

CORRECTIVE RAPE OF BLACK AFRICAN LESBIANS  
IN SOUTH AFRICA: THE REALISATION OR  
OVERSIGHT OF A CONSTITUTIONAL MANDATE?

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## **KEYWORDS**

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Gender

Hate crimes

International law

Lesbians

Sexual orientation

South African Constitution



## DECLARATION

I declare that *Corrective rape of black African lesbians in South Africa: The realisation or oversight of a constitutional mandate?* is my own work, that it has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

**Full name** .....

**Date** .....

**Signed by student** .....



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## **DEDICATION**

This mini-thesis is dedicated to the memory of my late father, John Harry Wheal, my mother, Babs Wheal and my partner, Sonja Bothma who offered their constant love, support, motivation and words of encouragement. They believed in me and were my source of inspiration and for that I thank them.



## ACRONYMS AND ABBREVIATIONS

<b>ACHPR</b>	African Charter on Human and Peoples' Rights
<b>African Commission</b>	African Commission of Human and Peoples' Rights
<b>Amendment Act</b>	Criminal Law Amendment Act 105 of 1997
<b>CEDAW Committee</b>	The UN Committee on the Elimination of Discrimination Against Women
<b>CEDAW</b>	Convention on the Elimination of All Forms of Discrimination Against Women
<b>CERD</b>	Convention for the Elimination of All Forms of Racial Discrimination
<b>CPA</b>	Criminal Procedure Act
<b>CRC</b>	Convention on the Rights of the Child
<b>ECOSOC</b>	United Nations Economic and Social Council
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ICESCR</b>	International Covenant on Economic, Social and Cultural Rights
<b>IGLHRC</b>	International Gay and Lesbian Human Rights Commission
<b>ILGA</b>	International Lesbian and Gay Association
<b>JWG</b>	Joint Working Group
<b>LGBTI</b>	Lesbian, Gay, Bi-sexual, Transsexual & Inter-sexed persons
<b>NGOs</b>	Non-Governmental Organisations
<b>PEPUDA</b>	Promotion of Equality and Unfair Discrimination Act

<b>Sexual Offences Act</b>	Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007
<b>The Constitution</b>	The Constitution of South Africa, 1996
<b>UDHR</b>	Universal Declaration of Human Rights
<b>UNESCO</b>	UN Educational, Scientific and Cultural Organisation



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## Chapter 1

### INTRODUCTION AND OVERVIEW OF THE STUDY

#### 1.1. Background and introduction

Violence and discrimination affecting the LGBTI community is on the increase and has become a global phenomenon.<sup>1</sup> Such violence and discrimination manifests itself in various forms such as the denial of employment, education and other basic rights, hate speech, sexual assault, torture and corrective rape. This mini-thesis will, however, only focus on corrective rape which affects black African lesbians in South Africa despite the constitutional protection afforded to the community concerned in terms of the Constitution.<sup>2</sup>

Corrective rape in South Africa has become very prevalent over the last couple of years. For example, it was reported by ActionAid that between 1998–2009 there were 31 recorded murders of lesbians and only one conviction for these crimes.<sup>3</sup> Support groups however believe that the actual number is much higher as crimes on the basis of sexual orientation are not recognised in the South African criminal justice system.<sup>4</sup> In addition, a study conducted in 2008 showed that 86 percent of black African lesbians in the Western Cape province live in fear of sexual assault in a country that has an estimated rape statistic of 500 000 rapes a

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<sup>1</sup> Nelson, C.H ‘Sexualized Violence Against Lesbians’ (2005) *Peace Review: A Journal of Social Justice* 17 at 163.

<sup>2</sup> Martin, A, Kelly, A, Turquet, L & Ross, S ‘Hate Crimes: The rise of ‘Corrective Rape’ in South Africa’ (2009) *ActionAid* at 6.

Section 9(3) of the Constitution of the Republic of South Africa, 1996 (hereafter referred to as the Constitution) states that:

‘The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth’.

<sup>3</sup> Belge, K ‘Corrective Rape and Violence Against Lesbians in South Africa’ (2011) Available at: <http://www.google.co.za/url?sa=t&source=web&cd=8&ved=0CGAQFjAH&url=http%3A%2F%2Flesbianlife.about.com> [Accessed on 23 March 2011]. Hereafter cited as: Belge, K ‘Corrective Rape and Violence Against Lesbians in South Africa’ (2011).

Definition of a lesbian for purposes of this thesis is a female attracted primarily to other females as defined in the Report of Human Rights Watch (HRW) and the International Gay and Lesbian Human Rights Commission (IGLHRC) ‘More than a name: State-Sponsored Homophobia and its consequences in Southern Africa’ (2001) at i. Hereafter cited as HRW & IGLHRC Report (2001).

<sup>4</sup> Wesley, T ‘Classifying ‘Corrective’ Rape as a Hate Crime: A Call for Justice’ Available at: <http://www.osisa.org/buwa/south-africa/classifying-%E2%80%98corrective%E2%80%99-rape-hate-crime-call-justice> [Accessed on 1 November 2012].

Sexual orientation is understood to refer to each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender as defined in The Yogyakarta Principles: ‘Principles on the application of international human rights law in relation to sexual orientation and gender identity’ Introduction to the Yogyakarta Principles (March 2007) at 6.

year.<sup>5</sup> Kekeletso Khena, for example, fled from her home in Soweto after being raped three times before turning 19. She admits that she was a butch<sup>6</sup> child and recalls being raped for the first time at the age of 13. Her mother responded by saying: '[T]his is what happens to girls like you'. She was thereafter raped by an ex-boyfriend as she refused him sex during their relationship. At 18, she was raped again by a family friend who told her that he was going to teach her what it means to be a black woman. Since then, she has left the township and hardly ever goes back.<sup>7</sup>

Again in April 2008, Banyana Banyana soccer star, Eudy Simelane, 'was gang raped, beaten, stabbed 25 times in the face, chest and legs, her body left in a roadside creek'.<sup>8</sup> She was a lesbian as well as a gay rights advocate and became a victim of corrective rape.<sup>9</sup> In 2006, 19-year old Zoliswa Nkonyana was murdered in Cape Town; her trial was postponed numerous times.<sup>10</sup> Activists were up in arms about the continuous delays and demanded a speedier trial.<sup>11</sup>

In addition, in 2003 was documented that '33 black lesbians [had reported incidents] of rape, assault, sexual assault and verbal abuse to organisations fighting hate crimes in Johannesburg townships'.<sup>12</sup> In Cape Town more than ten lesbians are raped or gang raped a week.<sup>13</sup> Furthermore, the Institute for Democracy in South Africa has observed that lesbians face violence twice as often as heterosexual women and are at an increased risk of being raped because of their sexual orientation.<sup>14</sup>

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<sup>5</sup> Staff Reporter 'Brutal murder of lesbian activist condemned' (2011) Available at: <http://mg.co.za/article/2011-05-03-brutal-murder-of-lesbian-activist-condemned> [Accessed on 20 May 2011].

<sup>6</sup> Butch refers to a person who identifies themselves as masculine, whether it be physically, mentally or emotionally. It is sometimes used as a derogatory term for lesbians, but it can also be claimed as an affirmative identity label as explained in Green, E.R & Peterson, E.N 'Terminology sheet' (2003-2004) Available at: [http://lgbtro.ucsd.edu/LGBTQIA\\_Terminology.asp](http://lgbtro.ucsd.edu/LGBTQIA_Terminology.asp) [Accessed on 12 June 2012].

<sup>7</sup> Mufweba, Y 'Corrective rape makes you an African woman' (2011) Available at: <http://www.iol.co.za/news/south-africa/corrective-rape-makes-you-an-african-woman-1.116543> [Accessed on 20 May 2011]. Hereafter cited as: Mufweba, Y 'Corrective rape makes you an African woman' (2011).

<sup>8</sup> Belge, K 'Corrective Rape and Violence Against Lesbians in South Africa' (2011).

<sup>9</sup> Belge, K 'Corrective Rape and Violence Against Lesbians in South Africa' (2011).

<sup>10</sup> Underhill, G 'People are dying as we speak' (2011) Available at: <http://mg.co.za/article/2011-05-06-people-are-dying-as-we-speak> [Accessed on 20 May 2011]. Hereafter cited as: Underhill, G 'People are dying as we speak' (2011).

<sup>11</sup> Underhill, G 'People are dying as we speak' (2011).

<sup>12</sup> Mufweba, Y 'Corrective rape makes you an African woman' (2011).

<sup>13</sup> Luleki Sizwe 'Supporting Victims of 'CORRECTIVE RAPE' in South Africa's townships' Available at: [http://www.change.org/organizations/luleki\\_sizwe](http://www.change.org/organizations/luleki_sizwe) [Accessed on 22 March 2011].

<sup>14</sup> O'Flaherty, M & Fisher, J 'Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles' (2008) *Human Rights Law Review* 8(2) at 210.

Despite these reports, South Africa's National Prosecuting Authority refuses to declare corrective rape as a hate crime. They said:

Whilst we are mindful of the fact that hate crimes – especially of a sexual nature – are rife, it is not something that the South African government has prioritised as a specific project.<sup>15</sup>

The Director of the Forum for the Empowerment of Women stated that the criminal justice system is not equipped to deal with hate crimes, especially those associated with sexual orientation.<sup>16</sup> She made this statement after being presented with the findings of a study on hate crimes against lesbian women which illustrated that out of 22 lesbian women who had been raped because of their sexual orientation, 19 did not report.<sup>17</sup> It was also pointed out that hate crimes do not fall into the categories of sexual assault or domestic violence although the majority of attacks against lesbians are of a sexual nature.<sup>18</sup>

## 1.2. Problem statement

In South Africa corrective rape is committed by African men as a form of social control to cure women of their homosexuality.<sup>19</sup> The problem with corrective rape is that the victims of this crime are mainly black African lesbians, particularly those in townships who are seen to challenge patriarchal gender norms.<sup>20</sup> Therefore discrimination on the basis of gender, race, sex and sexual orientation is called into play. Section 9 of the Constitution provides that the state may not unfairly discriminate directly or indirectly against anyone on one or more specified ground which include gender, race, sex and as well as sexual orientation.<sup>21</sup> Further, no person may unfairly discriminate against anyone on one or more of the same specified grounds.<sup>22</sup> Thus, the black African lesbians affected by corrective rape are protected by the equality provisions of the Constitution upon which discrimination is prohibited.

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Heterosexual for purposes of this thesis is defined as a person attracted primarily to people of the opposite sex as defined in the HRW & IGLHRC Report (2001) at i.

<sup>15</sup> Martin, A, Kelly, A, Turquet, L & Ross, S (2009) at 8.

<sup>16</sup> '365 Days of Action to End Violence Against Women and Children Conference Report' (3-5 May 2006) at 20. Hereafter cited as: '365 Days of Action' (2006).

<sup>17</sup> '365 Days of Action' (2006) at 20.

<sup>18</sup> '365 Days of Action' (2006) at 20.

<sup>19</sup> Quintal, A 'Stop saying homosexual activities are unAfrican' *Cape Times* 27 October 2006 at 5. See also Nel, J.A & Judge, M 'Exploring Homophobic Victimisation in Gauteng, South Africa: Issues, Impacts and responses' (2008) *Acta Criminologica*, 21(3) at 26.

<sup>20</sup> Nel, J.A & Judge, M (2008) at 26.

Quintal, A (2006) at 5.

<sup>21</sup> The Constitution, section 9(3).

<sup>22</sup> The Constitution, section 9(4).

In addition, the impact of discrimination on lesbians is thus rendered more serious and their vulnerability increased by the fact that the victims are black women. In the context of black African lesbians, it is believed that these women are a threat to the manhood as well as cultural beliefs of the perpetrators.<sup>23</sup> Perpetrators, therefore, can justify their actions on the constitutional right to culture.<sup>24</sup> This position obviously reopens the debate on the conflicts between African culture and tradition with human rights within the context of corrective rape which ultimately continues to militate against the adequate protection of women's rights.

Against this background, this research will focus on how South Africa is balancing its constitutional mandate in relation to the black African lesbians affected by corrective rape. It will be argued that for victims of corrective rape to be adequately protected it is necessary to define corrective as a hate crime and not merely the crime of rape. In addition, it will also be argued that because there is an inherent conflict between the right to culture of the perpetrators and the constitutionally protected rights of the victims of corrective rape, courts, in enforcing the rights of these victims should also address this conflict. The importance in recognising this conflict lies in the fact that one needs to take into account that both the perpetrators and the victims are protected by the Bill of Rights and that one cannot disregard the importance of either of their rights.

### **1.3. Significance of the study**

This study is important because it will provide literature on the prevalence of corrective rape which in most cases is under-reported. The information will also be significant in defining corrective rape as a hate crime and not merely the crime of rape. This will in turn inform policy and law makers of the impact of the available law to combat corrective rape. In addition academics will also use this information in studies related to corrective rape against black African lesbians. The information will also be essential to prosecutors when dealing with the offence of corrective rape, not merely as rape.

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<sup>23</sup> Belge, K 'Corrective Rape and Violence Against Lesbians in South Africa' (2011).  
<sup>24</sup> See sections 30 & 31 of the Constitution.

#### **1.4. Objectives of the study**

The main objective is to determine whether South Africa is effectively balancing its constitutional mandate in relation to the black African women affected by corrective rape. To achieve this objective, the thesis will:

- determine the reasons and justifications given to the practice of corrective rape;
- provide a legal framework on the resolution of the conflict between the right to culture and women's rights;
- contextualise corrective rape within the constitutional and international dialogue; and
- analyse court jurisprudence on victims of corrective rape.

#### **1.5. Methodology**

In determining whether South Africa is balancing its constitutional mandate in relation to women affected by corrective rape, reference will be made to the Constitution of South Africa, the Sexual Offences Act as well as other relevant legislation. The study will make reference to international best practices and theoretical materials, since hate crime is not unique to South Africa. The study will also look at cases from Magistrates' Courts. In addition, reference will be made to literature such as reports and publications on the issue. The study will also be making use of desktop research which includes internet research.

##### **1.5.1. Literature review**

In 2001, research was done by the Joint Working Group (JWG) conducted by Out Lesbian, Gay, Bisexual and Transgender.<sup>25</sup> The aim of the research was to look at the prevalence of hate crimes, its consequences as well as contributing factors. They found that hate crimes against minority groups are a global phenomenon with negative impacts on its victims. They further found that the fear of victimisation from black respondents were higher than from white respondents where sexual abuse/rape, physical abuse and verbal abuse were the most feared. Victimisation on the basis of sexual orientation was found to be the most widespread. They also established that hate crimes occurred more frequently between black people as opposed to their white counterparts. They made recommendations urging gay and lesbian

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<sup>25</sup> Wells, H & Polders, L 'Hate Crimes against gay and lesbian people in Gauteng: Prevalence, consequences and contributing factors' (2004) Report by the Joint Working Group and OUT LGBT Well- Being.

organisations to work with the Department of Education and the South African Police Services to decrease and/or to prevent hate crimes against LGBT people.

Again, in 2009 ActionAid published a report<sup>26</sup> in which they addressed the global issue of human rights violations against people due to their sexual orientation. They compared and found that 44 percent of white lesbians live in fear of sexual assault whilst 86 percent of their black counterparts felt the same. They looked at a few case studies on corrective rape and its victims. They made recommendations to the South African government, the international community as well as the UK government. They urged the South African government to bring the perpetrators of violence against women to justice and to uphold the Constitution's prohibition of discrimination on the basis of sexual orientation. In addition, government was urged to recognise hate crimes as a specific crime category.

Both these research initiatives looked at the prevalence of sexual violence against lesbian, gay, bisexual, transgender and inter-sexed (LGBTI) people and found that black lesbians suffer a harsher fate than their white counterparts.

However, none of them looked at how South Africa is balancing its constitutional mandate in relation to women affected by corrective rape.

## **1.6. Overview of chapters**

Chapter 1 introduces the topic and outlines the background of the study by identifying the problem of the research. In addition, it highlights the methodology that is going to be used, and lays down the objectives of the study. Chapter 2 defines corrective rape with the aim of establishing the reasons and justifications for the prevalence and occurrences. This is done by looking at individual case studies and contextualising these incidents within the constitutional and international dialogue to show that an inherent conflict exists between constitutionally recognised rights. Chapter 3 follows with the legal framework on how to resolve the conflict between customary law and women's human rights by looking at the international as well as national legislative framework. Chapter 4 discusses how South Africa has responded to victims of corrective rape by looking at the legislative provisions available to prosecute the perpetrators as well as court's jurisprudence. Chapter 5 evaluates South Africa's response to victims of corrective rape as discussed in chapter 4. Lastly, chapter 6 concludes the mini-

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<sup>26</sup> Martin, A, Kelly, A, Turquet, L & Ross, S 'Hate Crimes: The rise of 'Corrective Rape' in South Africa' (2009) *ActionAid*.



thesis by stating that South Africa has failed to fulfil its constitutional mandate. In addition, this chapter makes recommendations on how South Africa can address the problem more effectively.



## Chapter 2:

### CORRECTIVE RAPE IN SOUTH AFRICA

Neither the existence of national laws, nor the prevalence of custom can ever justify the abuse, attacks, torture and indeed killings that gay, lesbian, bisexual, and transgender persons are subjected to because of who they are, or are perceived to be. Because of the stigma attached to issues surrounding sexual orientation and gender identity, violence against LGBT persons is frequently unreported, undocumented and goes ultimately unpunished. Rarely does it provoke public debate and outrage. This shameful silence is the ultimate rejection of the fundamental principle of universality of rights.<sup>1</sup>

#### 2.1. Introduction

This chapter discusses corrective rape in South Africa with the aim of contextualising it within the constitutional and international dialogue. It will first define what corrective rape is. This will be followed by a discussion surrounding its prevalence by delving into case studies of specific victims who has been affected by corrective rape. It will further look at the reasons and justifications given by the perpetrators for the practice of corrective rape in South Africa.

#### 2.2. Definition of corrective rape

Before we define corrective rape, it will be useful that the terms corrective and rape are defined separately. According to the Oxford Dictionary, ‘corrective’ means something which is ‘designed to put right something undesirable’<sup>2</sup> whereas the Cambridge Dictionary, defines it as something which ‘intends to improve a situation’ or something which ‘is intended to cure a medical condition’.<sup>3</sup> Rape on the other hand was first defined in terms of the common law until its constitutional validity was challenged in the *Masiya* case<sup>4</sup> where it was found to be unconstitutional.<sup>5</sup> The matter was subsequently referred to the Constitutional Court where the decision of the High Court to develop the common law definition of rape to include ‘non-consensual sexual penetration of the male penis into the vagina or anus of another person’

<sup>1</sup> Arbour, L. “Ensuring LGBTI Rights and Protection as Human Rights HV & Gender-Based Violence Prevention for LGBTI People’ Advocating a Rights-Based Prevention Approach! (2011) at 4.

<sup>2</sup> *Compact Oxford English Dictionary for Students* 3<sup>rd</sup> ed (2006) at 219.

<sup>3</sup> *Cambridge Advanced Learner’s Dictionary* 1<sup>st</sup> ed (2003) at 273.

<sup>4</sup> *S v Masiya* (Minister of Justice and Constitutional Development Intervening) 2006 (2) SACR 357.

<sup>5</sup> *Masiya* case (2006) at para 60.

was confirmed.<sup>6</sup> The current definition of rape can now be found in a statute which states that a person will be guilty of rape if he unlawfully and intentionally commits an act of sexual penetration without consent.<sup>7</sup>

For corrective rape however, a vast number of definitions have been given by different authors. Mieses<sup>8</sup> has referred to corrective rape as some sort of sexual punishment by local men towards black lesbians for being gay and violating traditional gender presentation. Nklane<sup>9</sup> on the other hand has described it as a practice whereby men rape lesbians in order to ‘turn them straight’ or to ‘cure’ them of their sexual orientation. Similarly, the Institute for Security Studies<sup>10</sup> referred to corrective rape as an act of non-consensual sex which is directed towards lesbians by persons of the opposite sex with the aim of punishing them and/or curing or correcting their sexual orientation. ActionAid<sup>11</sup> has characterised it as a practice where black African men rape black African lesbians in order to cure them of their lesbianism.<sup>12</sup>

From the above definitions, one can infer that the men who rape these women want to ‘put right’ something which they find ‘undesirable’. As also pointed out by Mehrin, the perpetrators want to teach the victims a lesson by showing them how to be real women, thus forcing them to conform to gender stereotypes stemming from patriarchal male domination

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<sup>6</sup> *Masiya v Director of Public Prosecutions Pretoria (The State) and Another* 2007 (5) SA 30 (CC) at para 93.

<sup>7</sup> Section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. Hereafter referred to as the Sexual Offences Act.

According to Chapter 1 of the Sexual Offences Act, ‘sexual penetration includes any act which causes penetration to any extent whatsoever by –

(a) The genital organs of one person into or beyond the genital organs, anus, or mouth of another person

(b) Any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or

(c) The genital organs of an animal, not or beyond the mouth of another person’.

<sup>8</sup> Mieses, A ‘Gender Inequality and Corrective Rape of Women Who Have Sex With Women’ (2009) Available at: <http://www.thebody.com/content/art56244.html> [Accessed on 22 August 2012].

<sup>9</sup> Nklane, M ‘Protest against corrective rape’ (2011) Available at: <http://www.sowetanlive.co.za/news/2011/01/06/protest-against-corrective-rape> [Accessed 22 March 2011].

<sup>10</sup> Kinama, E ‘Classifying ‘Corrective Rape as a Hate Crime in South Africa’ (2011) Available at: <http://www.polity.org.za/article/classifying-corrective-rape-as-a-hate-crime-in-south-africa-2011-05-25> [Accessed on 7 July 2012].

<sup>11</sup> Martin, A, Kelly, A, Turquet, L & Ross, S ‘Hate Crimes: The rise of ‘Corrective Rape’ in South Africa’ (2009) ActionAid at 3.

<sup>12</sup> Corrective rape has also been referred to as ‘curative rape’ by Bernadette Muthien, director of Engender. Further, the 07-07-07 Campaign has used the term ‘hate rape’ as cited in Bucher, NR ‘Law Failing Lesbians on Corrective Rape’ (2009) Available at: <http://ipsnews.net/news.asp?idnews=48279> [Accessed on 14 March 2011]. Hereafter cited as: Bucher, NR ‘Law Failing Lesbians on Corrective Rape’ (2009).

which is embedded in culture.<sup>13</sup> As a result, corrective rape has become an epidemic of violence against women threatening their lives and safety. It is however believed that the term ‘corrective rape’ contributes to the views of the perpetrators.<sup>14</sup> It is thus maintained by Henderson that the term should be used with great caution as it names an act of violence using the term of reference of the perpetrators which leads to the belief that rape can in fact be used to correct or cure lesbians of their sexuality.<sup>15</sup>

### 2.3. Prevalence of corrective rape

Corrective rape amongst black African lesbians in South Africa occurs mainly in townships.<sup>16</sup> It has been argued that this is precipitated by culturally sanctioned homophobia and hate speech which often results in physical, mental and emotional harm inflicted on them.<sup>17</sup> In addition, Henderson contends that corrective rape is directly linked to patriarchal systems of control and power as a means of maintaining power over women and their bodies which is why lesbians are particularly vulnerable as they are deemed to violate the rules of gender which states that women’s bodies belong to men.<sup>18</sup> Corrective rape thus emanates from the belief that homosexuality is un-African and therefore in direct conflict with cultural norms and practices, hence the prevalence in black communities.<sup>19</sup> One could therefore agree that the trend of targeting lesbians from townships is mainly influenced by cultural factors.

