



UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA

**Corrective rape and the war on homosexuality:
Patriarchy, African culture and *Ubuntu*.**

Mutondi Muofhe Mulaudzi

12053369

LLM (Multidisciplinary Human Rights)

Supervisor

Prof Karin Van Marle

Chapter 1: Introduction	3
1.1 Research Problem	3
1.2 Research questions	5
1.3 Motivation/Rationale	6
1.4 Methodology.....	7
1.5 Structure.....	8
Chapter 2: Homophobic Rape – Stories and response by courts	9
2.1 Introduction.....	9
2.2 The definition of “corrective rape”	10
2.3 Corrective Rape: The act, the stories and the deeply flawed responses	11
2.5 Conclusion.....	18
Chapter 3: The intersection between patriarchy, culture and homophobia	19
3.1. Introduction	19
3.2. Part 1: The use and abuse of culture to justify homophobia	19
3.2.1 <i>Decolonisation, marriage and procreation: The fundamentals of what it means to be African.....</i>	<i>20</i>
3.2.2 <i>Counter-arguments</i>	<i>22</i>
3.3. Part 2: A patriarchal society.....	24
3.3.1 <i>Homophobic rape: Autonomy, ownership & power.....</i>	<i>25</i>
3.3.2 <i>Historical ownership of women, Breeding fear in the girl child and breeding patriarchal violent masculinity in the boy child.....</i>	<i>28</i>
3.4 Conclusion.....	32
Chapter 4: Ubuntu – A response	33
4.1 Introduction.....	33
4.2. Criticisms of <i>Ubuntu</i> and responses thereto	34
4.3. Revolutionary <i>ubuntu</i> , <i>ubuntu</i> feminism and reconfiguration.....	36
4.4 Conclusion.....	39
Chapter 5: Conclusion,.....	40
Bibliography	42

Chapter 1: Introduction

1.1 Research Problem

The research problem to explore in this dissertation is how cultural and patriarchal perspectives on gender influence the occurrence of what is commonly known as corrective rape in South Africa.¹ Even though this is an issue that affects women on a global scale, this dissertation will focus on black lesbian women living in South African townships.

Furthermore, the aim of this dissertation is to reflect on the view or the argument that “homosexuality is un-African” or that it is against African culture. This argument links to patriarchy and influences and informs homophobic perspectives that lead to corrective rape. Thereafter, this dissertation will reflect on the African philosophy of *ubuntu* by investigating if and how *ubuntu* could serve as a response to perspectives that have a certain influence on corrective rape attacks against lesbian women living in South Africa. In other words, this dissertation will question how the so-called “homosexuality is un-African” rhetoric is contrary to the African philosophy of “*umuntu ngumuntu ngabantu*”.

In general, Africa as a continent continues to have slow or stagnant development when it comes to the recognition of the rights of lesbian, gay, bisexual, transgender and and intersex people.² With the slow development, there is also a continuous pushback from African leaders, politicians and parts of society. Current statistics speak volumes and support this statement. In 2014, the Human Rights Campaign Foundation published a report on the State of Human Rights for LGBT people living in Africa. The Foundation found that 37 African countries criminalise same-sex marriages and that four of those countries allow for the death penalty.³

In certain African countries, leaders speak openly about their positions on homosexuality and sexual minority rights. Former President of The Gambia, Yahya Jammeh, has been quoted saying: “homosexuality is anti-God, anti-human and anti-civilisation” and “homosexuals are not welcome

¹ Corrective rape does not only occur in South Africa, there have also been reports on corrective rape in countries like India. The times of India, “Parents use ‘corrective rape’ to ‘straighten gays’”, Rupan Jain, 21 June 2015 <http://timesofindia.indiatimes.com/life-style/relationships/parenting/Parents-use-corrective-rape-to-straighten-gays/articleshow/47489949.cms>

² Hereafter referred to as ‘LGBTI’.

³ Human Rights Campaign Foundation and Human Rights First Report: The State of Human Rights for LGBT People in Africa, page 5.

in The Gambia”.⁴ He has even gone as far as to say that all homosexuals should leave the country.⁵ Ugandan President, Yoweri Museveni, has made his position clear by stating: “we cannot accept that living unnaturally is a human right” and the “Ugandan society has never supported homosexuality”.⁶ President Robert Mugabe has been blunt and has upheld his position with fierce consistency. At a United Nations General Assembly meeting, Mugabe said: “we reject attempts to prescribe to new rights that are contrary to our norms, values traditions and beliefs. We are not gay.”⁷ In essence, there is a belief that Africans are not and cannot be homosexuals because homosexuality in itself goes against what it means to be African.

South Africa is no stranger to this rhetoric. Democratic Alliance Leader, Mmusi Maimane’s, stance on LGBT rights was questioned after reports of comments he made in a sermon in 2014.⁸ His position on sexual minority rights was questioned because he referred to gay people as sinners.⁹ Maimane cleared up his position by assuring the public that he was a full supporter of sexual minority rights.¹⁰ When Jacob Zuma was Deputy President of the country, he was not afraid to inform people that he did not support same-sex marriages when he said, “when I was growing up, *unqingili* (a gay person) would not have stood in front me. I would knock him out”.¹¹ Zuma later apologised for his comments. In 2014, President Zuma came under fire again for failing to condemn Ugandan legislation that criminalised homosexuality. His reasoning was that Uganda had sovereign rights to adopt legislation and he respected that.¹² This rhetoric informs the idea that homosexuality is un-African and that it is against African culture.

In the same breath, the hatred geared towards black lesbians living in South African townships, is also informed by patriarchal ideas of gender and the power relations surrounding sexual relations between man and woman. This dissertation, therefore, seeks to explore how these patriarchal ideas

⁴ Ishaan Tharoor, “Gambia’s president threatens to slit the throats of gay men”

<https://www.washingtonpost.com/news/worldviews/wp/2015/05/12/gambias-president-threatens-to-slit-the-throats-of-gay-men/> (accessed 12 August 2016).

⁵ Marloes Janson, [Opinion] Enough is enough: Gambians put faith in democracy,

<http://ewn.co.za/2016/12/05/enough-is-enough-gambians-put-faith-in-democracy> (accessed 12 August 2016)

⁶ Michael W Chapman, Uganda President to Obama on Gays: ‘Respect African Societies and Their Values’ – What Gays “Do is Terrible”, <http://www.cnsnews.com/blog/michael-w-chapman/uganda-president-obama-gays-respect-african-societies-and-their-values-what> (accessed 12 August 2016).

⁷ <http://www.ibtimes.co.uk/zimbabwe-we-are-not-gays-president-robert-mugabe-rejects-homosexual-rights-un-speech-1521685> (accessed 12 August 2016).

⁸ Dianne Hawker, Maimane, Zuma and other ‘anti-gay’ statements in SA politics, , <http://www.enca.com/south-africa/maimane-zuma-and-other-anti-gay-statements-sa-politics> (accessed 12 August 2016).

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Ibid.*

influence gender-based violence in the form of corrective rape. Patriarchy in itself has an influence on cultural perspectives such as the idea that homosexuality is un-African or against African culture. Therefore, this dissertation seeks to explore this notion in light of patriarchy and make an argument against it.

Ubuntu is an isiZulu South African word that when directly translated means “a person is a person through other persons”. *Ubuntu*, favours the reestablishment of harmony¹³, and prejudices against homosexuality are a contradiction of the African way of living that is prescribed by *ubuntu*. At the heart of *ubuntu* is inclusiveness. In other words, the expulsion of others is not permitted. The exclusion of homosexuals in any community is a direct contradiction of who we say we are as Africans and how we live with one another. *Ubuntu* refers to understanding diversity and the belief in a universal bond and sharing.¹⁴ So with this in mind, I intend to argue that we cannot possibly say that homosexuality is un-African when *ubuntu* lies at the heart of what it means to be African and live in an African community.

The attitudes of African leaders are reflective of the feelings of a number of individuals in South African society. These attitudes have now become formed and resulted in an increased belief in the “homosexuality is un-African” rhetoric that has made its way into the minds and belief systems of communities – a dangerous rhetoric that gives a voice to homophobia. In South Africa, this rhetoric results in violence and discrimination that is pointed towards black lesbians living in a country where they should feel safe but instead, face similar dangers to those of their counterparts in South Africa’s anti-homosexuality neighbour, Zimbabwe. Combine this toxic attitude with patriarchal ideas and the result is a recipe for disaster, all of this, in the name of upholding African culture. This dissertation seeks to explore the idea of *ubuntu* as a response. *Ubuntu* is an important part of what it means to be African that can serve as a response to the above-mentioned rhetoric. The result, will therefore, be that the argument that uses African culture to justify homophobia has no legitimate standing when facing the counter-argument of *ubuntu*.

1.2 Research questions

The following research questions will guide my study:

¹³ *Afri-Forum and Another v Malema and Others* 2011 (6) SA 240 (EqC).

¹⁴ Tamale (2014) 14 *AHRLJ* 151.

- What does the act of corrective rape entail and how is it dealt with in South African law and society?
- What are the cultural and patriarchal views on lesbianism in South African townships and do these views play a role in the violence against black lesbians?
- How does *ubuntu* serve as a response to these cultural perspectives?

1.3. Motivation

Corrective rape affects all lesbian women, so why focus on the rape of black lesbian women specifically? What does rape have to do with race? Pumla Dineo Gqola asks and answers this question in her book *Rape - A South African Nightmare*¹⁵. To do this, Gqola outlines the history behind the rape of black women. Gqola takes the colonial history of South Africa, starting off with how the rape of slaves was an integral part of colonised Cape society. How black women were always more at risk of being raped because they were seen as “unrapable” because their bodies did not belong to them, how slaves were sexualised in regulation, art and the creation of stereotypes.¹⁶ In other words, black bodies have always existed for consumption and years and years later that has not changed.

South Africa is seen as a leading example in the fight for the recognition of sexual minority rights in Africa and the world at large. South Africa is the only African country with legislated marriage equality and constitutional discrimination protection for sexual minorities.¹⁷ South Africa was the first country in the world to have anti-discrimination legislation that is inclusive of the protection of sexual minorities.¹⁸ However, even with its stellar record, it is important to remember that the work does not end at legislative reform. There needs to be a continued mandate in the form of societal reform. In countries such as South Africa, sexual minority rights are no longer a legislative issue. The issue that these states face is getting society to keep up with the legislative reform. The issue lies in changing the mindsets of people to bring them in line with where the legislation is. In other words, after legislative reform, the current South African context is in desperate need of social reform. South Africa is not a stranger to this hurdle. The negative attitudes that South Africans have towards homosexuals are reflected in the treatment of lesbian women living openly in South Africa.

¹⁵ 2015

¹⁶ Gqola (2015) 43

¹⁷ The Constitution of the Republic of South Africa, 1996.

¹⁸ Human Rights Campaign Foundation and Human Rights First Report: The State of Human Rights for LGBT People in Africa, page 14.

It is my contention that the attitudes of presidents, political and religious leaders and certain members of society at large across the continent, are translated into the act of corrective rape.

In the past, the South African government has been a champion of LGBT rights on a global scale. In 2011, South Africa was at the forefront of a resolution that resulted in a study on discrimination and sexual orientation. South Africa was a champion of sexual minority rights a second time in 2014 when it initiated another resolution that called for a report on the best practices for combating discrimination based on sexual orientation or gender identity. However, to everyone's disappointment, South Africa decided to abstain on a resolution calling for the appointment of an independent expert on the protection against sexual orientation and gender identity based discrimination and violence in June 2016. This decision is reflective of the government's indirect stance on issues facing LGBT people in South Africa and the dwindling support of sexual minorities in and out of South Africa.

On a regional level, the African Commission on Human and Peoples' Rights has attempted to send a message on the rights of sexual minorities living in Africa. In August 2014, the African Commission passed a resolution on the protection against violence and other human rights violations against persons on the basis of their real or imputed sexual orientation or gender identity. The resolution expressed alarm at "acts of violence, discrimination and other human rights violations" based on one's sexual orientation. The resolution specifically makes reference to corrective rape as such violence. The resolution also expresses concern over the lack of proper interventions on the part of law enforcement agencies in investigating and prosecuting this crime.

