiya* case⁴² and still remains a prosecutable offense under the statutory laws now in force.

As for the adjective 'corrective', it means to 'make a thing correct by altering or adjusting it' or 'to point out or punish a person's faults'.⁴³ Put differently it means to remedy or correct a matter that has gone wrong or is askew. Therefore we can derive that the concept of 'corrective' rape is based on the presumption that there is something wrong or askew with the sexuality and/or sexual preferences of lesbian, bisexual or transgender women and that their sexuality and preferences need to be 'corrected' or 'cured' through the use of rape.

The act having been defined we now need to consider at the prevalence of 'corrective' rape in the society, which is not an easy feat as no official statistics exist in this regard. Therefore we are forced to look to the work of non-profit/governmental organisations, support groups and newspaper articles to form an idea as to what is happening to lesbian women in the society. A 2003 study headed by OUT LGBT Well-being, a non-profit organisation, revealed that 10% of homosexual, bisexual and/or transgender persons had experienced rape.⁴⁴ The study further revealed that of 10% of black lesbians and 4% of the white lesbians had experienced some form of sexual assault.⁴⁵ However the study was limited to the Gauteng area alone. LulekiSizwe, a non-profit organisation based in the Western Cape has been, on more than one occasion, reported to have stated that each year at least 510 lesbian women report being victims of 'corrective' rape.⁴⁶ However the organisation fails to substantiate or explain the above figure. We can only assume that the figure given is based on the submission by the Triangle Project, also a non-governmental organisation, in which the organisation claims to deal with at least 10

⁴⁰ See Snyman (n 14 above) 55 - 369; *Masiya v Director of Public Prosecution & Others* CCT 54/06 2007 ZACC 9 (*Masiya* case)

⁴¹ n 39 above section 3

⁴² *Masiya* (n 40 above) para 45

⁴³ *The South African Oxford school dictionary* (2004) 104

⁴⁴ Wells & Polder (n 24 above) 2

⁴⁵ As above

⁴⁶ 'All she needs is a jolly good...' *Saturday Star* 29 January 2011 15; 'Rape of lesbians 'a hate crime' *Business Day* 6 January 2011 3

new cases of 'corrective' rape every week.⁴⁷ The organisation also reported in that in the Western Cape alone 44% of white lesbian women and 86% of black lesbian women fear sexual assault.⁴⁸

The actual number of lesbian women who have been 'correctively' raped is difficult to establish due to the fragmented and repetitive nature of the research work carried out. However, the few stories that have received news coverage, have shown that behind the emotive language and the sensationalism thereof there is such a thing as 'corrective' rape and it is happening within the South African society with disturbing brutality. The story of the violent gang-rape and murder of Eudy Simelane was one of the first to receive international coverage. Simelane, an openly lesbian football player, was allegedly gang-raped and murdered in her hometown of KwaThema in April of 2008.⁴⁹ Her body was found in a creek with twenty five inflicted stab wounds.⁵⁰ Of the five men accused of the robbery (with aggravated circumstances), rape and murder of Simelane one was acquitted and another pled guilty to three charges and was sentenced to 32 years imprisonment.⁵¹ In sentencing the latter, the learned Judge Mavundla, M declared Simelane sexual orientation to have had no relevance to the facts of the case – reportedly this was an upset to many in attendance that day as it had been the hope of some spectators that the sexual orientation of the victim would be taken into consideration.⁵² This in no way implies that the learned Judge's finding was incorrect in law, but rather that perhaps a possibility exists that our law may be lacking something. The three other accused were tried in July of 2009. Two were acquitted and one was sentenced to life.⁵³

⁴⁷ Interview with Vanessa Ludwig (director of the Triangle Project in Cape Town) conducted by the agents of ActionAid in January 2009 as recorded in Martin *et al* (n 13 above) 8

⁴⁸ Triangle Project & Unisa Centre for Applied Psychology *Levels of empowerment among LGBT people in the Western Cape, South Africa* (2006) 30

⁴⁹ 'Eudy Simelane: the lesbian who was marked for death by her love of football' *The Times* August 2009 available at <http://www.timesonline.co.uk/tol/news/world/africa/article6809931.ece> (accessed 20 November 2010)

⁵⁰ As above

⁵¹ Martin *et al* (n 13 above) 10;

http://www.few.org.za/index.php?option=com_content&view=article&id=38:sentencing-of-confessed-murderer-of-eudy-simelane-just-one-huddle-in-a-long-struggle&catid=19:press-release&Itemid=29 (accessed 29 April 2011)

⁵² As above; Unfortunately, the court file in this matter seems to have disappeared from the courthouse of the Delmas Periodical Court

⁵³ As above

Similar stories include those of Sizakele Sigasa and Salome Massooa, who were allegedly gang-raped, tortured, restrained with their own underwear and shoelaces and then murdered.⁵⁴ To date their rapists and killers remain at large.⁵⁵ Another similar story that made headlines was that of Millicent Gaika, who was allegedly verbally abused, beaten and raped over a period of five hours before community members rescued her – these acts of violence allegedly committed all in the name of correcting and/or punishing her sexual orientation.⁵⁶ The man accused of the rape and assault of Gaika was apprehended by police and granted bail by the Wynberg Magistrate’s court.⁵⁷ The accused was later re-apprehended for being in violation of his bail conditions only to be released on bail again.⁵⁸ These are but three of the stories of violence that is being perpetrated against lesbian women and unfortunately not all the victims live to tell their story. But what happens to those who are fortunate enough to survive? What follows on the victimisation?

2.3 Secondary victimisation

As we have already mentioned above, victims do not experience crime in one part alone. After the criminal conduct has been completed and in a state of humiliation (as is common with all victims of sexual assault)⁵⁹ the victim is required to report the crime to the police authorities and a case needs to be opened against the perpetrators and in most instances the victim may require medical attention. Having already suffered, victims are required to go through a secondary phase of suffering in order to make a full physical and mental recovery from the crime and for the perpetrators to be prosecuted before the law. But what happens in the situation where the social and criminal justice institutions put in place to assist the victims of crimes negatively receive a victim due to her sexual orientation?

‘Secondary victimisation’ – the negative reception of a victim by his or her community and the social agencies put in place to assist victims of a crime (such reception at times being due to his

⁵⁴ Martin *et al* (n 13 above) 9; n 46 above; Z Muholi *Mapping Our Histories: A Visual History of Black Lesbians in Post-Apartheid South Africa* (2009) 22

⁵⁵ Martin *et al* (n 13 above) 9

⁵⁶ ‘A cowardly crime against lesbians’ *City Press* 6 January 2011 10; n 46 above

⁵⁷ ‘Mob justice threat as ‘corrective’ rape accused granted bail’ *Cape Times* 31 May 2010 6

⁵⁸ n 46 above

⁵⁹ Garnet *et al* (n 31 above) 213

or her membership to a particular group of society) –⁶⁰ occurs in South Africa more often than it should.⁶¹ It has the effect of further traumatising an already traumatised victim and causing others who may find themselves in similar situations in the future to fear seeking the assistance of the correct social institutions and agencies.⁶²

As a general rule, rape victims often suffer secondary victimisation whether it be the intention of their secondary victimisers or not,⁶³ but ‘corrective’ rape victims suffer in a twofold manner – firstly because they are rape victims and secondly because of their sexual orientation. This means that above and beyond what all other rape victims go through, they also have to endure the judgment and misunderstanding that stems from the personal beliefs and convictions of the servants of the institutions and agencies put in place to support them. This is especially troubling against the fact that the scope of the prohibition against unfair discrimination (on the basis of sexual orientation) by the Promotion of Equality & Prevention against Unfair Discrimination Act⁶⁴ has been interpreted as wide enough to include access to services and facilities available to the heterosexual members of society.⁶⁵

But what is meant by the social institutions and agencies put in place to assist victims of crime? Here we are referring to service providers tasked to uphold the rights of victims as they are spelt out in the Service Charter for Victims of Crime in South Africa (Victims’ Charter).⁶⁶ Put in more specific terms these service providers are the South African police services (SAPS), health care service providers, the national prosecuting authority (NPA) and other agencies with which victims may come into contact in pursuing justice and recovery.⁶⁷ However, the sad reality is that these are also the primary culprits of the secondary victimisation of ‘corrective’ rape victims. Also included in the lot are the communities to which the victims belong and how they react to the victim.⁶⁸ Each of these deserves due consideration as to the part they play in the secondary victimisation of ‘corrective’ rape victims.