In addition to being disadvantaged by cultural traditions, beliefs and practices, black African lesbians also lack sufficient support systems.<sup>20</sup> This can be seen from the 2009 report submitted by ActionAid relating to the difference in the number of white lesbians living in fear of sexual assault as opposed to their black counterparts.<sup>21</sup> There have been numerous

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<sup>13</sup> Mehrin, S.L ‘Daughters of South Africa’ Independent World Report, Issue 6 Spring 2011 Available at: <http://www.independentworldreport.com/2011/04/daughters-of-south-africa/> [Accessed on 13 May 2012]. Hereafter cited as: Mehrin, S.L ‘Daughters of South Africa’ (2011).

<sup>14</sup> Robertson, D ‘South African Lesbians Targeted for Rape and Violence’ (2011) Available at: <http://www.voanews.com/english/news/africa/South-African-Lesbians-Targeted-for-Rape-and-Violence-114495619.html> [Accessed on 30 March 2011]. Hereafter cited as: Robertson, D ‘South African Lesbians Targeted for Rape and Violence’ (2011).

<sup>15</sup> Robertson, D ‘South African Lesbians Targeted for Rape and Violence’ (2011)

<sup>16</sup> Mkhize N, Bennet J, Reddy V and Moletsane R ‘The country we want to live in – Hate crimes and homophobia in the lives of black lesbian South Africans’ (2010) *Human Sciences Research Council (HSRC) Press* at 11.

<sup>17</sup> Mkhize N, Bennet J, Reddy V and Moletsane R (2010) at 11.

<sup>18</sup> Robertson, D ‘South African Lesbians Targeted for Rape and Violence’ (2011).

<sup>19</sup> Quintal, A ‘Stop saying homosexual activities are unAfrican’ *Cape Times* 27 October 2006 at 5. See also Meersman, B ‘Homosexuality is African’ (2012) Available at: <http://www.thoughtleader.co.za/brentmeersman/2012/03/26/homosexuality-is-african/> [Accessed on 17 April 2012].

<sup>20</sup> Martin, A, Kelly, A, Turquet, L & Ross, S (2009) at 8.

<sup>21</sup> Martin, A, Kelly, A, Turquet, L & Ross, S (2009) at 8.

corrective rapes over the past years due to the fact that lesbianism is considered unnatural and victims subsequently suffer systematic rapes with the goal of convincing them that their true orientation is in fact heterosexual.<sup>22</sup> Only some of the well-known cases will be discussed for purposes of this thesis.

### 2.3.1. Cases of corrective rape

Reliable statistics of corrective rape incidents are hard to come by which leads to difficulty in determining the true extent of the problem and in turn to hold the perpetrators accountable.<sup>23</sup> This can be attributed to the fact that most incidents go unreported and those that are, are not properly identified as homophobic attacks arising from the sexual orientation of the victims.<sup>24</sup> Verification of this can be found in a 2004 study which observed that 41 percent of incidents of rape and sexual abuse targeting LGBTI persons in Gauteng were in fact reported to the police while 73 percent of the respondents contended that they did not report such victimisation as they feared they would not be taken seriously, 43 percent feared abuse by the police and 33 percent did not want the police to know their sexual orientation.<sup>25</sup> Similarly, a study by the Forum for the Empowerment of Women found that out of 22 lesbians that were raped, 19 failed to report it.<sup>26</sup>

Of the cases that will be discussed below, it should be noted that only two have successfully gone to trial.<sup>27</sup> This is despite the fact that there have been a number of cases across South

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<sup>22</sup> Martin, R 'Eudy Simelane: Corrective rape, Corrective death' (2009) Available at: <http://globalcomment.com/2009/eudy-simelane-corrective-rape-corrective-death/> [Accessed on 29 March 2011].

Thokozane Qwabe Ezkheni, stoned and murdered (2007), Ladysmith, Kwa-Zulu Natal, Khanyisa Hani, stabbed and murdered (2008), Daisy Dube, shot and murdered (2008), Sibongile Mphelo, raped, shot and her vagina cut out. (2008), Girly 'S' Gelane Nkosi, stabbed and murdered (2009) and Nontsikelelo (2011), Nyanga, Western Cape. Went to Wynberg Magistrate's Court, case number SHE 79/12.

There have been many more victims: The above mentioned are the tip of the iceberg.

<sup>23</sup> Pillay, N 'No place for homophobia here' (2011) Available at: <http://www.iglhrc.org/cgi-bin/iowa/article/publications/reportsandpublications/1416.html> [Accessed on 30 July 2012]. Hereafter cited as: Pillay, N 'No place for homophobia here' (2011).

<sup>24</sup> Pillay, N 'No place for homophobia here' (2011).

<sup>25</sup> Davis, R 'SA's gay hate crimes: An epidemic of violence less recognized' (2012) Available at: <http://dailymaverick.co.za/article/2012-06-27-sas-gay-hate-crimes-an-epidemic-of-violence-less-recognised> [Accessed on 30 July 2012].

<sup>26</sup> IGLHRC Press Release 'South Africa: IGLHRC Condemns the Killing of 19-year-old Zoliswa Nkonyana in Cape Town and Other Violence Against Lesbians' (2006) Available at: <http://www.iglhrc.org/cgi-bin/iowa/article/pressroom/pressrelease/249.html> [Accessed on 19 August 2012]. Hereafter cited as: IGLHRC Press Release 'South Africa: IGLHRC Condemns the Killing of 19-year-old Zoliswa Nkonyana in Cape Town and Other Violence Against Lesbians' (2006).

<sup>27</sup> These cases will be discussed in Chapter 4.

Africa involving rape, assault and murder of lesbians.<sup>28</sup> Some of these cases even involve minors.

The youngest victim of corrective rape was only 13 years old when the incident occurred.<sup>29</sup> She was raped in Atteridgeville, Pretoria after she had declared her sexuality.<sup>30</sup> In response to the incident, a spokesperson from the Department of Justice and Constitutional Development made a statement in which he stated that '[g]overnment condemns this senseless and cowardly act of criminality' and further promised assistance to the girl and her family.<sup>31</sup> In April of 2007, Madoe Mafubedu (16) was raped and repeatedly stabbed to death.<sup>32</sup> No arrests have been made for the sexual assault and murder of this young woman who lived openly as a lesbian in Soweto, Johannesburg.<sup>33</sup>

Apart from the minor victims, a young lesbian couple, Sizakele Sigases (34) and Salome Massooa (23) were raped and murdered in Soweto, Johannesburg on 7 July 2007.<sup>34</sup> Sizakele was an outreach worker at Positive Women's Network and well known gay and women's rights activist.<sup>35</sup> She lived openly as a lesbian in her community and was subsequently shot six times, her underwear and shoelaces were used to tie her hands and feet and her partner, Salome, was shot in the head.<sup>36</sup> Prior to her death, Sizakele had complained to friends that she felt threatened in her community due to the fact that she was a lesbian and a week later, these women were found murdered next to a dumpsite.<sup>37</sup> According to a witness they had suffered homophobic abuse by a crowd of people prior to leaving on that fatal night at a local

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<sup>28</sup> Mtetwa, P 'Trial into Murder of Lesbian Soccer Player set for 11-13 Feb at Delmas Court' Available at: <http://www.jwg.org.za/content/view/112/82/> [Accessed on 30 July 2012]. Hereafter cited as:

<sup>29</sup> Mtetwa, P 'Trial into Murder of Lesbian Soccer Player set for 11-13 Feb at Delmas Court'.

<sup>30</sup> GayNZ 'Girl, 13, victim of 'corrective rape' in South Africa' (2011) Available at: [http://www.gaynz.com/articles/publish/3/article\\_10336.php](http://www.gaynz.com/articles/publish/3/article_10336.php) [Accessed on 15 August 2011]. Hereafter cited as: Gay NZ 'Girl, 13, victim of 'corrective rape' in South Africa' (2011).

<sup>31</sup> GayNZ 'Girl, 13, victim of 'corrective rape' in South Africa' (2011).

<sup>32</sup> Staff Reporter 'Thirteen-year-old a victim of corrective rape' (2011) Available at: <http://mg.co.za/article/2011-05-07-thirteen-year-old-a-victim-of-corrective-rape> [Accessed on 22 July 2012].

<sup>33</sup> Muholi, Z 'Mapping Our Histories: A Visual History of Black Lesbians in Post-Apartheid South Africa' Available at: [http://zanelemuholi.com/ZM%20moh\\_final\\_230609.pdf](http://zanelemuholi.com/ZM%20moh_final_230609.pdf) [Accessed on 19 July 2011].

<sup>34</sup> Pithouse, R 'Only Protected on Paper' (2011) Available at: <http://sacsis.org.za/site/article/644.1> [Accessed on 20 July 2011].

<sup>35</sup> Human Rights Watch Report 'We'll Show You You're a Woman - Violence and Discrimination against Black Lesbians and Transgender Men in South Africa' (2011) at 76.

<sup>36</sup> Martin, A, Kelly, A, Turquet, L & Ross, S (2009) at 9.

<sup>37</sup> Human Rights Watch Report (2011) at 76.

Cameron, J 'The Killing of Sistahs' (2007) Available at: <http://www.atlanticphilanthropies.org/news/killing-sistahs> [Accessed on 20 August 2012].

bar.<sup>38</sup> Initially, three men were detained but subsequently released and the case has since been closed.<sup>39</sup> After the double murder of these women in 2007, the 07-07-07 Campaign<sup>40</sup> seeks to end the targeting of lesbians for violent sexual crimes.<sup>41</sup> The rape and subsequent murders of these women has formed part of a continuing and growing pandemic of targeting black African lesbians in order to forcibly conform them to what is believed to be normal, being heterosexual.

Another victim, Nosizwe Nomsa Bizana, was gang-raped by five men because of her sexuality after which she succumbed to crypto meningitis and passed away on 16 December 2007.<sup>42</sup> Her friend, Luleka Makiwane, who was not ashamed of her sexuality, was raped by her cousin who was HIV positive.<sup>43</sup> Community activist, Ndumie Funda, fiancée of the late Nosizwe, started a shelter in 2007 for corrective rape victims in the township of Gugulethu near Cape Town.<sup>44</sup> The initiative was named Luleki Sizwe and provides support for lesbian women in the township which aims to rescue, feed and nurse to health survivors of corrective rape.<sup>45</sup>

Further, Zukiswa Gaca was first raped at the age of 15 after which she ran away from the rural village situated in the Eastern Cape, a place she called home as it was an easier option than to deal with a community which did not accept her as a lesbian.<sup>46</sup> She subsequently moved to the Khayelitsha Township where she was confronted by more hate as 'being a lesbian in Khayelitsha is like you are being treated like an animal, like some kind of an alien or something'.<sup>47</sup> When she was 20, she met a man in a bar who at first seemed fine with her sexual orientation.<sup>48</sup> When they left the bar, he however attacked and raped her and said that

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<sup>38</sup> Martin, A, Kelly, A, Turquet, L & Ross, S (2009) at 9.

<sup>39</sup> Martin, A, Kelly, A, Turquet, L & Ross, S (2009) at 9.

<sup>40</sup> Named after the murder to mark the date on which the women were murdered.

<sup>41</sup> Martin, A, Kelly, A, Turquet, L & Ross, S (2009) at 9.

<sup>42</sup> Bucher, NR 'Law Failing Lesbians on Corrective Rape' (2009). See also Mehrin, S.L 'Daughters of South Africa' (2011).

<sup>43</sup> Mehrin, S.L 'Daughters of South Africa' (2011).

<sup>44</sup> Bucher, NR 'Law Failing Lesbians on Corrective Rape' (2009).

<sup>45</sup> Haiku, H 'South Africa: Corrective rape is a hate crime' (2010) Available at: <http://globalvoicesonline.org/2010/12/24/south-africa-corrective-rape-is-a-hate-crime/> [Accessed on 7 April 2011]. Hereafter cited as: Haiku, H 'South Africa: Corrective rape is a hate crime' (2010).

<sup>46</sup> Mabuse, N 'Horror of South Africa's 'corrective rape'' (2011) Available at: <http://edition.cnn.com/2011/10/27/world/wus-sa-rapes/index.html> [Accessed on 3 September 2012]. Hereafter cited as: Mabuse, N 'Horror of South Africa's 'corrective rape'' (2011).

<sup>47</sup> Mabuse, N 'Horror of South Africa's corrective rape' (2011).

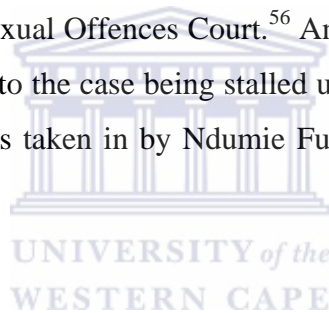
<sup>48</sup> Hazelton, L 'Raped for being gay: Scourge of South African sex attacks which men claim will 'cure' women of being lesbian' (2011) Available at: <http://www.dailymail.co.uk/news/article-2055289/Corrective-rape-South-Africa-women-attcked-cure-lesbians.html> [Accessed on 22 August

he in fact hated lesbians and that he was going to show her that she was not a man, that he was the real man who had all the power over her.<sup>49</sup> Due to fear, she did not report the first assault which occurred when she was 15, but the attack which occurred in December 2009 was reported to the police.<sup>50</sup> She accompanied the officer to identify her attacker upon which he was questioned but subsequently released and that was where the investigation ended.<sup>51</sup>

The violence continued as Milicent Gaika (30) from the Western Cape, was walking home with friends after a night out.<sup>52</sup> When they reached her house, they were approached by a man, Andile Ngcoza, whom Milicent was acquainted with, and therefore she told her friends they could walk on.<sup>53</sup> She was then pushed into a shack after which she was beaten and raped for five hours.<sup>54</sup> She testified to police and averred that throughout the assault, her attacker repeated the same thing over and over:

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 am going to kill you.<sup>55</sup>

Her case went to the Wynberg Sexual Offences Court.<sup>56</sup> Andile was released on R60 bail and fled while he was out.<sup>57</sup> This led to the case being stalled until his re-arrest which to date has not yet happened.<sup>58</sup> Millicent was taken in by Ndumie Funda who helped her recover from



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2012]. Hereafter cited as: Hazelton, L 'Raped for being gay: Scourge of South African sex attacks which men claim will 'cure' women of being lesbian' (2011).

<sup>49</sup> Hazelton, L 'Raped for being gay: Scourge of South African sex attacks which men claim will 'cure' women of being lesbian' (2011).

<sup>50</sup> Hazelton, L 'Raped for being gay: Scourge of South African sex attacks which men claim will 'cure' women of being lesbian' (2011).

<sup>51</sup> Alfred, T 'The growing trend of "corrective rape" in South Africa' (2011) Available at: <http://impunitywatch.com/the-growing-trend-of-%E2%80%9Ccorrective-rape%E2%80%9D-in-south-africa/> [Accessed on 30 July 2012].

<sup>52</sup> Jones, M 'Five Hours of Trying to Rape a Lesbian Straight' (2010) Available at: <http://news.change.org/stories/five-hours-of-trying-to-rape-a-lesbian-straight> [Accessed on 22 August 2011]. Hereafter referred to as: Jones, M 'Five Hours of Trying to Rape a Lesbian Straight' (2010).

<sup>53</sup> Jones, M 'Five Hours of Trying to Rape a Lesbian Straight' (2010).

<sup>54</sup> Middleton, L 'Corrective Rape': Fighting a South African Scourge' (2011) Available at: <http://www.nsvrc.org/news/3746> [Accessed on 15 November 2011]. Hereafter cited as: Middleton, L 'Corrective Rape': Fighting a South African Scourge' (2011).

<sup>55</sup> Middleton, L 'Corrective Rape': Fighting a South African Scourge' (2011).

<sup>56</sup> Jones, M 'Five Hours of Trying to Rape a Lesbian Straight' (2010).

<sup>57</sup> Arnott, J 'Tabulated Report on the incidents of corrective rape in South Africa' (2012) compiled by the *Triangle Project*, an organization which deals with issues faced the LGBTI community. Information received via email from the director of the organization on 20 July 2012 – [director@triangle.org.za](mailto:director@triangle.org.za). Case SHF 132/10, case number 54/94/2010. Hereafter cited as Arnott, J 'Tabulated Report on the incidents of corrective rape in South Africa' (2012).

<sup>58</sup> Arnott, J 'Tabulated Report on the incidents of corrective rape in South Africa' (2012). See also Haiku, H 'South Africa: Corrective rape is a hate crime' (2010).



the rape as well as advocating for her case.<sup>59</sup> Since her attack, Milicent has become an icon in the battle against corrective rape in South Africa.

Shortly after, Noxolo Nogwaza (24), an open lesbian, was found in an alley on 24 April 2011.<sup>60</sup> Her head was deformed, eyes out of its sockets, her brain split and her teeth were scattered around her face.<sup>61</sup> An empty beer bottle and used condoms were shoved up her genitals and parts of her body were stabbed with glass and the brick used to smash her head was found next to her body.<sup>62</sup> Her surname, Nogwaza, ironically means ‘one who stabs others’ but she is the one who became yet another unfortunate victim of corrective rape when a group of men in the Kwa-Thema Township attacked her.<sup>63</sup>

According to a researcher from the LGBTI program at Human Rights Watch, Noxolo’s death can be seen as one which forms part of a long series of sadistic crimes against lesbians in South Africa and that the vicious nature of the assault should serve as a reminder that these attacks are in fact not only premeditated and planned, but that they are committed with impunity.<sup>64</sup> The case was investigated by the Tsakane Police Station.<sup>65</sup> There have however been no arrests made in the matter and in crimes such as these against the LGBTI community; it is literally a matter of life and death for state officials to prosecute the perpetrators and bring them to justice.<sup>66</sup>

In addition, Eudy Simelane (31), a well-known Banyana-Banyana soccer player and an out lesbian was gang-raped and murdered on 28 April, 2008 in Kwa-Thema, a township near Johannesburg.<sup>67</sup> She was stabbed more than 20 times, her body found mutilated in an open

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<sup>59</sup> Haiku, H ‘South Africa: Corrective rape is a hate crime’ (2010).

<sup>60</sup> Human Rights Watch Report (2011) at 77.

<sup>61</sup> Ekurhuleni Pride Organizing Committee (EPOC) & the Coalition of African Lesbians (CAL) ‘Call to Action Against the Brutal Rape and Murder of South African Lesbian Noxolo Nogwaza’ (2011) Available at: <http://www.iglhrc.org/cgi-bin/iowa/article/takeaction/partners/1376.html> [Accessed on 22 August 2012]. Hereafter cited as: EPOC & CAL ‘Call to Action Against the Brutal Rape and Murder of South African Lesbian Noxolo Nogwaza’ (2011).

<sup>62</sup> EPOC & CAL ‘Call to Action Against the Brutal Rape and Murder of South African Lesbian Noxolo Nogwaza’ (2011).

<sup>63</sup> Dlamini, E ‘Lesbian community living in fear after rape’ (2011) Available at: [http://www.thenewage.co.za/17687-1009-53-Lesbian\\_community\\_living\\_in\\_fear\\_after\\_rape](http://www.thenewage.co.za/17687-1009-53-Lesbian_community_living_in_fear_after_rape) [Accessed 16 September 2011].

<sup>64</sup> Nath, D ‘South Africa: No arrests in lesbian murder case’ (2011) Available at: <http://www.hrw.org/en/news/2011/05/02/south-africa-no-arrests-lesbian-murder-case/> [Accessed on 20 May 2011]. Hereafter cited as: Nath, D ‘South Africa: No arrests in lesbian murder case’ (2011).

<sup>65</sup> EPOC & CAL ‘Call to Action Against the Brutal Rape and Murder of South African Lesbian Noxolo Nogwaza’ (2011). Case number 635/04/2011.

<sup>66</sup> Nath, D ‘South Africa: No arrests in lesbian murder case’ (2011).

<sup>67</sup> Human Rights Watch Report (2011) at 76.

field.<sup>68</sup> Four suspects were brought to trial at the Delmas High Court in 2009 of which two were convicted in the same year and received sentences exceeding 30 years whilst the other two were acquitted.<sup>69</sup> This could have been a ground breaking case in terms of deterring further hate crimes directed at lesbians as the perpetrators were convicted and thus should have been viewed as a great success. The problem was however that the attempts to establish the relevance of her sexual orientation to her killers' motives were unsuccessful.<sup>70</sup> The judge stated that her sexual orientation had no significance to the case.<sup>71</sup> A detailed discussion of the trial will follow in the evaluation chapter.<sup>72</sup>

The last victim that will be discussed is Zoliswa Nkonyana (19) who was brutally murdered in Khayelitsha, Cape Town on 4 February 2006 when she was stabbed, kicked and beaten to death. She lived her life openly as a lesbian which was the ultimate reason she lost her life when she died merely meters from her home.<sup>73</sup> Zoliswa was at a tavern with a friend when an argument broke out centred on the lesbians' use of the ladies toilet while pretending to be 'tom boys'.<sup>74</sup> They left the tavern and when they separated, a group of nine youths caught up with Zoliswa.<sup>75</sup> The murder of Zoliswa was a blatant way to communicate to lesbians that they are less human and that their lives are expendable.<sup>76</sup> The young men who attacked her were explicit about the fact that they wanted to kill her because she was a lesbian.<sup>77</sup> This case is a clear example of the intolerance, intimidation and dangers that lesbians are facing in

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<sup>68</sup> ILGHRC Press Release 'South-Africa: Statement by Paula Ettelbrinck on the killing of the Former Banyana Banyana Soccer Player Eudy Simelane' (2008) Available at: <http://www.iglhc.org/cgi-bin/iowa/article/pressroom/pressrelease/215.html> [Accessed on 20 August 2012]. See also Human Rights Watch Report (2011) at 76.

<sup>69</sup> Human Rights Watch Report (2011) at 77.

<sup>70</sup> Human Rights Watch Report (2011) at 77.

<sup>71</sup> Martin, A, Kelly, A, Turquet, L & Ross, S (2009) at 10.

<sup>72</sup> Chapter 4.

<sup>73</sup> Joint Press Statement (by Social Justice Coalition, Treatment Action Campaign, Free Gender, Triangle Project and Sonke Gender Justice): 'Justice For All! Zoliswa Nkonyana Murder Trial Set To Conclude After Five Years' (2011) Available at:

<http://www.tac.org.za/userfiles/Zoliswa%20Nkonyana%20Joint%20Statement.pdf> [Accessed on 15 November 2011]. Hereafter cited as: Joint Press Statement 'Justice For All! Zoliswa Nkonyana Murder Trial Set To Conclude After Five Years' (2011).