1.4 Methodology

This dissertation follows a socio-legal approach. This means the law will be viewed within a social context. I will look at the law through a sociological lens through the use of cultural and patriarchal perspectives. I will then rely on the use of African jurisprudence through the use of the African philosophy of *ubuntu* as a response to these perspectives.

My research will be conducted through a desktop search of journal articles, media reports and South African legislation and case law.

1.5 Structure

This dissertation is divided into five chapters. The second chapter focuses on the concept of corrective rape and the relevant laws in South Africa. The third chapter explores the cultural and patriarchal perspectives on homosexuality that surrounds the act of corrective rape. The fourth chapter looks at how the African philosophy of *ubuntu* can serve as a response to these arguments. Chapter 5 serves as the conclusion of the dissertation.

Chapter 2: Homophobic Rape – Stories and response by courts

2.1 Introduction

The term corrective rape has been defined and redefined countless times. Corrective rape can be defined as: the rape of a woman by a man with the intention to change or correct her sexual orientation. A better definition that places emphasis on the current South African context is given by Mieses. Mieses defines corrective rape as: the “sexual punishment by African men towards black African lesbians for being homosexual and violating traditional gender norms”.¹⁹ This definition places emphasis on the act in a South African context. Mwambene and Wheal define corrective rape as: “a form of sexual punishment by men towards lesbians to ‘cure’ them of their sexual orientation.”²⁰

In South Africa, corrective rape affects all lesbian women. Regardless of their race or social and economic backgrounds. All lesbian women in South Africa are at risk of being a target for sexual violence solely on the basis of their sexual orientation. In 2014, a support group based in Cape Town reported that in 2009, they were dealing with 10 new cases of corrective rape every week.²¹

There have been studies on the prevalence of homophobic rape that have been conducted around the world. According to Mieses, there were only 31 lesbian women that reported rape between 1998 and 2009.²² This is not a number to celebrate. This number is not indicative of the number of lesbian women that have been raped during that period, it is only indicative of the number of women who have reported their rapes. Only 31 women have had enough faith in the legal system to report these crimes. This is an alarming number in a country where it is reported that approximately ten lesbian women per week are victims of homophobic rape.²³

In another study conducted, 46 black lesbian women living in townships were interviewed.²⁴ Out of the 46 women interviewed, 41% of the women admitted to having being raped and 9% of the

¹⁹ Mwambene & Wheal (2015) 15 *AHRJ* at 60.

²⁰ Mwambene & Wheal (2015) 15 *AHRJ* at 58.

²¹ Patrick Strudwick “Crisis in South Africa: The shocking practice of ‘corrective rape’ –aimed at ‘curing lesbians’ <http://www.independent.co.uk/news/world/africa/crisis-in-south-africa-the-shocking-practice-of-corrective-rape-aimed-at-curing-lesbians-9033224.html> (accessed 30 June 2017).

²² Chabalalala & Roelofse (2015) 28(3) *South African Journal of Criminology* 54

²³ Koraan & Geduld (2015) 18(5) *PER* 1931

²⁴ Naidoo & Karels (2012) 33 *Obiter* 239

women interviewed reported that they were lucky enough to have not been raped but were survivors of attempted rape. 37% of women had not been sexually abused but they had been assaulted, whilst 17% of women had been verbally abused. A different study that was not conducted on black women but women of different races found that 92% of women interviewed had experienced verbal abuse and 91% of women interviewed had been assaulted.²⁵ All of these numbers are indicative of violence against women on the basis of their sexual orientation.

This chapter entails a discussion of the term “corrective rape”, a narrative on the stories of victims of corrective rape and the legal and social responses thereto.

2.2 The definition of “corrective rape”

The term corrective rape has become a widely accepted term used to define the rape of lesbian women on the basis of their sexual orientation. Corrective rape is used interchangeably with the term “curative rape”. It is argued that the term itself is deeply flawed and speaks to the way in which homosexuality is viewed in South Africa.²⁶ The term can be interpreted in two ways: on the one side, the term is flawed because it can be interpreted in a way that contributes to the belief that the sexuality of lesbian women is one that should be or has the ability to be cured. In essence, the term makes the assumption that the sexuality of a lesbian woman is capable of correction. On the other side, it can be interpreted in a way that it seeks only to point to the intention of the perpetrator.

Oxford dictionaries define the term “*corrective*” (adjective) as “designated to correct or counteract something harmful or undesirable”.²⁷ The term “*curative*”²⁸ is defined as “able to cure disease”. In other words, both words have a rehabilitative focus. Synonyms for “corrective” include “*disciplinary*”, “*reformatory*” and “*punitive*”. It is, therefore, reasonable to interpret this use of the term as a way to describe the intention of the perpetrator. The perpetrator believes that the sexuality of the lesbian woman he is raping is something that needs to be corrected, that her sexuality is harmful or undesirable or even that it is a disease that can be cured. The perpetrator feels as if the lesbian woman is going against traditional gender norms and that it is his duty to lead her down the “right” path and it is perhaps even his duty to punish her for “straying” from her path. One can even

²⁵ *Ibid*

²⁶ Chabalala & Roelofse (2015) 23(3) *SAJC* at 50

²⁷ Oxford English Dictionary: <http://www.oed.com>

²⁸ *ibid.*

interpret the term corrective rape as conferring a position of power on the perpetrator that points to his belief that he has the duty to discipline and reform lesbian women.

Chabalala and Roelofse interpret the term corrective rape differently to the above interpretation. They are of the opinion that it creates an idea of correction and should not be used at all. They further argue that the term suggests that the rape of a lesbian woman has “rehabilitative focus”.²⁹ In other words, it contributes to the idea that a non-heterosexual identity has corrective or curative capabilities, an opinion similar to that adopted by the church wherein it is believed that the “gay” can be “prayed away”. Matebeni argues that the ambiguity in the term corrective rape could lead one to believe that there is an element of blame on the part of the victim and that she could be deserving of the crime committed against her because she was behaving in a way that was unwanted.³⁰ Chabalala and Roelofse suggest the use of the term “homophobic rape” as a more appropriate term.³¹ It achieves the same purpose as corrective or curative but manages to achieve this without placing blame on the victim or presupposing that there is an element of one’s sexuality that requires correction.

2.3 Corrective Rape: The act, the stories and the deeply flawed responses

It must be noted that a large number of cases pertaining to corrective rape go unreported and records thereof are not easily accessible. Therefore one has to resort to the use of blog posts, articles by civil society groups, activist writing and media interviews with victims. This section will entail a discussion of the more publicised cases of corrective rape in South African townships as victims, civil society groups and the media relayed them.

A discussion of this kind has to begin with society’s opinions and reactions to the act of corrective rape. This is because the police force, the judges in the courts and legislators, all form a part of society. One cannot simply view the courts or the police force as constitutional or legislated structures. These structures are made up of human beings who developed in communities within the greater society and must be discussed as such because the decisions they make are still those of members of society. It is important to note that this section will only be a discussion on the various

²⁹ Chabalala & Roelofse (2015) 23(3) *SAJC* at 50.

³⁰ Unpublished: Z Mtabeni “Exploring black sexualities and identities in Johannesburg”, unpublished Phd thesis, University of Witwatersrand 2011 157

³¹ Chabalala & Roelofse (2015) 28(3) *South African Journal of Criminology* 60

“corrective rape” and “homophobic rape” will be used interchangeably in the rest of this dissertation.

opinions that have been recorded during discussions over the years. The discussion on what influences or attributes to these opinions will be discussed and put forward in chapter 3.

There are three groups in society that should be held to a higher standard when crimes such as corrective rape are dealt with. Namely: the police, the courts and legislators. These groups of people need to be held to a higher standard because they have the power to make decisions that can effect change and form part of structures put in place to protect women who have been victims of this crime. A large portion of the problems victims face begin with the police. The police are generally the first port of call when a woman has been raped, however, this has not proven to be a safe space for victims. Victims have reported being laughed at, ridiculed or ignored when attempting to report cases of corrective rape.³²

Legislators should be held to a higher standard. Common law defined rape as “the unlawful and intentional sexual intercourse by a man with a female”. The South African Constitution protects the right to equality and protects the right to be free from discrimination on the basis of one’s sexual orientation. The common law definition of rape was found to be discriminatory because it did not deal with rape involving a perpetrator and victim of the same sex.³³ Rape is now defined in terms of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act.³⁴ Section 3 of the Sexual Offences Act defines rape as the unlawful and intentional committing of an act of sexual penetration with a person without the consent of such a person.

It is argued that the current legal system has proven itself to be insufficient, in other words, that legislators need to do more to address the crime of corrective rape.³⁵ Commentators have suggested that homophobic rape should be classified as a hate crime. Some commentators argue for new hate crime legislation whilst others argue for the amendment of current legislation.³⁶ Even with the high rise of violent attacks on lesbian women of South Africa, there is still no official hate crime that is aimed at crimes against sexual minorities. A hate crime is a crime motivated by a specific prejudice. In this instance, the prejudice is the sexual orientation of the victim. Some hold the view

³² Pumza Fihlani “South Africa’s lesbians fear ‘corrective rape’”, 30 June 2011
<http://www.bbc.co.uk/news/mobile/world-africa-13908662> (accessed 1 August 2017)

³³ *Masiya v Director of Public Prosecution & Others* CCT 54/06 2007 ZACC 9

³⁴ Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007

³⁵ Tina Wesley, Classifying ‘corrective rape’ as a hate crime. Report on behalf of OSISA, page 75

³⁶ Naidoo & Karels (2012) 33 *Obiter* (part 2) 620

that “homophobic rape” should be categorised as a hate crime because victims are vulnerable to perpetrators due to a characteristic that they cannot change.³⁷ A Hate Crimes Bill³⁸ was announced in October 2016. The bill is meant to address the pressing issue of hate speech and hate crimes in the South African context. The bill does make an effort to address violence against sexual minorities.

The Hate Crimes Bill as discussed above defines a hate crime as “an offence recognised under any law, the commission of which by a person is motivated on the basis of that person’s prejudice, bias or intolerance towards the victim of the hate crime in question because of one or more of the following characteristics or perceived characteristics of the victim or his or her family member...” one of the characteristics is sexual orientation.³⁹ In other words, homophobic rape is considered a crime in terms of the Hate Crime Bill. The bill punishes people guilty of committing the crime, attempting to commit the crime, instigating, inciting or conspiring.⁴⁰ The Bill also provides that the hate crime should be considered an aggravating circumstance during sentencing.⁴¹

Responses by the community, the police, legislators and the courts will be discussed by using case-studies in the paragraphs below.

The rape and murder of Eudy Simelane was one of the most publicised cases of homophobic rape. Her case was one of the cases that brought homophobic rape to the attention of South Africans and the world at large. In April 2008, Simelane was brutally raped and murdered in her home township of Kwa-Thema. Although this case is an unreported case in the law reports, it was widely reported in the media and by civil society organisations. Simelane was a black female soccer player for the national women’s soccer team *Banyana Banyana*. She was vocal and public about her sexuality and advocated for the rights of lesbians and to a certain extent, the community she lived in loved and accepted Simelane. Simelane was murdered in Kwa-Thema, a township on the East Rand of Johannesburg, a community that has a history of being an open and accommodating place for gay and lesbian people.⁴² She was stabbed 25 times in the face, chest and legs.⁴³

³⁷ Tina Wesley, Classifying ‘corrective rape’ as a hate crime. Report on behalf of OSISA, page 75

³⁸ Prevention and Combatting of Hate Crimes and Hate Speech Bill.