⁶⁰ Cramer (n 21 above) 15

⁶¹ K Geldenhuys ‘Revictimisation of sexual abuse victims’ (2009) *Servamus* 28

⁶² Schulz (n 36 above)

⁶³ Geldenhuys (n 61 above) 28

⁶⁴ n 1 above

⁶⁵ A Pantazis ‘Home and the world: lesbian and gay places in the law’ (2002) 119 *South African Law Journal* 315; Nel & Judge (n 21 above) 28 - 29

⁶⁶ Department of Justice and Constitutional Development *Service Charter for Victims of Crime in South Africa* (2004)

⁶⁷ *Understanding the South African Victims’ Charter – A conceptual framework* (n 38 above)

⁶⁸ Martin *et al* (n 13 above) 13

For many homosexual, bisexual and transgender persons reporting a crime that has been committed against him or her presents a great challenge as reporting the nature of the crime most times entails the disclosure of such person's sexual orientation to a police force perceived to be abusive towards persons belonging to sexual minority groups.⁶⁹ Most often if the rape is reported, it is documented by the receiving officer as 'common' rape and without specific reference to the possible homophobic motivation that could have been behind the attack.⁷⁰ This of course contributes to the lack of national statistics we have on the matter. But more importantly it has caused the relationship that exists (or should exist) between the police authorities and the LGBT community to deteriorate to a point of mistrust. The SAPS are seen as being sub-standard (and sometimes wholly inactive) in the protection of lesbian women and in the investigation of crimes committed against such persons.⁷¹ Adding on to this is the fact that members of the SAPS have, in the past, been reported as some of the perpetrators of the primary victimisation of members of the LGBT community.⁷² As early as 1992 the SAPS have been tarnished for the negative reception of homosexual, bisexual and transgender victims of crime – and allegedly very little has changed over the past eighteen years.⁷³

Healthcare service providers, though not strictly a part of the criminal justice system, do play an important role in the collection of evidence, especially in cases involving assault and rape. The allegedly 'unsympathetic' reactions of the healthcare service providers to the sexual orientation of the victims sometimes cause delays in seeking (or complete failure to seek) medical attention on the part of the victims.⁷⁴ And if medical attention is sought, lesbian women fear that the attitudes of their attendants may result in the delivery of sub-standard healthcare services.⁷⁵ What is most evident with this group of service providers is that in the secondary victimisation of women, though at times it can be caused intentional and conscious, it is for the most part an

⁶⁹ Seminar on 'Anti-gay hate crimes: A need for police involvement to curb violence against gays' given by A Theron & C Bezuidenhout; <http://www.csvr.org.za/wits/papers/papgay.htm> (accessed 16 November 2010)

⁷⁰ As above; Mieses (n 9 above)

⁷¹ Martin *et al* (n 13 above) 9, 13; E Steyn 'Women who love women – a female perspective on gay family law' (2001) 2 *Journal of South African Law* 340

⁷² Theron & Bezuidenhout (n 69 above); See *Understanding the South African Victims' Charter – A conceptual framework* (n 38 above) 25 to see further examples of secondary victimisation committed by the police services in South Africa

⁷³ As above

⁷⁴ Nel & Judge (n 21 above) 29

⁷⁵ As above

unconscious event, as staff members are merely too busy to apply the correct measures of sensitivity and understanding.⁷⁶

And should the alleged perpetrators be brought before for a court of law, it must be born in mind that the mere experience of relaying the events of a crime may be further traumatising to a victim,⁷⁷ especially in a courtroom where the accused persons are present to face their accuser. However, above and beyond this arguably painful, but wholly necessary experience, the prosecuting authorities and the courts have also played a role in the secondary victimisation of 'corrective' rape victims.⁷⁸ On their part prosecutors have failed on numerous occasions to communicate to the courts the true nature of the crimes committed against the victims and have in some instances failed to sufficiently prepare for the case – sometimes resulting in the acquittal of the accused persons or the dismissal of the case.⁷⁹ It is also submitted that legal practitioners contribute to the secondary victimisation of victims by the manner in which they present questions to or examine the victims⁸⁰ – sometimes insinuating that the victim provoked the attack.⁸¹ On the other hand the courts have failed to consider the sexual orientation of the victim as an aggravating factor both during the trial and the sentencing procedures – blatantly ignoring the possible link that might exist between the crimes and the sexual orientation of the victims.⁸² One such example has already been discussed above.⁸³ Furthermore section 51 of the Criminal Law (Sentencing) Amendment Act (Sentencing Act)⁸⁴ does not include discrimination into list of factors to be taken into consideration when the court is faced with sentencing an accused for the commission of a serious offense. This puts the courts in a difficult position, as even if they were to acknowledge the role that the victim's sexual orientation had played in the attack, it would probably not be a consideration at the time of sentencing.

⁷⁶ *Service Charter for Victims of Crime in South Africa* (n 66 above) 25; (n 61 above) 28

⁷⁷ U Orth 'Secondary victimisation of crime victims by criminal proceedings' (2002) 15 *Social Justice Research* 316, 324

⁷⁸ Martin *et al* (n 13 above) 13

⁷⁹ As above; 'State gets time to do homework in murder, rape trial' *The Star* August 2009 28

⁸⁰ Nel & Judge (n 21 above) 28

⁸¹ Buvanasundaram (n 7 above) 220

⁸² As above; http://www.few.org.za/index.php?option=com_content&view=article&id=88:day-1-the-murder-of-eudy-simelane-trial-commences-at-the-delmas-high-court&catid=19:press-release&Itemid=29 (accessed 29 April 2011)

⁸³ 'Sentencing of confessed murderer of Eudy Simelane just one hurdle in a long struggle' *Citizen Journalism in Africa* February 2009 17 available at <http://www.citizenjournalismafrica.org/node/1319> (accessed 20 November 2010); Martin *et al* (n 13 above) 10

⁸⁴ Act 105 of 1997

The community in itself also presents lesbian women who have been ‘correctively’ raped with a challenge in that often members of the community tend to blame the victims for what has happened to them.⁸⁵ Family, friends and even strangers sometimes take the side of the attacker, arguing that she (the victim) deserved what happened to her.⁸⁶ This situation is worsened by the silence of key role players in the community and the society as a whole.⁸⁷ And in situations where the criminal justice system has completely failed the victims in the investigation and/or prosecution stages, victims often have the misfortune of bumping into their attackers on the streets or living down the street from them – able to hear their taunts when they pass by each other. Long after the crime has been committed the victims still live in fear – a fear encouraged by the conduct and attitudes of their communities.⁸⁸

2.4 Conclusion

‘Corrective’ rape is a real and present danger to the lesbian women of the country; so too is the secondary victimisation that they experience after the assault. If we still remain unconvinced, consider that at the time that this article was being written news reports had just come in on the latest victim of ‘corrective’ rape – a thirteen year old victim who had been raped in Pretoria.⁸⁹ But even in light of this, the question still remains; ‘does corrective’ rape amount to a ‘hate crime’ offense?

⁸⁵ Buvanasundaram (n 7 above) 218

⁸⁶ Martin *et al* (n 13 above) 13

⁸⁷ Buvanasundaram (n 7 above) 223; n 10 above para 634

⁸⁸ Raped and killed for being a lesbian: South Africa ignores ‘corrective’ attacks’ *The Guardian* March 2009 12 available at <http://www.guardian.co.uk/world/2009/mar/12/eudy-simelane-corrective-rape-south-africa> (accessed 19 November 2010)

⁸⁹ <http://www.news24.com/SouthAfrica/Local-Elections-2011/NYDA-Take-action-on-corrective-rape-20110511> (accessed 12 May 2011)

Chapter three: Defining ‘hate crimes’ and their application to ‘corrective rape’

3.1 Introduction

Having defined and established the reality of ‘corrective’ rape within South Africa, we now consider the submission that ‘corrective’ rape is a ‘hate crime’ offense.⁹⁰ Though this may sound simple, it is complicated by the further and more implicit submission attached to the former, namely, that the South African legal system should recognise ‘hate crime’ offenses as a separate category crime.⁹¹ However, before we can even attempt to give due consideration to either one of the above, we require an understanding of what is meant by the term ‘hate crimes’.

3.2 Definition of ‘hate crimes’

As already mentioned above, the South African legal framework does not recognise ‘hate crimes’ as a separate category crime. The former in no way means that crimes such as assault, sexual assault and rape go without punishment in our law. On the contrary, and as has already been discussed in the previous chapter, rape is recognised as a criminal act punishable under the laws of the land. However, the non-recognition of ‘hate crimes’ means that there currently is no working definition for the term. This being the case, we are forced to draw inspiration from criminology, sociology and the laws of other jurisdictions. It must be noted though, that even with such inspiration, finding one singular, all-inclusive and generally acceptable definition for the concept of ‘hate crimes’ (or any other kind of crime for that matter) presents a challenge as the definition that a particular jurisdiction attaches to crimes is deeply influenced by the political and social background of that jurisdiction.⁹² The result of this is that multiple definitions exist as to what constitutes a ‘hate crime’.

⁹⁰ Martin *et al* (n 13 above) 9

⁹¹ As above

⁹² RJ Boeckman & C Turpin-Pestrosino ‘Understanding the harm of hate crime’ (2002) 58 *Journal of Social Issues* 208

3.2.1 Legislative definitions

Within various legal systems the term ‘hate crime’ has only gained prominence in the last two decades of the twentieth century.⁹³ Under the American legal system, the leading nation in ‘hate crime’ research, the term was made popular by researchers, activists and politicians, but was only reduced to federal law and defined in 1990 by the American Hate Crimes Statistic Act. According to the federal legislation ‘hate crimes’ are:

‘crimes that manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity, including where appropriate the crimes of murder, non-negligent manslaughter, forcible rape, aggravated assault, simple assault, intimidation, arson, and destruction, damage or vandalism of property.’⁹⁴

If one is to analyse the above definition, we pick up on a few notable aspects. The first noteworthy aspect from the above definition, for purposes of this article, is that it takes acts traditionally recognised as criminal conduct and couples them with the element of prejudice. The second noteworthy aspect is the inclusion of sexual orientation into the list of grounds of which prejudice can be based. Therefore one can derive from the above that under the American federal legal system, where a man rapes lesbian women with the intention or motive of ‘correcting’ her sexuality, he could possibly be charged with a ‘hate crime’ offense. However this is by no means conclusive proof that ‘corrective’ rape amounts to a ‘hate crime’ offense.

The third noteworthy aspect about the federal definition is its legalistic nature in that we can derive from the wording alone that this definition establishes the elements required to be proven for the successful prosecution and conviction of an alleged perpetrator. In other words the prosecution would, according to the above definition, have to prove prejudice on one or more of the listed grounds on the part of the accused and that such prejudice manifested in or through an act traditionally recognised by the law as criminal conduct and that such act was carried out by the accused. In this regard the definition delves into the material aspects of American criminal law, which – though giving guidance – does not answer our present question.