<sup>74</sup> De Waal, M 'We'll make you a 'real' woman – even if it kills you' (2011) Available at:

<http://dailymaverick.co.za/article/2011-12-09-well-make-you-a-real-woman-even-if-it-kills-you>

[Accessed on 19 July 2012]. Hereafter cited as: De Waal, M 'We'll make you a 'real' woman – even if it kills you' (2011).

<sup>75</sup> De Waal, M 'We'll make you a 'real' woman – even if it kills you' (2011).

<sup>76</sup> Triangle Project and Free Gender Press Release 'Evidence for Sentencing in the Zoliswa Nkonyana Murder Trial' (2012) Available at:

<http://www.facebook.com/notes/triangle-project/triangle-project-and-free-gender-testify-in-zoliswa-nkonyana-murder-trial/10150641853203594> [Accessed on 19 July 2012].

<sup>77</sup> Mkhize N, Bennet J, Reddy V and Moletsane R (2010) at 9.

informal settlements, thus making them more vulnerable and in need of protection.<sup>78</sup> The case of Zoliswa was one of the longest-running in the country's history as it was postponed 50 times.<sup>79</sup> A detailed discussion of the trial will follow in the evaluation chapter.<sup>80</sup>

#### 2.4. Reasons and justifications

From the above discussion of the cases, one can deduce that the perpetrators commit the act of corrective rape in the belief that they can cure the victims of their sexual orientation. In addition, homosexuality is deemed to be inconsistent with African values, procreation and the belief in the continuity of family and clan.<sup>81</sup> This is due to the fact that in the African culture, women have the role to be a wife, a mother and subordinate to their husbands and lesbians are seen as not fulfilling their roles.<sup>82</sup> Consequently, these women are believed to compromise population growth and also perceived to disrupt the gender status quo in society.<sup>83</sup> What also comes from the above discussion is that the men who rape these women often boast about their criminal acts and assert their intent to rape as they are not treated as 'guys' with due respect and this may boost their social status to that of heroes in their communities which fuels a climate in which more sexual assault may occur.<sup>84</sup> Therefore, black African lesbians suffer discrimination and violence as they are seen have betrayed their culture and should be taught a lesson.

In addition, a survey conducted in 2003 by the South African Social Attitudes Survey asked respondents about 'sexual relations between two adults of the same sex' and an overwhelming 84 percent answered that it was 'always or almost always wrong' and only seven percent felt that it was 'not wrong at all'.<sup>85</sup> This may be attributed to the fact that

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<sup>78</sup> Joint Press Statement 'Justice For All! Zoliswa Nknyonyana Murder Trial Set To Conclude After Five Years' (2011).

<sup>79</sup> Thamm, M 'Not just another murder' (2006) Available at: <http://mg.co.za/article/2006-02-26-not-just-another-murder> [Accessed on 19 July 2012].

<sup>80</sup> Chapter 4.

<sup>81</sup> The Observer 'Bahati's anti-gay bill returns to the table' (2011) Available at: [http://www.observer.ug/index.php?option=com\\_content&view=article&id=12628:bahatis-anti-gay-bill-returns-to-the-table&catid=34:news&Itemid=59](http://www.observer.ug/index.php?option=com_content&view=article&id=12628:bahatis-anti-gay-bill-returns-to-the-table&catid=34:news&Itemid=59) [Accessed on 29 May 2012]. Hereafter cited as: The Observer 'Bahati's anti-gay bill returns to the table' (2011).

<sup>82</sup> Austin's Atheism Blog 'Corrective Rape for African Lesbians' (2003) Available at: <http://atheism.about.com/b/2003/11/10/corrective-rape-for-african-lesbians.htm> [Accessed on 22 March 2011].

<sup>83</sup> The Observer 'Bahati's anti-gay bill returns to the table' (2011). See also Judge, M 'Beyond the law, homophobia remains pervasive' *Cape Times*, Monday 17 May 2010 at 8.

<sup>84</sup> Ottosson, D 'State-sponsored Homophobia: A World survey of laws prohibiting same sex activity between consenting adults' (2010) *ILGA Report* at 29.

<sup>85</sup> Thoreson, R.R. 'Somewhere over the Rainbow Nation: Gay, Lesbian and Bisexual Activism in South Africa' (2008) *Journal of Southern African Studies* 34(3) at 682.

cultural norms and traditions are sometimes used to police women's sexuality and to limit their roles to marriage and motherhood for example and thus, through such dominant discourses of cultural and sexual identity, men and women are coerced to behave in culturally acceptable ways.<sup>86</sup> A prime example can be found in the 2006 rape trial of Jacob Zuma,<sup>87</sup> where the complainant was vilified and accused of betraying her culture as she undermined the dignity of an important black man.<sup>88</sup> Further, Jacob Zuma has publically stated that:

When I was growing up, an unqingili (a derogatory term for a gay person) would not have stood in front of me. I would knock him out.<sup>89</sup>

In addition, controversy was again caused after a speech he made stating that same-sex marriages were a disgrace to both the nation and to God.<sup>90</sup> He however apologised within days for the comment he made regarding same-sex marriage and stated that:

My remarks were made in the context of the traditional way of raising children... I said the communal upbringing of children in the past was able to assist parents to notice children with a different social orientation.<sup>91</sup>

It is therefore contradictory when the announcement was made as to the identity of the newly appointed Chief Justice of the Constitutional Court, Mogoeng Mogoeng, a man who believes that homosexuality can be prayed away.<sup>92</sup>

Based on the beliefs of such a prominent public figure, many who believe that homosexuality is wrong feel that their views are correct and supported as a Gugulethu resident rightly stated that the reason lesbians are raped is due to the fact that it is accepted by the community as well as by 'our' culture.<sup>93</sup> This seems to be illustrative of the contradictory nature of gay rights in South Africa as it is the fifth country in the world to have legalised same-sex marriages and to tolerate homosexuality but yet incidents of corrective rape are on the

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<sup>86</sup> Bhana, D, Morell, R, Hearn, J & Moletsane, R 'Power and Identity: An Introduction to Sexualities in Southern Africa' (2007) *Sexualities* 10 at 135.

<sup>87</sup> *S v Zuma* 2006 (2) SACR 191 (W).

<sup>88</sup> Ratele, K. 'Ruling Masculinity and Sexuality' (2006) *Feminist Africa* (Special issue on subaltern sexualities) at 6.

<sup>89</sup> Judge, M (2010) at 8.

<sup>90</sup> Conway-Smith, E 'South Africa's traditional leaders want gay rights constitution clause changed' (2012) Available at: <http://www.globalpost.com/dispatch/news/regions/africa/south-africa/120506/traditional-leaders-oppose-gay-rights-constitution-clause> [Accessed on 3 October 2012].

<sup>91</sup> BBC News 'Zuma apologises for gay comments' (2011) Available at: <http://news.bbc.co.uk/2/hi/5389378.stm> [Accessed on 4 October 2012].

<sup>92</sup> Maughan, K 'Mr Gay World: less than ambivalent, more than a pretty face' (2012) Available at: <http://dailymaverick.co.za/article/2012-04-10-mr-gay-world-less-than-ambivalent-more-than-a-pretty-face> [Accessed on 4 October 2012].

<sup>93</sup> Middleton, L 'Corrective Rape: Fighting a South African Scourge' (2011).

increase which proves that some still struggle to accept it. It should thus be of great concern that lesbians are facing the violence, discrimination and victimisation in a country which supposedly welcomes diversity.

Traditional and cultural views of dominant public figures can also be found in other African states such as Zimbabwe, Malawi and Kenya. For example, in 1995, Robert Mugabe, the Zimbabwean President, shut down a book exhibition organised by the homosexual community in Zimbabwe, held at the Harare International Book Fair.<sup>94</sup> He stated that:

[Homosexuality] degrades human dignity. It's unnatural, and there is no question ever of allowing these people to behave worse than dogs and pigs... If dogs and pigs do not do it, why must human beings? We have our own culture, and we must rededicate ourselves to our traditional values that make us human beings... what we are being persuaded to accept is a sub-animal behaviour and we will never allow it here.<sup>95</sup>

He further said that he found homosexuality to be extremely outrageous and repugnant to the human mind as it is immoral and repulsive for the reason that it offends the rules of nature and religious beliefs.<sup>96</sup> He again expressed his views at the Global Coalition for Africa meeting held in the Netherlands in 1995 where he said that 'our tradition and culture in Africa does not allow [homosexuality]'.<sup>97</sup>

In addition, Mugabe believes that the LGBTI population is the root cause of Zimbabwe's problems and he therefore views homosexuality as un-African and immoral.<sup>98</sup> The justifications of Mugabe illustrate that homosexuality is not part of African culture and that it has been 'imported' into Zimbabwe. Due to these advocated beliefs by authority figures, many black Zimbabweans maintain that homosexual behaviour is un-African and a foreign disease which was introduced by white settlers.<sup>99</sup> Further, the late Mr Gezi, close ally of Mr Mugabe, pronounced homosexuality to be completely alien to Zimbabwean culture and stated

<sup>94</sup> Divani, A (2011) 'Is Homosexuality "Un-African"?' (2011). Available at: <http://thinkafricapress.com/gender/homosexuality-un-african-colonialism> [accessed on 29 May 2012]. Hereafter referred to as: Divani, A (2011) 'Is Homosexuality "Un-African"?' (2011).

<sup>95</sup> Divani, A (2011) 'Is Homosexuality "Un-African"?' (2011).

<sup>96</sup> Sanders, A.J.G.M 'Homosexuality and the Law: A Gay Revolution in South Africa?' (1997) *Journal of African Law* 4(1) at 101.

<sup>97</sup> Sanders, A.J.G.M (1997) at 101. Own emphasis added.

<sup>98</sup> Monroe, I 'Rev. Irene Monroe on South Africa's 'corrective rape' of lesbians' (2012) Available at: <http://pamshouseblend.firedoglake.com/2012/06/14/rev-irene-monroe-on-south-africa%E2%80%99s-corrective-rape-of-lesbians/> [Accessed 3 October 2012].

<sup>99</sup> Epprecht, M. 'The 'Unsayings' of Indigenous Homosexualities in Zimbabwe: Mapping a Blindspot in an African Masculinity' (1998) *Journal of Southern African Studies* 24, Issue 4 (Special Issue on Masculinities in Southern African) at 632.

that no one has the right to practice homosexuality in the country, and those who object, have the option of leaving.<sup>100</sup>

Similarly, the former Malawian president, late Dr Bingu wa Mutharika referred to homosexuals as 'worse than dogs' which is similar to the views expressed by Mugabe.<sup>101</sup> To prove how the beliefs of the former president affected the country's views on homosexuality, a study was conducted in 2011 by the Centre for the Development of People and the Centre for Human Rights and Rehabilitation which found that 99.5 percent of the survey respondents expressed knowledge of sexual minorities in the country but most had very strong and negative views and attitudes towards such minorities.<sup>102</sup> Two men each received a 14 year prison sentence after celebrating their engagement in 2010 for which they were charged with unnatural acts and gross indecency.<sup>103</sup> The country faced international condemnation in response to the conviction and sentencing forcing the former president to pardon the couple, which he did based only on humanitarian grounds.<sup>104</sup> He continued to insist that they had in fact 'committed a crime against our culture, against our religion, and against our laws'.<sup>105</sup> This statement therefore proves that homosexuality is not tolerated by African culture.

Similarly, violence and discrimination against LGBTI persons continue in Kenya as the former Kenyan president, Daniel Arap Moi has publically stated that:

Homosexuality is against African norms and traditions, even in religion it is considered a great sin... Kenya has no room for homosexuals and lesbians.<sup>106</sup>

In 2011, the Kenyan Human Rights Commission interviewed LGBTI Kenyans and reported that 89 percent of the interviewees who 'came out' to their families were disowned when their sexual orientation was discovered.<sup>107</sup> Some were forced to undergo therapy to 'cure'

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<sup>100</sup> Divani, A (2011) 'Is Homosexuality "Un-African"?' (2011).

<sup>101</sup> Dada, K 'Malawi President's State of the Nation and Homosexuality' (2012) Available at: <http://habanahaba.wordpress.com/2012/05/21/malawi-presidents-state-of-the-nation-and-homosexuality/> [Accessed on 5 October 2012]. Hereafter cited as: Dada, K 'Malawi President's State of the Nation and Homosexuality' (2012).

<sup>102</sup> Dada, K 'Malawi President's State of the Nation and Homosexuality' (2012).

<sup>103</sup> News24 'Malawi president vows to repeal gay ban' (2012) Available at: <http://m.news24.com/news24/Africa/News/Malawis-president-vows-to-repeal-gay-ban-20120518> [Accessed on 5 October 2012]. Hereafter cited as: News24 'Malawi president vows to repeal gay ban' (2012).

<sup>104</sup> News24 'Malawi president vows to repeal gay ban' (2012).

<sup>105</sup> News24 'Malawi president vows to repeal gay ban' (2012).

<sup>106</sup> News24 'Being Gay in Kenya' (2006) Available at: <http://www.news24.com/Africa/Features/Being-gay-in-Kenya-20060222> [Accessed 6 October 2012].

<sup>107</sup> The Kenya Human Rights Commission conducted a series of interviews with 474 LGBT Kenyans aged eighteen to sixty-five to document their experiences of homophobia within the country. Kenyan Human Rights Commission 'The Outlawed Amongst Us: A Study of the LGBTI Community's Search for Equality and Non-Discrimination in Kenya' (2011) at 19 as cited in Finerty, C.E 'Being Gay in Kenya:

them; others lost their jobs or were expelled from school.<sup>108</sup> They were thus subjected to physical violence along with stigmatisation by their families and society as a result of their sexual orientation.<sup>109</sup> A religious elder publically stated that: ‘I would remove my dagger and kill if I met any [homosexual or lesbian]’.<sup>110</sup> It therefore follows that along with the views of the aforementioned countries, Kenya is yet another example of a country which views homosexuality as un-African.

It therefore follows as no surprise that when a documentary on corrective rape was made in 2009, the men who were interviewed had very strong opinions about what a women’s role in society is and what they should be and act like.<sup>111</sup> One of them stated that:

If there is someone out there who is trying to rape those lesbians, me, I can appreciate. It is just to let them know, they must be straight. Once she gets raped by a guy, I think she will want to know a way which is nice.<sup>112</sup>

He added that the idea of homosexuality irritated and hurt him.<sup>113</sup>

It is clear from the above discussion that the perpetrators of corrective rape feel that their actions are justified in the name of preserving their culture. This is attributable to the fact that we live in a misogynist society that uses tradition, culture, religion and various other reasons to justify prejudice.<sup>114</sup> The form of violence which women are likely to suffer may stem from various factors, including sexual orientation, as the manifestation of violence against women are often shaped by social and cultural norms.<sup>115</sup> The strong prejudices held by the men in cultural communities are thus expressed through sexual violence.

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The Implications of Kenya’s New Constitution for its Anti-Sodomy Laws’ (2012) *Cornell International Law Journal* 45 at 435.

<sup>108</sup> Finerty, C.E (2012) at 435.

<sup>109</sup> Finerty, C.E (2012) at 434.

<sup>110</sup> Finerty, C.E (2012) at 435.

<sup>111</sup> Mehrin, S.L ‘Daughters of South Africa’ (2011).

<sup>112</sup> Mehrin, S.L ‘Daughters of South Africa’ (2011).

<sup>113</sup> Mehrin, S.L ‘Daughters of South Africa’ (2011).

<sup>114</sup> Mkhize, N, Bennet, J, Reddy, V & Moletsane, R (2010) at 5.

<sup>115</sup> ‘Advancement of Women: Advancement of Women In-depth Study on all forms of Violence Against Women’ Background documentation for the 61<sup>st</sup> session of the General Assembly. (Item 60(a) on advancement of women) Secretary General’s study on violence against women. doc. A/61/122/Add.1 at 47, para 147.

## 2.5. Contextualisation of the incidents of corrective rape within the constitutional and international dialogue

From the above discussion, several conclusions with constitutional implications can be drawn from corrective rape. It is clear that this practice targets black African lesbians which inevitably bring the right to equality into play. Section 9 of the Constitution provides that:

- (2) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (3) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, region, conscience, belief, culture, language and birth
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

From the foregoing provisions race, sex, gender as well as sexual orientation are listed grounds upon which discrimination is prohibited. Furthermore, legislative and other measures may be taken to protect persons who have been targeted by unfair discrimination.

The victims of corrective rape are thus equal before the law and are protected on the basis of express grounds upon which discrimination is prohibited. According to Albertyn, patterns of inclusion as well as exclusion in which the behaviour of a particular group are stigmatised have resulted in increased vulnerability to physical violence.<sup>116</sup> Therefore victims of corrective rape should be afforded equal protection as they are women, they are black and they are homosexual which ultimately increases their vulnerability. It is thus logical to assume that further differential treatment will contribute to the perpetuation or promotion of their unfair social characterisation and consequently, will have a more severe impact on them

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<sup>116</sup> Albertyn, C 'Substantive Equality and Transformation in South Africa' (2007) *South African Journal on Human Rights* 23 at 255.



as they are already vulnerable.<sup>117</sup> Equal respect for difference is at the heart of equality which largely depends on the protection of minorities.<sup>118</sup> As it was rightly held in the *National Coalition* case:

It is easy to say that everyone who is just like ‘us’ is entitled to equality. Everyone finds it more difficult to say that those who are ‘different’ from us in some way should have the same equality rights that we enjoy. Yet as soon as we say any ... group is less deserving and unworthy of equal protection and benefit of the law all minorities and all of ... society are demeaned. It is so deceptively simple and so devastatingly injurious to say that those who are handicapped or of a different race, or religion, or colour or sexual orientation are less worthy.<sup>119</sup>

It has been held by the Constitutional Court that the concept of sexual orientation as used in section 9(3) should be given a generous interpretation and that it applies to the orientation of all persons who are bi-sexual, transsexual and those persons who are attracted to the same sex.<sup>120</sup> The only way to recognise sexual orientation as an impermissible ground of discrimination is to base it on a claim to equal protection of the law which asserts that discrimination on the ground of homosexuality is untenable as sexual orientation should be a matter of indifference, morally as well as constitutionally.<sup>121</sup> To that end, Justice Sachs has rightly observed that equality should not be confused with uniformity and that such uniformity may be the enemy of equality as equality does not presuppose the elimination or suppression of difference.<sup>122</sup>

Further, South Africa is committed to the promotion of gender equality and non-discrimination which is clear from the preamble of the Promotion of Equality and Unfair Discrimination Act (PEPUDA).<sup>123</sup> This Act specifically acknowledges the necessity of eradicating social and economic inequalities.<sup>124</sup> Further it also addresses social structures and

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<sup>117</sup> De Vos, P & Barnard, J ‘Same-sex Marriage, Civil Unions and Domestic Partnerships in South Africa: Critical Reflections on an Ongoing Saga’ (2007) *South African Law Journal* at 799

<sup>118</sup> *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 1999 (3) BCLR 280 (C) at para 112.

<sup>119</sup> *National Coalition* case (1999) at para 22.

<sup>120</sup> *National Coalition* case (1999) at para 20-21.

<sup>121</sup> Cameron, E ‘Sexual Orientation and the Constitution: A Test case for Human Rights’ (1993) *South African Law Journal* 110 at 464.

<sup>122</sup> *National Coalition for Gay and Lesbian Equality & Another v Minister of Justice & Others* (1999) 1 SA 6 (CC) at para 132.

<sup>123</sup> The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

<sup>124</sup> PEPUDA, Preamble at para 1.

practices which encourage or perpetuate unfair discrimination.<sup>125</sup> According to PEPUDA, any practice, including traditional or customary practices which impairs the dignity of women constitutes unfair discrimination.<sup>126</sup> In addition, it is stated that South Africa is under an international obligation to promote equality and to prevent non-discrimination.<sup>127</sup>

Similarly, at an international level, CEDAW offers protection to all women and places an obligation upon states to embody the principle of equality of men and women in their national constitutions and to adopt legislative and other measures to prohibit all forms of discrimination against women.<sup>128</sup> In addition, a duty is placed on states to refrain from practices which discriminate against women and to take measures to eliminate such discrimination by private actors.<sup>129</sup>

Section 9 has also been phrased in similar terms to that of the Canadian Charter.<sup>130</sup> Both the Canadian Supreme Court and the South African Constitutional Court have interpreted their respective equality clauses as prohibiting all forms of disadvantage, stereotyping as well as prejudicial treatment which has the effect of denying people or groups of people their human dignity.<sup>131</sup> This ultimately means that any State action which had an adverse impact on disadvantaged groups such as women or homosexuals will be subject to close scrutiny and must therefore be shown to be necessary and justified.<sup>132</sup> The victims of corrective rape are

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<sup>125</sup> PEPUDA, Preamble at para 2.

<sup>126</sup> PEPUDA Section 8(d).

<sup>127</sup> PEPUDA, Preamble at para 4 specifically refers to South Africa's obligations in terms of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1249 U.N.T.S. 13, signed 18 Dec. 1979 and Convention for the Elimination of All Forms of Racial Discrimination (CERD) 660 UNTS 195; G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) U.N. Doc. A/6014 (1966).

Additional examples of international legislation recognising and protecting the right to equality are the International Covenant on Civil and Political Rights (ICCPR) 999 UNTS 171 and 1057 UNTS 407 / [1980] ATS 23 / 6 ILM 368 (1967), the Universal Declaration of Human Rights (UDHR) G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), the International Covenant on Economic, Social and Cultural Rights (ICESCR) GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966); 993 UNTS 3; 6 ILM 368 (1967) as well as the Convention on the Rights of the Child (CRC), UN GA Res 44/25 (1989). These instruments can all be used in efforts to eliminate all forms of discrimination.

<sup>128</sup> CEDAW Article 2(a)&(d).

<sup>129</sup> CEDAW Article 2(d)&(e).

<sup>130</sup> Section 15 (1) of the Canadian Charter of Rights and Freedoms, R.S.C,1985 Appendix II, No. 44 see also Part I (ss. 1 to 34) of the Constitution Act, 1982, provides that: 'Every individual is equal before and under the law and has the right to the equal protection of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.'

<sup>131</sup> O'Conneide, C 'The Right to Equality: A Substantive Legal Norm or Vacuous Rhetoric?' (2008) *UCL Human Rights Review* 1(1) at 87.

<sup>132</sup> O'Conneide, C (2008) at 87.

thus equal before the law and should enjoy full protection of their right to equality and non-discrimination.