³⁹ Section 3(1) (f) of the Prevention and Combating of Hate Crimes and Hate Speech Bill

⁴⁰ Section 3 (2) (a-c) of the Prevention and Combating of Hate Crimes and Hate Speech Bill

⁴¹ Section 6 of the Prevention and Combating of Hate Crimes and Hate Speech Bill

⁴² Unpublished: Z Mtabeni “Exploring black sexualities and identities in Johannesburg”, unpublished Phd thesis, University of Witwatersrand 2011 162

It is incorrect to assume that all people living in South African townships are homophobic. There are a few instances in which the community has come out and condemned cases of corrective rape in support of lesbian women. For example, Eudy Simelane's community and the people around her accepted Simelane and were supportive of her.⁴⁴ To show that her death was a loss to the township community, a bridge was erected in her honour.⁴⁵

Mr Mpiti, one of the accused, was questioned on Simelane's sexual orientation during the trial of Eudy's rape and murder. Mpiti claimed that he did not know Simelane or the fact that she was lesbian and that he only knew of her and her sexual orientation whilst he was in custody.⁴⁶ During the trial of the other four accused, the prosecutor questioned one of the accused on the sexual orientation of Simelane, to which the judge responded, "There is no significance of the victim's sexual orientation in Mpiti's crime".⁴⁷ Mpiti pleaded guilty and he was sentenced to 32 years imprisonment. Of the five perpetrators, three were acquitted, one was sentenced to life imprisonment and one was sentenced to 32 years imprisonment.⁴⁸ Simelane's case is regarded as one of the more successful cases. In most cases, the matter does not even see a trial date, charges are not pressed, perpetrators are not found and various other delays result in justice not seeing the light of day.⁴⁹

In February 2006, 19-year-old Zoliswa Nkonyana was murdered in Khayelitsha Cape Town. On the day of the murder, two girls who lived in the area approached Nkonyana. The girls told Nkonyana and her friend that they (Nkonyana and her friend) wanted to be raped because they were tomboys and lived as lesbians.⁵⁰ The girls proceeded to call on twenty young men in the area to come and "sort out" Nkonyana and her friend. Nkonyana's friend managed to run away but Nkonyana was

⁴³ Di Silvio (2011) 99 *The Georgetown Law Journal* 1470

⁴⁴ Unpublished: Z Mtabeni "Exploring black sexualities and identities in Johannesburg", unpublished Phd thesis, University of Witwatersrand 2011 168

⁴⁵ Unpublished: Z Mtabeni "Exploring black sexualities and identities in Johannesburg", unpublished Phd thesis, University of Witwatersrand 2011 168

⁴⁶ Unpublished: Z Mtabeni "Exploring black sexualities and identities in Johannesburg", unpublished Phd thesis, University of Witwatersrand 2011 166

⁴⁷ Unpublished: Z Mtabeni "Exploring black sexualities and identities in Johannesburg", unpublished Phd thesis, University of Witwatersrand 2011 167

⁴⁸ Unpublished: WB Phiri "Crimes against sexual orientation: A critical study of 'corrective rape' within the South African context" Unpublished masters dissertation, University of Pretoria 2011

⁴⁹ Unpublished: Z Mtabeni "Exploring black sexualities and identities in Johannesburg", unpublished Phd thesis, University of Witwatersrand 2011 169

⁵⁰ Unpublished: Z Mtabeni "Exploring black sexualities and identities in Johannesburg", unpublished Phd thesis, University of Witwatersrand 2011 172

clubbed, kicked and beaten to death because she was a lesbian.⁵¹ Nkonyana was not raped but the motive behind her murder was nonetheless related to her sexual orientation.

In certain instances, society or members of the community may not condone the act of corrective rape but are complicit in that they stand by whilst women are raped and harassed. In some cases, people stay away out of fear for their own lives. Nkonyana's murder happened publicly. There were numbers of community members who witnessed the crime. Nkonyana's father was close to the scene and heard what was happening but he chose to stay away out of fear for his own life, it was not until she was already dead that he realised that the victim was his daughter.⁵² Another bystander tried to intervene and was almost killed. However, in other cases, bystanders are the ones who incite the violence – as was the case in Nkonyana's murder.

Only nine men were arrested and subsequently charged. All nine men pleaded not guilty to the murder of Nkonyana and not guilty to the attempted murder of her friend and another gentleman who tried to intervene. Three years later, the trial for Nkonyana's murder finally began. The primary witness (her friend who was with her on the day of the murder) took to the stand. She testified to what happened on the day of her friend's murder and remained firm on the fact that their sexual orientation was the reason for their attack and her friend's murder.⁵³

A year later, another state witness testified. This time, it was one of the young women who incited the violence. Even under threats by supporters of the accused, the witness testified against the accused. She testified that she indeed told the accused to “sort out the lesbians”. Nine people were charged. Five of the accused were acquitted for lack of evidence. All of the accused were under the age of 18 at the time that Nkonyana was murdered, which was a relevant factor for sentencing.⁵⁴ The motive for the crime was seen as a relevant factor for sentencing, even though it did not come up during the trial.⁵⁵ The court found that the motive behind Nkonyana's murder was indeed hatred caused by her sexual orientation. The accused were sentenced to eighteen years imprisonment, four of which were suspended for a period of five years on the condition that the accused were not convicted of murder during the suspension period.⁵⁶ The judge in the *Nkonyana* case decided that

⁵¹ *Ibid*

⁵² *Ibid*

⁵³ Unpublished: Z Mtabeni “Exploring black sexualities and identities in Johannesburg”, unpublished Phd thesis, University of Witwatersrand 2011 173

⁵⁴ Mwambene & Wheal (2015) 15 *AHJR* 78

⁵⁵ *Ibid*

⁵⁶ Mwambene & Wheal (2015) 15 *AHJR* 80

the fact that the victim lived openly as a lesbian was the motive for the crime and that this was an aggravating circumstance that should be considered in sentencing.⁵⁷

In July 2007, Sizakele Sigasa and Salome Masooa, a young lesbian couple, were both brutally murdered in Soweto.⁵⁸ Sigasa and Masooa were found dead after they accompanied a friend home. They were both attending the opening of a lesbian and gay bar. The next day, a jogger found both the bodies of Sigasa and Masooa disposed at a dumping site. Sigasa's hands were tied using her underwear and her ankles tied up with the shoestrings from her shoes. Sigasa was shot six times – three times in the head and three times in the collarbone. Masooa was shot once in the head. In the past, Sizakele had told her friends that she did not feel safe in her community because of her sexual orientation. In Sigasa's case, there was only one suspect identified. Whilst out on bail, the suspect committed suicide.⁵⁹ As of the year 2011, the rest of the perpetrators have not yet been caught.⁶⁰ The case has since been closed.⁶¹ The murders of Sigasa and Masooa were commemorated in Meadowlands Township. A memorial bench and trees were built in their memories.⁶²

In March 2011, 13-year-old Nosizwe Nomisa Bizana from Pretoria was gang-raped by five men after coming out as a lesbian. In April of the same year, 24-year-old Noxolo Nogwazi's dead body was found in an alley in a township in Kwa-Thema.⁶³ This was just three years after the death of Eudy Simelane who was found dead in the same township. Noxolo was raped and her head had been crushed. 16-year-old Madoe Mafubedu from Soweto, who lived openly as a lesbian was raped and murdered in 2007. As of 2015, no arrests were made for these crimes.⁶⁴

Communities are filled with people who condone the rape of lesbian women or who believe that rape has some sort of curative power. In fact, it is not only the perpetrators of this crime that believe in the act but even other women and surrounding people. Pearl Mali's mother believes in the

⁵⁷ Mwambene & Wheal (2015) 15 *AHRLJ* at 77.

⁵⁸ Unpublished: Z Mtabeni "Exploring black sexualities and identities in Johannesburg", unpublished Phd thesis, University of Witwatersrand 2011 168

⁵⁹ Unpublished: Z Mtabeni "Exploring black sexualities and identities in Johannesburg", unpublished Phd thesis, University of Witwatersrand 2011 171

⁶⁰ Unpublished: WB Phiri "Crimes against sexual orientation: A critical study of 'corrective rape' within the South African context" Unpublished masters dissertation, University of Pretoria 2011 12

⁶¹ Mwambene & Wheal (2015) 15 *AHJR* 63

⁶² Staff Writer, Hate Crimes Victims Remembered <http://www.mambaonline.com/2009/07/08/hate-crime-victims-remembered/>, accessed 30 June 2016

⁶³ Koraan & Geduld (2015) 18(5) *PER* 1938

⁶⁴ Mwambene & Wheal (2015) 15 *AHJR* 62

curative power of rape.⁶⁵ Mali was first raped at age 12 when her mother sought the aid of an old man to rape the gay out of her. Mali's mother stood on the other side of the door and shouted at Mali to shut up the first time it happened. Thereafter, the old man moved into Mali's home and he raped and beat her for the next four years in the name of turning her straight. Pearl made a few attempts to report what was happening to her but the police always laughed at her. When he impregnated her at age 16, her mother took the baby away because she felt that Mali would make the child gay by touching and feeding the baby. In 2014, Mali was still fighting for custody of her baby.

Simphiwe Thandeka was raped by a male relative and when he failed in his quest to make her straight he married her off to one of his friends.⁶⁶ After raping and beating her for years, he returned her to her family after realising that he could not change her. Some of the harsh and homophobic words violently thrown at women who are 'correctively raped' include "I'll prove that you are a girl, not a man" or "after everything that we're going to do to you, you're going to be a real woman, and you are not going to act like this again".

A large number of cases of rape are committed by those closest to the victim. This is also true in cases of homophobic rape. Nosiziwe's friend was raped by her HIV positive cousin⁶⁷ and 30-year-old Millicent Gaika was also raped by a man who was not a stranger to her. Millicent was walking home with friends when a man she was acquainted with pushed her into a shack and raped and beat her for five hours. She told the police that he told her that she thinks that she is a man and he will make her pregnant to prove to her that she is not a man.⁶⁸

In Zukiswa Graca's case, the courts completely failed her. Graca first left her rural hometown in the Eastern Cape at the age of 15 because her community did not accept her sexual orientation. She moved to Khayelitsha looking for a more accepting community but when she was 20 years old, she was raped by a man who told her that he hated lesbians and that he was going to show her that she was not a man. She was brave enough to show the police her attacker who was subsequently

⁶⁵ Clare Carter, "the Brutality of corrective rape" 27 July 2013 <http://www.nytimes.com/interactive/2013/07/26/opinion/26corrective-rape.html?mcubz=1> (accessed 1 August 2017)

⁶⁶ *Ibid*

⁶⁷ *Ibid*

⁶⁸ Mwambene & Wheal (2015) 15 *AHJR* 64

arrested and then released.⁶⁹ The perpetrator was released after paying R60 bail and he fled soon after.

2.4 Conclusion

Corrective rape is a crime against lesbian women wherein the purpose of the rape is to change the woman's sexual orientation. South African society and laws have made some strides in the promotion and protection of the rights of sexual minorities. Even though the community of Kwa-Thema showed a lot of support for Eudy Simelane after her death, the rape of another lesbian woman in the same community (Noxolo Nogwazi) is evidence that there is still a bigger problem, a deeper problem that is personal to most people. Even though the fact that Simelane's sexuality was seen as irrelevant during the trials of those who raped and murdered Eudy Simelane but was seen as relevant in the sentencing of those who raped and murdered Nkonyana can be viewed as progress there are still a large number of crimes of this nature that go unpunished.

⁶⁹ *Ibid*

Chapter 3: The intersection between patriarchy, culture and homophobia

3.1. Introduction

“You think you’re a man, but I’m going to show you, you’re a woman. I am going to make you pregnant, I’m going to kill you”.⁷⁰ These are words that many women hear as they are tormented and attacked by men who think they can prove their manhood through such extreme forms of violence. Incidences of corrective rape often occur in South African townships with openly lesbian women serving as the main target. Two of the primary reasons this phenomenon exists is the so-called cultural views on sexuality and patriarchy.⁷¹ This is not to say that culture and patriarchy are the sole reason for the surge of homophobic rape in South Africa but at the same time one cannot deny the influence. In her book *Rape: A South African Nightmare*, Gqola asks that we stop ignoring the fact that the reason behind gender-based violence in South Africa is the patriarchal society that we live in, one that promotes and celebrates violent masculinities.⁷² The rhetoric that homosexuality is un-African has now become widely accepted and is often used as a tool to defend homophobic behaviours and actions.