⁹³ S Tomsen *Violence, prejudice and sexuality* (2009) 38

⁹⁴ K Franklin ‘Hate crimes’ in J Worrell (ed) *Encyclopedia of women and gender: sex similarities and differences and the impact of society on gender volume 1* (2002) 572

Also to be considered is the fact that British law, which informs the South African formal criminal law, defines 'hate crimes' along similar lines to the American law,⁹⁵ though sexual orientation (and disability) were only included as grounds upon which a 'hate crime' can be committed in 2003.⁹⁶ Of further interest is the fact that the Canadian law, which also informs the South African constitutional law, though recognising 'hate crimes', does so only in terms of genocide (which does not include sexual orientation as a prohibited ground)⁹⁷ and hate speech.⁹⁸ However, Canadian sentencing laws have proven to be advanced in nature in that they acknowledge the relevance of 'bias or prejudice', on the part of the accused, during the sentencing procedure.⁹⁹

The above definitions, though insightful as to how legislatures in other jurisdictions define 'hate crimes', bring us no closer to the substantive meaning required to understand what these crimes are. Nonetheless these definitions do indicate to us that, like South Africa, the above jurisdictions do recognise rape as a criminal conduct punishable under the law, but unlike South Africa, these jurisdictions have gone an extra mile to recognise rape motivated by prejudice as a completely different category of crime.

3.2.2 Academic Definitions

The term 'hate crime' can be said to be misleading because it presumes that the criminal conduct is rooted in or fueled by hate,¹⁰⁰ which is not the entire truth of the matter. And to the argument that 'hate crimes' are in fact crimes of prejudice¹⁰¹ – this too is also an over simplification of the matter. The notion that 'hate crimes' have only hate and/or prejudice as the motivation or intention behind them seems to completely neglect the fact that these crimes are committed in a social context and as such other social factors play a role. A more correct submission, in the opinion of the author, is that 'hate crimes' are crimes of mixed motivations.¹⁰² This appears to be true even if we are to consider some historical accounts of 'hate crime'.

⁹⁵ Crime and Disorder Act of 1998

⁹⁶ Criminal Justice Act of 2003 sections 145 - 146

⁹⁷ Criminal Code of Canada 1985 section 318 available at <http://laws.justice.gc.ca> (accessed 27 November 2010)

⁹⁸ As above section 319; Also see *R v Keegstra* (1990) 3 S.C.R. 697 and *R v Andrews* (1990) 3 S.C.R. 870 for the Canadian Constitutional Court's indepth discussion into hate speech and freedom of expression

⁹⁹ As above section 718.2

¹⁰⁰ N Hall *Hate crime* (2005) 11

¹⁰¹ As above

¹⁰² Tomsen (n 93 above) 38

If one takes a look at the historical background of ‘hate crimes’ (though not termed such until the recent decades), what becomes evident is that these crimes are most prominent in times of economic hardship and where society is in a state of decay.¹⁰³ And due to the problems that society is, or parts of the society are, undergoing at that point in time, a ‘spirit’ of division surfaces and the prevailing attitude becomes one of; ‘there is them and then there is us’.¹⁰⁴ It is this spirit of division that feeds and enables the commission of these crimes against those considered not to be among the ‘us’. Unfortunately the distinction between the ‘us’ and ‘them’ is an instinctual distinction¹⁰⁵ that arises with the introduction of a new group to the society or the recognition and/or legal acceptance of ‘identities’ that have always been a part of the society but up until recently were not legally acknowledged.

But ‘hate crimes’ don’t arise out of distinction. In fact distinction serves a function in society, in that it identifies the different and diverse cultures, beliefs, preferences and traditions that can happily co-exist in a society. The only time that distinction becomes relevant to this argument is when there is an inequality in the treatment of different groups or individuals of society. And most often, those who find themselves on the wrong end of the unequal treatment are those most vulnerable to ‘hate crimes’. This submission is supported by the definition of ‘hate crime’ as presented by Perry¹⁰⁶ who states that ‘hate crimes’ involve;

‘...acts of violence and intimidation, usually directed toward already stigmatised and marginalised groups. As such, it is a mechanism of power and oppression, intended to reaffirm the precarious hierarchies that characterise a given social order. It attempts to re-create simultaneously the threatened (real or imagined) homogeneity of the perpetrator’s group and the ‘appropriate’ subordinate identity of the victim’s group.’¹⁰⁷

Perry’s definition, though drawing inspiration from previous works¹⁰⁸ is a step forward in that it is an objective step away from any emotional and political entanglements the previous works appear to have had. It, in the opinion of the author, and unlike the legislative definitions,

¹⁰³ J Levin & J McDevitt *Hate crimes: The rising tide of bigotry and bloodshed* (1993) 150

¹⁰⁴ Hall (n 100 above) 39

¹⁰⁵ As above 25

¹⁰⁶ See L Wolfe & L Copeland ‘Violence against women as bias-motivated hate crime: defining issues in USA’ in M Davies (ed) *Women and violence* (1994) 201; Also see C Sheffield ‘Hate violence’ in P Rothenberg (ed) *Race, class and gender in the United States* (1995) 438; Hall (n 100 above) 3

¹⁰⁷ B Perry *In the name of hate: understanding hate crimes* (2001) 10

¹⁰⁸ Wolfe & Copeland (n 106 above); Sheffield (n 106 above); Hall (n 106 above)

reconciles the material criminal law with sociological aspects of ‘hate crimes’ to tell the story of the push and pull forces of diversity in society.

This definition is therefore important because it highlights the most important and definitional characteristics of ‘hate crimes’, which we further require to examine the truthfulness of the argument that ‘corrective’ rape is a ‘hate crime’.

3.3 Definitional characteristics of ‘hate crimes’

Perhaps most fascinating about the definition that Perry provides it that it highlights certain key elements and/or characteristics which will now be discussed.

The first of these characteristics is the manifestation of prejudice. Prejudice enters into play where there is diversity in a society.¹⁰⁹ The type of diversity is irrelevant as in itself, diversity can be interpreted as the introduction of multiple and different cultures, religions, beliefs and/or aspirations into what can be seen as a formerly single-minded society. This introduction sparks off the instinctual ‘us’ and ‘them’ attitude that develops towards what the ‘us’ does not understand and fears about the ‘them’.¹¹⁰ And it is out of this misunderstanding and fear that prejudice is birthed. Prejudice standing in isolation is arguably not the problem,¹¹¹ but rarely does it stand alone. Prejudice has relational links to social order and the state of society at that point in time.¹¹² This we have seen even in our own national history. In less favourable social conditions prejudice is more likely to manifest in some form or another.¹¹³ It manifests with the aim of delivering a message from the actors of one social group to the members of another social group – such message usually being one of dominance (perceived or otherwise) by the former group and the intolerance of the differences that the latter group presents.¹¹⁴ Also in times of strife, the message can shift to one of blame for the decay of society and livelihood.¹¹⁵

However, this element in Perry’s definition seems to be too simplified. As we have already mentioned above, ‘hate crimes’ are committed with mixed motivations which can include but is

¹⁰⁹ C Albertyn & B Goldblatt ‘Equality’ in S Woolman *et al* (eds) Constitutional law of South Africa (2007) 35-13

¹¹⁰ Hall (n 100 above)3

¹¹¹ Levin & McDevitt (n 103 above) 150

¹¹² As above

¹¹³ As above

¹¹⁴ S Tomsen (n 93 above) 67, 69

¹¹⁵ J Levin & McDevitt (n 103 above) 150

not limited to prejudice. Take for example social considerations such as the desire to protect oneself from someone or something that poses a threat to one's way of life¹¹⁶ or the desire to rid society of all things that one considers immoral.¹¹⁷ Normally in the perpetration of 'hate crime' offenses more than one social consideration is in play. And it is these social considerations, prejudice included, that drive and fuel 'hate crimes'.

The second defining characteristic is the type of victim chosen by the perpetrators. 'Hate crimes' differ from our normal conception of crime in that the victim is always chosen due to his or her association with a certain social group.¹¹⁸ Ultimately the individual identity of the victim matters less than the social grouping of the victim.¹¹⁹ The reason for this oddity in 'hate crimes' comes back once again to the fact that these types of crimes are designed to send a message to particular social group and any victim within that social group will do.¹²⁰ And it is because of this characteristic that 'hate crimes' can be said to have a deeper impact on society as a whole in comparison to other crimes.¹²¹ All in all three victims can be identified in the perpetration of 'hate crimes'. The first is the direct victim – the person who actually experiences the criminal act perpetrated against his/her person or property. Needless to say this is the victim who experiences the immediate effect and is hardest hit by the crime. The other two victims are indirect victims, but nonetheless they too suffer. The second is the social group of the primary victim, as the actions of the perpetrator indicate to this group that any member of the group is a potential victim.¹²² And the third, which usually suffers in the long run, is the diverse character of the society. In an effort to protect oneself and one's family from any or further attacks the members of the affected minority group tend to cautiously and protectively withhold information about their beliefs, preferences and practices that contribute to the essence of the society.