Another right which is violated by corrective rape is the right to human dignity as guaranteed by section 10 of the Constitution. It was held by the Constitutional Court that the heart of the equality test lies in whether or not there has been an impairment of the right to dignity as well as the extent to which such impairment has taken place.<sup>133</sup> In addition, it has been held by the Constitutional Court that discrimination means ‘treating people differently in a way which impairs their fundamental dignity as human beings.’<sup>134</sup> It is clear that when considering the individual cases of the incidents of corrective rape, that the inherent dignity of the victims was in fact impaired by the actions of the perpetrators who justify their actions in the name of culture. This is however not tolerated in South Africa as the Constitutional Court has held that the right to dignity is not subject to abrogation or subordination to other rights.<sup>135</sup> Similar to the provisions of section 10 of the Constitution is article 1 of the Universal Declaration which states that all people are born free and equal in dignity as well as rights. The right to dignity is therefore regarded as an important right, even in the international arena as many international conventions also recognise the intrinsic worth of this right.<sup>136</sup>

In addition, section 12 of the Constitution guarantees everyone the right to freedom and security of the person.<sup>137</sup> In terms of this right, every person has the right to be free from all forms of violence from public or private sources.<sup>138</sup> In the *Carmichele* case, it was held that the state has a positive duty to protect individuals through laws and structures and in the event that it is necessary, it has to take preventative measures where such an individual’s life or person is at risk from the criminal conduct of a third party.<sup>139</sup> This right therefore means that everyone has the right to be free from assault and interference from third parties; a right which is infringed by the perpetrators of corrective rape.

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<sup>133</sup> *President of Republic of South Africa v Hugo* 1997 4 SA 1 (CC) at para 41.

<sup>134</sup> *Prinsloo* case at para 31

<sup>135</sup> Glensy, R.D ‘The Right to Dignity’ (2011) *Columbia Human Rights Law Review* 43(1) at 99 as cited in *S v Makwanyane* 1995 (3) 391 (CC).

<sup>136</sup> See also the ICESCR, preamble at para 1, 2 and article 13 and the ICCPR, preamble at para 1, 2 and article 10.

<sup>137</sup> Section 12(1).

<sup>138</sup> Section 12(1)(c).

<sup>139</sup> *Carmichele v Minister of Safety and Security and Another* 2001 (4) SA 938 (CC) at para 44-45.

Further, this section also grants everyone the right to bodily as well as psychological integrity which includes the right to security and control over one's own body.<sup>140</sup> This means that everyone has the right to make their own choices with regards to their bodies without interference from other members of society. It is evident from the case studies of the victims that they are subjected to violence resulting from the criminal conduct of the perpetrators which inevitably violate their bodily as well as psychological integrity. In a discussion document commissioned by the Deputy Minister of Justice, it was stated that the crime of rape affects all women's sense of safety and their physical integrity as it restricts their mobility and freedom of movement.<sup>141</sup>

The right to life is another right which is protected in terms of the Constitution under section 11 which states that everyone has the right to life. This right is however unqualified whereas other jurisdictions and international instruments have qualified the right to life by providing that it may not be deprived arbitrarily.<sup>142</sup> According to O'Regan J, the right to life is antecedent to all other rights in the Constitution as one cannot exercise any of the rights enshrined in the Bill of Rights, without life.<sup>143</sup> It was further held that the right to life goes hand-in-hand with the right to dignity as without dignity, life is substantially diminished.<sup>144</sup> Reflecting on the victims of corrective rape, many lost their lives, which is a direct violation of their right to life.

It is thus clear with regards to the above discussion that the fundamental rights of the victims of corrective rape are in fact infringed by the acts of the perpetrators. In support of this, it was held by the Supreme Court of Appeal that judicial officers are aware of the extent to which sexual violence deprives women of their rights to dignity and bodily integrity.<sup>145</sup> Further, in *S v Chapman*,<sup>146</sup> it was held that rape in general, constitutes a humiliating, degrading as well as

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<sup>140</sup> Section 12(2)(b). See also international instruments granting persons the right to physical integrity such as the UDHR in articles 1 & 3, the ICESCR in its preamble, the ICCPR in its preamble and article 9(1) as well as the CRC in article 19.

<sup>141</sup> Discussion document 'Legal Aspects of Rape in South Africa' (1999) Commissioned by the Deputy Minister of Justice at 3.

<sup>142</sup> Currie, I & De Waal, J *The Bill of Rights Handbook* 5<sup>th</sup> ed (2005) at 281.

Other jurisdictions include the United States, Canada, Hungary and India and the international instruments referred to are the European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, and the ICCPR.

<sup>143</sup> *Makwanyane* case at para 326.

<sup>144</sup> *Makwanyane* case at para 327.

<sup>145</sup> *DPP v Prins* (Minister of Justice and Constitutional Development & two amici curiae intervening) (369/12) [2012] 106 ZASCA at para 1.

<sup>146</sup> *S v Chapman* 1997 (3) SA 341 (A)

brutal invasion of privacy and dignity of the victim.<sup>147</sup> The court further held that rape infringes women's fundamental human rights.<sup>148</sup> Courts are therefore determined to protect the equality, dignity and freedom of all women and thus no mercy will be shown when these rights are invaded.<sup>149</sup>

The women affected by corrective rape suffer discrimination based merely on the fact they belong to a particular cultural community in addition to the discrimination they suffer as women and as lesbians. This is due to the fact that the perpetrators tacitly claim to act in accordance with their constitutional right to culture as recognised by sections 30 and 31 of the Constitution. This is evident from the reasons and justifications given to corrective rape. As a consequence, there is a clear conflict between the constitutional rights of the perpetrators, used as a 'protective tool' to infringe upon a vast number of constitutional rights of the victims.

## **2.6. Conclusion**

This chapter has highlighted the reasons and justifications of corrective rape in South Africa. These reasons are mainly attributed to cultural beliefs and practices. Cultural justifications to women's human rights violations have been asserted for centuries by states and social groups based on the notion that they are defending cultural tradition.<sup>150</sup> This was evidenced from the views expressed by prominent public figures and individuals. In addition, it has been shown that corrective rape clearly violates a number of constitutional rights. Simultaneously, the perpetrators invoke their constitutional right to culture to justify their actions. This position ultimately results in a clash between right to culture and human rights which, we argue, continues to militate against the adequate protection of victims of corrective rape.

In the following chapter, we discuss the legal framework on how the conflict in the context of corrective rape can be resolved.

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<sup>147</sup> *Chapman* case at 344.

<sup>148</sup> *Chapman* case at 345.

<sup>149</sup> *Chapman* case at para 5.

<sup>150</sup> Secretary General's study on violence against women. doc. A/61/122/Add 1 at para 81.

## Chapter 3:

### LEGAL FRAMEWORK FOR THE RESOLUTION OF THE CONFLICT BETWEEN THE RIGHT TO CULTURE AND WOMEN'S HUMAN RIGHTS

#### 3.1. Introduction

This chapter will discuss international as well as national legislation focussing specifically on provisions dealing with the resolution of conflicts between the right to culture and women's human rights.<sup>1</sup> The chapter commences with an analysis of international declarations, conventions as well as regional instruments. It then proceeds to look at national legislative provisions. Thereafter, case law will be analysed in order to determine how international and national legal frameworks have been applied in instances where such a conflict has arisen between its fundamental human rights provisions and that of customary law in general. Ultimately this will inform how these rules will be applied in resolving the conflict between the right to culture and fundamental human rights in the context of corrective rape.

#### 3.2. International instruments

##### 3.2.1. Declarations

According to the Universal Declaration of Human Rights<sup>2</sup> (UDHR), human rights are '... a common standard of achievement for all peoples and all nations...'.<sup>3</sup> Although the UDHR is a declaration and therefore not legally binding, it is nevertheless used to apply moral pressure on states which violate its principles.<sup>4</sup> The declaration has provided the groundwork for many subsequent legally binding international instruments which is why the International Conference on Human Rights urged all governments to dedicate themselves to the principles set out in the UDHR.<sup>5</sup> On the recognition of the right to culture, it states that everyone has the freedom to participate in the cultural life of the community which therefore entitles persons to freely participate in the cultural life as well as beliefs of their choice.<sup>6</sup> However, article 2 of

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<sup>1</sup> International law will be discussed as South Africa is mandated to take cognizance of its provisions in order to fulfil its international law obligations.

<sup>2</sup> Universal Declaration of Human Rights (UDHR) G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

<sup>3</sup> Preamble of the UDHR.

<sup>4</sup> UN Office of the High Commissioner for Human Rights 'Fact Sheet No. 2 (Rev.1), The International Bill of Human Rights' (1996) Available at: <http://www.unhcr.org/refworld/docid/479477480.html> [Accessed on 12 September 2012].

<sup>5</sup> Proclamation of Teheran, 'Final Act of the International Conference on Human Rights' Teheran, 22 April to 13 May 1968, U.N. Doc.A/CONF. 32/41 at 3.

<sup>6</sup> UDHR Article 27(1).

the UDHR views all human beings as ‘free and equal in dignity and rights’ and further contains a non-discriminatory provision which provides that ‘everyone is entitled to all rights and freedoms... without distinction of any kind, such as race, colour, sex... or other status’.

By virtue of the fact that ‘everyone’ is entitled to the rights and freedoms as set out in the UDHR without any manner of distinction, means, in the context of this discussion, that black African lesbians cannot be excluded due to their sexual orientation.<sup>7</sup> Further, article 1 of the UDHR provides that ‘all human beings are born free and equal in dignity and rights’. The application of international human rights law is thus guided by the principles of universality and non-discrimination and by virtue of the words ‘all human beings’ it would again include black African lesbians as they too are entitled to enjoy the protections provided for by international human rights law.<sup>8</sup> This instrument therefore places certain limits on the exercise of freedoms in that cultural practices which violate human rights are not part of the freedom to enjoy one’s culture.<sup>9</sup> Moreover, it states that the provisions in the declaration may not be interpreted in order to perform any act aimed at the destruction of the rights afforded therein.<sup>10</sup>

Another instrument with similar provisions is the Vienna Declaration and Programme of Action<sup>11</sup> which states that ‘the human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights’.<sup>12</sup> There are wide ranging protections against human rights abuses, but they have been interpreted in such a way that it disadvantages women as it has become embedded in the social structure so as to assume the

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<sup>7</sup> Catania, D.A ‘The Universal Declaration of Human Rights and Sodomy law: A Federal Common Law Rights to Privacy for Homosexuals based on Customary International Law’ (1994) *American Criminal Law Review* 31at 316.

<sup>8</sup> Human Rights Council 19<sup>th</sup> Session (Agenda item 2 and 8) Follow-up and implementation of the Vienna Declaration and Programme of Action. ‘Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity’ *Report of the UN High Commissioner for Human Rights A/HRC/19/41* (17 November 2011) at 4. Hereafter cited as: *Report of the UN High Commissioner for Human Rights A/HRC/19/41*.

<sup>9</sup> UDHR Article 29.

<sup>10</sup> UDHR Article 30. The UDHR was therefore one of the first documents to recognise and protect human rights in the same way that the International Lesbian and Gay Association (ILGA) is the first gay organization that has obtained consultative status to the United Nations Economic and Social Council (ECOSOC) and is in a position to gain admission to human rights forums as well as to report anti-gay human rights abuses to various United Nations human rights panels. This proves that homosexuals are also recognised and protected in terms of international law as cited in Catania, D.A (1994) at 316.

<sup>11</sup> Vienna Declaration and Programme of Action A/CONF.157/23 (12 July 1993).

<sup>12</sup> Vienna Declaration at para 18.

form of a social or cultural norm.<sup>13</sup> This has resulted in many women's human rights violations being ignored or dismissed as cultural practices, even though the declaration states that gender-based violence resulting from cultural prejudice must be eliminated.<sup>14</sup> This instrument confirms this by stating that:

While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.<sup>15</sup>

Further, the UNESCO Declaration on Cultural Diversity<sup>16</sup> states that cultural rights are an integral part of human rights and that all persons have the right to conduct their own cultural practices as well as to participate in the cultural life of their choice.<sup>17</sup> However, the declaration commits itself to the implementation of human rights which are proclaimed in the UDHR and clearly states in article 4 that no one is permitted to invoke cultural diversity to infringe upon human rights which are guaranteed under international law nor may it be used to limit the scope thereof. In support of this, the records of the General Conference under the Programme for 2002-2003 show that the director-general is authorised to enhance the contribution of the UNESCO in order to promote human rights and particular reference was made to the rights of women as well as gender equality which is in conformity with various other international human rights instruments and resolutions.<sup>18</sup>

In addition, the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities<sup>19</sup> provides that persons who belong to minority groups have the right to enjoy their own culture and the right to participate in a cultural life.<sup>20</sup> This declaration lists a vast number of rights and freedoms to be awarded to minority groups as

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<sup>13</sup> Lai, S.Y & Ralph R.E 'Female Sexual Autonomy and Human Rights' (1995) *Harvard Human Rights Journal* vol. 8 at 203.

<sup>14</sup> Lai, S.Y & Ralph R.E (1995) at 203.

<sup>15</sup> Vienna Declaration at para 18.

<sup>16</sup> Vienna Declaration at para 5.

<sup>17</sup> UN Educational, Scientific and Cultural Organization, UNESCO Universal Declaration on Cultural Diversity, 2 November 2001.

<sup>18</sup> UNESCO Declaration Article 5.

<sup>19</sup> Records of the General Conference, 31<sup>st</sup> Session (2001) Volume 1 Resolutions of the United Nations Educational, Scientific and Cultural Organization *Under Programme III.2 'Promotion of human rights, peace and democratic principles'* at 46

<sup>20</sup> Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, UN GA Res 47/135 of 18 December 1992.

<sup>20</sup> Declaration on Minorities Article 2(2).



well as instructions on how states should implement these rights.<sup>21</sup> It is however plausible to note that the exercise of the rights set out in the declaration shall not prejudice the enjoyment of universally recognised human rights and fundamental freedoms.<sup>22</sup>

Furthermore, according to the Declaration of Principles of Equality,<sup>23</sup> the right to equality is the right of all human beings to be equal in dignity and to be treated with respect and to participate on an equal basis with others in any area, including a cultural life and that all human beings are equal before the law and thus have the right to equal protection and benefit of the law.<sup>24</sup> To integrate cultural rights, the policies that are put in place in order to achieve this should always respect, protect and fulfil the right to equality as disregarding this right may deepen existing disadvantage for already disadvantaged groups or individuals.<sup>25</sup> In the event that it is found that the right to equality has in fact been violated, appropriate measures must be put in place to modify or abolish existing regulations, customs and practices that conflict or are incompatible with it.<sup>26</sup> Thus, culture may never be used as a justification of any type of discrimination or human rights violations as cultural practices which are based on gender, ethnic or other inequality, must be limited by the right to equality.<sup>27</sup>

### 3.2.2. Conventions

In terms of article 15(1)(a) of International Covenant on Economic, Social and Cultural Rights<sup>28</sup> (ICESCR), state parties must recognise the right of everyone to take part in cultural life, thus giving recognition to cultural rights as well as the freedom to partake in such a

<sup>21</sup> Some of these rights include the right enjoy their culture freely without interference or any form of discrimination (Article 2(2)), the right to exercise rights without any discrimination (Article 3) and the right to full equality before the law (Article 4).

<sup>22</sup> Declaration on Minorities Article 8(2).

<sup>23</sup> Equal Rights Trust 'Declaration of Principles on Equality' (2008) Available at:<http://www.equalrightstrust.org/ertdocumentbank/Pages%20from%20Declaration%20perfect%20principle.pdf> [Accessed on 12 August 2011]. Hereafter cited as: Declaration of Principles of Equality.

<sup>24</sup> Declaration of Principles on Equality at 5.

<sup>25</sup> 'Implementing cultural rights: Nature, issues at stake and challenge' Seminar organised by the Office of the High Commissioner for Human Rights, in partnership with the International Organisation of La Francophonie and UNESCO, in collaboration with the Observatory of diversity and cultural rights. Geneva, 1-2 February 2010, working document no. 8 at 9. Hereafter cited as: 'Implementing cultural Rights: Nature, issues at stake and challenge' (2010). See also Petrova, D 'Diverse Cultural Identities: the Challenges of Integrating Cultural Rights in Policies and Practices'(2010) Available at <http://www.docstoc.com/docs/37177532/The-World-Commission-on-Culture-and-Development-noted> [Accessed on 13 June 2012].

<sup>26</sup> 'Implementing cultural rights: Nature, issues at stake and challenge' (2010) at 9.

<sup>27</sup> 'Implementing cultural rights: Nature, issues at stake and challenge' (2010) at 9.

<sup>28</sup> International Covenant on Economic, Social and Cultural Rights (ICESCR) GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc.A/6316 (1966); 993 UNTS 3; 6 ILM 368 (1967). South Africa became a signatory to the ICESCR on 3 October 1994 and has not yet ratified it.

cultural life. It has been observed that this article may however not be interpreted in so far as to destroy any right or freedom which is recognised in the Covenant.<sup>29</sup> The ICESCR therefore permits limitations on the right to culture which was analysed by the Committee on Economic, Social and Cultural Rights.<sup>30</sup> General Comment 21 clearly states that the right of everyone to take part in cultural life may be limited in circumstances where it is necessary, particularly in cases of negative practices stemming from customs and traditions that infringes upon other human rights.<sup>31</sup>

The ICESCR further calls upon states to take appropriate measures, especially legislative, to ensure that all rights in the Covenant are enumerated.<sup>32</sup> Article 2(2) of the ICESCR provides that state parties undertake to guarantee that the rights in the Covenant will be exercised without discrimination of any kind in terms of race, colour, sex or other status. For clarity, the UN Committee on Economic, Social and Cultural Rights stated that ‘other status’ as referred to in the aforementioned article, includes sexual orientation.<sup>33</sup> Thus, black African lesbians also enjoy the protections afforded by this instrument.

Similarly, article 27 of the International Covenant on Civil and Political Rights<sup>34</sup> (ICCPR) provides that states which have ethnic, religious or linguistic minorities, may not deny them the right to enjoy their own culture with other members of their community. It was however contended in General Comment 23 that the rights under article 27 may not be exercised in a manner which is inconsistent with the other provisions of the Covenant.<sup>35</sup> Article 26 can be found amongst these other provisions which states that all persons are equal before the law and they are entitled to equal protection of the law without any discrimination. In this respect, the law shall therefore prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex or other

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<sup>29</sup> Committee on Economic, Social and Cultural Rights, 43<sup>rd</sup> Session (2009), General comment No. 21: *Right of everyone to take part in cultural life* (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights) E/C.12/GC/21 at para 20.

<sup>30</sup> Human Rights Council Expert Mechanism on the Rights of Indigenous Peoples, 5<sup>th</sup> Session (2012) ‘Study on the role of languages and culture in the promotion and protection of the rights and identity of indigenous peoples’ A/HRC/EMRIP/2012/3 at para 88.

<sup>31</sup> General Comment 21 E/C.12/GC/21 at para 19.

<sup>32</sup> ICESCR Article 2(1).

<sup>33</sup> Committee on Economic, Social and Cultural Rights, 42<sup>nd</sup> Session (2009), General comment No. 20: *Non-discrimination in economic, social and cultural rights* (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights) E/C.12/GC/20 at para. 32.

<sup>34</sup> International Covenant on Civil and Political Rights (ICCPR) 999 UNTS 171 and 1057 UNTS 407 [1980] ATS 23 / 6 ILM 368 (1967). South Africa became a signatory on 3 October 1994 and ratified the ICCPR on 10 December 1998.

<sup>35</sup> Office of the High Commissioner for Human Rights, 15<sup>th</sup> Session (1994), General Comment No. 23: *The Rights of Minorities* (Art. 27) CCPR/C/21/Rev.1/Add/5 at para 8.

status.<sup>36</sup> A further duty is imposed by the ICCPR to protect people from unlawful attacks on their honour<sup>37</sup> by obligating state parties to enact appropriate laws which embody the rights recognised in the Charter.<sup>38</sup> State parties would therefore be required to ensure that steps are taken to eradicate violations of women's human rights. Corrective rape would thus be a clear violation of the Covenant as it impairs the honour of those affected as well as violating their fundamental women's human rights as demonstrated in the previous chapter.

In addition, the UN Working Group on Arbitrary Detention has explained that detention and prosecution of individuals solely based on their homosexuality is arbitrary as it violates the guarantees of equality before the law and the right to equal protection of the law against discrimination in all forms, including based on sex as set out in the provisions of the ICCPR.<sup>39</sup> This was illustrated in the 1994 case of *Toonen v Australia*, where the UN Human Rights Committee<sup>40</sup> found that the laws in Tasmania criminalising consensual same-sex sexual conduct violated the privacy provision of the ICCPR and further noted that the reference to 'sex' in Articles 2 and 26 were taken as to include sexual orientation.<sup>41</sup>

The position taken in the *Toonen* decision was also reflected in General Comment 20 of the Committee on Economic, Social and Cultural Rights (referred to above) who observed that 'other status' included sexual orientation and further that state parties should ensure that a person's sexual orientation is not seen as a barrier to realising the rights set out in the Covenant.<sup>42</sup>

Furthermore, it should also be noted that article 5, prohibits a person or group from engaging in activities which are aimed at the destruction or limitation of the fundamental human rights as recognised in the Covenant.<sup>43</sup> Article 20 of the ICCPR further prohibits the advocacy of hatred which constitutes incitement to discrimination or violence.<sup>44</sup>

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<sup>36</sup> ICCPR Article 26.

<sup>37</sup> ICCPR Article 17(1).

<sup>38</sup> ICCPR Article 2(2).

<sup>39</sup> Report of the Working Group on Arbitrary Detention, UN Doc. E/CN.4/2004/3, 15 December 2003 at para. 73.

<sup>40</sup> The body mandated under ICCPR article 40 with monitoring states' compliance with its provisions.

<sup>41</sup> *Toonen v Australia*, Communication No. 488/1992, UN Doc. CCPR/C/50/D/488/1992, 4 April 1994 at para. 8.7.

<sup>42</sup> General Comment No.20 E/C.12/GC/20 at para 32.

<sup>43</sup> ICCPR Article 5(1) &(2).

<sup>44</sup> ICCPR Article 20(2).

In addition, another instrument which is of particular importance to black African lesbians is the Convention on the Elimination of All Forms of Discrimination Against Women<sup>45</sup> (CEDAW) as it was one of the first documents to specifically address and prohibit discrimination against women. This Convention provides that women will not be discriminated against because of their sex and shall not have their ‘human rights and fundamental freedoms...in any field’ impaired.<sup>46</sup> Article 2 further requires that states pursue by all appropriate measures and without delay, a policy of eliminating discrimination against women.<sup>47</sup> Of particular importance to this discussion is that CEDAW also provides for state parties to take appropriate measures in order to modify social and cultural patterns of men and women with the aim of achieving the elimination of prejudices and customary practices which are based on the idea of the inferiority or superiority of either of the sexes or on stereotyped roles for men and women.<sup>48</sup> In response to this General Recommendation 19 places an additional duty on states to report and identify the nature and extent of customs and practices that perpetuate violence against women and should further report what they have done to overcome such violence.<sup>49</sup> In order to achieve this, it is required that measures are taken, including legislative, ‘in order to modify or abolish existing laws... customs and practices which constitutes discrimination against women’.<sup>50</sup> In addition, specific concern was expressed by the UN Committee on the Elimination of Discrimination Against Women (The CEDAW Committee)<sup>51</sup> about laws that classify sexual orientation as a sexual offence and it was recommended that such penalties be abolished,<sup>52</sup> thereby proving that the sexual orientation of corrective rape victims is a ground which requires protection against discriminatory laws and practices.