This chapter explores two forces behind the violent rape and murder of lesbian women in South Africa. The first part critically explores how “African culture” is used as an excuse for homophobic acts such as the curative rape of lesbian women, in other words, how so-called “African” culture is used as a weapon against lesbian women. The second part focuses on patriarchy as a force that drives a perpetrator to believe that he has agency over a woman’s body to the extent that he has a right or duty to “cure” a lesbian woman of her sexuality.

3.2. Part 1: The use and abuse of culture to justify homophobia

Culture can be defined in various ways but a simplistic way to define culture is to define it as a way in which a group of people live. Culture can also be defined as the identity of a people. Albertyn

⁷⁰ Mwambene & Wheal (2015) 15 *AHRJ* at 64.

⁷¹ *Ibid.*

⁷² *Gqola* (2015) 67

states that culture “encompasses the values that the group members hold, the norms they follow and the material goods that they produce”.⁷³ Albertyn also views culture as something that defines not only how we view ourselves but also how we view others.⁷⁴

The idea that homosexuality is un-African or that it is against African culture continues to be a widely spread notion, even though there is evidence that homosexuality existed long before colonisation and the western influence on Africa.⁷⁵ There have been academics that proved homosexuality is not a western import. Homosexuality existed before colonisation but the missionaries who first came into the continent regarded it as taboo and thus the concept of “homophobia” came to fruition in Africa.⁷⁶ This is a widely known academic fact, but the rhetoric continues to spread like a disease and has seeped its way into society. This is to such an extent that it is now widely accepted and believed. People accepted the rhetoric that homosexuality is un-African as fact.

This section offers a general discussion on the argument that homosexuality is contrary to African culture, the impact of colonial laws on the argument that homosexuality is un-African, the importance of marriage and procreation to African people and the influence of religion on the idea that homosexuality is un-African. I start with an exploration of the various reasoning and justifications for this rhetoric and then consider a few counter-arguments.

3.2.1 Decolonisation, marriage and procreation: The Fundamentals of what it means to be African

What is at the centre of the argument that “homosexuality is un-African” is that homosexuality should be rejected due to the fact that homosexuality is a remnant of colonisation and that the existence of homosexuality in Africa is attributed to colonial establishments such as single-sex schools and mine-owned hostels.⁷⁷ In South Africa, black workers working in the mines lived in hostels where only men were allowed to live. Workers were not allowed to bring their wives and there were generally no women workers living in the same hostels. A number of these men had wives or partners back home and went months without seeing them. To deal with the loneliness,

⁷³ Albertyn (2009) 2 *Constitutional Court Review* at 170.

⁷⁴ *Ibid.*

⁷⁵ Naidoo & Karrels (2012) 33 *Obiter* at 25.

⁷⁶ McCormick (2013) 42 *Stellenbosch Papers in Linguistics Plus* at 138.

⁷⁷ Judge M, Manion A & Dewaal S (eds) (2008) 81.

miners would take new or young miners as wives and the young miners would take on traditionally female roles in the hostels.⁷⁸ Traditional leaders continue to be on the frontline of the war against homosexuality in South Africa. In 2005, during discussions on same-sex marriage legislation, the National House of Traditional Leaders made a vow to campaign against “this wicked, decadent and immoral western practice”.⁷⁹

Another argument used to support the belief that homosexuality is contrary to African culture is the argument that homosexuality cannot possibly be in line with African culture because of the importance of procreation in African marriages.⁸⁰ In other words, two men or two women cannot procreate so the purpose of marriage is therefore not complied with. The purpose of marriage is to build a family and grow a nation and if people of the same sex are together, they cannot fulfil their duty to the community. As stressed by various traditional leaders, homosexuality prevents procreation and as a result, goes against traditional gender roles.⁸¹ Men and women were created for specific roles and have certain duties that must be fulfilled because of their gender. If women are lesbian then who will carry the man’s children? Lesbian women are seen as a threat to the African ideal of marriage and its purpose.

Traditional leaders have stressed the importance of procreation as one of the main reasons for their homophobic rhetoric. In 2005, King Goodwill Zwelithini said if there was homosexuality in the past and if homosexuality was permitted in Zulu culture, then there would not be as many Zulu people as there are today.⁸² In other words, the community would not have grown if there were homosexuality. Black South Africans again feel that something is being taken away from them a part of what they believe to be African or the definition of African marriages because unlike African/black cultures, western/white culture is different and is not about bringing families together but rather bringing two people together. This is the view of black South Africans who support the above rhetoric.⁸³

⁷⁸ *Namwase S & Jjuuko A (eds) (2017) 32.*

⁷⁹ Staff Reporter “Prejudice peddled as tradition” <https://mg.co.za/article/2011-10-10-prejudice-peddled-as-tradition> (accessed 10 June 2017).

⁸⁰ *Judge M, Manion A 7& Dewaal S (eds) (2008) 77.*

⁸¹ *Ibid.*

⁸² Niren Toisi “Being gay and Zulu” <https://mg.co.za/article/2006-10-16-being-gay-and-zulu> (accessed 10 June 2017).

⁸³ *Judge M, Manion A 7& Dewaal S (eds) (2008) 80 .*

It is here where religion is often used in line with so-called African culture. The bible is often quoted to support the notion that the purpose of marriage is procreation and that homosexuality is contrary to that purpose.⁸⁴ In an interview conducted, a gay man who also had a girlfriend told himself that the birth of his first born child was a sign from that he was a “real man” and not a homosexual, one that has fulfilled his role as a man.⁸⁵ Because homosexuals cannot procreate in the way that society is accustomed to, they are also seen as the kind of people who have no family or relatives because two families are brought together through marriage and procreation. Religion is further used in anti-homosexuality rhetoric.⁸⁶

Outside of procreation, African marriage is also affected by the confusion that is caused by same-sex marriage. An essential part of African marriages is the bride price or *lobola*. When a group of black South Africans were interviewed, they expressed concern over questions such as who would pay the bride price if two men or two women married one another.⁸⁷ When homosexual people decide to have children, whose egg will be used? Whose last name will the child take? According to Nonhlanhla Mkhize, it is a shame that the custodians of culture have refused to seek answers to these questions.⁸⁸

3.2.2 Counter-arguments

Homosexuality is un-African, Africans cannot be homosexuals, it is not who we are. Homosexuality is western and exists in Africa because we were colonised. This is the standard rhetoric by those who believe that homosexuality is contrary to the beliefs and culture of African. But what does it mean to be African? Does this rhetoric speak to West Africans or Southern Africans? Does this rhetoric speak to Kenyan people or to South Africans? Does this rhetoric speak to the Vhavenda or the AmaZulu of South Africa? The questions above seek to begin this section by completely denying the idea of a singular “African Culture”. There is no one singular monolithic

⁸⁴ Judge M, Manion A 7& Dewaal S (eds) (2008) 79

for example, Genesis 1:28 reads as follows: *be fruitful and multiply, and fill the earth and subdue it*. In Genesis 9:7, God commanded that people “be fruitful and multiply; populate the earth abundantly and multiply in it”. Biblical verse also speaks to the role of women in in this command. Psalm 128:3 states the following “your wife shall be like a fruitful vine within your house, your children like olive plants around your table”.

⁸⁵ Judge M, Manion A 7& Dewaal S (eds) (2008) 79.

⁸⁶ Romans 1:26-28 explains how women who slept with women and men who slept with men in unnatural or indecent ways received the death penalty for their perversion. Leviticus 18:22 states that it is an abomination for one to lie with a man as one would lie with a woman and chapter 20 verse 13 sentences such people to death. 1 Corinthians 6:9-11 warns that homosexuals will not inherit the kingdom of God and labels homosexuals as unrighteous.

⁸⁷ Judge M, Manion A 7& Dewaal S (eds) (2008) 103

⁸⁸ *Ibid.*

African culture. South Africa alone has at least 11 different cultural groups with varying belief systems.

Another piece of irony lies in the fact that a big part of the struggle for black South Africans has been the struggle for identity. A struggle which seeks to avoid the view that black South Africans encompass one homogenous identity, a struggle that seeks to show that we are a diverse people, with diverse backgrounds and cultural beliefs. However, that struggle is ignored in instances where it is necessary in order to manipulate a specific agenda. Before imperialism, Africa consisted of around 1000 tribes and 10000 polities.⁸⁹ It is therefore not sound to argue that homosexuality is un-African because African culture is not one singular culture with a rulebook that governs all Africans.

One of the main ironies in the argument that homosexuality is un-African lies in the fact that a number of the laws that influenced homophobic laws in South Africa and continue to influence the mindsets of South African people even in democratic South Africa were colonial laws, for example, anti-homosexuality legislation in colonial South Africa such as sodomy.

One can also not forget the school of thought that believed that homosexuality did exist in Africa (and in South Africa) before colonisation. It is believed that men did have sexual relations with men and women. With women however, due to the high premium placed on procreation, men and women based marriage and the building of families on heterosexual relationships. It is also argued that because men who engage in same-sex sexual relations still married women and procreated, same-sex relations were harmless and therefore ignored.⁹⁰ Same-sex relationships of this nature have been recorded among the Vhavenda and the Basotho in South Africa.⁹¹ In fact, it was the colonialists that declared homosexuality un-African.⁹²

There seems to be no consensus as to what homosexuality is and where it comes from and as a result, much of the confusion surrounding homosexuality in pre-colonial Africa could possibly be related to the definition of homosexuality. Ambane argues that perhaps there is some merit to the argument that homosexuality is un-African only in so far as homosexual identity is concerned, he

⁸⁹ Namwase S & Jjuuko A (eds) (2017) 18.

⁹⁰ Namwase S & Jjuuko A (eds) (2017) 22.

⁹¹ Namwase S & Jjuuko A (eds) (2017) 24; Msibi (2011) 58 *Indiana University Press* 64.

⁹² Msibi (2011) 58 *Indiana University Press* 63.

does, however, maintain the position that homosexuality always existed in Africa.⁹³ There exist a wide variety of derogatory terms for homosexuals that are used in South Africa. In isiXhosa, they are called “*talese*” which means “hermaphrodite”. Butch women are referred to as “*nongay’ndoda*” in isixhosa meaning “like a man”. Zulu people usually use the terms “*stabane*” or “*ungqingili*” which does not mean gay or lesbian but actually means someone born with a penis and a vagina.⁹⁴ These words that are used in a derogatory fashion to refer to homosexuals point to and enforce the idea that homosexuality is un-African. More importantly, the real definitions of these words support the idea that homosexual identity did not exist in Africa but same-sex relationships did exist. In other words, all the Bantu words for homosexuality, some of which are now viewed as derogatory, referred to intersex people, not to homosexuals because it is homosexuality as a sexual identity that did not exist in Africa, not sexual relationships between people of the same sex.

3.3. Part 2: A patriarchal society

In light of part one above, wherein one can make the conclusion that it is not homosexuality that is un-African, it is homophobia that is un-African, one then has to ask what it is that fuels this hatred for lesbian women. In other words, if it were accepted that homosexuality is accepted in African culture, what would it be that informs homophobia of this sort? Is culture merely used as an excuse or a cover-up to hide the true reason for this hatred? Thabo Msibi argues that the argument that homosexuality is un-African lies in sexism and patriarchy and is merely an extension of the male ownership, control and power described above.⁹⁵

In the same way that one cannot discuss culture without discussing religion, one cannot discuss culture without discussing the patriarchal aspect of culture. Culture informs how one views gender roles.⁹⁶ It has been said that the homophobic views stem from the idea that a woman’s role is to serve her husband and her children. She is to be a wife and a mother.⁹⁷ Such African ideals also prescribe to the fixed gender roles of a patriarchal society.⁹⁸ Homosexuality is viewed as “inappropriate”, mainly because it dares to go against and challenges a patriarchal society. Because of this, there is the view that lesbian women want to be men or masculine. This is due to the fact that they do not subscribe to “normal” heteronormative roles. The realities for women in townships

⁹³ *Namwase S & Jjuuko A* (eds) (2017) and Msibi 56.