The third definitional characteristic is violence or acts of violence. Here we have other sub-considerations that make up this one characteristic. Firstly, it has been submitted that acts of violence committed against victims belonging to social minority groups for reason of their affiliation to such groups are excessively brutal – especially in cases where the victim belongs to

¹¹⁶ As above 75

¹¹⁷ As above 89; Also see GM Herek 'Psychological heterosexism and anti-gay violence: the social psychology of bigotry and bashing' in Herek & Berrill (n 20 above) 163

¹¹⁸ Levin & McDevitt (n 103 above) 15

¹¹⁹ As above

¹²⁰ As above; Also see Hall (n 100 above) 69

¹²¹ Hall (n 100 above)66

¹²² As above

a sexual minority group.¹²³ This implies that more force than what is necessary to make the victim submit is used in the attack and suggests an intention to severely traumatise, if not cause death to the victim.¹²⁴ This submission has met very little opposition and has in fact been supported by reported incidents.¹²⁵

Secondly, it has been argued that the acts of violence though they appear to be random acts are in fact carried out on a rational basis by strangers so as to perpetuate the fear of potential victims.¹²⁶ However, this submission has met opposition from authors who argue that though it is possible that there can be no rational basis for 'hate crimes', it is also possible that the motivation behind such attacks can be rational or even quasi-rational as perpetrators can be and are sometimes driven by other interests other than hatred.¹²⁷ It is also further submitted that victims of hate crimes based on sexual orientation tend to report incidents that involved a perpetrator known to the victim as incidents that involved an unknown perpetrator (a stranger), which of course affects the research of academics.¹²⁸

Lastly is the submission that 'hate crimes' usually involve more than one offender.¹²⁹ This is most probably because offenders find safety in numbers, knowing that it is easier to subdue a victim when there is more than one offender and it is harder for the victim to single out one offender if he/she does report the crime.¹³⁰ Put differently, the offenders feed off one another's energy.¹³¹

3.4 Application of the definition and the characteristics of 'hate crime' to 'corrective' rape

Having considered the definition of 'hate crimes' and the characteristics thereof, we now have to answer the question as to whether or not 'corrective' rape amounts to a 'hate crime'. This is done by applying the definition and the characteristics of 'hate crimes' to 'corrective' rape. And

¹²³ Herek (n 117 above) 162 -163

¹²⁴ KT Berrill 'Anti-gay violence and victimization in the United States: an overview' (1990) 5 *Journal of Interpersonal Violence* 279 -280

¹²⁵ Cramer (n 21 above) 5-6

¹²⁶ J Levin & McDevitt (n 103 above) 12 - 13

¹²⁷ Tomsen (n 93 above) 42

¹²⁸ CR Bartol & AM Bartol *Current perspectives in forensic psychology and criminal behaviour* (2008) 174

¹²⁹ Levin & McDevitt (n 103 above) 16

¹³⁰ As above 17

¹³¹ As above

for ease of reference the author will apply the definition and the characteristics to a scenario that has already been used.

If we apply the definition to the story of Millicent Gaika,¹³² we see the following; Gaika is a lesbian women. Lesbian women have in the past fallen into patterns of stigmatisation and marginalisation because they allegedly challenge the traditional roles that society maps out for women and men. Lesbian women are also a sexual minority group within our society that have in the recent decade found legal acceptance. She was allegedly raped and assaulted by a man. According to Gaika, her alleged rapist, during the rape and assault, informed her that he was aware of the fact that she is a lesbian woman. He further went on to inform her that though she may think herself to be so, she is not a man. He, according to her retelling of the events of that day, vowed to show her that she was a woman.¹³³ From his alleged words we can gather his subjective picture of a social order that is characterised by heterosexuality, male dominance and female submission. The author acknowledges that this may not necessarily be the true state of affairs but, nonetheless his possible perceptions, as communicated to the victim, find place in this application.

Beyond this we must also apply the characteristic of 'hate crimes' to the scenario and here we see; the accused's alleged words to Gaika are indicative of someone who has a false understanding of what lesbianism is. The alleged rape and assault took place in her home town of Gugulethu. Also from the alleged rapist's alleged words we can also see that Gaika was chosen for her affiliation to a sexual minority group. Furthermore, if we are to take Gaika out of the equation and replace her with any heterosexual woman (and a known heterosexual women for that matter) then his alleged words would be empty and meaningless and the alleged attack, if it would have occurred anyway, would not have occurred on the basis of correcting her sexuality. The accused's conduct can be said to have probably been designed to teach Gaika a lesson and, whether he was conscious of it or not, to send a message to other lesbians that anyone one of them could also be 'corrected'. Furthermore rape and assault, under our law, are criminal conducts punishable in our law.¹³⁴ She was repeatedly raped and assaulted over a five hour period. She was allegedly attacked by a person whom she knows and has known for many years. And finally she was allegedly attacked by one perpetrator.

¹³² Chapter two above

¹³³ 'All she needs is a jolly good...' (n 46 above) 15

¹³⁴ n 39 above; Common law

From the above application of the definition and characteristics to Gaika's story it is probable that in this particular instance, Gaika's 'corrective' rape ordeal amounted to a 'hate crime' offense. However this application is not absolute and each case would have to be decided on the merits.

From this application, one is able to gather that 'corrective' rape can amount to a 'hate crime'.

This then gives rise to the fair question; if we were to recognise 'corrective' rape, how do we then distinguish between the 'corrective' rape of a lesbian and the rape of a lesbian? The author submits that courts would have to draw on the wisdom of *S v F and Another*¹³⁵ and that of Levin and McDevitt.¹³⁶ The answer to this question will depend on the perpetrator's intention and motivation. This will of course be a subjective test, based on the perpetrator's intention as it was communicated to the victim or any other witness.¹³⁷ For the above test to present the most equitable results it would have to be applied in light of the constitutional guarantees provided to the accused and the suggestion by the two abovementioned authors that because 'hate crimes' are crimes directed at a whole social group rather than an individual we should ask the following hypothetical question: would any person belonging to the same social group have suffered similarly if they were put in the same scenario as the victim?¹³⁸ If answered in the affirmative then it more likely that the crime committed was a 'hate crime'.¹³⁹ Ultimately however it will be left to the court to make a value judgment based on the merits of each individual case.

3.5 Conclusion

In conclusion to this chapter the author submits that 'corrective rape' can amount to a 'hate crime' as defined by Perry and the American and British jurisdictions. However this then raises two questions that require adequate attention. The first of these questions is whether or not South Africa should recognise 'hate crimes' as a separate category crime. The second question is, if indeed recognised, how should the legislature define 'hate crimes'. It is the opinion of the author that these questions can only be best answered after a close examination of the current

¹³⁵ 1982 2 SA 580 (T)

¹³⁶ Levin & McDevitt (n 103 above) 16

¹³⁷ *S v F & Another* (n 135 above)

¹³⁸ Levin & McDevitt (n 103 above) 15

¹³⁹ As above

provisions of the South African legal framework so as to enable us to establish whether the matter of 'corrective' rape has been adequately addressed in our law.

Chapter four: International and domestic protection of lesbian women – a look at the current laws

4.1 Introduction

Having considered definition of ‘hate crimes’ and also having established that the rape of lesbians, based on the expressed intention and motive of the perpetrator, can amount to a ‘hate crime’, it now becomes necessary to consider the laws and standards that apply to and bind South Africa both at the domestic and the international level. It is also necessary to consider whether the national laws have sufficiently and effectively done the job for which they were intended and whether or not more needs to be done in addressing the plight of lesbian women in South Africa. However before starting the discussion the author points out that the focus of this chapter is on provisions designed to have a preventative effect rather than a curative effect. Therefore the criminal law because it can be defined as a post facto law, that is, only coming into operation after a criminally act has been committed, will suffer under less emphasis in this chapter.

4.2 Constitutional framework

At home the state is first and foremost bound by the supreme law of the land - the Constitution.¹⁴⁰ It, and more specifically the Bill of Rights, applies to all law, binds all spheres of government and all persons, whether natural or juristic and whether such person is a public or private actor – this is the rule of law principle, i.e no person is above the law.¹⁴¹ Underlying this all-binding law, are the values of equality, freedom and human dignity.¹⁴² And though these values have complementary rights¹⁴³ provided for in the Constitution, they differ from the rights in that they are the tools by which the rights of the Bill of Rights are achieved.¹⁴⁴ They give substance and meaning to the rights of the Bill of Rights.¹⁴⁵

¹⁴⁰ n 11 above

¹⁴¹ I Currie & J de Waal *The Bill of Rights Handbook* (2005) 10 - 13

¹⁴² n 141 above

¹⁴³ Constitution (n 11 above) section 9 (equality), section 10 (human dignity) and section 12 (freedom and security)

¹⁴⁴ Albertyn & Goldblatt ‘Equality’ (n 109 above) 35-13

¹⁴⁵ *Minister of Home Affairs v National Institute for Crime Prevention* 2005 3 SA 280 (CC) para 21

To understand the full scope of constitutional protection offered to lesbian women (and in fact all South Africans) it becomes necessary to discuss each one of the abovementioned values and their complementary rights individually.

4.2.1 Lesbian women are equal before the law

First mentioned in the chain of values is equality – the value and right most central to the subject matter of this article and one that, even though it enjoys extensive constitutional protection, still continues to elude South Africa.¹⁴⁶

The Constitution does not define what is meant by ‘equality’, but section 9(1) of the Constitution does provide that everyone is equal before the law and is entitled to equal protection and benefit of the law. The section goes on to include equal and full enjoyment of all rights and freedoms into the scope of equality before listing all the grounds upon which unfair discrimination is prohibited.¹⁴⁷ Included in the listed grounds are gender and sexual orientation.¹⁴⁸ With the exception of that, no other provision is given as to the meaning of equality. This is due to the fact that our Constitution was only designed to provide for fundamental rights in general terms, so as not to hinder the progression of law.¹⁴⁹ This also meant that defining equality would be a task left up to the courts and more specifically the Constitutional Court.