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<sup>45</sup> United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1249 U.N.T.S. 13, signed 18 December 1979; entered into force 3 September 1981. South Africa became a signatory on 29 January 1993 and ratified CEDAW on 15 December 1995

<sup>46</sup> CEDAW Article 1.

<sup>47</sup> CEDAW Article 2.

<sup>48</sup> CEDAW Article 5.

<sup>49</sup> Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW) General Recommendation 19: *Violence Against Women* (1992) A/47/38 at para 24(e).

<sup>50</sup> CEDAW Article 2(f).

<sup>51</sup> Oversees the implementation of the Convention on the Elimination of All Forms of Discrimination Against Women.

<sup>52</sup> Concluding Observations on Kyrgyzstan, UN Doc.A/54/38, 20 (1999) at para. 128.

CEDAW has also commended states for enacting laws protecting against discrimination on the basis of sexual orientation. Concluding Observations on Sweden, UN Doc.A/56/38 (2001) at para 334; Concluding Observations on Ecuador, UN Doc. CEDAW/C/ECU/CO/7 (2008) at para. 28.

Moreover, the CEDAW Committee has expressed concern about reported sexual offences committed against women based on their sexual orientation.<sup>53</sup> The Special Rapporteur on violence against women noted that ‘lesbian women face an increased risk of becoming victims of violence, especially rape, because of widely held prejudices and myths’ which includes the belief that raping a lesbian will change her sexual orientation when she is raped by a man.<sup>54</sup> The Committee further expressed serious concern about the practice of corrective rape of lesbians.<sup>55</sup> It therefore called on South Africa to abide by its constitutional provisions by providing effective protection from violence and discrimination against women based on their sexual orientation.<sup>56</sup>

Correspondingly, the Convention on the Rights of the Child<sup>57</sup> (CRC) requires state parties to ‘take all effective and appropriate measures with the view to abolishing traditional practices prejudicial to the health of children’.<sup>58</sup> In light of this, the UN Committee on the Rights of the Child<sup>59</sup> issued General Comment 4 in 2003 explaining that under the non-discrimination provision of Article 2, prohibited grounds of discrimination included ‘adolescents’ sexual orientation.’<sup>60</sup>

Furthermore, the Convention for the Elimination of All Forms of Racial Discrimination<sup>61</sup> (CERD) creates an obligation whereby state parties undertake to prohibit and eliminate racial discrimination in all forms and to guarantee everyone the right and enjoyment to equal protection in cultural activities.<sup>62</sup> The Committee established under CERD provides an important forum to raise issues of discrimination against women belonging to racial minorities as these women are subject to discrimination and violence as members of their

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<sup>53</sup> Committee on the Elimination of Discrimination against Women. 48<sup>th</sup> Session 17 January – 4 February 2011. *Concluding observations of the Committee on the Elimination of Discrimination against Women: South Africa*, UN Doc.CEDAW/C/ZAF/CO/4 (2011) at para. 39-40.

<sup>54</sup> *Report of the UN High Commissioner for Human Rights A/HRC/19/41* at 10.

<sup>55</sup> CEDAW: *Concluding observations on South Africa*, (2011) at para 39.

<sup>56</sup> CEDAW: *Concluding observations on South Africa*, (2011) at para 40.

<sup>57</sup> Convention on the Rights of the Child (CRC), UN GA Res 44/25 (1989). South Africa became a signatory on 29 January 1993 and ratified the CRC on 16 June 1995.

<sup>58</sup> CRC Article 24(3). The CRC becomes relevant because some of the victims of corrective rape, as demonstrated in chapter 2 are children.

<sup>59</sup> Monitors States’ compliance with provisions of the Convention on the Rights of the Child.

<sup>60</sup> Committee on the Rights of the Child, General Comment 4, UN Doc. CRC/GC/2003/4 (2003) at para. 6.

<sup>61</sup> Convention for the Elimination of All Forms of Racial Discrimination (CERD) 660 UNTS 195; G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) U.N. Doc. A/6014 (1966) at 47. South Africa became a signatory on 3 October 1994 and ratified CERD on 10 December 1998.

<sup>62</sup> CERD Article 5(vi).

communities in addition to the discrimination and violence they suffer as women.<sup>63</sup> They are thus further condemned to carry the brunt of resistance to change by accepting and conforming to the discriminatory traditions and customs which are practiced by their communities.<sup>64</sup>

Additionally, article 4(a) of CERD requires state parties to take all positive measures to eliminate acts which promote racial hatred or those which are racially discriminatory in all forms.<sup>65</sup> It therefore places an obligation on states to declare such acts as criminal offences. Thus the office of the Commission for Human Rights issued General Recommendation 1 dealing with state parties' obligations in terms of article 4 which indicated that a number of states did not have legislation which dealt with the issues raised in article 4.<sup>66</sup> It was subsequently recommended that those states should remedy the deficiency in their legislative provisions.<sup>67</sup> General Recommendation 7 was then later adopted which again dealt with legislation to eradicate racial discrimination and it was recommended that those states whose legislation did not satisfy the provisions of article 4 should take the necessary steps to satisfy the mandatory requirements thereof. South Africa is a signatory to CERD and is thus required to implement the obligations which are contained in article 4.<sup>68</sup>

At a regional level, the African Charter on Human and Peoples' Rights<sup>69</sup> (ACHPR) makes provision for every individual to freely take part in the cultural life of his community.<sup>70</sup> The ACHPR however also entitles every individual to the enjoyment of rights and freedoms recognised in the Charter without any distinction of any kind including race and sex.<sup>71</sup> Further, article 3 provides that every individual shall be equal before the law and is thus entitled to equal protection of the law. Thus, in a Zimbabwean case, the African Commission of Human and Peoples' Rights (the African Commission) observed that:

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<sup>63</sup> Cook, R.J 'Women's International Human Rights law: The Way Forward' (1993) *Human Rights Quarterly* 15 at 254.

<sup>64</sup> Cook, R.J (1993) at 254.

<sup>65</sup> CERD Article 4(a).

<sup>66</sup> UN Committee on the Elimination of Racial Discrimination (CERD) General Recommendation 1: *State parties' obligations* (Art. 4) 25/02/1972.

<sup>67</sup> CERD General Recommendation 1: *State parties' obligations*.

<sup>68</sup> UN Committee on the Elimination of Racial Discrimination (CERD) General Recommendation 7: *Legislation to eradicate racial discrimination* (Art. 4) 23/08/1985 UN Doc. A/40/18.

<sup>69</sup> African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc.CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982). South Africa became a signatory and ratified the Charter on 9 July, 1996.

<sup>70</sup> ACHPR Article 17(2).

<sup>71</sup> ACHPR Article 2.

Together with equality before the law and equal protection of the law, the principle of non-discrimination provided under article 2 of the Charter provides the foundation for the enjoyment of all human rights... The aim of this principle is to ensure equality of treatment for individuals irrespective of nationality, sex, racial or ethnic origin, political opinion, religion or belief, disability, age or sexual orientation.<sup>72</sup>

In support of this are the principles and guidelines as set out by the African Commission where recognition is given to the enjoyment of cultural rights which is subject to limitations as long as it is in line with human rights principles and obligations.<sup>73</sup> Further, in the preamble of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women<sup>74</sup> (Protocol to the African Charter), state parties are determined to ensure that women's rights are in fact promoted, realised and protected in order for them to enjoy their human rights fully.<sup>75</sup> The Protocol also provides that state parties must enact and effectively implement appropriate legislative measures in order to curb and prohibit all forms of discrimination, especially those harmful practices which endangers the health and general wellbeing of women.<sup>76</sup> State parties are furthermore required to commit themselves to modify social and cultural patterns of men and women with the view of eliminating harmful cultural practices.<sup>77</sup>

Similarly, the African Charter on the Rights and Welfare of the Child<sup>78</sup> (the Children's Charter) provides that state parties must adopt legislative or other means to give effect to the provisions of the Charter and that any custom, tradition or cultural practice is discouraged to the extent that it is inconsistent with its provisions.<sup>79</sup> Article 21 therefore specifically aims at the protection of children against harmful social and cultural practices where states are obligated to eliminate such practices if they affect the dignity of the child.<sup>80</sup> In addition, those

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<sup>72</sup> Communication 245/2002 – *Zimbabwe Human Rights NGO Forum/Zimbabwe*, 21st Activity Report, EX.CL/322(X), Annexure III at para. 169.

<sup>73</sup> African Commission on Human and Peoples' Rights (the Commission) 'Principles and Guidelines on Economic, Social and Cultural Rights and Reporting Guidelines on Economic, Social and Cultural Rights' Launched during its 50th ordinary session held in Banjul, the Gambia from 24 October to 7 November 2011 at 7.

<sup>74</sup> Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 11 July 2003. South Africa signed became a signatory of the Protocol on 16 March, 2004 and ratified in on 17 December, 2004.

<sup>75</sup> Protocol to the African Charter Preamble at para 14.

<sup>76</sup> Protocol to the African Charter, Article 2(1)(b).

<sup>77</sup> Protocol to the African Charter, Article 2 (2).

<sup>78</sup> African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), entered into force November 29, 1999. Hereafter referred to as: Children's Charter.

<sup>79</sup> Children's Charter Article 1(1)&(3).

<sup>80</sup> Children's Charter Article 21(1).

practices which are prejudicial to the life of the child along with practices which discriminate against the child on the grounds of sex or other status.<sup>81</sup>

### 3.3. National legislation

Section 30 of the Constitution<sup>82</sup> reads:

Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.

Further, section 31 reads:

- (1) Persons belonging to cultural, religious or linguistic communities may not be denied the right, with other members of that community –
  - (a) to enjoy their culture, practice their religion and use their language; and
  - (b) to form, join and maintain cultural, religious and linguistic associations, and other organs of civil society.
- (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

It is however of utmost importance that both of the aforementioned sections clearly state that the rights afforded may not be exercised in a manner which is inconsistent with the provisions of the Bill of Rights. The right to culture is therefore protected in the Constitution in so far as it does not conflict with its provisions by violating or unreasonably limiting other fundamental rights such as the right to equality which is one of the founding principles of the Constitution. These internal limitations were placed on the right to culture to ensure that it does not conflict with other human rights.<sup>83</sup>

From the foregoing provisions it can be deduced that customary law is now recognised and should be correctly applied by the courts. Section 30 provides for every person to participate in the cultural life of their choice, whereas section 31 extends the right to the enjoyment of culture to persons belonging to a specific cultural group. Tebbutt J held that one should interpret section 31 within the context and historical background of South Africa and in the

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<sup>81</sup> Children's Charter Article 21(1)(a)&(b).

<sup>82</sup> The Constitution of the Republic of South Africa, 1996

<sup>83</sup> Both section 30 & 31 state that the exercise of the right to culture must not be in a manner which is 'inconsistent with any provision of the Bill of Rights'.



light of its unique social structures.<sup>84</sup> In addition, Constitutional Principle XIII declares that indigenous law, like the common law should be recognised and applied by the courts but still subject to the fundamental rights contained in the Constitution as well as legislation which specifically deal with it.

In support of this, section 39 of the Constitution reads:

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

According to Himonga, the fact that the legislature termed this section ‘interpreted or developed’ indicates that different systems of law are recognised as part of the legal system and that they may co-exist with the rights conferred by the Bill of Rights as long as they are not inconsistent with it.<sup>85</sup> Section 39(2) therefore specifically requires a court when interpreting customary law, to promote the spirit, objects and purport of the Bill of Rights which is similar to the views expressed in section 39(3).

Section 211(3) then places a further duty on the courts to apply customary law and the elements of this section relates to the application of customary law subjecting it to the Constitution.<sup>86</sup> The Constitutional Court emphasised that in terms of section 8(1)<sup>87</sup> and 211(3) of the Constitution, customary law is subject to the Constitution and that any developments to bring the provisions of customary law in line with the spirit, purport and

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<sup>84</sup> *Park-Ross & Another v The Director, Office for Serious Economic Offences* 1995 (2) BCLR 1 at 198 & 208.

<sup>85</sup> Himonga, C.N (1998) ‘A legal System in Transition: Cultural Diversity and National Identity in Post-Apartheid South Africa’ (1998) *Law in Africa* (Journal of the African Law Association in Germany) 1 at 9.

<sup>86</sup> S211(3) provides that: ‘The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.’

<sup>87</sup> S8(1) provides that: ‘The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.’

objects of the Bill of Rights are mandated by section 39(2).<sup>88</sup> An example can be found in the *Alexkor*<sup>89</sup> case where it was held that customary law should be seen as an integral part of our law and that courts are obliged by section 211(3) to apply customary law when applicable and subject to the Constitution as well as any other legislation that deals with customary law.<sup>90</sup> In addition, it was held in the *Gumede* case that courts are required to not only apply customary law, but also to develop it and that the Constitution does not abjure the existence of any rights recognised or conferred by the common law or customary law to the extent that they are consistent with the Bill of Rights.<sup>91</sup> This is mainly based on the fact that many customary law rules reflect, either directly or indirectly, the patriarchal norms and traditions of the African culture and should therefore be accordingly invalidated for infringing the right to equality.<sup>92</sup>

From the above discussion, it can be accepted that when courts apply customary law, they should use their discretion in order to develop its provisions in instances where it conflicts with the provisions of the Constitution. It is due to the fact that the application of customary law has become a constitutional issue, that the conflict of laws must be considered in view of the Bill of Rights.<sup>93</sup> This was illustrated in the case of *Christian Education of South Africa v Minister of Education*,<sup>94</sup> where the Constitutional Court affirmed that the rights of members of communities that associate on the basis of language, culture and religion cannot be used to shield practices which offend the Bill of Rights.<sup>95</sup> It has been established in chapter 2 that the practice of corrective rape clearly violates the equality clause as set out in section 9 of the Constitution from which one can infer that the right to culture may not offend the said right. In support of this, the Women's Charter for Effective Equality confirms that cultural practices frequently subordinate women confining them to stereotypical and restrictive roles and therefore states that culture shall be subjected to the equality clause in the Bill of Rights.<sup>96</sup>

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<sup>88</sup> *Bhe v Magistrate Kayelitsha; Shibi v Sithole; SA Human Rights Commission v President of the RSA* 2005 1 BCLR 1 (CC) para 44.

<sup>89</sup> *Alexkor Ltd and Another v The Richtersveld Community and Others* 2004(5) SA 460 (CC)

<sup>90</sup> *Alexkor case* at para 51.

<sup>91</sup> *Gumede v President of the Republic of South Africa* 2009 (3) BCLR 243 (CC) at para 28-29.

<sup>92</sup> South African Law Reform Commission *Project 90: The Harmonisation of the Common Law and the Indigenous Law – Report on Conflicts of Law* (September 1999) at 23.

<sup>93</sup> South African Law Reform Commission (1999) at 24.

<sup>94</sup> *Christian Education of South Africa v Minister of Education* 2000 (4) SA 757 (SCA).

<sup>95</sup> *Christian Education case* at para 26.

<sup>96</sup> Section 9 of The Women's Charter for Effective Equality 1994 (From the second draft Charter drawn up through the National Women's Coalition structures, and approved at the National Conference on 27 February 1994).

This can also be derived from the fact that the Preamble of the Constitution states that ‘the achievement of equality is one of the founding values of the Republic’ thus the right to equality is deemed to be one of the most important fundamental human rights. Further, Kriegler J has held that the notion of equality is our Constitution’s focus and its organising principle.<sup>97</sup> This right is important especially to minority groups such as women as well as gays and lesbians and these groups should therefore be afforded the most protection from the right to equality. According to Cameron J, ‘gays and lesbian are in certain respects in a uniquely vulnerable position as far as legal protection and the exercise of political power are concerned’.<sup>98</sup> Therefore it is of even greater importance to apply the right to equality correctly in order to protect this vulnerable group. Both these rights are recognised and protected in the Constitution and they are thus often in conflict with one another as has been shown in the international arena. The aim is therefore to resolve these conflicts between customary law and the right to equality which mainly arise in the arena of women’s rights.<sup>99</sup> Resolution of this conflict is of utmost importance as South Africa is largely governed by customary law and it will thus aid in the general development of the law in South Africa.<sup>100</sup>

With regards to equality, it was held in the *Fourie*<sup>101</sup> case that the Constitution represents a radical rupture with the past which was based on intolerance as well as exclusions and that in order to move forward, society needs to learn acceptance and respect by all for all based on equality.<sup>102</sup> Further, the Constitutional Court has consistently affirmed that the right to equality and non-discrimination are recognised resulting in its value conceding in instances where there is a conflict between the right to equality and the right to culture.<sup>103</sup> It was noted by Langa DCJ that:

The rights to equality ... are of the most valuable of rights in an open and democratic state. They assume special importance in South Africa because of our past history of inequality and hurtful discrimination on grounds that include race and gender.<sup>104</sup>

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<sup>97</sup> *President of the Republic of South Africa v Hugo* (1997) 6 BCLR 708 (CC) at para 74.

<sup>98</sup> Cameron, E ‘Sexual Orientation and the Constitution: A Test case for Human Rights’ (1993) *South African Law Journal* 110 at 456.

<sup>99</sup> Lehnert, W ‘The Role of the Courts in the Conflict between African Customary Law and Human Rights’ (2005) *South African Journal on Human Rights* 12 at 241.

<sup>100</sup> Lehnert, W (2005) at 241.

<sup>101</sup> *Minister of Home Affairs and Another v Fourie and Others* 2006 (1) SA 524 (CC).

<sup>102</sup> *Fourie* case at para 59.

<sup>103</sup> Mwambene, L. & Sloth-Nielsen, J. ‘Benign accommodation? Ukuthwala, ‘forced marriage’ and the South African Children’s Act’ (2011) *African Human Rights Law Journal* 11(1) at 9.

<sup>104</sup> *Bhe* case at para 71.

It has thus been established that the Constitution protects the fundamental human rights of all but it should however be noted that any right in the Bill of Rights may be restricted. There are three limitation clauses built into the provisions of the Bill of Rights.<sup>105</sup> The first limitation clause is a general one which limits the application of all rights which inevitably includes the right to culture, but only to the extent that the limitation is reasonable and justifiable in an open and democratic society which is based on human dignity, equality and freedom.<sup>106</sup> The second limitation clause provides that when interpreting legislation or developing either the common law or customary law, courts must promote the spirit, purport and objects of the Bill of Rights.<sup>107</sup> The last limitation clause subjects the recognition of the right to culture to the Bill of Rights or the Constitution generally.<sup>108</sup>

The second type has already been discussed above, and for purpose of this thesis, emphasis will be placed on the general limitation clause only which is found in section 36(1) of the Constitution. This section contains a set of relevant factors that has to be taken into account by a court when considering the reasonableness and justifiability of a limitation which corresponds with the factors identified as making up the proportionality enquiry laid down in the *Makwanyane* case.<sup>109</sup>

The first element lies in considering the nature of the right in terms of section 36(1) which involves weighing up the infringement of a fundamental right against the purpose or reasons for the law. Some rights weigh more heavily than other and it is important to consider what is being protected by the right and how important the rights is and the way that it is exercised in an open and democratic society.<sup>110</sup> According to the Constitutional Court, the rights to life and dignity, for example, are considered to be the most important of all human rights and we are required to value these rights above all others.<sup>111</sup> The right in question which is subject to limitation is the right to culture and it should be weighed against the infringement of the fundamental rights to equality, dignity, freedom and life as the victims of corrective rape are often killed. This would involve a balancing of rights in order to ascertain which right is worthy of greater protection. In doing so, it does not suggest that the right which is subject to

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<sup>105</sup> Himonga, C.N (1998) at 9.

<sup>106</sup> The Constitution section 36(1).

<sup>107</sup> The Constitution section 36(2).

<sup>108</sup> The Constitution section 15(3)(b).

<sup>109</sup> Currie, I & De Waal, J (2005) at 176.

<sup>110</sup> Rautenbach, I.M & Malherbe, E.F.J *Constitutional Law* 5th ed (2009) at 349.

<sup>111</sup> *S v Makwanyane* 1995 (3) 391 (CC) at para 104.

limitation is of lesser importance, it merely aims at protecting those affected from the violations stemming from the infringing right.

The court in *Makwanyane* then further held that there must be compelling reasons to justify the limitation of such important rights.<sup>112</sup> In terms of section 36(1)(b), one must consider the importance of the purpose of the limitation. Reasonableness therefore requires the limitation of a right to serve some purpose which should be one worthwhile and important in a constitutional democracy and therefore requires a determination into the benefits achieved by the limitation.<sup>113</sup> The purpose served must be observed by all reasonable citizens to be of compelling importance.<sup>114</sup> It is contended by the author that the purpose of limiting the right to culture would be justified when looking at the effect which the unlimited right has on the victims of corrective rape. The act of corrective rape is justified by means of culture and the same justification is therefore used to infringe the right to equality, dignity, freedom and life of the victims.

In terms of section 36(1)(c), the nature and extent of the limitation must be looked at which involves looking at the method used to limit the right and how the limitation affects the protected interests and conduct. In order to determine whether the limitation damages the affected right more than what is reasonable for achieving the purpose, requires an assessment of how extensive the infringement is.<sup>115</sup> The right to culture will not be limited in its entirety, it will only be limited in so far as it infringes on the right to equality and therefore would limit the extent to which the perpetrators conduct themselves in terms of their self-proclaimed 'cultural practices'.

Section 36(1)(d) further requires that there must be a relation between the limitation and its purpose, therefore for the limitation to be legitimate, a law that infringes the right must be reasonable and justifiable.<sup>116</sup> The purpose of limiting the right to culture would be to protect the victims of corrective rape against the violence stemming from sexual assault on the basis that they are black, gay women.

Lastly, section 36(1)(e) requires that one must consider less restrictive means to achieve the same purpose, other than the limitation. Therefore, the limitation will not be legitimate or

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<sup>112</sup> *Makwanyane* case at para 142.

<sup>113</sup> Rautenbach, I.M & Malherbe, E.F.J (2009) at 350.

<sup>114</sup> Currie, I & De Waal, J (2005) at 180.

<sup>115</sup> Currie, I & De Waal, J (2005) at 182.

<sup>116</sup> Currie, I & De Waal, J (2005) at 182.

proportionate if other means could be employed to achieve the same purpose that will not restrict the right at all, or that will restrict the right, but to a lesser extent.<sup>117</sup> It is thus logical to assume that the only way to combat corrective rape would be to limit the right to culture in order to prevent perpetrators from relying on the cultural justification to escape liability and to accept accountability.