⁹⁴ *Judge M, Manion A & Dewaal S* (eds) (2008) 82.

⁹⁵ *Msibi* (2011) 58 *Indiana University Press* 55-57.

⁹⁶ *Albertyn* (2009) 2 *Constitutional Court Review* at 171.

⁹⁷ *Naidoo & Karels* (2012) 33 *Obiter* at 254-255.

⁹⁸ *Ibid.*

who do not conform to the patriarchal society or the created ideal of how a woman should look or behave are in danger of punishment ranging from harassment, beatings or even death.

It is important to note that the writer of this dissertation understands that being in a same-sex relationship does not mean that the relationship is completely free of patriarchal elements. There are same-sex relationships that have a foundation of patriarchy,⁹⁹ however, there is also the element that there is a certain level of freedom from male power. Regardless, men who perpetuate the violence against lesbian women, see them as one of two things. Firstly, that they are trying to be men and secondly, that they are “taking their women from them”.

3.3.1 Homophobic rape: Autonomy, ownership & power

As mentioned above, this dissertation seeks to discuss how patriarchy may influence the crime of corrective rape of lesbian women in South Africa. In relation to homophobic rape, the most relevant symptom of a patriarchal society is hyper-masculinity. With hyper-masculinity there follows a sense of ownership, power and violence. Gqola describes these as “violent masculinities”. She describes hyper-masculinity as a “heightened claim to patriarchal manhood, to aggression, strength and sexuality”.¹⁰⁰ This heightened claim described by Gqola is one that leads to extreme violence in instances where this entitlement is rejected. One of the ways in which this violence manifests itself is the rape of women and in other instances the curative rape of lesbian women.

Power dynamics perpetuated by a culture of patriarchy result in women having less power than men. Women are then viewed as inferior to men, which results in the feeling that men have ownership over women. The feeling of that ownership is lost when men feel that lesbian women have sidelined them. When they feel as if they have zero access to a woman or to her body, it leads to a system of violence that gives back the power that they feel they have lost. When a gentleman was asked about his views on homosexuality, his response was “I don’t have a problem when a man dates another man but when a woman dates a woman that is not right. Women should be dating us”.¹⁰¹ Patriarchal cultural norms have been and are continuously being dealt with in South African

⁹⁹ Mkasi (2013) University of KwaZulu Natal at 48

¹⁰⁰ *Gqola* (2015) 154

¹⁰¹ Unpublished: LP Mkasi ‘A threat to Zulu patriarchy and the continuation of community: A queer analysis of same sex relationships amongst Female Traditional Healers at Inanda and KwaNgcolosi, KwaZulu Natal, Unpublished Masters dissertation, University of KwaZulu Natal 2013 41

jurisprudence¹⁰². There are various cases that have pointed toward patriarchal norms having no place in the new South Africa.¹⁰³

It can, therefore, be inferred that some men see lesbianism, as a threat to a patriarchal society, which is a society that benefits them. As a threat to the power they hold. Violence that is perpetrated against lesbian women becomes a way to hold on to that power and to forcefully take that power back. These men believe that violence can turn a lesbian woman into a heterosexual woman.

It is not absurd to assume that ownership and power play a centralised role in the occurrence of homophobic rape in South Africa. A patriarchal society is one where a woman is seen as property and the man has ownership over her and her body. Patriarchy gives men an entitlement that allows them to take whatever they deem to belong to them. The South African context is one where men are driven by and have power and ownership over women and women have no autonomy over their own lives. When this entitlement is lost or there is a feeling that it is lost, it leads to aggression and violence. This entitlement that men feel, is often heard in the rhetoric of rapists or rape apologists. It is visible in testaments such as: “she asked for it”, “she was just playing hard to get” or “she is my wife or girlfriend, she cannot say no”. The sense of ownership over women is also shown in common slang words used to refer to women. These slang words are often descriptive words for women that allude to women being viewed as things. For example: “cherries”, “stock” or “items”. In a patriarchal society such as South Africa, viewing women as property capable of ownership is common.

With ownership comes power and control. Men that assert ownership over women also thrive on the power or control that comes with that ownership. Therefore, when a man rapes a woman, one can conclude that there is a feeling of control or power over the woman. This is evidenced by the way in which sex is described. Slang terms used to describe sex always allude to something being taken from a woman. They are usually violent, shy away from the notion of consent and also have a sense of describing women as “things”. Terms such as “*ukushaya nge kauza*” (to hit her with the

¹⁰² For example: *Bhe and Others v Khayelitsha Magistrate and Others* (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (15 October 2004).

¹⁰³ Albetyn (2009) 2 *Constitutional Court Review* at 200.

pipe) or “*ukuhlaba*” (to stab)¹⁰⁴, “*goja banyana*”/“*udla abantwana*” (to eat girls)”. These are all terms that take control from a woman who dares to assert her rights and give the control back to the man who it supposedly rightly belongs to. Women are therefore seen as things that are made to be consumed and sex is viewed as something that takes something from a woman rather than being there for her pleasure and enjoyment. This power, that comes with patriarchy, is the kind that allows men to feel comfortable with gender-based violence so comfortable to the extent that there is no fear of retribution. They have no fear so they act in public spaces and there is no fear of public outcry or fear of the law.

This ownership, power and control that men feel they have a right to, actively clashes with the rights granted to women by the Constitution. A woman who actively asserts her right to say no, dresses however she may feel, dares to question a man or reject him is seen as a threat to this sense of ownership, control and power. At a hearing in KwaZulu-Natal organised by the National House of Traditional Leaders after the Supreme Court of Appeal judgement in the *Fourie* case, a male speaker said: “And you girls as you say, have rights, fine, go ahead and destroy us because you want to do what you want. Children make their own laws. Women make their own laws”.¹⁰⁵ Men, who have a sense of entitlement to ownership over women, feel threatened by the Constitution that seeks to destroy that patriarchal entitlement that takes autonomy away from women.

If men have “title” over women’s bodies in a patriarchal society, then the result for women is a vulnerability and a lack of autonomy over their own bodies. This has become normalised in South African society. This is shown in how women are taught what to do to avoid getting raped. For example: do not walk around at night, do not wear revealing clothing, or do not get into a taxi that does not have any women in it, to name a few. Therefore, an essential element of what drives men to rape is ownership. These are all symptoms of a patriarchal society where women and their bodies are believed to belong to men. Women are taught how to avoid rape, instead of men being taught not to rape.

The above is the reality of being a woman living in a patriarchal society. The reality is not necessarily harsher for the lesbian woman but it can expose lesbian women to different types of

¹⁰⁴ Mokoena S. (1991) The era of the jackrollers: Contextualising the rise of youth gangs in Soweto. Paper presented at the Centre for the Study of violence and Reconciliation. Seminar no. 7, 30 October 1991. Accessed at <http://www.csvr.org.za/publications/latest-publications/1805-the-era-of-the-jackrollers-contextualising-the-rise-of-the-youth-gangs-in-soweto> on 18 June 2017

¹⁰⁵ Judge M, Manion A 7& Dewaal S (eds) (2008) 81.

violent aggression. The ownership, power and control that manifests into violence and aggression described above, exposes itself differently to that experienced by heterosexual women. When it comes to lesbian woman, the loss of ownership, control and power is greater and seems like more of a threat to men who enjoy the privileges of men in a patriarchal society. Lesbian women take away the man's position as the one in power and control and the man then feels he needs to take back that position.¹⁰⁶ Men believe that lesbian women are not, in fact, lesbian but are actually playing hard to get.¹⁰⁷ This seems rational, in the mind of someone who believes that the body of a woman belongs to a man and cannot fathom how a woman can live without a man. Therefore, in order to take that power and control back and regain ownership, it must be taken forcefully and so brutally that it sends a message to all lesbian women to remind them of who is in control and who they belong to.

3.2.2 Historical ownership of women, Breeding fear in the girl child and breeding patriarchal violent masculinity in the boy child

The paragraphs below seek to explore the historical context of ownership, control and power over women's bodies in South African townships as well as how in a patriarchal society, young girls grow up in fear whilst young boys learn of the power and control that they have.

Violence against women in the township is not a new phenomenon, it is grounded in history. Gqola attributes the surge of violence against women in the township in the '80s and '90s and today to the historical context of being a man in colonial and apartheid South Africa. In other words, the violence is grounded in powerlessness and emasculation. Men were legally and economically reduced to boys under the conditions of apartheid.¹⁰⁸ As a result, the intense focus of "manhood" was, and continues to be, a way to assert freedom.¹⁰⁹ Some commentators have even gone as far as to argue that black women are impossible to rape. The reasoning behind this line of thinking is that under white supremacy, black men have the status of "women" and as a result do not have the "privilege" of patriarchy or the power and control that comes with it.¹¹⁰ In a patriarchal society, rape apologists exist to the extent that there is the thinking that in certain instances, rape is acceptable or impossible based on the social context, in other words, in certain instances rape is

¹⁰⁶ Msibi (2011) 58 *Indiana University Press* 70.

¹⁰⁷ *Gqola* (2015) 67.

¹⁰⁸ *Gqola* (2015) 154.

¹⁰⁹ *Gqola* (2015) 155.

¹¹⁰ *Gqola* (2015) 157.

justifiable. So when one looks at this line of thinking, then one can conclude that even in instances of homophobic rape, it is acceptable in the name of patriarchy and so-called African culture.

Ownership over the bodies of black women is not a new phenomenon. Violence against women has existed in South African townships for years. Women's bodies have always been there for the taking and it is, therefore, no surprise that lesbian women have had a target on their backs for daring to defy hetero-normative relationships. Violence against women has always been largely attributed to the historical and current existence of gangs in townships. Gangs have always been a big part of the South African township. Stories of the terror caused by gangs in areas like Soweto are well known. These gangs were known for various violent crimes from petty theft to murder. Gangs first emerged with the discovery of gold and this continued into the 1950s in urban townships, flowing into political resistance of the 1970s and 1980s and continues today.¹¹¹ A big part of how these gangs operated was the terrorism of women through rape and abuse. Some of the well-known and more prominent gangs were the *jackrollers*, *iintsara*, *amajapan* and *amaninja*. These were the more prominent gangs in Soweto and Cape Town.

The Jackrollers became a widely known gang in Soweto between 1987 and 1988.¹¹² They were known for a variety of crimes and they were some of the most feared people in the township. They were the reason for the coining of the term "jackrolling". Jackrolling is the abduction and rape of women and girls.¹¹³ It became a trend and even men that were not officially part of the *Jackrollers* network/gang would "jackroll". This led to an environment where the man is entitled to take what he wants from a woman and the result is that consent is no longer a factor for sex. In a study conducted in 2005, men living in townships were questioned on consent and sex. One of the questions asked was what the interviewee does when a girl refuses to have sex with him. Answers included "*Hai! No ways, she likes it or not, she has to give it*".

Jackrollers and *Iinstara* may be deemed to be a thing of the past but the current reality is merely an extension of the above. Women are still being terrorised on a daily basis. The warnings to women on how to behave to avoid being raped, are still being issued and still have a similar nature to the ones that parents issued out in the time of *jackrollers* and *iintsara*. The first example of these

¹¹¹ Mokoena S. (1991) The era of the jackrollers: Contextualising the rise of youth gangs in Soweto. Paper presented at the Centre for the Study of violence and Reconciliation. Seminar no. 7, 30 October 1991. Accessed at <http://www.csvr.org.za/publications/latest-publications/1805-the-era-of-the-jackrollers-contextualising-the-rise-of-the-youth-gangs-in-soweto> on 18 June 2017

¹¹² *Ibid.*

¹¹³ *Ibid.*

warnings is the “do not get into a taxi if there are no women on board”. Over the years, there have been rapes related to taxis. More recently, a woman was raped onboard a taxi in front of her 10-year-old son.¹¹⁴ After this woman reported the crime, various other women reported that taxi drivers had also sexually assaulted them. The second example is “do not wear short skirts or dresses, otherwise, men will assume that you are asking for it”. In 2012, two women were harassed at Noord Taxi Rank in Johannesburg for wearing revealing clothing.¹¹⁵ In 2008, a woman was assaulted, drenched in alcohol and sexually abused as a punishment for wearing a mini-skirt. This happened in front of about 100 onlookers who cheered in agreement. According to reports at the time, these assaults have been happening for the past eight years. The men claimed the reason they did this was that they felt women were provoking them.¹¹⁶ They also claimed “women abuse men by being half naked”, another man interviewed said “before 1994, women wore clothes neatly and properly, now they have rights”.¹¹⁷ Another man, claimed that miniskirts should not be worn because they arouse men and it leads to rape.¹¹⁸ It is a fair assumption to make that in this context of violence and hatred against women, men who feel “provoked” by short skirts and revealing clothing may also feel provoked by women who reject a heteronormative status quo.