For most jurisdictions the definition of equality is influenced and to a certain extent determined by the legal, social, political and historical background of each society.¹⁵⁰ South Africa is no exception to this rule. As the author has already mentioned, South Africa has a notorious past in which inequality was a legally acceptable part of society. And moving away from the past, it was the intention of the constitutional drafters to lay the foundations for an environment where all had equal access to the necessary resources required for the fulfillment of human potential – even the most intimate aspects of human fulfillment.¹⁵¹ This of course required the facilitation of both economic and social equality.¹⁵² Economic equality referred to the opening up of

¹⁴⁶ Constitution (n 11 above)

¹⁴⁷ As above section 9(2) and (3)

¹⁴⁸ As above section 9(3)

¹⁴⁹ Currie and de Waal (n 141 above) 153 - 155

¹⁵⁰ Albertyn & Goldblatt in Woolman *et al* (n 109 above)35-3

¹⁵¹ As above 35-5

¹⁵² As above

opportunities for all South Africans so as to one day eradicate poverty.¹⁵³ Social equality, on the other hand, meant something completely different. It referred to the acceptance of different types of human identities so that all South Africans may live without fear of persecution because of their beliefs, traditions and/or preferences.¹⁵⁴ Social equality is thus the focus of this article because an essential element to human identity and fulfillment of human potential is how one sexually and intimately chooses to express themselves.¹⁵⁵

And though the goal has always been social equality, it has been hindered by social inequality – that is, ‘patterns of inclusion and exclusion in which (the) identity...and behaviour of a particular group are stigmatised, marginalised and/or denigrated’.¹⁵⁶ And these patterns of inclusion and exclusion have ‘result(ed) in (the) increased vulnerability (of excluded groups) to physical and psychological violence’.¹⁵⁷ Put differently, social exclusions of certain groups have the ability to impair upon that group’s dignity – dignity being a central value that informs equality.¹⁵⁸ This is perhaps why the courts’ jurisprudence on equality, with specific regard to sexual orientation, has been focused on inclusion of homosexual, bisexual and transgender persons as full members of society.¹⁵⁹

And though it has taken many years for the LGBT community to find protection for all aspects of life under the law, one of the reasons for the granting such protection was to prevent abuses based on prejudice.¹⁶⁰

¹⁵³ As above

¹⁵⁴ As above

¹⁵⁵ Amnesty International ‘*Crimes of hate, conspiracy of silence: torture and ill-treatment based on sexual identity* (2008)7

¹⁵⁶ C Albertyn ‘Substantive Equality and Transformation in South Africa’ (2007) 23 *South African Journal on Human Rights* 255

¹⁵⁷ As above

¹⁵⁸ *President of Republic of South Africa v Hugo* 1997 4 SA 1 (CC) (*Hugo case*) para 41

¹⁵⁹ See *National Coalition for Gay & Lesbian Equality v Minister of Justice and Others* (*National Coalition case* 1) 1999 1 SA 6 CC; *National Coalition case* 2 (n 3 above); *Fourie case* (n 3 above); *Satchwell v President of the Republic of South Africa* 2003 4 SA 266 (CC) (*Satchwell case*); *Du Toit v Minister for Welfare and Population Development* 2003 2 SA 198 (CC) (*Du Toit case*); *J v Director-General, Department Home Affairs* 2003 5 SA 621 (CC) (*J case*)

¹⁶⁰ *Fourie case* (n 3 above)

4.2.2 Lesbian women are endowed with human dignity

Human dignity, of all the values and rights in the Bill of Rights, is the most complex value and right. As a value¹⁶¹ it informs all other values and rights and as a right¹⁶² it is always at play in our dealings with each other. Perhaps this is why there are contradicting views as to whether or not there exists a generally acceptable definition for human dignity.¹⁶³ Nonetheless the Constitutional Court and authors seem to agree that the original source of the concept of human dignity comes from the Kantian notion '(a)ct in such a way that you always treat humanity, whether in your own person or in the person of another, never simply as a means, but always at the same time as an end'.¹⁶⁴ Phrased differently, (and the author is well aware of the different constructions that arise from the above notion) all people should be treated with equal respect and equal concern.¹⁶⁵ Lesbian women should be seen, by both the state and private actors, as having the inherent ability to govern themselves and to make decisions that give meaning to their lives; and once those decisions have been made and if they do not infringe on the interests of others, they should be left to enjoy the fruits of their decisions in peace. Treatment of people in such a manner not only protects the individual but also protects the integrity of the society.¹⁶⁶

And ultimately what we endeavor to protect is the holistic dignity of the society for social equality means very little without the notions of equal concern and equal respect (dignity). This is clearly evident from the fact that at the heart of the equality test, is whether or not an impairment of dignity has occurred and the extent of the impairment on dignity.¹⁶⁷

¹⁶¹ Constitution (n 11 above) section 1(a)

¹⁶² As above section 10, 'everyone has inherent dignity and the right to have their dignity respected and protected'

¹⁶³ S Woolman 'Dignity' in Woolman *et al* (n 109 above) 36-6, Stuart Woolman submits five definitions for human dignity, but later accepts that there are theories of dignity; Currie and de Waal (n 141 above) 273, Currie and de Waal merely accept that the meaning of dignity is not certain.

¹⁶⁴ *I Kant Groundwork of the Metaphysics of Morals* trans AW Wood (2002) 45-46 as quoted in Woolman (n 109 above) 36 – 7

¹⁶⁵ *National Coalition* case 1 (n 159 above) para 132

¹⁶⁶ *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) (*Port Elizabeth Municipality* case) para 18, here the court refers to marginalisation of the poor by the state affecting the poor, but the author believes that marginalisation of persons by private actors also affects the society as a whole.

¹⁶⁷ *Hugo* case (n 158 above) para 41; *Prinsloo v Van der Linde* 1997 3 SA 1012 (CC) para 31

4.2.3 Lesbian women have the right to freedom of security

Freedom as a value that informs the Constitution, speaks of a history where one lived in fear of violations of their security and bodily integrity, especially from state actors.

The incorporation of the right to freedom and security of the person into the interim Constitution saw to the rejection of the former state of affairs.¹⁶⁸ Section 12 of the 1996 Constitution settled the matter by providing that everyone had a right to freedom and security of the person and a right to bodily and psychological integrity. Put in their simplest forms these two rights mean that everyone is entitled to be left alone to live their lives (regardless of one's sexual orientation).¹⁶⁹

With regard to the first of these two rights – the right to freedom and security of the person – section 12(1) sets out certain inclusions into the scope of this right. Most significant for our purposes is the right to be free from all forms of violence from either public or private sources,¹⁷⁰ the right not to be tortured in any way whatsoever,¹⁷¹ and the right not to be treated or punished in a cruel, inhuman or degrading manner.¹⁷²

The right to freedom from all forms of violence from either public or private sources was something novel to the country. The effect of the inclusion of this right is that it places a negative and positive duty on the state. The negative duty placed on state entails refraining from interfering with the enjoyment and exercise of the right, whereas the positive duty requires state to take steps to prevent private persons from interfering with the physical security of other people.¹⁷³ This section – section 12(1)(c) – was one of the stepping stones for *Carmichele v Minister of Safety and Security* (*Carmichele case*).¹⁷⁴ The *Carmichele* case was an opportunity presented to the Constitutional Court to develop the law of delict (common law) with regard to the extent of state liability where a private actor infringed on the rights of an individual and the right of women (even lesbian, bisexual and transgender women) to have their physical security protected. According to the court the state has a positive duty to protect individuals through laws and structures and where necessary preventative measures have to be taken in the case where

¹⁶⁸ Interim Constitution of the Republic of South Africa 1993 section 11(1)

¹⁶⁹ Currie and de Waal (n 141 above) 308

¹⁷⁰ Constitution (n 11 above) section 12(1)(c)

¹⁷¹ As above section 12(1)(d)

¹⁷² As above section 12(1)(e)

¹⁷³ Currie and de Waal (n 163 above) 304

¹⁷⁴ *Carmichele case* (n 19 above)

said individual's life or person is at risk from the criminal conduct of a third party.¹⁷⁵ The resultant effect of this judgment is that now the state can be held delictually liable, where the state had knowledge or should have had knowledge of a real and present threat to the physical security of an individual or group of individuals from the conduct of a third party and state failed to reasonably act on such knowledge to prevent harm from ensuing.¹⁷⁶ This position appears to be in line with the international standard which holds that acts of violence perpetrated by private actors in no way absolves state of its international (and domestic) obligation to protect individuals against abuses of their human rights.¹⁷⁷

As for the right not to be tortured and not to be treated or punished in a cruel, inhuman or degrading manner, it must be understood that cruel, inhuman or degrading punishment or treatment, though commonly arises from state conduct, can also arise from the conduct of private persons, such as members of the society. In such a scenario, the state must act to discourage, prevent and lawfully punish the conduct of such persons and should in no way display attitudes of acquiescence.¹⁷⁸

The second right, the right to bodily and psychological integrity is inclusive of the right to security in and control over one's body.¹⁷⁹ To be fully understood this right should be read with section 12(1)(c) above. The right to security in one's body means that everyone has the right to be free from assault and interference by third parties, whereas the right to control over one's body means that everyone has the right self-autonomy – especially in intimate matters such as love, sexuality and sex.¹⁸⁰ Put differently the latter right means that everyone has the right to make their own life choices – for example their sexual orientation – and live by those choices without fear of interference from other members of society.

An attack on a person, regardless of the nature of the attack, violates all the above rights and subjects the underlying constitutional values to jeopardy.

¹⁷⁵ As above para 44-45

¹⁷⁶ Currie and de Waal (n 141 above) 305

¹⁷⁷ Amnesty International (n 155 above) 7, 40

¹⁷⁸ As above

¹⁷⁹ Constitution (n 11 above) section 12(2)(b)

¹⁸⁰ Constitution (n 11 above) 9

4.2.4 Other legislative considerations

Complementing the fundamental rights and arising out of the constitutional requirement for the enactment of national legislation to prevent or prohibit unfair discrimination¹⁸¹ the national legislature presented the Equality Act as its offering.¹⁸² The aim of the Act is to facilitate the transition of the South African society into a democratic society¹⁸³ by firstly acknowledging that democracy not only requires ‘the eradication of social and economic inequalities’¹⁸⁴ but also the addressing of social structures, practices and attitudes that encourage or perpetuate unfair discrimination.¹⁸⁵ The Act further acknowledges that South Africa is under international obligation to promote equality and prevent unfair discrimination.¹⁸⁶

The Act builds on and fills in the gaps that section 9 of the Bill of Rights left open. For example though the grounds upon which unfair discrimination is prohibited as listed by the Act resemble those of the Constitution, they differ in that where the Constitution implies the existence of other grounds of discrimination, the Equality Act expressly states that discrimination on other grounds – other than the listed grounds – is possible.¹⁸⁷

And though the Act is undoubtedly comprehensive the main grounds upon which the Act focuses are race, gender and disability.¹⁸⁸ It does however also go on to prohibit hate speech¹⁸⁹ and harassment.¹⁹⁰ Commendably the wording of section 10 casts a wide net as to what can be considered hate speech, but the Act fails to all together provide for other crimes that may be motivated by expressions of discrimination other than hate speech. It does, however, grant the

¹⁸¹ As above section 9(4); also see Equality Act (n 1 above) section 2(a)

¹⁸² Equality Act (n 1 above)

¹⁸³ As above preamble para 6

¹⁸⁴ As above para 1

¹⁸⁵ As above, para 2

¹⁸⁶ As above, para 4 The preamble makes specific reference to South Africa’s obligations under the Convention on the Elimination of all Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination Against Women.