The issue surrounding the limitation of the right to culture was decided in the *Bhe* case, where it was held that the rule of male primogeniture (a cultural tradition) was justified by the traditional social economic structure in which it was developed but has since, outlived its usefulness.<sup>118</sup> It was therefore decided that in the present day and age, the limitation on the right of women to succeed as family head is not reasonable and justifiable under section 36(1) and the rule of male primogeniture was thus found to be inconsistent with section 9(3) of the Constitution in that it excludes women from succeeding to the family head.<sup>119</sup> It was further held that the section was contrary to the right to dignity.<sup>120</sup> According to the court, the right to equality relates to the right to dignity in that discrimination conveys to the person discriminated against, that they are not of equal worth and in relation to discrimination against women, that they are not of equal worth as men which inevitably affects their dignity.<sup>121</sup>

The court then had to consider whether the rule should be struck down or whether it had to be developed in order to bring it in line with the Constitution. Ngcobo J, for the minority, held that the *Carmichele* case<sup>122</sup> applies equally to the development of indigenous law and therefore where a law deviates from the spirit, purport and objects of the Bill of Rights, the courts have an obligation to develop it in order to remove such deviation rather than striking it down.<sup>123</sup> This could be achieved by removing reference to a male so as to allow women, in this case an eldest daughter, to succeed to the deceased estate.<sup>124</sup>

The rights in the Bill of Rights are therefore not cast in stone as they are subject to limitation in instances where they infringe on another's rights, unless the limitation can be proved to be reasonable and justifiable. The right to culture is therefore subject to limitation as was seen in

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<sup>117</sup> Currie, I & De Waal, J (2005) at 184.

<sup>118</sup> *Bhe* case at para 210.

<sup>119</sup> *Bhe* case at para 210.

<sup>120</sup> *Bhe* case At para 187

<sup>121</sup> *Bhe* case at para 187.

<sup>122</sup> *Carmichele v Minister of Safety and Security and Another* 2001 (4) SA 938 (CC).

<sup>123</sup> *Carmichele* case at para 33.

<sup>124</sup> *Bhe* case at para 222.

the above mentioned case examples. The courts will however aim to develop customary law in order to remove the discriminatory effects and to ultimately bring it in line with the Constitution rather than striking it down as was decided Ngcobo J in the *Bhe* case.

### **3.3.1. Case law dealing with resolving the conflict between the right to culture and the right to equality**

The tension between customary law and human rights have been subject to many court decisions as courts are bound by the provisions of the Constitution, particularly, the Bill of Rights while at the same time they need to have regard to customary law.<sup>125</sup> Courts thus have a central role in resolving the conflict between customary law and women's rights.

In the event that a conflict arises, courts have three options in dealing with the problem. First, they can strike down the customary law rule, second it can exclude the application of customary law whereby common law or statutory law will be applied instead or lastly, they can develop it in terms of section 39(2) of the Constitution in order for it to be in line with its provisions.<sup>126</sup> Ngcobo J supports the latter view and is of the opinion that courts should develop customary law rather than strike it down.<sup>127</sup>

The relationship between customary law and the Constitution was considered in the two decisions of *Mthembu v Letsela*<sup>128</sup> of which the first was in the Pretoria High Court and secondly in the appeal heard by the Supreme Court of Appeal.<sup>129</sup> In these cases, a deferential approach was followed in resolving the conflict between human rights and customary law.<sup>130</sup>

The applicant alleged that she had been married in terms of customary law to the deceased who had died intestate.<sup>131</sup> In terms of the rules of male primogeniture, she and her minor daughter would be excluded from succession which was in direct conflict with the Bill of Rights. The application was dismissed by the High Court which held that the rule of male primogeniture was not unconstitutional.<sup>132</sup> The rule was recognised in accordance with the constitutional protection of the right to culture as embodied in section 31 of the Interim

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<sup>125</sup> Lehnert, W (2005) at 242.

<sup>126</sup> Lehnert, W (2005) at 248-249.

<sup>127</sup> *Bhe* case at para 215.

<sup>128</sup> *Mthembu v Letsela* 1998 (2) SA 675 (T).

<sup>129</sup> *Mthembu v Letsela* 2000 (3) All SA 219 (SCA).

<sup>130</sup> Lehnert, W (2005) at 256.

<sup>131</sup> *Bhe* case at para 98.

<sup>132</sup> *Bhe* case at para 98.

Constitution.<sup>133</sup> An appeal was made to set aside the order and to develop the rule of male primogeniture in order to allow all descendants to participate in intestacy. The court however did not decide the constitutional challenge on the ground that the Interim Constitution did not apply retroactively as the rights of the heir in the estate had vested on the death of the deceased which was before the Interim Constitution took effect.<sup>134</sup> In this decision, it is clear that the court failed in its duty to develop customary law. Langa DCJ has held that the customary-law rule of primogeniture, in its application to intestate succession, is not consistent with the equality protection under the Constitution,<sup>135</sup> and thus it was even more so important for the court to have resolved the issue in the *Mthembu* case.

In the case of *S v Manamela*,<sup>136</sup> the court stated that one must engage in a balancing exercise to arrive at a global judgment on proportionality.<sup>137</sup> The ultimate question should therefore be one of degree which should be assessed in the concrete legislative and social setting of the measure, paying due regard to the means which are realistically available without losing sight of the ultimate value which must be protected.<sup>138</sup> The rights to equality and dignity are seen as the most valuable rights in any open and democratic society which must assume special importance in South Africa, especially due to our past history of inequality and discrimination.<sup>139</sup> Therefore, trying to limit these very important rights may prove to be rather difficult and will require much justification.

The most preferable approach was followed in the case of *Mabena v Letsoalo*,<sup>140</sup> where a more aggressive approach was followed where a decision had been made on the validity of customary marriage on the grounds that the father of the groom was not a party to the marriage negotiations and that *lobolo* had been received by the bride's mother and not the father. The court noted that according to official customary law, marriage requires the consent of the bride and groom as well as the bride's guardian and that the *lobolo* agreement had to be negotiated by the families of both parties to the marriage but nevertheless held that the marriage was valid. In arriving at this decision, the court took cognisance of the current social practices of the community to which the parties belonged where the groom could

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<sup>133</sup> Constitution of the Republic of South Africa 200 of 1993.

<sup>134</sup> *Mthembu* case (2000) at para 35.

<sup>135</sup> *Bhe* case at para 100.

<sup>136</sup> *S v Manamela & Another* 2000 (5) BCLR 491 (CC).

<sup>137</sup> *Manamela* case at para 32.

<sup>138</sup> *Manamela* case at para 32.

<sup>139</sup> *Bhe* case at para 71.

<sup>140</sup> *Mabena v Letsoalo* 1998 2 SA 1068 (T).



negotiate *lobolo* with his prospective wife's mother. Therefore the court held that this new gender-neutral custom was consonant with the spirit, purport and objects of the Bill of Rights. The court thus recognised that the nature of marriage negotiations may be changing due to the fact that many households are now headed by women and therefore held that living customary law does allow a woman to act as head of the family in certain circumstances. In the present matter it was held that the consent of the bride's mother as the head of the family could serve as the requisite permission for a marriage and a mother could negotiate *lobolo* in the absence of the father.

A differing approach was however followed by the court in the *Bhe* decision where it was held that one of the problems in applying the Constitution to customary law is that official customary law as reflected in legislation, academic writing and court decisions, are often not an accurate reflection of living customary law which continuously changes with the changes in society.<sup>141</sup> Langa DCJ held that the rule of male primogeniture in customary law, for example, as mentioned above, was inconsistent with the constitutional guarantee of equality and the questions thus followed whether the court was in a position to develop the rule in a manner that would 'promote the spirit, purport and objects of the Bill of Rights'.<sup>142</sup> In the event that the court could not develop the rule of customary law, it should allow for flexibility to facilitate the development of the law and therefore 'living' customary law would be implemented instead of official customary law.<sup>143</sup> It was held that it would be just and equitable to apply the Intestate Succession Act.<sup>144</sup> The court in this case therefore followed the approach of excluding the application of customary law and applied statutory law instead.

However, in the dissenting judgment of Ngcobo J, it was held that the nature of the customary law of succession has to support and maintain the whole family and subsequently stated that the regime could and should not be replaced by the Intestate Succession Act.<sup>145</sup> In order to overcome the discriminatory effect of the rule of male primogeniture, it had to be developed in such way that reference to the word male is removed in order to allow an eldest daughter to succeed to the deceased estate.<sup>146</sup> The author agrees with the approach followed by Ngcobo J in that he opted to develop the rules of customary law in terms of section 39(2)

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<sup>141</sup> *Bhe* case at para 82.

<sup>142</sup> *Bhe* case at para 109.

<sup>143</sup> *Bhe* case at para 110.

<sup>144</sup> *Bhe* case At para 241

<sup>145</sup> Lehnert, W (2005) at 269.

<sup>146</sup> *Bhe* case at para 222

for it to be in line with the Constitution as opposed to invalidating or replacing it in its entirety.

Through the above case examples, it can be said that customary law has to be moulded and developed to be in line with the Constitution so as to not violate any of the rights as guaranteed in the Bill of Rights.

### 3.4. Conclusion

This chapter has looked at the international and national legal framework. From this discussion it has become clear that cultural rights have to cede to universal standards by not infringing any fundamental human rights.<sup>147</sup> This is an important concept as many gender-specific human rights violations such as corrective rape, are justified as cultural practices.<sup>148</sup> International and national legislation therefore accept the role of culture as these documents consistently address culture as a basis upon which protections must be afforded.<sup>149</sup> It is for this reason that it is always important to read the provisions on group rights, such as the right to enjoy one's culture, together with the existing body of international law which guarantees the human rights of women as the international framework on women's international human rights accepts equality as a guiding principle.<sup>150</sup>

In addition, this chapter has also illustrated that the right to equality, as one of the Constitution's founding principles are protected and in the event that cultural rights infringe on this right, it should be developed to bring it in line with the Constitution thereby preventing further violations of the fundamental rights of the victims of corrective rape. In addition, it has been shown that internal limitations exist in national legislation as well as the general limitations clause as provided for in section 36. The application of the these

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<sup>147</sup> Mwambene, L. & Sloth-Nielsen, J. (2011) at 13 as cited in R Cook 'State Accountability under the Convention on the Elimination of all Forms of Discrimination Against Women' in R Cook (ed) *Human Rights of Women: National and International Perspectives* (1994) 228 at 234-235.

<sup>148</sup> Lai, S.Y & Ralph R.E (1995) at 207.

According to the U.N. Special Rapporteur on Violence against Women, 'Certain customary practices and some aspects of tradition are often the cause of violence against women. Besides female genital mutilation, a whole host of practices violate female dignity. Foot binding, male preference, early marriage, virginity tests, dowry deaths, sati, female infanticide and malnutrition are among the many practices which violate a woman's human rights.' As cited in Preliminary report submitted by the Special Rapporteur on violence against women 'Its causes and consequences' (1995). *U.N. Commission on Human Rights*, 50th Sess., Agenda Item 11(a), at 16, U.N. Doc. E/CN.4/42.

<sup>149</sup> Hernandez-Truyol, B.E 'Sex, Culture, and Rights: A Re/conceptualisation of Violence for the Twenty-First Century' (1997) *Albany Law Review* 60 at 620.

<sup>150</sup> Coomaraswamy, R 'Identity Within: Cultural Relativism, Minority Rights and the Empowerment of Women' (2002) *The George Washington International Law Review* 34 at 508.

limitations as well as other relevant constitutional provisions therefore proved that courts will limit the right to culture in so far as it conflicts with the provisions of the constitution and in doing so, it should opt for the development of the inconsistent customary rule or law instead of invalidating it. The courts have however been increasingly paying attention to the rights of women thus recognising the importance of human rights.<sup>151</sup> In the next chapter, a discussion of how South Africa has responded to victims of corrective rape which can be justified on the right to culture is ensued.



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<sup>151</sup> Lehnert, W (2005) at 275.

## Chapter 4:

### SOUTH AFRICA'S RESPONSE TO VICTIMS OF CORRECTIVE RAPE

#### 4.1. Introduction

The aim of this chapter is to discuss South Africa's response to victims of corrective rape. This will be done in two ways: first by looking at existing legislation and guidelines available to the judiciary in order to prosecute the perpetrators of (corrective) rape. Thereafter, an examination of cases which have gone to court will be conducted.<sup>1</sup> This will be done in order to assess whether or not South Africa is fulfilling its constitutional mandate to not unfairly discriminate directly or indirectly against any one as provided under section 9(3) of the Constitution in relation to black African lesbians affected by corrective rape.<sup>2</sup>

#### 4.2. Legislative framework

In South African criminal law, a person can be charged for performing an illegal act.<sup>3</sup> In order for an individual to be prosecuted, it must first be proved that a law has been broken either in terms of statutory law or the common law.<sup>4</sup> The common law definition of rape has been repealed in the case of *Masiya* where it was declared to be unconstitutional.<sup>5</sup> This means that the crime of rape is no longer deemed to be a common law offence, but a statutory one. Thus, the legislative provisions available for prosecuting perpetrators of corrective rape can be found in the Criminal Law (Sexual Offences and Related Matters) Act (Sexual Offences Act)<sup>6</sup> and the Criminal Procedure Act (CPA).<sup>7</sup>

The Sexual Offences Act provides the amended definition of rape in section 3 which states that a person who unlawfully and intentionally commits an act of sexual penetration with another person, without consent will be guilty of the offence of rape. To this end, the CPA provides for the imposition of sentencing by a court for the commission of offences which in this instance would be the crime of rape.

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<sup>1</sup> See chapter 2 for a discussion surrounding the facts of the Eudy and Zoliswa cases at 2.3.1.

<sup>2</sup> Full provisions of section 9 see chapter 2 at 2.3.

<sup>3</sup> 'Chapter 14: Criminal Law and Procedure' (2010) Available at: <http://section27.org.za/dedi47.cpt1.host-h.net/wp-content/uploads/2010/04/14Manual.pdf> [Accessed on 15 September 2012]. Hereafter cited as 'Chapter 14: Criminal Law and Procedure' (2010).

<sup>4</sup> 'Chapter 14: Criminal Law and Procedure' (2010).

<sup>5</sup> *Masiya v Director of Public Prosecutions Pretoria (The State) and Another* 2007 (5) SA 30 (CC) at para 93. See also chapter 2 at 2.2 for a discussion of this case.

<sup>6</sup> Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

<sup>7</sup> Criminal Procedure Act 51 of 1977.

The general principles with regards to sentencing was set out in the *Rabie* case where it was held that the punishment should fit the offender, the crime, it must be fair to society and the court must consider the surrounding circumstances of the case.<sup>8</sup> However, the Criminal Law Amendment Act (Amendment Act) now provides for the imposition of minimum sentences for a range of serious crimes.<sup>9</sup> These crimes are listed in the provisions of the CPA and include rape and murder.<sup>10</sup> According to the Amendment Act, a first time offender must be sentenced to a prison term of not less than 15 years.<sup>11</sup> When imposing sentence, it is however important for courts to consider and balance certain factors which were first established in the 1969 case of *Legoa*,<sup>12</sup> namely: the nature and circumstances of the offence; the characteristics of the offender; and the impact of the crime on the community.<sup>13</sup>

Further, it was explained by Cameron J that a criminal trial has two stages, the first being verdict and then sentence.<sup>14</sup> It was contended that the first stage concerns guilt or innocence of the accused based on the facts relating to the elements of the offence with which the accused is charged.<sup>15</sup> The second stage then concerns the question of an appropriate sentence where various mitigating as well as aggravating factors may play a role.<sup>16</sup> This is in accordance with the provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) which states that:

[I]f it is proved in the prosecution of any offence that unfair discrimination on the grounds of race, gender or disability played a part in the commission of the offence, this must be regarded as an aggravating circumstance for purposes of sentence.<sup>17</sup>

Thus, if prejudice or motive exists in the commission of an offence, it will only play a role in sentencing which relates to the second stage of a criminal trial as an aggravating factor. An instance which could give rise to mitigating circumstances is youth as juveniles are to be sentenced with more leniency than adults.<sup>18</sup> This is attributed to the fact that they cannot be

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<sup>8</sup> *S v Rabie* 1975 (4) SA 855 (A) at 826(G).

<sup>9</sup> Criminal Law Amendment Act 105 of 1997 section 51(2).

<sup>10</sup> CPA, Schedule 2, part II.

<sup>11</sup> Amendment Act Section 52(a)(i).

<sup>12</sup> *Legoa v S* (2002) 4 SA All SA 373 (SCA).

<sup>13</sup> *S v Zinn* 1969 (2) SA 537 (A) at 540G.

<sup>14</sup> *Legoa* case (2002) at para 15.

<sup>15</sup> *Legoa* case (2002) at para 15.

<sup>16</sup> *Legoa* case (2002) at para 15.

<sup>17</sup> PEPUDA section 28(1).

<sup>18</sup> Bekker, P.M, Geldenhuys, T, Joubert, J.J et al *Criminal Procedure Handbook* 7<sup>th</sup> ed (2005) at 272.

expected to act with the same measure of responsibility as adults, the lack of necessary life experience as well as insight which leads them to be more prone to commit thoughtless acts.<sup>19</sup>

It thus follows that for the crime of rape, a mandatory sentence is proposed by the Amendment Act of at least 15 years imprisonment but there are various factors which have to be taken into account by the presiding officer when imposing such sentences. It is now necessary to embark on a discussion surrounding the cases that went to trial in order to determine how the courts have incorporated these legislative provisions for purposes of sentencing the perpetrators of corrective rape.

### 4.3. Case law on corrective rape

The two cases to be discussed are the only ones which have been heard in the country and resulted in convictions, despite the fact that there have been numerous cases across South Africa involving rape, assault and murder of lesbians.<sup>20</sup> Such convictions are therefore the exception.

#### 4.3.1. The Eudy Simelane judgment<sup>21</sup>

The case of Eudy Simelane, an open lesbian activist and soccer star, was first heard in the Springs Magistrate Court by magistrate, Mr J. Mokoma, and prosecutor, Mr E. Maloba.<sup>22</sup> Five men appeared in the Magistrates Court from 5 May till 7 October in 2008.<sup>23</sup> After 11 hearings, all charges against accused number four, Tsepo Pitja were withdrawn and he was free to go as there was no evidence which linked him to the crimes after which he became a state witness.<sup>24</sup> His four co-accused were to appear for trial at the Delmas Court in Mpumalanga from 11 -13 February 2009 and were remanded until the conclusion of the trial

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<sup>19</sup> *S v Solani* 1987 (4) SA 203 (NC) at para 220E as cited in Bekker, P.M, Geldenhuys, T, Joubert, J.J et al (2005) at 272.

<sup>20</sup> Mtetwa, P 'Trial into Murder of Lesbian Soccer Player set for 11-13 Feb at Delmas Court' Available at: <http://www.jwg.org.za/content/view/112/82/> [Accessed on 30 July 2012]. Hereafter cited as: Mtetwa, P 'Trial into Murder of Lesbian Soccer Player set for 11-13 Feb at Delmas Court'.

<sup>21</sup> This case was not reported and direct references could therefore not be made to the actual judgment. However, there was extensive media coverage on the matter and various interest groups followed the case, its progress as well as the trial religiously.

<sup>22</sup> Gqola, P 'Eudy Simelane case update 7 Oct 08' (2008) Available at: <http://pumlagqola.wordpress.com/2008/10/07/eudy-simelane-case-update-7-oct-08/> [Accessed on 30 March 2011]. Hereafter referred to as: Gqola, P 'Eudy Simelane case update 7 Oct 08' (2008).

<sup>23</sup> Henderson, J 'About the Eudy Enoculate "Styles" Smelane Murder Case' Available at: <http://pda.jwg.org.za/content/view/111/82/> [Accessed on 30 March 2011]. Hereafter cited as: Henderson, J 'About the Eudy Enoculate "Styles" Smelane Murder Case'

<sup>24</sup> Gqola, P 'Eudy Simelane case update 7 Oct 08' (2008). See also Henderson, J 'About the Eudy Enoculate "Styles" Smelane Murder Case'.

facing charges of murder, two counts of robbery and ‘other’, possibly rape.<sup>25</sup> On the first day of the trial the defence attorney for Thato Mphiti, accused number four, requested a postponement and justified her request by alleging that the postponement would in fact benefit the state as she needed the additional time to consult with her client and certain documentation.<sup>26</sup> An objection was lodged to the application as there was a strong community interest which was evident by the number of people who attended the trial proceedings.<sup>27</sup> Mavundla J nevertheless held that the delay was not unreasonable and subsequently granted the postponement as it was in the interest of justice and the postponement was subsequently granted till the following day (12 February 2009).<sup>28</sup>

Mphiti pleaded guilty to the count of robbery with aggravating circumstances but not guilty to the count of rape.<sup>29</sup> He did however plead guilty to assisting his co-accused who attempted to rape Eudy.<sup>30</sup> The co-accused conversely pleaded not guilty to the charge of robbery with aggravating circumstances.<sup>31</sup> A statement made by Mphiti was read by his defence attorney who outlined the events of the night Eudy was murdered, stating that he and his friends passed Eudy in the early hours of the morning when they decided to rob her.<sup>32</sup>

When discovering that she did not carry any money, it was suggested that she be raped and all of them agreed.<sup>33</sup> At that point, Eudy had recognised one of them and in fear of being identified, he insisted that she be silenced and passed his knife to Mphiti who panicked and started stabbing her after which she was kicked into a stream.<sup>34</sup> According to the medical examiner, the wounds were critical and that she could not have survived without immediate medical attention.<sup>35</sup> After accepting Mphiti’s plea, an application was made by the prosecutor to separate his trial from the other accused<sup>36</sup> which was granted and their trial was to

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<sup>25</sup> Gqola, P ‘Eudy Simelane case update 7 Oct 08’ (2008).

<sup>26</sup> Nath, D & Henderson, J ‘The Trial Begins... Not’ (2009) Available at: <http://www.jwg.org.za/content/view/114/82/> [Accessed on 30 July 2012]. Hereafter cited as: Nath, D & Henderson, J ‘The Trial Begins... Not’ (2009).

<sup>27</sup> Nath, D & Henderson, J ‘The Trial Begins... Not’ (2009).

<sup>28</sup> Nath, D & Henderson, J ‘The Trial Begins... Not’ (2009).

<sup>29</sup> Henderson, J & Nath, D ‘Mphiti Pleads Guilty’ (2009) Available at: <http://www.jwg.org.za/content/view/115/82/> [Accessed on 30 July 2012]. Hereafter cited as:

Henderson, J & Nath, D ‘Mphiti Pleads Guilty’ (2009).

<sup>30</sup> Henderson, J & Nath, D ‘Mphiti Pleads Guilty’ (2009).

<sup>31</sup> Henderson, J & Nath, D ‘Mphiti Pleads Guilty’ (2009).

<sup>32</sup> Henderson, J & Nath, D ‘Mphiti Pleads Guilty’ (2009).

<sup>33</sup> Henderson, J & Nath, D ‘Mphiti Pleads Guilty’ (2009).

<sup>34</sup> Henderson, J & Nath, D ‘Mphiti Pleads Guilty’ (2009).

<sup>35</sup> Henderson, J & Nath, D ‘Mphiti Pleads Guilty’ (2009).