Fear is cultivated into girl children from an early age. The South African girl child is told not to wear a short skirt because she might be raped and murdered. The South African girl child cannot sleep over at a friend’s house because her friend’s brother, father or uncle could rape her. The South African girl child cannot use public transport because her mother fears that she could be attacked or raped. The South African girl child is taught from a young age that she should try, by all means, to avoid sexual violence because she is at constant risk of sexual violence and that in South Africa, she is never safe. What of the South African boy child? What is the South African boy child taught? Is the South African boy given a proper sexual education? Is the South African boy child taught the true meaning of sex? Is the South African boy child taught the female body belongs to her and not to him? The South African patriarchal society is so strong that we live in a society where the woman is blamed for being raped and the man is left to live his life as he wishes. All women are aware of this status quo and lesbian women have been made painfully aware of this through the

¹¹⁴ Staff Reporter “3 arrested in taxi rape, as more women come forward” <http://city-press.news24.com/News/3-arrested-in-taxi-rape-cases-as-more-women-come-forward-20170324> (accessed 10 June 2017).

¹¹⁵ News24 “Miniskirts paralyse Johannesburg” <http://www.news24.com/SouthAfrica/News/Miniskirts-paralyse-Johannesburg-20120217> (accessed 10 June 2017).

¹¹⁶ Louis Vincent “Miniskirt wearing women: A magnet for violence?” <https://mg.co.za/article/2008-05-22-miniskirtwearing-women-a-magnet-for-violence> (accessed 10 June 2017).

¹¹⁷ Staff Reporter “Outrage over attack on miniskirt-wearing woman” <https://mg.co.za/article/2008-02-19-outrage-over-attack-on-miniskirtwearing-woman> (accessed 10 June 2017).

¹¹⁸ *Ibid.*

outcomes of the cases of women like Eudy Simelane. The South African lesbian girl or woman is told that she is never safe because her sexuality is a threat to others.

Research shows that in South Africa, sexual violence is rampant amongst girls and boys in South Africa.¹¹⁹ There were 64 514 sexual offences reported in 2011 and 2012 and of the 64 514 reported cases, 25 862 involved children under the age of 18.¹²⁰ These figures do not only point to children that have been victims of sexual assault, but also those who have been the perpetrators of these crimes. Commentators hold that the reason for this, is the underlying patriarchal construction of male and female gender roles.¹²¹ In other words, a social construction of what is feminine and what is masculine. These patriarchal ideas are usually in favour of the man and not the woman, of the boy and not the girl. Children observe the behaviours displayed in their homes and communities and it is not a far reach to assume that they mimic the patriarchal society that they live in and are from. There is a seed of masculine power that is planted for boys and a seed of a female subordinate is planted in girls. The boy child is taught to be aggressive whilst his female counterpart is taught to suppress her confidence and self-assertion.¹²² That is the reality of a patriarchal society.

The fear bred into young girls continues to live in them as they grow into women. Gqola describes this as the “female fear factory” or the “manufacture of female fear”. We live in a society where we breed fear in women from a young age. We are constantly educating young girls on how to avoid rape but leaving our sons to run amuck. Gqola argues that the fear factory seeks to regulate women’s sexuality¹²³ and that the fear and the act of rape is a reminder to women that their bodies are not their own.¹²⁴ For the young lesbian girl, that fear has the potential to run deeper. Growing up as a lesbian teenager, the constant reminders that one’s body does not belong to oneself are constant. The fear that you could be raped simply for being a woman living in a South African township is added onto by the fear that someone in your community might take issue with your sexuality and use sexual violence to correct what they believe should be fixed.

¹¹⁹ In this context, girl and boy means children under the age of 18

¹²⁰ Bhana (2013) 11(2) *African Safety Promotion Journal* 39.

¹²¹ Bhana (2013) 11(2) *African Safety Promotion Journal* 39.

¹²² Fortier (1975) 7(6) *Family Planning Perspectives* 278.

¹²³ *Gqola* (2015) 92.

¹²⁴ *Gqola* (2015) 79.

3.3 Conclusion

So what part do patriarchy and so-called culture play? When it comes to culture, the fear stems from the idea that African culture is disappearing and that western culture is swallowing it. With a history of colonisation and apartheid which did not allow for black South Africans to have autonomy and to develop their own identities, there is a fierce desire to take back what was once stolen and that desire is sometimes misguided. This is especially true when the desire is combined with the fear of something unfamiliar and different. The combination can be toxic. So toxic that it can lead to violence. When people have had no choice or decision-making abilities for so long, the fear of returning to that can have detrimental effects such as rejecting homosexuality which in turn rejects black lesbian women and denies them the basic rights and freedoms that were fought for. The irony is that what colonialism brought to Africa was an intolerance towards homosexuality rather than homosexuality itself through religion and the laws that religion had an influence on.

Coupled with the fear of losing the African identity, is the fear of the loss ownership, control and power. The South African man then feels that, it is his duty to correct what patriarchy and so-called African culture tell him is wrong. It is his duty to be a soldier and take back African culture as well as the possession he felt were taken from him by the west. One can even combine the two concepts of patriarchy and culture because in a patriarchal society, culture and religion support patriarchy¹²⁵ so that even the argument that homosexuality is un-African is patriarchal in itself. Same-sex relationships are not un-African, it is homophobia that is un-African.

¹²⁵ Fortier (1975) 7(6) *Family Planning Perspectives* 278

Chapter 4: *Ubuntu* – A response

4.1 Introduction

As mentioned above, there is a common belief that homosexuality is un-African. This chapter entails a discussion on how *ubuntu* possibly could serve as a response to the patriarchal and cultural views discussed above. This chapter also explores the philosophy of *ubuntu* as a counter-argument to the so-called African ideals discussed above.

The Nguni proverb “*umuntu ngumuntu ngabantu*” can be translated to mean, “*A person is a person through other persons*” or “*I am because you are, you are because I am*”. *Ubuntu* is viewed as an important philosophy that forms part of South Africa’s history and continues to play a role in law and society today.¹²⁶ The philosophy was included in the Interim Constitution wherein a call was made for *ubuntu* not victimisation.¹²⁷ The main argument in this dissertation is that homophobic rape is an atrocious crime that preys on the lesbian woman and goes against what it means to be African people living by the philosophy of *ubuntu*. The philosophy of *ubuntu* includes aspects such as compassion, respect, human dignity, humanistic orientation and collective unity.¹²⁸ The ill-treatment of lesbians in South African townships is a direct and appalling contradiction of these values.

Even though *ubuntu* can be traced back to 1920,¹²⁹ there has never been a more important time for its applicability than now. Dolamo describes *ubuntu* as an “integral part of African ethics that is seeped in issues of liberation, development, identity etc.”¹³⁰ It is important that Africans continue to realise the importance of the values of *ubuntu*. Dolamo reminds us how important these values are for the dignity of people in postcolonial South Africa.¹³¹ *Ubuntu* can, therefore, be described as African humanism.¹³²

In the legal sense, *ubuntu* has been said to function as “a meta-norm” to correct the injustices resulting from the application of abstract rules of the common law and the Bill of Rights”.¹³³ It has

¹²⁶ Cornell & Van Marle (2005) 5 at 196.

¹²⁷ Mokgoro (1998) 10 *PELJ* at 5.

¹²⁸ Theron & Swart South Africa and the new Africa: Chasing African Rainbows (2008) *African Renaissance* 26.

¹²⁹ Bennett (2011) 2 *PELJ* at 32

¹³⁰ Dolamo (2013) 1 *Scriptura* at 1.

¹³¹ *Ibid.*

¹³² Eliastam (2015) (36) 2 *Verbum et Ecclesia* at 2.

¹³³ Bennett (2011) 14 *PELJ* 49.

been equated to the English law doctrine of equity. It asks that the community treat one another with “respect, dignity, value and acceptance to each member as the community. Lesbianism does not in any way have negative impacts that warrant this use of force.

4.2. Criticisms of *Ubuntu* and responses thereto

In 2015, after anti-xenophobia marches took place across South Africa, President Zuma said that South Africans believe in *ubuntu* and are peaceful people who believe in human rights. In 2016, at the National Prayer day in Durban, Jacob Zuma asked South Africans to pray for *ubuntu*.¹³⁴ Later that year he was quoted saying that *ubuntu* was central to nation building and social cohesion in South Africa.¹³⁵ He also stressed how important *ubuntu* should be in the eyes of traditional leaders because they lead and live with the people.¹³⁶ The writer specifically mentions these words to not only show how relevant *ubuntu* is in society today but also to show that the very same people who have been recorded as homophobic and who believe that homosexuality is un-African are the very same people who preach *ubuntu*.

Some of the questions that many seek to answer are: what is *ubuntu*? Is *ubuntu* a philosophy? Is it an ethic? Is it a basis for morality? What is it? It is perhaps this confusion that has led many to the conclusion that it is just an old man’s way of thinking; merely a pre-colonial way of thinking that has no place in South Africa today. From the outset, it should be noted that I disagree with the above notion and believe that *ubuntu* has never been as important as it is today. I agree with Mokgoro on the view that *ubuntu* is impossible to define in one way.¹³⁷ Mokgoro is of the view that *ubuntu* is one of those things that you recognise the moment you see it.¹³⁸ Research conducted in Khayamandi showed that the value of *ubuntu* continues to be very important to young people today.¹³⁹ It should, therefore, be noted that this chapter does not seek to confine *ubuntu* to a singular definition but rather to use definitions that have been put forward by various academics as a

¹³⁴ Amanda Khoza “Pray for the spirit of *ubuntu*” <http://www.news24.com/SouthAfrica/News/pray-for-the-return-of-the-spirit-of-ubuntu-zuma-20160522> (accessed 20 June 2017).

¹³⁵ Bonolo Selebano “Leaders to promote *ubuntu*” <http://www.ann7.com/leaders-to-promote-ubuntu/> (accessed 20 June 2017).

¹³⁶ Staff reporter “President Zuma: South Africans respect human rights and *ubuntu*” <https://www.enca.com/media/video/president-zuma-south-africans-respect-human-rights-and-ubuntu?playlist=107> (accessed 20 June 2017).

¹³⁷ Mokgoro (1998) 1 *Potchefstroom Electric Law Journal* 2.

¹³⁸ *Ibid.*

¹³⁹ Cornell & Van Marle (2015) 36 (2) *Verbum et Ecclesia* 1.

response. Therefore, the definition of *ubuntu* adopted for the purposes of this dissertation could be Mawere's definition:

Ubuntu is a multi-faceted philosophical system that involves logic, metaphysics, epistemology and ethics; it is a philosophy of life that is concerned with the reinforcement of unity, oneness and solidarity among the Bantu people.¹⁴⁰

The arguments in chapter 3 above are based on the accusation that to be lesbian is not to be African. The aim of this dissertation is to counter this by way of *ubuntu* and by subscribing to the notion that to be African is to have *ubuntu*. From this it follows that the violence perpetrated against lesbian women is contrary to *ubuntu* in various ways. However, there are a few criticisms of *ubuntu* that have the potential to work against *ubuntu* as a response.