¹⁸⁷ As above section 1(1)(xxii)(b)

¹⁸⁸ See n 1 above section 7, 8, 9 and n 49 above

¹⁸⁹ As above section 10

¹⁹⁰ As above section 11

equality court¹⁹¹ authority to refer a civil case involving hate speech to the Director of Public Prosecutions for the institution of criminal proceedings.¹⁹²

But the Act has more successes than it does failures. Chapter five of the Act sets out the social transformation provisions; shouldering the responsibility of social transformation through the promotion of equality on state,¹⁹³ agents of the state,¹⁹⁴ constitutional institutions¹⁹⁵ and all other natural, juristic and non-juristic persons.¹⁹⁶

Furthermore even though the Act only provides for civil remedies,¹⁹⁷ this has not hampered the steady increase of the number of cases that have been brought before the Equality Court, with the Department of Justice and Constitutional Development (DOJCD) reporting 447 cases having been brought before the court in the period between 2008 and 2009¹⁹⁸ and 508 being brought before the court between 2009 and 2010.¹⁹⁹

However the Legislature's work against unfair discrimination has not stopped there. In fact, upon the request of the ad hoc committee responsible for the drafting of the Equality Act we have seen a new bill come into the woodworks. It was the request of the committee that national legislation consistent with section 16 of the Constitution and the provisions Convention on the Elimination of All Forms of Racial Discrimination (CERD) be enacted.²⁰⁰ The resultant offering has been the 2004 Prohibition Against Hate Speech Bill.

Section 2(1) of the Bill sets out that the public advocacy of hatred is a criminal offence should it meet the conditions set out within the provision – these conditions being similar to those set out in section 10 of the Equality Act but notably more extensive. However for an offence to have been committed the publicly advocated hatred must be based on race, gender, religion or

¹⁹¹ As above chapter 4 establishes the Equality Court, the rules of procedure and the powers and functions of the court

¹⁹² As above section 10(2)

¹⁹³ As above section 24, 25

¹⁹⁴ As above section 26

¹⁹⁵ As above section 25(2) & (5), 28

¹⁹⁶ As above section 24 and 27; Currie and de Waal (n 141 above) 267

¹⁹⁷ As above section 21

¹⁹⁸ Annual report 2008/09: Department of Justice and Constitutional Development' (2009) 75 available at <http://www.info.gov.za/view/DownloadFileAction?id=124898> (accessed 11 February 2011)

¹⁹⁹ Annual report 2009/10: Department of Justice and Constitutional Development' (2010) 146 available at http://www.justice.gov.za/reportfiles/anr200910/anr2009-2010_part2.pdf (accessed 11 February 2011)

²⁰⁰ 660 UNTS 195; G.A.res.2106(XX), Annex, 20 U.N GAOR Supp. (no.14) at 47, U.N Doc.A/6014 (1996), available at <http://www2.ohchr.org/english/law/cerd.htm> (accessed 9 November 2010)

ethnicity. Therefore a person's public advocacy of hatred based on sexual orientation receives no explicit attention from this Bill. This position seems to stand foul, because there have been loud whispers that the DOJCD intends to change the title and the scope of the Bill to include racial discrimination, xenophobia and related intolerances.²⁰¹ What exactly is meant by the term 'related intolerances' is yet to be seen. However it would appear that almost seven years later, a lot of work remains to be done in this regard as the Bill is still undergoing internal procedures.²⁰²

4.3 International framework

Having given consideration to the laws that specifically bind the nation, consideration must be given to the international standards that apply to and bind South Africa as a member of the international community. As a starting point, it be understood that at the international level the rights of the LGBT community as a whole have presented a tricky challenge for the international community and this is mostly due to the fact that the international level belongs to many nations, each with their own (and different) cultures, religions and laws.²⁰³ This is not to say that there exists no protection for members of the LGBT community, but only that against the backdrop of a multi-cultural and multi-religious community, the battle for protection and recognition has certainly been an uphill one. This also explains why there is no international case law that criminalises or encourages the criminalisation of the 'corrective' rape of lesbians.

The first time that we see the rights of lesbian women make an appearance onto the international agenda can be traced back to the 1985 United Nations World Conference on Women.²⁰⁴ However, it isn't up until the recent years that the international instruments have made specific provision for the protection of sexual orientation.²⁰⁵ Up until the recent years, homosexuality, bisexuality and trans-sexuality could only find protection from violence and

²⁰¹ n 198 above 116

²⁰² n 199 above 21

²⁰³ J Swiebel 'LGBT human rights: The search for an international strategy' (2004) 10

²⁰⁴ R Rosenbloom (ed) *Unspoken rules: Sexual orientation and women's human rights* (1995) as quoted in Swiebel (n 203 above)

²⁰⁵ http://www.ictj.org/static/Americas/Colombia/Amicus-brief_Colombia_same-sex-couples-reparations-23%2006-08.pdf (accessed 9 November 2010)

human rights abuse under the general provisions of international instruments.²⁰⁶ And for lesbian women, this protection was (and still is) primarily found under three instruments.

The first of these instruments being the International Convention on Civil and Political Rights (ICCPR).²⁰⁷ Though the ICCPR makes no specific or express reference to sexual orientation, references to 'sex', 'non-discrimination' and 'equality before the law' have been interpreted as including sexual orientation into the scope of protection offered by the convention.²⁰⁸ Thus lesbian women, are entitled to respect of all their rights,²⁰⁹ which includes the right not to be tortured or treated in any cruel, inhuman or degrading manner,²¹⁰ the right to security of their person,²¹¹ the right to privacy without interference,²¹² and the right to equality before the law.²¹³

The second instrument giving general protection to the lesbian women is the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention),²¹⁴ which provides a broad enough definition of torture to almost effortlessly protect lesbian women from torture at the hands of the state or with the acquiescence of state.²¹⁵ According to the convention, torture is defined as;

*'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes of obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, where such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'*²¹⁶

²⁰⁶ As above

²⁰⁷ GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966); 999 UNTS 171; 6 ILM 368 (1967), available at: <http://www2.ohchr.org/english/law/ccpr.htm> (accessed 9 November 2010); South Africa signed the ICCPR on 3 October 1994 and ratified on 10 December 1998

²⁰⁸ *Toonen v. Australia*, CCPR/C/50/D/488/1992, UN Human Rights Committee (HRC), 4 April 1994, available at: <http://www.unhcr.org/refworld/docid/48298b8d2.html> (accessed 9 November 2010) para 8.7; 1994 1-3 IHRR 97; http://www.hrea.org/index.php?doc_id=432 (accessed 9 November 2010)

²⁰⁹ ICCPR (n 207 above) article 2 and article 3

²¹⁰ As above article 7; Also see article 5 of the Universal Declaration of Human Rights 1949

²¹¹ As above article 9

²¹² As above article 17

²¹³ As above article 26

²¹⁴ GA res. 39/46, annex, 39 UN GAOR Supp. (No. 51) at 197, UN Doc. A/39/51 (1984); 1465 UNTS 85, available at: <http://www2.ohchr.org/english/law/cat.htm> (accessed 9 November 2010); South Africa signed and ratified the Torture Convention on 29 January 1993 and 10 December 1998 respectively

²¹⁵ As above article 1 http://www.hrea.org/index.php?doc_id=432 (accessed 9 November 2010)

²¹⁶ As above (own emphasis added)

The above definition, though not making specific reference to the LGBT community, affords protection to the latter from state conduct or the conduct of private actors that amounts to torture or cruel, inhuman or degrading treatment.

The third of the instruments that provide generalised protection to lesbian women is the International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),²¹⁷ which offers specific protection to all women. According to the provisions of CEDAW, it is the obligation state parties to 'embody the principle of equality of men and women in their national constitutions'²¹⁸ and also to adopt 'legislative and other measures...prohibiting all forms of discrimination against women'.²¹⁹ Furthermore the state and its agents are charged with the duty to refrain from any practices or acts that discriminate against women and to take measures to ensure the elimination of discrimination against women by any private actor.²²⁰ Also relevant is the duty placed on the state to 'modify the social and cultural patterns of conduct of men and women' for the purposes of eliminating any prejudices that stem from the notion that women are inferior to men.²²¹

The above was the state of affairs for the lesbian women up until 2008. In 2008 the United Nations (UN) issued a joint statement on sexual orientation and general identity.²²² The effect of this statement is that it recognises the precarious position in which all members of the LGBT community have been placed as a result of the vehement denial of their right to sexual identity. It takes cognisance of the fact that sexual identity is one of the most fulfilling ways to satisfy human worth and potential.²²³ This statement won the support of sixty eight nations – six of these being African nations.²²⁴ Sadly South Africa was one of the countries that failed to support the statement. However, in redemption, it was South Africa that presented the resolution on

²¹⁷ GA res. 34/180, 34 UN GAOR Supp. (No. 46) at 193, UN Doc. A/34/46; 1249 UNTS 13; 19 ILM 33 (1980), available at: <http://www2.ohchr.org/english/law/cedaw.htm> (accessed 9 November 2010); ; South Africa signed CEDAW on 29 January 1993 and then ratified on 15 December 1995

²¹⁸ As above article 2(a)

²¹⁹ As above article 2(d)

²²⁰ As above article 2(e) & (d)

²²¹ As above article 5(a)

²²² 'Governments remove sexual orientation from UN resolution condemning extrajudicial, summary or arbitrary executions' available at <http://www.iglhrc.org/cgi-bin/iowa/article/pressroom/pressrelease/1257.html> (accessed 29 November 2010); www.ohchr.org (accessed 9 November 2010)

²²³ Amnesty International (n 155 above) 6

²²⁴ As above

human rights, sexual orientation and gender identity to the UN General Assembly. The resolution reaffirms human rights for all and expresses 'grave concern' for the human rights abuses and violent acts that the international LGBT community has had to endure.²²⁵ It also requests the High Commissioner of Human Rights to commission a study that records the laws and practices that infringe on the rights of the members of LGBT community – the deadline for which is December 2011.²²⁶ The irony of the fact that South Africa presented this resolution lies perhaps in the fact that back at home there are violent practices that infringe on the rights of members of the LGBT community that continue to go unaddressed.