<sup>36</sup> Khumbulani Magagula, Johannes Mahlangu, and Themba Mvubu.

commence on 29 July 2009.<sup>37</sup> The prosecutor however failed to raise questions relating to the possibility that prejudice based on the sexual orientation of Eudy was motivation for the attack.<sup>38</sup>

#### 4.3.1.1. Sentencing

Mavundla J delivered sentencing for Mphiti on 13 February 2009.<sup>39</sup> He received 18 years imprisonment on the count of murder, 15 years on the count of robbery with aggravating circumstances of which 10 years was ordered to run concurrently with the first sentence.<sup>40</sup> In terms of assisting the other accused with the attempted rape, he received a further 9 years, although it was held that the time already spent in custody should be deducted from the said 9 years which brought Mphiti's total sentence to 31 years imprisonment.<sup>41</sup> Factors given by Mavundla J which were considered in reaching a decision deviating from mandatory life sentence was amongst others, the youthfulness of the accused, the fact that Mphiti had been intoxicated at the time the crime was committed as well as his level of education in addition to the fact that Mphiti suffered from 'fright/fear syndrome'.<sup>42</sup>

The three remaining accused who faced charges of robbery with aggravating circumstances, murder and rape were heard in September 2009.<sup>43</sup> Magagula and Mahlangu were both acquitted for lack of evidence.<sup>44</sup> Mokoathleng J found Mvuba guilty of murder, rape and accomplice to rape.<sup>45</sup> Mvuba subsequently received a life sentence to which he showed no remorse as he told a reporter: 'Ach, I'm not sorry at all'.<sup>46</sup>

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<sup>37</sup> Henderson, J & Nath, D 'Mphiti Pleads Guilty' (2009).

<sup>38</sup> Henderson, J & Nath, D 'Mphiti Pleads Guilty' (2009).

<sup>39</sup> Henderson, J 'Mphiti is sentenced' (2009) Available at: <http://www.jwg.org.za/content/view/116/82/> [Accessed on 30 July 2012]. Hereafter cited as: Henderson, J 'Mphiti is sentenced' (2009).

<sup>40</sup> Henderson, J 'Mphiti is sentenced' (2009).

<sup>41</sup> Henderson, J 'Mphiti is sentenced' (2009).

<sup>42</sup> According to the Judge this 'fright/fear syndrome' coupled with the influence of educational level 'impacted on Mphiti's ability to rationalise in a crisis situation' as cited in Henderson, J 'Mphiti is sentenced' (2009).

<sup>43</sup> Mtetwa, P 'Eudy Simelane Murderer Gets Life Imprisonment' (2009) Available at: <http://www.womensnet.org.za/news/eudy-simelane-murderer-gets-life-imprisonment> [Accessed on 30 March 2011]. Hereafter referred to as: Mtetwa, P 'Eudy Simelane Murderer Gets Life Imprisonment' (2009).

<sup>44</sup> Mtetwa, P 'Eudy Simelane Murderer Gets Life Imprisonment' (2009).

<sup>45</sup> Mtetwa, P 'Eudy Simelane Murderer Gets Life Imprisonment' (2009).

<sup>46</sup> Bearak, B 'Mixed Verdict in S. African 's Murder Trial' *New York Times* 22 September 2009 Available at: [http://www.nytimes.com/2009/09/23/world/africa/23safrica.html?\\_r=2&](http://www.nytimes.com/2009/09/23/world/africa/23safrica.html?_r=2&) [Accessed on 29 March 2011].



### 4.3.2. The Zoliswsa Nkonyana judgment

The Zoliswa case is not one dealing with corrective rape, but has nevertheless been the breakthrough which LGBTI right groups have been waiting for. She was a lesbian who was killed due to her sexual orientation which will become evident in assessing the judgment.

Zoliswa's case was heard in the Khayelitsha Magistrates' Court in 2011.<sup>47</sup> Four of the nine accused were convicted on 7 October 2011 and sentencing was set for 1 February 2012.<sup>48</sup> There were originally nine accused, but five were acquitted as the state did not have enough evidence against them.<sup>49</sup> The magistrate deemed it important to take into account that all the accused were under the age of 18 at the time the offence was committed in 2006 as the sentencing of youthful offenders are difficult to address due to the fact that there are many factors which has to be considered.<sup>50</sup> There were three criteria which the magistrate took into consideration: the seriousness and nature of the offence; interests of the community and the family of the victims as well as the personal circumstance of the accused.<sup>51</sup> The magistrate was of the view that sentencing should serve as a deterrent to the accused as well as to the community at large by sending a message that such crimes will not be tolerated and in addition, to encourage rehabilitation.<sup>52</sup>

#### 4.3.2.1. Factors considered by the court

##### a.) Seriousness and nature of the offence

In considering the first factor, due consideration was given to the case as proven by the state which dealt with the murder of a young woman whose life was taken away by virtue of her

<sup>47</sup> Case number RCB216/06.

<sup>48</sup> Arnott J, 'Sentencing of the Zoliswa case: case number RCB216/06' (Unreported) Information received from the director of the Triangle Project who attended the trial proceedings and have formulated their own notes. This case is unreported and reliance is thus made on all relevant and important sources and documentation. Email received on 20 July 2012 - [director@triangle.org.za](mailto:director@triangle.org.za). At 682.

<sup>49</sup> Accused: Lubabalo Ntlabathi, Sicelo Mase, Luyanda Londzi and Mbulelo Damba. Sabelo Yakiso, Themba Dlephu, Mfundo Kulani, Zolile Kobese and Anele Gwele were acquitted as mentioned in SAPA '2 acquitted in lesbian murder trial' (2011) Available at: <http://www.news24.com/SouthAfrica/News/2-acquitted-in-lesbian-murder-trial-20110907> [Accessed on 19 September 2012]. See also Adams, T '18 years 'won't bring our daughter back' (2012) Available at: <http://www.iol.co.za/capeargus/18-years-won-t-bring-our-daughter-back-1.1226070#.UAFZMVKyhdg> [Accessed on 19 September 2012].

<sup>50</sup> Zoliswa case at 682.

<sup>51</sup> Zoliswa case at 682-683. These factors are no different to those established in *S v Zinn* 1969 (2) SA 537 (A) at 540G.

<sup>52</sup> Zoliswa case at 683.

life choices and personal beliefs.<sup>53</sup> She posed no threat to the accused but yet they acted in such a brutal and violent manner which cannot be condoned by the community, nor the court.<sup>54</sup> A representative of Triangle Project made recommendations with regards to sentencing in that it should reflect the ‘extremely brutal nature’ of the crime, in addition to acknowledging and specifically mentioning that the discrimination based on sexual orientation and gender should be named as an aggravating factor in sentencing.<sup>55</sup> During the trial, no reference was made as to the motive for the killing of Zoliswa but it was a necessary factor to consider in sentencing in the view of the court.<sup>56</sup> It was held that the ‘preceding events to the commission of the offence was a clear indicator as to what the motive was’ which according to the court was held to be hatred.<sup>57</sup> Such hatred stemmed from intolerance of her difference and thus motive was considered as an aggravating factor in sentencing.<sup>58</sup> The message that the murder of Zoliswa sent, was one which blatantly communicated to lesbians that they are less than human and that their lives are thus expendable.<sup>59</sup>

#### **b.) Community and family interests**

It was clear to the court that the community was outraged by the murder of Zoliswa as the courtroom was over-crowded in addition to the extensive media coverage and attention given to the matter by various interest groups who expressed their discontent.<sup>60</sup> A report was compiled by the Department of Social Justice regarding the circumstances of the family of the deceased which stated that she was an only child resulting in an even greater loss to her family.<sup>61</sup> Furthermore, a report was submitted by the Triangle Project which comprehensively set out the impact which her death had on her girlfriend who had in fact witnessed her murder as well as giving the court insight into the problems the LGBTI community faces within their

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<sup>53</sup> *Zoliswa* case at 683-684.

<sup>54</sup> *Zoliswa* case at 684.

<sup>55</sup> Henderson, J & Arnott J ‘Evidence for Sentencing in the Zoliswa Nkonyana Murder Trial: Press Statement by the Triangle Project’ (2012) Available at: <http://feministssa.com/2012/01/31/evidence-for-sentencing-in-the-zoliswa-nkonyana-murder-trial/> [Accessed on 19 September 2012]. Hereafter cited as: Henderson, J & Arnott J ‘Evidence for Sentencing in the Zoliswa Nkonyana Murder Trial: Press Statement by the Triangle Project’ (2012).

<sup>56</sup> *Zoliswa* case at 684.

<sup>57</sup> *Zoliswa* case at 685.

<sup>58</sup> *Zoliswa* case at 685.

<sup>59</sup> Henderson, J & Arnott J ‘Evidence for Sentencing in the Zoliswa Nkonyana Murder Trial: Press Statement by the Triangle Project’ (2012).

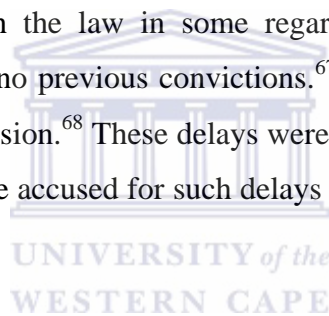
<sup>60</sup> *Zoliswa* case at 685.

<sup>61</sup> *Zoliswa* case at 686.

communities and thus shedding some light on the degree of intolerance they suffer as a consequence.<sup>62</sup>

### **c.) Personal circumstances of the accused**

The court then came to the conclusion that all four accused came from good homes with loving families and strong support systems which meant that their families would also suffer a great loss once they were sentenced.<sup>63</sup> Their families also seemed to show a great degree of empathy for the family of the deceased as opposed to the accused who were silent on the issue as they showed no remorse for what they have done.<sup>64</sup> The court was thus of the opinion that life is about choices and that once a choice is made, the consequences has to be dealt with accordingly.<sup>65</sup> At the time of the commission of the offence, all four accused were under the age of 18 but this did not retract from the fact that they have to face the consequences of their actions.<sup>66</sup> All of the accused had clean criminal records but it was however discovered that they have had clashes with the law in some regards which was not considered in sentencing as there were in fact no previous convictions.<sup>67</sup> Further, there were many delays during the trial up until its conclusion.<sup>68</sup> These delays were mostly caused by the defence and one could therefore not punish the accused for such delays which is why the court considered it in their favour.<sup>69</sup>



#### **4.3.2.2. Sentencing**

The magistrate was of the view that sentencing should not only be considered as a form of punishment, but rather as something which should instil a sense of retribution, rehabilitation in addition to serving as a deterrent.<sup>70</sup> Retribution, according to the court, was not to be confused with revenge.<sup>71</sup> Zoliswa will never be returned to her family and the accused should

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<sup>62</sup> *Zoliswa* case at 686.

<sup>63</sup> *Zoliswa* case at 687.

<sup>64</sup> *Zoliswa* case at 687.

<sup>65</sup> *Zoliswa* case at 687.

<sup>66</sup> *Zoliswa* case at 688.

<sup>67</sup> *Zoliswa* case at 688.

<sup>68</sup> *Zoliswa* case at 689.

The accused pleaded to the charge on 27 August 2008. The conviction took place three years later on 7 October 2011 and sentencing only took place on 1 February 2012. The case of Zoliswa was therefore one of the longest-running in the country's history as it was postponed 50 times as cited in Thamm, M 'Not just another murder' (2006) Available at: <http://mg.co.za/article/2006-02-26-not-just-another-murder> [Accessed on 19 July 2012].

<sup>69</sup> *Zoliswa* case at 689.

<sup>70</sup> *Zoliswa* case at 690.

<sup>71</sup> *Zoliswa* case at 690.

pay the price for their actions in that regard in order to restore some sort of justice to her family as well as to the community at large.<sup>72</sup> In terms of rehabilitation, it was contended that in order for it to be effective, there should be a realisation of the wrongfulness of one's actions; there should be acceptance of responsibility of one's actions as well as a willingness to make right the wrongs you have caused.<sup>73</sup> In the view of the court, acceptance of responsibility and acknowledgement of wrongfulness were key elements in mitigation of sentence which seemed to be absent in this case as none of the accused showed any remorse and thus re-offending could not be excluded.<sup>74</sup> In so far as deterrents were concerned, the court was of the view that it should not only be directed at the accused, but sentencing should also send a clear message to 'would-be' offenders which is that violent crimes will not be awarded by the courts.<sup>75</sup>

After considering a potential mitigating factor, the court moved on to discuss the aggravating factors and took cognisance of the fact that we live in a diverse society which requires a greater degree of tolerance.<sup>76</sup> When constitutional rights clash, it is up to the court to weigh up the conflicting rights in order to reach a determination.<sup>77</sup> The deceased exercised her right to live openly as a lesbian in her community which was a clear and conscious that she made, a choice which the accused quite clearly did not agree with.<sup>78</sup> Personal opinion and free choice is another constitutional right which all persons are entitled to, but having entitlement to one's opinion and acting out based on that opinion in a brutal and public way thus expressing clear intolerance was not acceptable for the court.<sup>79</sup> It was held that:

[T]he court has a duty to enforce the ideology that violent intolerance of difference, whether it be based on race, whether it be based on sex, whether it be based on religion, [whether it be based on sexual orientation]<sup>80</sup>, it will not go unpunished and it will not go rewarded.<sup>81</sup>

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<sup>72</sup> *Zoliswa* case at 691.

<sup>73</sup> *Zoliswa* case at 691.

<sup>74</sup> *Zoliswa* case at 691-692.

<sup>75</sup> *Zoliswa* case at 691.

<sup>76</sup> *Zoliswa* case at 692.

<sup>77</sup> *Zoliswa* case at 692.

<sup>78</sup> *Zoliswa* case at 692.

<sup>79</sup> *Zoliswa* case at 692.

<sup>80</sup> Own emphasis added.

<sup>81</sup> *Zoliswa* case at 692.

In light of all the factors which were taken into consideration, direct imprisonment was the only appropriate sentence in the view of the court.<sup>82</sup> Acknowledgement was given to the fact that the accused were all first time offenders in addition to having the support of their families but this was however weighed up against the aggravating factors surrounding the case.<sup>83</sup> Sentencing was pronounced: ‘a term of eighteen (18) years imprisonment of which four (4) years is suspended for a period of five (5) years’ on the condition that they were not convicted of murder during the period of suspension.<sup>84</sup>

#### **4.4. Conclusion**

This chapter set out to discuss South Africa’s response to victims of corrective rape. This was done by looking at the available legislation and guidelines at the disposal of the judiciary in order to prosecute perpetrators of corrective rape. In addition existing court jurisprudence was discussed to see how courts have in fact prosecuted the perpetrators. In doing so, it was shown that only one of the judgments has set a long awaited precedent in finally recognising the right to non-discrimination on the basis of sexual orientation. This is however not enough as further protections need to be put in place to ultimately eradicate the problem. Thus, the next chapter will analyse South Africa’s response to victims of corrective rape by addressing the various levels of the justice system consisting of law enforcement, the legislature and the judiciary.

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<sup>82</sup> *Zoliswa* case at 693.

<sup>83</sup> *Zoliswa* case at 695.

<sup>84</sup> *Zoliswa* case at 693.

## Chapter 5

### ANALYSIS OF SOUTH AFRICA'S RESPONSE TO VICTIMS OF CORRECTIVE RAPE

#### 5.1. Introduction

The aim of this chapter is to analyse South Africa's response to victims of corrective rape. This will be done in light of the discussed definition, prevalence and reasons for corrective rape (chapter 2) as well as the international and national legal framework (chapter 3). The analysis will be conducted in three parts. First, the author will discuss the criminal justice system pertaining to law enforcement. Here the focus will be on the legislature as well as the judiciary to show how the available law is inadequate to deal with the offences of corrective rape. Second, the definition of corrective rape, defined merely as the crime of rape. The aim will be to show why corrective rape should be considered as a hate crime and not merely the crime of rape in order to properly prosecute perpetrators of this offence. Lastly, it will consider the impact of overlooking the inherent conflict between the constitutionally recognised rights, the right to culture and the right to equality, which were not acknowledged nor addressed by the judiciary in the cases that were before the court.

#### 5.2. The justice system

The South African justice system<sup>1</sup> has failed the victims of corrective rape in more than one regard. This inference is drawn from the fact that the number of corrective rapes do not correspond with the number of cases that have gone to court for prosecution as shown in chapter 2. There have only been two cases heard by the courts of which both are unreported and further, only one can be properly analysed to ascertain how the court has interpreted the infringement, prosecuted the perpetrators and whether justice has been restored.<sup>2</sup>

##### 5.2.1. Law enforcement

When an offence is committed, the point of departure is the investigation by law enforcement (the police). The aim of such an investigation is to collect evidence which will be presented in court as well as to record the incidents in order to create reliable statistics with the aim of

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<sup>1</sup> For purposes of this discussion, the justice system comprises of law enforcement, the legislature as well as the judiciary.

<sup>2</sup> See chapter 4 at 4.3.1. & 4.3.2.

establishing the true extent of the problem. Currently, corrective rape is not recognised as a separate crime category in South Africa which is one of the reasons why reliable statistics are hard to come by as no distinction is made between offences regarding rape and corrective rape. Thus, the incidents that are reported will merely be recorded as rape and it has been proved by the author that there are in fact distinct differences between these two crimes.<sup>3</sup>

In addition, it has been shown that the reason reliable statistics of corrective rape incidents are hard to come by is owing to the fact that the majority of incidents are either unreported or misidentified in that the sexual orientation of the victims are not taken into account. In support of this, the study conducted by ActionAid showed that 66 percent of women failed to report their attacks in the fear of not being taken seriously, further, 25 percent feared exposing their sexual orientation to the police as fearful that they would suffer added abuse.<sup>4</sup> These fears are justified as they emanate from the fact that when these women are raped, the perpetrators believe that they deserved it as they were shown how to be real women.<sup>5</sup>

When one takes into account that these incidents occur mainly in townships due to the cultural attitudes and views of the perpetrators, it is understandable that the victims are fearful to report the incidents as it is reasonable to expect that they might be subjected to further victimisation. It was also shown that the incidents which were reported were not followed up and thus could not be brought before the courts. This can be corroborated by the case studies which were discussed as the perpetrators involved in the attack against Sizakele Sigases and Salome Massooa were initially detained but subsequently released. Similarly, Zukiswa Gaca was attacked on two occasions and plucked up the courage to report the second attack and even accompanied the investigating officer to identify her attacker, but he was released. Moreover, the man who raped Millicent Gaika received a ridiculously low bail after which he fled and was never found again. These are the messages that the victims of corrective rape receive which serves as an additional deterrent to reporting such incidents as they fear they will not be taken seriously.

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<sup>3</sup> See chapter 2 for the full definitions of both rape and corrective rape at 2.2. See also chapter 4 for South Africa's legislative framework for the crime of rape at 4.2.

<sup>4</sup> Martin, A, Kelly, A, Turquet, L & Ross, S 'Hate Crimes: The rise of 'Corrective Rape' in South Africa' (2009) *ActionAid* at 13.

<sup>5</sup> Martin, A, Kelly, A, Turquet, L & Ross, S (2009) at 13.

### 5.2.2. The Legislature: Inadequacy of the domestic legal framework

The legislative provisions available and utilised to prosecute the perpetrators of corrective rape were aimed and directed at the crime of rape and provided guidelines along with mandatory sentencing periods accordingly. Corrective rape is however not the same as ‘mere’ rape in that it is committed based on prejudice and intolerance. It has been shown in the previous chapter that motive does not play a role during the first part of a trial as it only becomes relevant during sentencing. This was also evident in the *Zoliswa* judgment where it was held that motive is not an element to be proven during criminal trials and it therefore very often leads to such trials being concluded without the motive ever being established. This is due to the fact that ‘it never forms part of the body of evidence and often people are left dumbfounded as to why a particular crime is committed’.<sup>6</sup> It was subsequently held that motive was to be considered as an aggravating factor for sentencing which means that the motive was not a factor which was considered or one which carried any weight in terms of conviction. If hypothetically speaking, the accused were acquitted, the motive for her killing would never have been established.

The definition of the statutory offence of rape along with mandatory sentencing is set out in legislation.<sup>7</sup> However, no such legislative definition or mandatory sentencing exists for corrective rape. This is supported by section 28 of PEPUDA which confirms that where unfair discrimination played a role in the commission of the offence, it should contribute to imposing a harsher sentence.<sup>8</sup>

### 5.3. Definition of corrective rape

South Africa’s failure to fulfil its constitutional mandate in relation to victims of corrective rape also lies with the definition of the corrective rape. If corrective rape could be considered as a hate crime and not merely as the crime of rape, then it would be easier to prosecute perpetrators of this offence successfully. The term ‘hate crime’ comes with differing perspectives and includes various definitions within and between countries, but most of the qualities within these definitions tend to overlap.<sup>9</sup> A hate crime is an act which constitutes a

<sup>6</sup> *Zoliswa* case RCB216/06 (unreported) at 684-685

<sup>7</sup> See chapter 4 at 4.2.

<sup>8</sup> See chapter 4 discussion under 4.2.

<sup>9</sup> Harris, B ‘Arranging Prejudice: Exploring Hate Crime in post-apartheid South Africa’ *Race and Citizenship in Transition Series*, 2004. Available at: <http://www.csvr.org.za/wits/papers/paprctp1.htm#series> [Accessed on 14 November 2011]. Hereafter



criminal offence and is motivated in whole or part by prejudice or hate.<sup>10</sup> There are a range of crimes that could be considered a 'hate crime' such as damage to property, murder, arson, intimidation, assault and rape.<sup>11</sup> Hate crimes also refer to:

Actions against a person based on their race, ethnicity, sexual orientation, religion or political convictions or gender that intends to do harm or intimidate the person...<sup>12</sup>

Hate crimes are thus generally seen as acts of prejudice or message crimes and are mostly violent in nature.<sup>13</sup>

Hate crimes in its nature causes greater harm than ordinary crimes because it increases the vulnerability of the victims as they are unable to change the characteristic which made them a target.<sup>14</sup> As a result, it is of utmost importance to recognise corrective rape as a hate crime as the victims are unable to change the inherent characteristic which make them the target of such violence and prejudice; their sexual orientation.

The Convention on the Elimination of All Forms of Racial Discrimination (CERD) defines hateful activities as all those which are based on ideas or theories of superiority of one race or group of one colour or ethnic origin, which justify or promote racial hatred and discrimination.<sup>15</sup> These definitions both describe crimes that are motivated by prejudice and therefore the definitions of a 'hate crime' could be described as 'motive-driven'.<sup>16</sup>

For example, xenophobia swept South Africa in 2008 when foreign national were attacked in over 130 locations in various parts of the country.<sup>17</sup> Many were killed, hundreds injured and over 100 000 displaced.<sup>18</sup> This phenomenon is defined as an attack on foreign nationals

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referred to as: Harris, B 'Arranging Prejudice: Exploring Hate Crime in post-apartheid South Africa' (2004)

<sup>10</sup> 'Hate Crimes in South Africa' A background paper for the Hate Crimes working group at 1

<sup>11</sup> 'Hate Crimes in South Africa' at 1

<sup>12</sup> 'Hate Crimes Against Gay and Lesbian People in Gauteng: Prevalence, Consequences and Contributing Factors' Research Initiative of the Joint Working Group conducted by OUT LGBT Well-being in collaboration with the UNISA. Centre for Applied Psychology at 1.