As mentioned above, *ubuntu* calls for personhood, humanness and morality, it also calls for group solidarity. Therefore, for the purpose of this dissertation, one of the more important elements of *ubuntu* is the call for inclusivity. Solidarity is necessary for a community to thrive and survive.¹⁴¹ Therefore, when others are excluded there are adverse results. The individual cannot exist without his/her community. In other words, how can *ubuntu* be used as a counter-argument against the idea that "Africans are not homosexual" when *ubuntu* calls for group solidarity? In this context, it could reason that the majority of people are against homosexuality and view it as un-African and therefore, the principle of majority rule should apply.

Van Marle and Cornell describe *ubuntu* as a form of critique. As a critical response, *ubuntu* "unsettles and opens"; it does not "unite and confine".¹⁴² This again, points to the fact that the interpretation of community that calls for conformity rather than individual uniqueness within a community is an incorrect one. If *ubuntu* were indeed used as a critique of the arguments discussed above, then it would, of course, be unsettling to those who believe in and live comfortable in those arguments. It would ask of people that they put aside what they grew up believing and what was ingrained in them as false and to accept a society that may not necessarily favour them, as it would be a society that calls for equality.

¹⁴⁰ Mawere (2012) 3 *Afro-Asian Journal of Social Sciences* 3.

¹⁴¹ Ntlama (2014) 18 *Law, democracy & development* 83.

¹⁴² Cornell & Van Marle (2015) 36 (2) *Verbum et Ecclesia* 4

Ubuntu also calls for community relations based on compassion towards one another.¹⁴³ Those who identify with the religious can also look to *ubuntu* for answers. *Ubuntu* also described as “a prescription for treating others as we would like to be treated”,¹⁴⁴ and reinforces reciprocity.¹⁴⁵ Similar to the principle of doing unto others that is found in the Christian bible, the survival of community depends on the survival of the individual.¹⁴⁶ Therefore, if the argument were to turn to a religious and not a cultural one, which often happens because the two are so closely related, then *ubuntu* could counter even the religious arguments.

4.3. Revolutionary *ubuntu*, *ubuntu* feminism and reconfiliation

Cornell has defined revolutionary *ubuntu* as “free human beings living together in ethical community”.¹⁴⁷ She has also defined it as a response to the transformative counter-hegemonic struggles breaking out in SA.¹⁴⁸ Revolutionary *ubuntu* is a term that was coined by the shack dwellers movement in South Africa in the context of anti-capitalism, transformation and the poor.¹⁴⁹ Revolutionary *ubuntu* demands that people live freely but simultaneously live together in a community. How does this apply to gender-based violence such as corrective rape that is so strongly based on a patriarchal society that goes back centuries? All the way back to the time when Africans were hunters and gatherers and as a result men and women were thrust into certain roles?¹⁵⁰ More specifically, how can a revolutionary interpretation of *ubuntu* respond to a patriarchal society and the violence that comes with it? My interpretation of revolutionary *ubuntu* entails two main demands: freedom and transformation. Freedom for women and sexual minorities, in that they can live freely in the communities without fear of persecution; and social transformation in that there is a need for transformation outside of the constitutional and legislative framework. In other words, revolutionary *ubuntu* must also be used as a tool to challenge all forms of inequality. One of the main battles of sexual minority rights in South Africa, is that theoretically they exist, but the reality is usually contrary. What follows is a society with beliefs that are of the legal order. As mentioned above, it is a pity that traditional leaders have

¹⁴³ Himonga (2013) 16 (5) *Potchefstroom Electronic Law Journal* 375.

¹⁴⁴ Elehi & Others (2010) 20(1) *International Criminal Justice Review* 75.

¹⁴⁵ Elehi & Others (2010) 20(1) *International Criminal Justice Review* 82.

¹⁴⁶ Elehi & Others (2010) 20(1) *International Criminal Justice Review* 73.

¹⁴⁷ Cornell (2014) 181

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*

¹⁵⁰ Cornell & Van Marle (2015) 36 (2) *Verbum et Ecclesia* 2.

decided not to develop *ubuntu* in communities so that it extends to sexual minorities and that it works to bridge this gap, to advance *ubuntu* so ensure that it covers and protects everyone equally.

One of the main arguments that could work against *ubuntu* as a response to any issues related to women usually found in discourse on *ubuntu* is the argument that *ubuntu* in itself is rooted in patriarchy and has a patriarchal history. How then can it be used as a counter-argument for patriarchy or a view on the culture that is in itself patriarchal? Chisale uses *ubuntu* in marriage as an example.¹⁵¹ She cites how in marriage, a woman is considered to have *ubuntu* when she places the interests of the community (promoting her submissiveness to men) over her rights as a woman.¹⁵² In other words, *ubuntu* makes room for the ownership and power discussed in chapter 3 above by labelling submission and conformity as *ubuntu*. The response to this is simple. Like culture, *ubuntu* is not static; it has the potential to develop. This is evident in the way in which it has continued to be developed in post-apartheid studies and jurisprudence. In the same way that culture is not static as discussed above, nor are pre-modern African philosophies. They also have the ability to adapt based on the current social context. Hinga writes that African women are working on reclaiming *ubuntu* as moral agents.¹⁵³ She further writes that for African women, it is an important task to be rid of dehumanising systems and to enhance *ubuntu*.¹⁵⁴ In other words, systems such as racism, economic exploitation, and cultural demonisation¹⁵⁵ and for the lesbian women, even homophobia must be destroyed in favour of the enhancement of *ubuntu*. *Ubuntu* feminism can also be used a response. Van Marle and Cornell offer *ubuntu* feminism as an ethical feminism that surpasses patriarchy. They argue that “to regard *ubuntu* as either conservative or fundamentally patriarchal misunderstands the transformative potential of *ubuntu*.”¹⁵⁶

Chapter three above also discusses the importance of how the ownership and power exercised over women in the name of culture, for example the man who inadvertently claimed that society has lost its way because women now have rights and that it goes against African culture for women to behave in a certain way. *Ubuntu* feminism requires mutual support so that people can become “unique and singular”¹⁵⁷ persons within a community. *Ubuntu* feminism also calls for autonomy within a community. Similarly to revolutionary *ubuntu*, *ubuntu* feminism, also similarly to

¹⁵¹ Chisale (2016) *Gender & Behaviour*.

¹⁵² Chisale (2016) *Gender & Behaviour* 7277

¹⁵³ Hinga (2002) 18 (1) *Journal of Feminist Studies in Religion* 85.

¹⁵⁴ Hinga (2002) 18 (1) *Journal of Feminist Studies in Religion* 84.

¹⁵⁵ *Ibid.*

¹⁵⁶ Cornell & Van Marle (2015) 36 (2) *Verbum et Ecclesia* 2.

¹⁵⁷ Cornell & Van Marle (2015) 36 (2) *Verbum et Ecclesia* 2

western feminism, calls for freedom and the value of individualisation¹⁵⁸ whilst still forming part of the community. Just because one human being acts outside of what is considered at the time to be the norm, it does not mean that one breaks ties with their community and their culture because one is still an individual within a collective. If one flourishes, the entire community flourishes.¹⁵⁹ So when lesbian women can live freely in a society, free from oppression and violence and are seen as human in the way that *ubuntu* demands, the result is a safer community where violence against lesbian women is not tolerated.

Manyonganise argues for a womanist interpretation of *ubuntu* to fill the gender gaps created by a patriarchal *ubuntu*. She argues that *ubuntu* is not the perfect answer to all questions it has been modelled as because it is gender insensitive.¹⁶⁰ Manyonganise makes his argument in particular reference to the context in Zimbabwe, but the same can be said for the South African context. The supposed holders of culture in society (i.e traditional leaders) are men who bend and misuse culture to suit a patriarchal agenda that they comfortably live in. Reconciliation offers the same comfort that Manyonganise's womanist *ubuntu* is, therefore, similar to Obinah's reconciliation. Reconciliation is to bring together. It also invokes a sense of belonging and family. It demands the equal dignity of all people. It is defined as the "return to a right and deserved relationship as son and daughter". Reconciliation and reconciliation are terms that are closely related. The difference lies in that reconciliation calls for the equal dignity of those who need to be reconciled.¹⁶¹

Reconciliation consists of three principles/virtues. The first calls for the necessity for the restoration of community or fellowship.¹⁶² With that in mind, the second virtue calls for the equality of all persons.¹⁶³ The third principle, and the most important for purposes of this dissertation, is that reconciliation is gender sensitive.¹⁶⁴ It is important that there be continued communication and participation in order to ensure that everyone in the family is protected. In other words, to ensure the continued well-being of everyone in the family.

Ramose argues that much of South Africa's post-apartheid jurisprudence is geared toward national unity and nation building and has had a focus on reconciliation. He uses South Africa's Truth and

¹⁵⁸ Cornell & Van Marle (2015) 36 (2) *Verbum et Ecclesia* 5

¹⁵⁹ Cornell & Van Marle (2015) 36 (2) *Verbum et Ecclesia* 6

¹⁶⁰ Manyonganise (2015) 36(2) *Verbum et Ecclesia* 6-7

¹⁶¹ Ramose (2012) 5 *Journal on African Philosophy* at 35.

¹⁶² Ramose (2012) 5 *Journal on African Philosophy* at 35.

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.*

Reconciliation Commission empowered by the National Unity and Reconciliation Act 34 of 1995 as a way to illustrate his point. Ramose argues that reconciliation through legislative reform as was the case in South Africa resulted in “social tension and polarisation”, instead of the intended reconciliation.¹⁶⁵ Ramose discusses the falsely assumed reconciliation created by the Truth and Reconciliation Commission. The same could be argued about the false assumption of reconciliation or protection of women and sexual minorities created by the Constitution. However, reconciliation adds the dimension of dignity and gender equality that would be necessary if communities and perspective would ever be sought to change as well as a changed society.

4.4 Conclusion

Ubuntu is a response not only to the misuse of culture as described in chapter 3 above. According to Kantianism, actions are wrong when they harm or degrade autonomy.¹⁶⁶ Autonomy has been taken from lesbian women in South Africa and there is no justification for this. *Ubuntu* demands justice, not only for those who have been mistreated in the past but also for those who are currently being mistreated. Lesbian women were mistreated in the past but continue to be mistreated. So if to be African is to have *ubuntu*, then where is the *ubuntu*?

¹⁶⁵ Ramose (2012) 5 *Journal on African Philosophy* at 22.

¹⁶⁶ Metz (2011) 11 *African Human Rights Journal* 540.

Chapter 5: Conclusion

If one looks at the argument that homosexuality is un-African and the reasons put forward for this belief, it becomes almost impossible to deny the patriarchal undertones that avail themselves, patriarchal gender roles and a duty that comes with those roles, a duty that is ordained by God himself.

Chapter 2 outlines real-life stories of the lesbian experience in South Africa. Chapter 2 forces one to ask a few questions on these realities in a country with equal rights for all. How seriously does the law take the punishment of the perpetrators of rape? In other words, should those that commit the crime of homophobic rape in the existing legal framework be afraid of the consequences of their actions or does the legal framework allow perpetrators to believe they can easily get away with committing such a crime? The way in which the police deal with victims and cases of homophobic rape as discussed above are clearly indicative of the latter. What happens in an instance a case makes it through to the courts? What does the legal framework deem fit punishment?

It is my contention that the homosexuality is un-African argument is merely a mask for the patriarchal underpinnings of homophobia towards lesbian women. In other words, the homosexuality is un-African argument is patriarchal in itself. Chapter 3 looks at the reasoning behind the argument that homosexuality is un-African, one can see the patriarchal elements that hold the argument together. For example, homosexuality is un-African because Africans believe in procreation and growth of the family; who will continue the family name if women are getting married to other women? It all boils down to a feeling of loss over the ownership and control of women. Msibi argues that the qualm does not lie with denying colonisation and anything that supposedly comes with it, but rather that the qualm is with “an identity that troubles the pretence of heteronormativity. Heteronormativity allows more space for a patriarchal society. Msibi agrees with this position and states, “the spread of homophobia is largely driven by a neo-conservatism that in effect works to create and foster patriarchy”¹⁶⁷.