In light of the above domestic provisions we now consider whether there is a need for further legislative measures that criminalise 'hate crimes' in any form.

4.4 Is there a need for anti-hate crime laws?

From the above it is evident that provisions that set out the rights of lesbian women and all members of the LGBT community are available, but then the question then arises; do they truly address the problems and challenges that lesbian women experience through violent expressions of prejudice? Put differently, is South Africa in need of anti-hate crime legislation?

To answer this question, we need to consider the rationale behind anti-hate crime legislation. The first and foremost reason for the enactment of any law is the need to respond to the state of affairs.²²⁷ Law, amongst other things, is a reaction to a situation or set of facts that the society deems to be unacceptable and in need of regulation, prevention, prohibition and/or sanction. With 'hate crimes' the situation is relatively simple; in a diverse and free society members of minority groups (or even majority groups) suffer victimisation because of such membership or perceived membership.²²⁸ But the reaction or response can only occur where there is adequate and substantial proof of the state of affairs. This of course is challenging in a situation where no official statistics exist to substantiate the claim that there is a need to react. This situation is

²²⁵ A/HRC/17/L.9/Rev.1 available at www2.ohchr.org (accessed on 22 June 2011)

²²⁶ As above

²²⁷ Hall (n 100 above) 45

²²⁸ Levin & McDevitt (n 103 above); Also see *R v Keegstra* (n 98 above)

further aggravated by unsystematic and inactive monitoring of prejudice-based victimisation²²⁹ and the silence of victims.

But beyond the need to respond are more factors, which include but are not limited to; the recognition and prohibition of hate crime serves to raise the society's confidence in the authorities of the land, which in turn may lead to the opening up of channels of communication between the local authorities and the communities.²³⁰ Furthermore hate crime legislation improves the criminal justice system's response to 'hate crimes' and makes the collection of information for statistical purposes more efficient.²³¹

On a more theoretical level anti-hate crime legislation can be used as a symbol of society's refusal to accept expressions of prejudice.²³² It also acts as a message to perpetrators and potential perpetrators that their disruption of the peace will not be tolerated nor accepted²³³ – and in so doing vindicates the fears and experience of victims and potential.

Hall includes to this discussion that hate crime laws are a reaction to an increasing threat of violence aimed at minority groups.²³⁴ Further he submits that the intended effect of anti-hate crime legislation is to promote equality and deter potential perpetrators of hate crimes.²³⁵

Another reason for the enactment of anti-hate crime laws is that it forces the entire criminal justice system to sit up and take seriously these crimes, to which it once paid little or no attention.²³⁶ Ultimately though, the chief reason for enactment of anti-hate crime legislation is that the state has a duty to all persons within its territory to protect their human rights. This includes the duty not interfere with these rights, to prevent interference with these rights by private actors and to fulfil these rights.²³⁷

Though the author is unable to find case law from the American, British and Canadian jurisdiction, that criminalises or encourages the criminalisation of 'corrective' rape, the author

²²⁹ Martin *et al* (n 13 above) 9

²³⁰ Organisation for Security and Cooperation in Europe *Hate crime laws: a practical guide* (2009)22

²³¹ As above

²³² As above; Also *R v Keegstra* (n 98 above) para 7

²³³ As above 23

²³⁴ Hall (n 100 above)132 – 133

²³⁵ As above 133

²³⁶ P Iganski 'Legislating against hate: outlawing racism and anti-Semitism in Britain' (1999) 19 *Critical social policy* as referenced by Hall (n 100 above) 133

²³⁷ Social and Economic Rights Action Centre (SERAC) and Another v Nigeria (2001) AHRLR 60 (ACHPR 2001)

was able to find judgments that criminalise or support the criminalisation of 'hate crimes'. In the landmark decision of *Wisconsin v Todd Mitchell*,²³⁸ a judgment delivered by the American Supreme court, the then chief justice Rehnquist explains that the provisions of Wisconsin law and he finds that state law that requires a heavier penalty be doled to a perpetrator because of the proven fact that the perpetrator selected his victim because said victim belonged to a certain social group within society is not an infringement on the perpetrator's First Amendment right – the right to freedom of expression – on the basis that if the motive of the perpetrator is considered in anti-discriminatory laws, it should therefore also be considered in criminal and sentencing laws.²³⁹ The chief justice then further explains that Wisconsin law is so designed because of the harm done to society as a result of the perpetrator's manifested prejudice.²⁴⁰ This judgment, it appears to the author hereof, is an echo of all the works of authors previously discussed and mentioned.

Returning to the South African context and the question as to whether or not there is a need for anti-hate crime laws, it would appear that the DOJCD has, by attempting to increase the scope of the proposed bill above, answered that question. Violent crimes against members of minority groups have been on the rise in the last decade.²⁴¹ The lines of communication between the local authorities and communities have been strained by distrust.²⁴² Statistical information and the collection thereof, has been fragmented and difficult to say the least. And yet against this backdrop the state still has a duty towards its citizens and all those within its territory to protect their rights and deter any third party who may threaten the exercise and enjoyment of those rights. What needs to be looked at now is the time in which it has taken the legislature to fully and finally respond to this state of affairs. Surely a seven year delay in finalising the legislative process cannot be the acceptable standard. We also can no longer fool ourselves into believing that the legislative measures currently in place will suffice until the legislature presents its final offering. The problem with this former manner of thinking is that the current measures are but mere anti-discriminatory laws. And though one would think that coupling the anti-discriminatory laws with the existing criminal laws would be enough to address the problem, this has not been

²³⁸ 508 U.S.47 (1993); Also see *R.A.V. v St Paul* 505 U.S. 377 (1992), *R v Keegstra* (n 98 above) and *R v Andrews* (n 98 above)

²³⁹ As above para 9 – 15

²⁴⁰ As above

²⁴¹ http://www.issafrica.org/iss_today.php?ID=988 (accessed 28 November 2010)

²⁴² *Martin et al* (n 13 above) 10

the cases. 'Corrective rape' continues to occur with response of the criminal justice system being just too little.

4.5 Conclusion

In conclusion, and in light of the above submissions as well as the information garnered from the previous chapter the author submits as follows:

- The current provisions, from a preventative aspect, have proved to be insufficient in addressing the problem.
- The South African jurisdiction requires legislative measures that are designed to deter and criminalise any forms of 'hate crimes'.

This being said, the author boldly submits that the South African jurisdiction should define 'hate crimes' as common law and/or statutory crimes, of which the commission is motivated and/or inspired by prejudice based on any one or more of the grounds listed in section 9 of the Constitution and any other grounds thereto not listed, which has the direct and/or indirect effect of prejudicing the rights of the victim, the rights of the social group to which the victim belongs as well as the society as a whole.

This being said, one final question requires attention; what more should then be done?

Chapter five: Recommendations and conclusion

'I want to go out and enjoy my youth without fearing being raped, assaulted and insulted.'

- Sylvia Vilakazi (1995)²⁴³

5.1 Introduction

From the previous chapter it is evident that the Constitution and the laws of the land do offer protection to lesbian women, but placed in sharp contrast to the reality of 'corrective rape', it would appear that the former does not adequately address the problem. The author wishes to reiterate that the discussion herein is not that there are no criminal provisions against rape and assault but rather that in spite of the constitutional and the criminal provisions, the law has failed to accommodate for preventative and educational measures to address the problem at hand.

This being said, the current chapter aims to conclude this article with the author's recommendations and concluding remarks on the subject matter.

5.2 Recommendations

In 1995 Morris Dees, an employee of the American Police Authorities at that point in time, said the following:

The fight against hate crime is challenging and demands the attention of every citizen. For legislators, it means refining laws to address the serious threat of hate crime. For educators, it means finding ways to open the channels of cultural understanding among children. For police, it means increased attention to acts of hate violence. For neighbourhoods, it means strengthening the bonds of community to embrace diversity and reject acts of bigotry.²⁴⁴

In light of the above statement and with due consideration to the research that has been covered in this article, the author focuses her recommendations on two specific aspects, namely, refinement of laws and education.

²⁴³ Interview with Sylvia Vilakazi by Karin Koen, 26 May 1995 as quoted in R Rosenbloom (ed) *Unspoken rules: Sexual orientation and women's human rights* (1996) 188

²⁴⁴ M Dees as quoted in Levin & McDevitt (n 103 above) viii

5.2.1 Refinement of laws

As already mentioned in the previous chapter, the laws that we currently have in place to protect lesbian women are non-discrimination laws and thus cannot address the problem of homophobic victimisation holistically. Therefore we need to refine our laws. Here, refinement is intended to mean that the provisions of the existing laws need to be, to the fullest extent possible, enforced and applied and where the existing laws cannot cater for the full scope of the problem, new laws need to be enacted to supplement already existing laws.