<sup>13</sup> Harris, B 'Arranging Prejudice: Exploring Hate Crime in post-apartheid South Africa' (2004).

<sup>14</sup> 'Hate Crime Laws: A Practical Guide' (2009) Published by the OSCE Office for Democratic Institutions and Human Rights (ODIHR) at 20.

<sup>15</sup> Convention for the Elimination of All Forms of Racial Discrimination (CERD) 660 UNTS 195; G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) U.N. Doc. A/6014 (1966), Article 4

<sup>16</sup> Harris, B 'Arranging Prejudice: Exploring Hate Crime in post-apartheid South Africa' (2004).

<sup>17</sup> LeGendre, P 'UN Expert Highlights Xenophobia in South Africa, Calls for Hate Crime Legislation' (2011) Available at: <http://www.humanrightsfirst.org/2011/06/03/u-n-expert-highlights-xenophobia-in-south-africa/> [Accessed on 7 April 2011]. Hereafter referred to as: LeGendre, P 'UN Expert Highlights Xenophobia in South Africa, Calls for Hate Crime Legislation' (2011).

<sup>18</sup> LeGendre, P 'UN Expert Highlights Xenophobia in South Africa, Calls for Hate Crime Legislation' (2011).

which is seen as a violent crime not only in South Africa but also abroad as a Special Rapporteur<sup>19</sup> on the Human Rights of Migrants stated that ‘indeed xenophobic violence is a global problem that has been extensively documented in many countries, including in South Africa...’.<sup>20</sup> After these xenophobic attacks, calls have been made to criminalise the attacks against foreigners as hate crimes.<sup>21</sup>

The Special Rapporteur’s report made important recommendations to South Africa of which many have been previously advanced by the South African Human Rights Commission, the Consortium for Refugees and Migrants in South Africa, the African Centre for Migration and Society, Lawyers for Human Rights as well as Human Rights First.<sup>22</sup> He called on authorities to:

[M]ake any act of violence against individuals or property on the basis of a person’s race, nationality, religion, ethnicity, sexual orientation or gender identity (‘hate crime’) an aggravating circumstance.<sup>23</sup>

Hate crimes are therefore essentially defined as an assault against all members of stigmatised as well as marginalised groups and communities which is embedded in the structural and cultural context with which those groups interact.<sup>24</sup> The International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) reported that hate crimes based on sexual orientation is only considered an aggravating factor in 17 countries of which South Africa is not one.<sup>25</sup> This is alarming as South Africa has a history of gross human rights violations and should thus have greater protections in place to combat these very serious issues.

When considering the definitions of hate crimes, the crux and decisive factor which sets it apart from other ordinary crimes is the motive behind the commission of the offence. As was rightly pointed out, a hate crime can be defined as ‘actions against a person based on their

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<sup>19</sup> Jorge Bustamante, Special Rapporteur on the Human Rights of Migrants.

<sup>20</sup> LeGendre, P ‘UN Expert Highlights Xenophobia in South Africa, Calls for Hate Crime Legislation’ (2011).

<sup>21</sup> Mkhize, N, Bennett, J, Reddy , V & Moletsane, R ‘The country we want to live in – Hate crimes and homophobia in the lives of black lesbian South Africans’ (2010) *Human Sciences Research Council* (HSRC Press) at 17.

<sup>22</sup> LeGendre, P ‘UN Expert Highlights Xenophobia in South Africa, Calls for Hate Crime Legislation’ (2011).

<sup>23</sup> LeGendre, P ‘UN Expert Highlights Xenophobia in South Africa, Calls for Hate Crime Legislation’ (2011).

<sup>24</sup> ‘An exploration of Hate Crime and Homophobia in Pietermaritzburg, KwaZulu-Natal’ A research report commissioned by the Gay and Lesbian Network at 13

<sup>25</sup> Ottosson, D ‘State-sponsored Homophobia: A World survey of laws prohibiting same sex activity between consenting adults’ (2010) ILGA Report at 48

race, ethnicity, sexual orientation, religion or political convictions or gender that intends to do harm or intimidate the person...'<sup>26</sup>

Corrective rape quite clearly and irrevocably conforms to this definition as it is committed against black African lesbians based on their sexual orientation which is intended to ultimately harm them and in the same breath, to send a message to other non-conforming lesbians in the hope that they will see the error in their ways and therefore turn straight. This crime is thus motivated by prejudice as the court in the *Zoliswa* judgement rightly pointed out to the fact that the motive was based on the intolerance of her difference, the fact that she was a lesbian.

There are two conflicting schools of thought on how to deal with hate crimes in the criminal justice system as some advocate for evidence of hate to be presented during the trial in order to prove it as a hate crime whereas others contend that evidence relating to hate should only be led after the verdict is guilty to serve as an aggravating factor during sentencing.<sup>27</sup> Hatred may however only be discussed during trial proceedings if and when it has been classified as a crime category. Consequently, in the South African justice system, it may only be brought up during sentencing in so far as to serve as an aggravating factor for sentencing. Therefore, in accordance with this understanding, the second approach was followed in the *Zoliswa* case when the four men were convicted in 2012 by magistrate Whatten who concluded that she had been murdered because she exercised her right to live openly as a lesbian and that hatred and intolerance which drove the crime was considered an aggravating sentencing factor.<sup>28</sup> This was a breakthrough for LGBTI rights group Triangle Project as the judgment set an important precedent in the South African Criminal Justice System when hatred and intolerance based on sexual orientation was considered an aggravating factor.<sup>29</sup>

The *Zoliswa* case was the first case in which evidence was introduced relating to factors surrounding hatred and prejudice based on sexual orientation in order to argue for a harsher sentence on the accused. It is thus clear from the *Zoliswa* judgment that motive is not considered as one of the elements of a crime which is why it was accordingly held that

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<sup>26</sup> 'Hate Crimes Against Gay and Lesbian People in Gauteng: Prevalence, Consequences and Contributing Factors' at 1

<sup>27</sup> Davis, R 'SA's gay hate crimes: An epidemic of violence less recognised' (2012) Available at: <http://dailymaverick.co.za/article/2012-06-27-sas-gay-hate-crimes-an-epidemic-of-violence-less-recognised> [Accessed on 30 July 2012]. Hereafter cited as: Davis, R 'SA's gay hate crimes: An epidemic of violence less recognised' (2012).

<sup>28</sup> Davis, R 'SA's gay hate crimes: An epidemic of violence less recognised' (2012)

<sup>29</sup> Davis, R 'SA's gay hate crimes: An epidemic of violence less recognised' (2012)

motive was deemed an aggravating factor which was considered in stage two only, during sentencing. The case was therefore also illustrative of the two stage approach as per Cameron J in the *Legoa* judgment. When evidence relating to motive comes to light it may therefore not be considered during the trial itself and will in turn have no effect on conviction.

#### **5.4. The misrecognition of corrective rape and the inherent conflict between the right to culture and the right to equality**

First and foremost, reflecting on the *Eudy* judgment, her sexual orientation was ruled out early by the court as a reason and motive for her murder.<sup>30</sup> It was however contended by Phumi Mtetwa<sup>31</sup> that people in the township knew Eudy as a soccer player in the community and they could tell from her appearance that she was 'butch'.<sup>32</sup> She thus concluded by saying that people are killed because of who they are.<sup>33</sup> According to Mbaru, a coordinator of IGLHRC's Africa Program, the level of homophobia in the courtroom was appalling as Mokgothleng J objected to the use of the word 'lesbian' in his court.<sup>34</sup> It is therefore contended by IGLHRC that homophobia is the factor which prevented the judge from fully acknowledging the role of Eudy's sexual orientation as a motive for the crime.<sup>35</sup> The partial conviction has thus sent a message that the brutal rape and murders of lesbians may continue with impunity, an antithesis of building a culture of good governance in South Africa.<sup>36</sup> If the motive for her killing was however established, the case would have been a breakthrough in terms of the continuous battle against corrective rape. Future perpetrators might have been deterred to some extent as it would have sent a message strongly stating that crimes committed based on hate and intolerance will not be condoned.

The above discussion thus leads the author to draw one very important inference; that the judiciary missed an opportunity to resolve the conflict between the right to culture and the right to equality in the context of corrective rape. This can be supported by a Periodic Review

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<sup>30</sup> Smith, D 'Life for man in rape and killing of lesbian South African footballer' (2009) Available at: <http://www.guardian.co.uk/world/2009/sep/22/eudy-simelane-gangrape-and-murder> [Accessed 20 May 2012]. Hereafter cited as: Smith, D 'Life for man in rape and killing of lesbian South African footballer' (2009).

<sup>31</sup> Executive Director of the Lesbian and Gay Equality Project (LGEP).

<sup>32</sup> Smith, D 'Life for man in rape and killing of lesbian South African footballer' (2009).

<sup>33</sup> Smith, D 'Life for man in rape and killing of lesbian South African footballer' (2009).

<sup>34</sup> Tobias, S 'Scant Justice in South African Murder Case; Courts Must Value Lesbian Lives!' (2009) Available at: <http://www.iglhrc.org/cgi-bin/iowa/article/pressroom/pressrelease/976.html> [Accessed on 30 July 2012]. Hereafter cited as: Tobias, S 'Scant Justice in South African Murder Case; Courts Must Value Lesbian Lives!' (2009).

<sup>35</sup> Tobias, S 'Scant Justice in South African Murder Case; Courts Must Value Lesbian Lives!' (2009).

<sup>36</sup> Tobias, S 'Scant Justice in South African Murder Case; Courts Must Value Lesbian Lives!' (2009)

of the Human Rights Council, where it was found that the CEDAW<sup>37</sup> Committee expressed concern relating to harmful cultural practices.<sup>38</sup> South Africa was urged to implement a strategy in order to modify or eliminate such harmful practices and stereotypes which discriminate against women.<sup>39</sup> It was also quite evident in the *Eudy* judgment that the judge was not attuned to the affects of prejudice or discrimination which motivated the offence leading to her death and therefore the motivation for her attack carried no weight.

In addition, it has been proved that there is an inherent conflict between the right to culture of the perpetrators and the constitutionally protected rights of the victims of corrective rape. The courts have also clearly set out how this conflict is to be resolved. It should thus be noted that in neither of the two judgments relating to corrective rape, was this conflict specifically addressed nor resolved. The importance in recognising this conflict lies in the fact that one needs to take into account that both the perpetrators and the victims are protected by the Bill of Rights and that one cannot disregard the importance of either of their rights.

This is also in line with Henry Shue's general theory on the duties of the state applying to its positive responsibilities with regard to eradicating violence against women.<sup>40</sup> His formulation consists of three legs of which the first is the duty on the state not to violate the right being scrutinised, which is in this case, the right to culture.<sup>41</sup> Second is the duty on the state to protect from the violation of the right and last, a duty to aid those whose rights have been violated.<sup>42</sup> To counteract these duties, it is important to note the general as well as internal limitations placed on the right to culture in terms of the Constitution itself.<sup>43</sup> In support of this, it was held in the dissenting judgment of the *Bhe* case that when the right to culture infringes on the rights of another, it should be developed to be in line with the Constitution.<sup>44</sup> Moreover, because Shue proposes that every basic right assumes the three mentioned duties;

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<sup>37</sup> United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1249 U.N.T.S. 13.

<sup>38</sup> Human Rights Council, Working Group on the Universal Periodic Review. 13<sup>th</sup> Session, Geneva, 21 May-4 June 2012. Compilation prepared by the Office of the High Commission for Human Rights in accordance with para. 5 of the annex to Human Rights Council. *Resolution 16/21, South Africa*. UN Doc A/HRC/WG.6/13/ZAF/2 (23 March 2012) at para 17. Hereafter referred to as: *Resolution 16/21, South Africa*. UN Doc A/HRC/WG.6/13/ZAF/2. .

<sup>39</sup> *Resolution 16/21, South Africa*. UN Doc A/HRC/WG.6/13/ZAF/2. At para 17.

<sup>40</sup> Combrinck, H 'Positive State Duties to Protect Women from Violence: Recent South African Developments' (1998) *Human Rights Quarterly* 20(3) at 668.

<sup>41</sup> Combrinck, H (1998) at 668 as cited Shue, H *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy* 1<sup>st</sup> ed. (1980) at 52.

<sup>42</sup> Combrinck, H (1998) at 668 as cited in Shue, H (1980) at 52-53.

<sup>43</sup> As discussed in chapter 3 at 3.3. (See discussion on sections 30, 31 & 36 of the Constitution).

<sup>44</sup> Chapter 3.

those duties should then also be applied to the rights of the victims which have been violated. Hence, there is a duty on the state to avoid violating the rights in question, namely the right to equality, dignity, freedom as well as life. Further, there is a duty to protect the victims from the violation of their rights in addition they must aid those whose rights have been violated.

In addition, the Constitution has a built-in supremacy clause stating that the Constitution is the supreme law of the Republic and subsequently, any law or conduct which is inconsistent with it is invalid.<sup>45</sup> This section thus creates a duty to fulfil the rights as set out in the provisions of the Bill of Rights. The right to culture as well as the rights to equality, dignity, freedom and life are protected in the Bill of Rights which gives rise to an inherent conflict. In the event that such a conflict arises, one must weigh up the conflicting interests of the parties having due regard to the internal as well as general limitations. Thus the requirement to develop customary law to bring it in line with the Constitution was overlooked in the discussed judgments. As a consequence the court erred when it failed to identify the inherent clash between these competing rights.

It was however noted in the *Zoliswa* judgment that although everyone is entitled to their opinion, one may not act based on such opinion in a brutal manner professing your intolerance of the opinion of another.<sup>46</sup> The fact that the court merely acknowledged the existence of a potential clash but failed to subsequently address it leads to the issue remaining unanswered.

## **5.5. Conclusion**

In conclusion, this chapter has shown how South Africa has failed in its constitutional mandate to protect victims of corrective rape. This was done by showing that law enforcement officials do not know how to record crimes based on prejudice, thus resulting in unreliable statistics of corrective rape as this crime may be misidentified and further, that cases are unreported based on the fears of the victims. It has also been shown that the existing domestic legal framework is inadequate in successfully dealing with the problem of corrective rape. Further, that the current definition of corrective rape is lacking in that it does not take into account that the crime is committed based on prejudice. In light of this, a vast number of

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<sup>45</sup> Section 2 of the Constitution.

<sup>46</sup> *Zoliswa* case at 692.

definitions to what a hate crime is were provided to show how these definitions could aid in defining corrective rape as a crime motivated by prejudice.



## Chapter 6

### CONCLUSION AND RECOMMENDATIONS

#### 6.1. Summary of findings

This mini-thesis aimed at exploring whether South Africa was fulfilling its constitutional mandate in relation to black African lesbians affected by corrective rape. The discussions above undoubtedly prove that the impact of corrective rape on its victims violate a vast number of rights, more specifically, the right to dignity, freedom, life and most importantly, their right to equality in terms of the Constitution as it clearly prohibits discrimination on the basis of race, gender, sex and sexual orientation. However, the existence of the non-discrimination clauses in both national and international legislation has clearly not deterred the perpetrators as the corrective rape pandemic has continued with impunity, violating these women's human rights.

The mini-thesis has also shown that corrective rape stems from cultural beliefs which are mainly based on patriarchal ideals as well as the oppression of women which is aimed at the subjugation of a group of persons based purely on their sexual orientation and gender which has potentially placed the issue within the inherent clashes between cultural and women's human rights. In addition, the failures by the criminal justice system pertaining to law enforcement, the definition of corrective rape, the legislature as well as the judiciary were addressed by analysing the way in which South Africa has responded to the victims of corrective rape which have been found to be wanting, leading the author to make a list of suggestions that can be used in order for South Africa to effectively meet its constitutional mandate.

#### 6.2. Recommendations based on findings

The discussions in the previous chapters provide evidence of the problems faced by black Africa lesbians in South Africa regarding the rights of these women stemming from corrective rape. It is therefore recommended that measures need to be adopted at various levels in order to improve the status quo. The recommendations below are an attempt to facilitate such changes.



### **6.2.1. Hate crime legislation**

As indicated in the previous chapter, corrective rape is not currently recognised as a separate crime category in South Africa.<sup>1</sup> It has also been established in this mini-thesis that corrective rape should be viewed as a hate crime as it targets a specific group, black African lesbians as well as members of this group. These factors thereby conform to the widely accepted definitions of what a hate crime is.<sup>2</sup> Further, it is aimed at the eradication of this group in its entirety purely based on the fact that homosexuality is viewed as un-African. Section 9(2) of the Constitution encourages the notion that those who have been disadvantaged by unfair discrimination be protected in order to promote the achievement of equality. Hate crimes in South Africa is not defined by the common law nor statutory law and therefore such an offence should be created. This will in turn also require motive to be established during the first phase of trial which would have an effect on conviction and not merely serve as an aggravating factor for sentencing.

### **6.2.2. Partnerships with NGOs**

The South African government should commit to partnering with NGOs as they are instrumental in the development of LGBTI rights in South Africa. They have conducted studies relating to specific issues faced by this minority group and are involved in constant advocacy aimed at the education of those issues which the community concerned faces in modern societies. NGOs have access to areas which government would not necessarily have and are thus in the position to raise important issues regarding their findings which is why it is imperative that government embarks on partnerships with the NGOs concerned. In support of this, it was submitted by the CEDAW Committee that South Africa should respond to the concerns expressed in the concluding observations by ensuring wide participation of ‘all ministries and public bodies’ when preparing the next periodic report.<sup>3</sup> It further suggested consultation with women’s and human rights organisations.<sup>4</sup>

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<sup>1</sup> See chapter 5 at 5.2.1.

<sup>2</sup> See chapter 5 at 5.2.2. for full discussion on definitions.

<sup>3</sup> CEDAW: *Concluding observations on South Africa*, UN Doc.CEDAW/C/ZAF/CO/4 (2011) at Para 49-50

<sup>4</sup> CEDAW: *Concluding observations on South Africa*, UN Doc.CEDAW/C/ZAF/CO/4 (2011) at Para 49

### **6.2.3. Educational programmes**

Society needs to be educated on the issues faced by the LGBTI community in order to create awareness of the challenges they face. Black African lesbians specifically, are exposed to the cultural practice of corrective rape which encourages the oppression of lesbians based on their sexual orientation. The author is cognisant of the fact that South Africa has limited resources and potential capacity shortages which is why it would be beneficial to approach the relevant NGOs in order to formulate a plan of action in creating the necessary large scale educational programmes in the form of workshops and seminars for the police and judiciary. In support of this, it was contended by Ndumie Funda that there is no awareness around hate crimes and corrective rape and thus we need a programme of action, intervention, research and most importantly, a budget to find out what problems black African lesbians are encountering.<sup>5</sup> In creating such educational programmes, South Africa will be abiding by one of the recommendations made by the Special Rapporteur on the Human Rights of Migrants, who urged for providing effective resources and training for police, justice as well as other relevant officials to successfully implement the law.<sup>6</sup> He added that in order to do this, training will be required in terms of detecting, recording as well as prosecuting hate crimes.<sup>7</sup>

### **6.2.4. Recognition of the inherent conflict between constitutional rights**

It is imperative that the conflict between the right to culture of the perpetrators and the rights to equality, dignity, freedom and life of the victims of corrective rape are recognised. The fact that the right to culture is entrenched in the Constitution creates the impression that the perpetrators are free to exercise their right without limitation. Thus it should be made clear that limitations to this right exist in so far as it infringes on the rights of the victims of corrective rape when cases land before the courts.

### **6.2.5. South Africa should fulfil its international obligations**

The Committee on the Elimination of Racial Discrimination considered a report submitted by South Africa in 2006 and it recommended that South Africa should ensure the full

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<sup>5</sup> Bucher, N.R 'Law Failing Lesbians on corrective rape' (2009) Available at: <http://ipsnews.net/news.asp?idnews=48279> [Accessed on 14 March 2011]

<sup>6</sup> LeGendre, P 'U.N. Expert Highlights Xenophobia in South Africa, Calls for Hate Crime Legislation' (2011) Available at: <http://www.humanrightsfirst.org/2011/06/03/u-n-expert-highlights-xenophobia-in-south-africa/> [Accessed on 20 November 2011].

<sup>7</sup> Le Gendre , P 'U.N. Expert Highlights Xenophobia in South Africa, Calls for Hate Crime Legislation' (2011).

implementation as well as other effective measures to prevent, combat and punish hate crimes as well as speech.<sup>8</sup> South Africa is thus under an obligation to draft hate crime legislation in terms of its obligations under the Convention for the Elimination of All Forms of Racial Discrimination (CERD).<sup>9</sup>

Similarly, the CEDAW<sup>10</sup> Committee called on South Africa to abide by the principles as set out in the Constitution and further, to provide effective protection from violence and discrimination against women based on their sexual orientation.<sup>11</sup> Specific reference was made to the enactment of comprehensive anti-discrimination legislation which should prohibit multiple forms of discrimination against women on all grounds, including sexual orientation.<sup>12</sup> In addition, it was noted by the Office of the High Commission that more efforts should be undertaken to prevent and combat racial discrimination as well as other forms of related intolerance.<sup>13</sup> To this end, in 2011, the Commissioner stated that South Africa's challenge was

[T]o be true to its ideals and to make real the promise of the post-apartheid era: a rainbow nation where everyone is free and equal and can live comfortably with those who are different.<sup>14</sup>

It is thus submitted by the author that South Africa fulfils its international treaty obligations by enacting hate crime legislation and define corrective rape as a hate crime which will afford greater protection to the victims of corrective rape. CAPE

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<sup>8</sup> Human Rights Council 19<sup>th</sup> Session (Agenda item 2 and 8) Follow-up and implementation of the Vienna Declaration and Programme of Action. 'Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity' *Report of the UN High Commissioner for Human Rights A/HRC/19/41* (17 November 2011) at para 14.

<sup>9</sup> Convention for the Elimination of All Forms of Racial Discrimination (CERD) 660 UNTS 195; G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) U.N. Doc. A/6014 (1966).

<sup>10</sup> United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1249 U.N.T.S. 13.

<sup>11</sup> Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW): *Concluding observations on South Africa*, UN Doc.CEDAW/C/ZAF/CO/4 (2011) at para. 40

<sup>12</sup> CEDAW: *Concluding observations on South Africa*, UN Doc.CEDAW/C/ZAF/CO/4 (2011) at para. 40

<sup>13</sup> Human Rights Council, Working Group on the Universal Periodic Review. 13<sup>th</sup> Session, Geneva, 21 May-4 June 2012. Compilation prepared by the Office of the High Commission for Human Rights in accordance with para. 5 of the annex to Human Rights Council. *Resolution 16/21, South Africa*. UN Doc A/HRC/WG.6/13/ZAF/2 (23 March 2012) at para 22. Hereafter referred to as: *Resolution 16/21, South Africa*. UN Doc A/HRC/WG.6/13/ZAF/2.

<sup>14</sup> *Resolution 16/21, South Africa*. UN Doc A/HRC/WG.6/13/ZAF/2. At para 24

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