Ubuntu, ubuntu feminism and reconfiguration can be used as responses to the violent and homophobic patriarchal response to the freedom and rights of lesbian women. Cornell argues that

¹⁶⁷ Msibi (2011) 58 *Indiana University Press* 70.

the criticism that *ubuntu* is patriarchal misses the activism that is inherent in *ubuntu* because *ubuntu* demands the experience of “building and repairing the moral fabric of an aspirational community inherent in the notion of the *ubuntu* as the African principle of transcendence”.¹⁶⁸ Cornell emphasises the importance of questioning colonial history. She used the example of forced removals as used by Judge Albie Sachs in *Port Elizabeth Municipality v Various Occupiers*. The same could be said of how South Africans need to remind themselves or to be reminded of the history of the ill-treatment of black women by the apartheid government and how women were used as weapons of war in South Africa’s colonial history and to aspire to a community where one is not persecuted on the basis of their gender or sexual orientation.

Custom and culture cannot be used as a tool of oppression. Custom and culture cannot be manipulated to suite the person in a position of power. Culture and custom cannot be used as a means to continue the suppression of women or of sexual minorities. Custom and culture should not be abused. This is what this dissertation tries to reveal. Custom and culture should be understood within the context of equality and justice. Custom and culture should be developed and used to uplift those who have been oppressed. Lesbian women have a history of oppression that demands for the protection necessary for upliftment. Lastly, *ubuntu* calls for a demand for justice. Not only for those who were mistreated in the past but also those who are being mistreated now. If *ubuntu* demands justice, where is the justice for the victims of homophobic rape?

¹⁶⁸ uBuntu, Pluralism and the responsibility of legal academics to the new South Africa, Inaugural lecture by Drucilla Cornell, 10 December 2008, page 7.

Bibliography

Books

- Oxford English Dictionary
- Gqola PD (2015) *Rape: A South African Nightmare*, Auckland Park, Jacana Media
- Judge M et al (eds) (2008) *To have and to hold: the making of same sex marriage in South Africa* Auckland Park, Jacana Media.
- Namwase S & Jjuuko A (eds) (2017) *Protecting the human rights of sexual minorities in contemporary Africa*, Pretoria, Pretoria University Law Press
- Cornell D (2014) *Law and Revolution in South Africa: uBuntu, Dignity, and the Struggle for Constitutional Transformation* New York Fordham University Press

Journal articles

- Albertyn C “The stubborn persistence of patriarchy? Gender equality and cultural diversity in South Africa” (2009) 2 *Constitutional Court Review* 165
- Bennett TW “Ubuntu: an African equity” (2011) 2 *Potchefstroom Electronic Law Journal* 30
- Bhana D “Gender violence in and around schools: Time to get to zero” (2013) 11(2) *African Safety Promotion Journal* 38
- Chabalala OR & Roelofse CJ “A phenomenological description of corrective rape and a new terminological perspective of the phenomenon” (2015) 28(3) *Southern African Journal of Criminology* 50
- Chisale SS “Love discipline, punishment or wife battering: a view from Ubuntu” (2016) *Gender & Behaviour* 7275

- Cornell D & Van Marle K “Exploring ubuntu: tentative reflections” (2005) 5 *African Human Rights Law Journal* 195
- Cornell D & Van Marle K “Ubuntu feminism: tentative reflections” (2015) 36 (2) *Verbum et Ecclesia* 1
- Dolamo R “Botho/Ubuntu: The Heart of African Ethics” (2013) 1 *Scriptura* at 1
- Elehi O et al “Restoring justice (ubuntu): An African perspective” (2010) 20(1) *International Criminal Justice Review* 73
- Eliastam “Exploring ubuntu discourse in South Africa: Loss, liminality and hope” (2015) (36) 2 *Verbum et Ecclesia* 1
- Fortier L “Women, Sex and Patriarchy” (1975) 7(6) *Family Planning Perspectives* 278
- Himonga C et al “Reflections on judicial views of Ubuntu” (2013) 16 (5) *Potchefstroom Electronic Law Journal* 370
- Hinga T “African feminist theologies. The global village, and the imperative of solidarity across borders: the case of the circle of concerned African women theologians” (2002) 18 (1) *Journal of Feminist Studies in Religion* 79
- Koraan R & Geduld A “Corrective rape” of lesbians in the era of transformative constitutionalism in South Africa (2015) 18(5) *Potchefstroom Electronic Law Journal* 1931
- Manyonganise M “Oppressive and liberative: Zimbabwean woman’s reflections on Ubuntu” (2015) 36(2) *Verbum et Ecclesia* 1

- Mawere M “Buried and forgotten but not dead: Reflection on ubuntu in environmental conservation in South-Eastern Zimbabwe” (2012) 3(3-2) *Afro-Asian Journal of Social Sciences* 1
- Metz T “Ubuntu as a moral theory and human rights in South Africa” (2011) 11 *African Human Rights Journal* 532
- McCormick TL “Queering discourses of coming out in South Africa” (2013) 42 *Stellenbosch Papers in Linguistics Plus* 138
- Mokgoro Y “Ubuntu and the law in South Africa” (1998) 1 *Potchefstroom Electric Law Journal* 1
- Msibi T “The lies we have been told: on (homo)sexuality in Africa” (2011) 58 *Indiana University Press* 55
- Mwambene L & Wheal M “Realisation or oversight of a constitutional mandate? Corrective rape of black lesbians in South Africa” (2015) 15 *African Human Rights Law Journal* at 58
- Naidoo & Karels “Hate crimes against black lesbian South Africans: Where race, sexual orientation and gender collide” (2012) 33 *Obiter* 236
- Ntlama N “Reflections on the rejection of the right to sexual orientation by the institution of traditional leadership: lessons from South Africa” (2014) 18 *Law, democracy & development* 80
- Ramose “Reconciliation and reconfiliation in South Africa” (2012) 5 *Journal on African Philosophy* 20
- Tamale S “Exploring the contours of African sexualities: religion, law and power” (2014) 14 *AHRLJ* 150

- Theron M & Swart G “ South Africa and the new Africa: Chasing African Rainbows” (2008) *African Renaissance* 26

Legislation

- Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007
- Prevention and Combatting of Hate Crimes and Hate Speech Bill
- The Constitution of the Republic of South Africa, 1996.

Case law

- *Afri-Forum and Another v Malema and Others* 2011 (6) SA 240 (EqC).
- *Masiya v Director of Public Prosecution & Others* CCT 54/06 2007 ZACC 9
- *Bhe and Others v Khayelitsha Magistrate and Others* (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (15 October 2004).

Thesis' and dissertations

- Unpublished: LP Mkasi ‘A threat to Zulu patriarchy and the continuation of community: A queer analysis of same sex relationships amongst Female Traditional Healers at Inanda and KwaNgcolosi, KwaZulu Natal, Unpublished Masters dissertation, University of KwaZulu Natal 2013
- Unpublished: Z Mtabeni “Exploring black sexualities and identities in Johannesburg”, unpublished Phd thesis, University of Witwatersrand 2011

Published reports by human rights organisations

- Human Rights Campaign Foundation and Human Rights First Report: The State of Human Rights for LGBT People in Africa, page 5
- Human Rights Campaign Foundation and Human Rights First Report: The State of Human Rights for LGBT People in Africa, page 14
- Tina Wesley, Classifying ‘corrective rape’ as a hate crime. Report on behalf of OSISA, page 75

Seminar papers & lectures

- Mokoena S. (1991) The era of the jackrollers: Contextualising the rise of youth gangs in Soweto. Paper presented at the Centre for the Study of violence and Reconciliation. Seminar no. 7, 30 October 1991. Accessed at <http://www.csvr.org.za/publications/latest-publications/1805-the-era-of-the-jackrollers-contextualising-the-rise-of-the-youth-gangs-in-soweto> on 18 June 2017
- uBuntu, Pluralism and the responsibility of legal academics to the new South Africa, Inaugural lecture by Drucilla Cornell

Internet

- Carter C, “the Brutality of corrective rape” 27 July 2013 <http://www.nytimes.com/interactive/2013/07/26/opinion/26corrective-rape.html?mcubz=1> (accessed 1 August 2017)
- Chapman MW, “Uganda President to Obama on Gays: ‘Respect African Societies and Their Values’ – What Gays “Do is Terrible””, <http://www.cnsnews.com/blog/michael-w-chapman/uganda-president-obama-gays-respect-african-societies-and-their-values-what> (accessed 12 August 2016).
- Fihlani P “South Africa’s lesbians fear ‘corrective rape’”, 30 June 2011 <http://www.bbc.co.uk/news/mobile/world-africa-13908662> (accessed 1 August 2017)

- Hawker, D “Maimane, Zuma and other ‘anti-gay’ statements in SA politics,” <http://www.enca.com/south-africa/maimane-zuma-and-other-anti-gay-statements-sa-politics> (accessed 12 August 2016).
- Jain R, “Parents use ‘corrective rape’ to ‘straighten gays”, 21 June 2015 <http://timesofindia.indiatimes.com/life-style/relationships/parenting/Parents-use-corrective-rape-to-straighten-gays/articleshow/47489949.cms> (accessed 12 August 2016).
- Janson M, “[Opinion] Enough is enough: Gambians put faith in democracy” <http://ewn.co.za/2016/12/05/enough-is-enough-gambians-put-faith-in-democracy> (accessed 12 August 2016)
- Justice A, “In Zimbabwe ‘we are not gays’: President Robert Mugabe rejects homosexual rights in UN speech” <http://www.ibtimes.co.uk/zimbabwe-we-are-not-gays-president-robert-mugabe-rejects-homosexual-rights-un-speech-1521685> (accessed 12 August 2016)
- Khoza A “Pray for the spirit of *ubuntu*” <http://www.news24.com/SouthAfrica/News/pray-for-the-return-of-the-spirit-of-ubuntu-zuma-20160522> (accessed 20 June 2017)
- News24 “Miniskirts paralyse Johannesburg” <http://www.news24.com/SouthAfrica/News/Miniskirts-paralyse-Johannesburg-20120217> (accessed 10 June 2017).
- Strudwick P “Crisis in South Africa: The shocking practice of ‘corrective rape’ –aimed at ‘curing lesbians”” <http://www.independent.co.uk/news/world/africa/crisis-in-south-africa-the-shocking-practice-of-corrective-rape-aimed-at-curing-lesbians-9033224.html> (accessed 30 June 2017)

- Tharoor I, “Gambia’s president threatens to slit the throats of gay men” <https://www.washingtonpost.com/news/worldviews/wp/2015/05/12/gambias-president-threatens-to-slit-the-throats-of-gay-men/> (accessed 12 August 2016).
- Selebano B “Leaders to promote *ubuntu*” <http://www.ann7.com/leaders-to-promote-ubuntu/> (accessed 20 June 2017)
- Staff Writer, Hate Crimes Victims Remembered <http://www.mambaonline.com/2009/07/08/hate-crime-victims-remembered/>, accessed 30 June 2016
- Staff Reporter “Prejudice peddled as tradition” <https://mg.co.za/article/2011-10-10-prejudice-peddled-as-tradition> (accessed 10 June 2017).
- Staff Reporter “3 arrested in taxi rape, as more women come forward” <http://citypress.news24.com/News/3-arrested-in-taxi-rape-cases-as-more-women-come-forward-20170324> (accessed 10 June 2017)
- Staff Reporter “Outrage over attack on miniskirt-wearing woman” <https://mg.co.za/article/2008-02-19-outrage-over-attack-on-miniskirtwearing-woman> (accessed 10 June 2017)
- Staff reporter “President Zuma: South Africans respect human rights and *ubuntu*” <https://www.enca.com/media/video/president-zuma-south-africans-respect-human-rights-and-ubuntu?playlist=107> (accessed 20 June 2017).
- Toisi N “Being gay and Zulu” <https://mg.co.za/article/2006-10-16-being-gay-and-zulu> (accessed 10 June 2017)
- Vincent L “Miniskirt wearing women: A magnet for violence?” <https://mg.co.za/article/2008-05-22-miniskirtwearing-women-a-magnet-for-violence> (accessed 10 June 2017).