5.2.1.1 Existing laws

With regard to the existing laws, the author recommends as follows:

- Firstly, the innovative powers awarded to the Equality Court by Section 21 of the Equality Act should be utilised to the fullest extent possible. Included into the scope of these innovative powers, is the power to order that an organ or agent of state take special measures to address unfair discrimination.²⁴⁵ This could possibly include, but is not limited to, an order directing the criminal justice system to enact policies for the training and educating of members of the authorities on female homosexuality and 'corrective rape'.²⁴⁶ Such an order could act as both an interim and permanent measure, insuring that the criminal justice system is sensitised to the problem, while we await any legislative measures to be taken and also thereafter.
- Section 51 of the Sentencing Act²⁴⁷ should, in the opinion of the author, be amended to include a provision similar to section 718.2 of the Canadian Criminal Code, which provides that:²⁴⁸

'(a) A sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,

²⁴⁵ n 1 above section 21(2)(h)

²⁴⁶ Pantazis (n 65 above) 312

²⁴⁷ n 84 above

²⁴⁸ Canadian Criminal Code 1985 (n 97 above) section 718.2 available at <http://laws.justice.gc.ca> (accessed 27 November 2010)

- (i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor, . . . shall be deemed to be aggravating circumstances.’

It is the belief of the author, that such an amendment would be an implicit indication of the reality that we do live in a diverse society and that at times the criminal acts perpetrated by certain members of society are motivated by prejudice and 'hate'. The author also believes that such an amendment would be in line with the principle of *S v Rabie*²⁴⁹ which stipulates that the punishment doled out must match the criminal; the crime perpetrated and must be fair to society.²⁵⁰

- Furthermore the author agrees with the submission that ‘service providers need to distinguish between their right to hold personal values, beliefs and prejudices, and their professional obligation to render services free from prejudice and/or discrimination’²⁵¹ and includes that the above needs to be fully enforced as one of the principles of the Victim's Charter.²⁵² Victims of 'corrective rape' are entitled service without prejudice and with consideration to their human dignity.²⁵³ It is the hope of the author that such treatment will encourage trust between the victims of 'corrective rape' and the healthcare service provider, which will ultimately lead to more cases being reported and properly addressed by the correct social and constitutional institutions.
- Where state fails to provide protection from the criminal conduct of private actors, it too should be held liable for the violations of individual rights that deprive a person of her constitutional rights both at the international and the domestic level.²⁵⁴ This principle, though already extensively addressed in the *Carmichele* case,²⁵⁵ cannot be a principle to which we merely pay lip service, as this will lead to the perpetuation of violations of human rights right under the nose of state. Perhaps the state cannot at this point in time

²⁴⁹ 1975 4 SA 855 (A)

²⁵⁰ As above 862

²⁵¹ Nel & Judge (n 21 above) 30

²⁵² n 38 above; n 66 above

²⁵³ n 66 above

²⁵⁴ Report of the Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions UN Doc E/CN.4/1996/53 para 32

²⁵⁵ n 19 above

provide society with the free and democratic society to which we aspire, but by implementing and enforcing the principles that have been carefully crafted to protect all members of society, it can foster an attitude of tolerance for diversity and intolerance for violence and victimisation.

5.2.1.2 New laws

What more needs to be done is the enactment of legislation that specifically addresses hate crimes in South Africa. The proposed legislation should ideally set out the definition of hate crime and what crimes constitute an offence in this regard. The legislation should also set out the grounds upon which a crime of hate can be committed against another person. Care should be taken to ensure that sexual orientation and gender are included as grounds for basing these attacks.

The objectives of the proposed legislation should include, amongst other things;

- the fulfillment of the state's duties under the Constitution and international law.
- the prevention and combating of crimes of hate.
- the effective prosecution and punishment of persons who commit crimes of hate.
- and the provision of support and assistance to victims of these crimes.

Furthermore the proposed legislation should demand the training of police officials, healthcare providers and court officials on hate crimes and related matters. In so doing this will improve the criminal justice system's response to hate crime offences and cultivate better communication between the victims and the system put in place to correct the wrongs of society.²⁵⁶

Lastly, the author submits that the proposed legislation should provide for the establishment of an inter-sectoral committee that focuses on preventing and combating 'hate crimes'. Primarily, this committee should involve the sectors of justice & constitutional development, education, social development and safety & security as these are the sectors responsible for the protection and education of members of society or the sectors hardest hit by acts of hate and violence.

As the empowering legislation, the proposed legislation would also have to set out the mandate, powers, functions and duties of said committee. However, the author strongly suggests that two functions should specifically be given to the committee. The first functions of the committee

²⁵⁶ Organisation for Security and Cooperation in Europe (n 230 above)

should be the establishment and implementation public awareness and education programmes as soon as possible. This should be the main focus of the committee in the initial years after its establishment as education and awareness will help society to identify the problem and provide society with alternative solutions to guide us towards the realisation of our aspiration. The second function given to the committee, should be the receipt of mandatory annual reports from the SAPS, the DOJCD, the National Departments of Health and Social Development and the NPA within the first five years after the establishment of the committee. These reports should detail the works that each of these above role players have done throughout the year to address hate crimes in society. It is the hope of the author that awarding the inter-sectoral committee such function will promote accountability on the part of the state which has been lacking in this regard up until now.

Ultimately however, the legislation should strengthen the laws already there and give clarity to an area of legal protection that is lacking.

5.2.2 Education and public awareness

It has been submitted that for change to take place, those in legislative or judicial positions have to bring about change and do so with sincerity.²⁵⁷ With respect, the author begs to differ. Up until now, the fight for social change and acceptance of all homosexual, bisexual and transgender persons has been taking place in the upper levels of society. And though the jurisprudence brought forth by the courts is transformative and the legislation²⁵⁸ presented by the legislature is commendable, the fight desperately needs to be brought down to the ground level where most of the suffering is occurring. As legal academics we often rush to find the solution for the evils of our time in legal reform and transformative jurisprudence, but here the author believes that more than laws, the society needs knowledge and information at each and every single level, but most of all at the ground level. This can only be achieved by the implementation of education and awareness programmes – especially amongst the youth – because should this battle be completely be lost by the current generation, at least the future generations can succeed where their predecessors failed through lessons of tolerance,

²⁵⁷ Buvanasundaram (n 7 above) 224

²⁵⁸ Equality Act (n 1 above)

understanding and the opposition of violence, hatred, crime, victimisation and discrimination. This is not to say that the legislature and judiciary should halt in their efforts, but more to say that their hard work, with no education for the rest of society, bears no fruit at all. The human rights culture, as long as it remains only amongst the most learned of society, will not lead to the societal change that will ultimately see the birth of our aspiration.

As already mentioned above society needs education and awareness to identify the problem, but it also needs education to engage with the state in finding solutions to the problem. What needs to be taught is that hate crimes – regardless of the reason behind them – have a negative effect not only on the individual victim or even a group of people, but society as a whole.²⁵⁹ By implementing education and awareness programmes the responsibility for the protection of all members of society is taken out of the hands of authorities and placed in those of society itself.²⁶⁰

The above being said, it must also be born in mind that education is a right that the state needs to implement so that members of the community can make informed decisions before acting on presumed social divides and arguably primitive social orders. It is the hope of the author that education and awareness will strengthen the ties of community and bring us one leap closer to our aspiration.²⁶¹

5.3 Conclusion

In conclusion, the author will briefly summarise the findings of this article.

In chapter two of this article consideration was given as to what is meant by the term 'corrective rape' and some of the most notorious cases reported in this respect. From this chapter the author is able to conclude the following:

- 'Corrective rape' is a fear and reality for lesbian women in South Africa. It is an act of violence that, according to the reports of support groups and NGO's, has been happening and continues to happen at an alarming rate.

²⁵⁹ As above ix; *Port Elizabeth Municipality* case (n 166 above)

²⁶⁰ Levin & McDevitt (n 103 above) xi

²⁶¹ Constitution (n 11 above) section 28

- Secondary victimisation is also a challenge that lesbian women face after the rape. The culprits here are the criminal justice system, healthcare service providers and the communities to which these women belong. This secondary victimisation prolongs the experience of the victim and plants a seed of fear and hesitation in potential-victims.

Chapter three delves into the question as to whether or not 'corrective rape' amounts to a 'hate crime' by looking at the definition and characteristics of hate crimes. From this chapter the author concludes as follows:

- 'Hate crime' offences are criminal manifestations of prejudice that are motivated by not only prejudice alone, but also other factors such as the economic and social decay of society. These are crimes designed to reaffirm the lowered position of the victim and any others like the victim in the perceived social order. At their very core, 'hate crimes' are destructive not only to the victim and the victim's social group but also to the society as a whole.
- And though it is true that 'corrective rape' can be comfortably categorised as a 'hate crime' offence, the rape of lesbian women does not necessarily amount to a 'hate crime' offence. In this regard, the courts will have to look at the merits of each case to establish whether prejudice motivated the crime and based on said merits will have to determine whether it was the subjective intention or motivation of the accused to correctively rape.

Chapter four takes a look at the international and domestic protection offered to lesbian women. From this chapter the author concludes the following:

- At the international level, sexual identity has found generic protection, especially under non-discrimination clauses and yet acts of violence against the LGBT community still continue to occur.²⁶²
- At the domestic level protection has been afforded to lesbian women (and all members of the LGBT community). However, the international standards and the domestic provisions have fallen short in that they are designed to address non-discrimination as opposed to 'hate crime' offences and as such the existing provisions have not sufficed and cannot be expected to do so as the situation intensifies.

²⁶² Amnesty International (n 155 above)

In final conclusion the author submits, that though 'corrective rape' incidences are on the increase, the issue of crimes against the sexual orientation of members of the community is not a matter that cannot, in the interim, be addressed by the effective implementation of legislative measures already available. However, it must at all times be born in mind that these measures were not designed to take on the full scope of 'hate crime' offences. It is the responsibility of state to efficiently come up with a more permanent and adequate solution for the problems that the homestead is facing before considering the challenges of the international community.

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