



UNIVERSITY OF THE WESTERN CAPE

FACULTY OF LAW

**EVALUATING THE EFFECTIVENESS OF THE SOUTH AFRICAN
CRIMINAL JUSTICE SYSTEM TO PROSECUTE HOMOPHOBIC RAPE**

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PLAGIARISM DECLARATION

I declare that *Evaluating the effectiveness of the South African criminal justice system to prosecute homophobic rape* 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 by complete references.

Full name: Kirby Malgas

Date: 2023/12/11

Signed:



DEDICATION AND ACKNOWLEDGMENT

I would first and foremost like to give praise and thanks to God, the almighty, who has granted me the knowledge, perseverance and opportunity to write this thesis. This accomplishment could not have been possible without Him. Through all the late night stresses and due-date anxieties, He has given me the strength to finally accomplish what I thought to be impossible at times.

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KEYWORDS

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Homophobia

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Black lesbians

Hate crimes

Sexual orientation

Gender identity

LGBTIQ+

ABSTRACT

In a heteronormative society, homophobic rape is said to be a “cure” for violating traditional gender representations, which is being anything other than heterosexual. Sexual orientation or gender identification is related to one’s identity. Therefore when someone is harmed because of their identity, such a harm should be deemed as a human rights violation. The Constitution of the Republic of South Africa provides its citizens with protection from discrimination on the basis of gender and sexual orientation, as explicitly mentioned in section 9(3) and (4) of the Bill of Rights. Section 9(4) in particular emphasises that national legislation is obligated to prevent or prohibit unfair discrimination. Homophobic rape is a discriminatory act as it focuses on victims of a particular characteristics or identity, this type of conduct can be recognised as a hate crime. Hate crimes are not specifically recognised within South African legislation. Is this omission aligned with the aims and values of our constitution? This will be the core issue that will be addressed within this thesis. A further study on the interpretation of other relevant legislation will be completed to determine whether it can be used to prosecute hate crime such as homophobic rape, or whether the law is in need of amendment and development to do so justifiably. Furthermore, an evaluation will be conducted on the issues faced by survivors from agents and officials of the South African criminal justice system, to determine whether reform is required to prevent secondary victimisation. Such development will require training methods to ensure that agents of the criminal justice system do not intimidate and victimise survivors of hate crimes, but rather ensure that they are protected regardless of their specific identity or characteristics.

ACRONYMS AND ABBREVIATIONS

AHRLJ	African Human Rights Law Journal
BCLR	Butterworth's Constitutional Law Reports
CC	Constitutional Court
CJS	Criminal Justice System
CPA	Criminal Procedure Act
CRIMSA	Criminological Society of South Africa Lesbian, gay, bisexual, transgender, intersex, queer and other
LGBTIQ+	Lesbian, Gay, Bisexual, Transgender, Intersex, Queer and other
NCP	National Council of Provinces
PEPUDA	Promotion of Equality and Prohibition of Unfair Discrimination Act
SAPS	South African Police Services
SOC	Sexual Offences Courts
ZACC	Constitutional Court of South Africa

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CHAPTER ONE

INTRODUCTION

1.1 INTRODUCTION

South Africa is well known for being a rainbow nation, with a rich diversity that encourages equal rights and respect. Diversity not only encapsulates the idea of race and ethnicity, but of identity too. Diversity is defined as “a range of many people or things that are very different from each other”.¹ The lesbian, gay, bisexual, transgender, intersex, and queer (hereafter LGBTIQ+) community can be identified as a diverse group. Their diversity is defined through their different gender identities and sexual orientation. Their legal entitlement to equal rights and respect are obtained through the Constitution of the Republic of South Africa, 1996 (hereafter the Constitution) which was the first in the world to prohibit unfair discrimination on the grounds of sexual orientation.² In light of this we know that it is vital for the South African law to provide, protect and promote equality to all persons, with the inclusion of the LGBTIQ+ community.

Prejudice and hate has encouraged the brutality, rape and killings of LGBTIQ+ persons across South Africa.³ Homophobic rape can be defined as a hate crime because it comprises of the two necessary requirements of a hate crime: one being a crime (rape) and the other, a hate motive towards the victim’s identity or characteristic.⁴ In other words, homophobia is what motivates the crime of rape. This thesis will focus on the practice whereby homosexual individuals are raped by persons of the opposite sex in order to “correct” or “cure” them of their homosexuality. For the purpose of this thesis, the term homophobic rape will be used, rather than that of “corrective rape” and “curative rape”. This thesis will determine whether South Africa’s criminal justice system (hereafter CJS) is effective enough to prosecute the rape of LGBTIQ+ persons.

The first objective will be to determine how hate crimes, like homophobic rape, have been approached over the years without legal standing. This discussion will include the treatment of the LGBTIQ+ community and the measure of protection afforded to them by the right to sexual

¹ Oxford Advanced American Dictionary (2021) OxfordLearnersDictionaries.com. Available at: https://www.oxfordlearnersdictionaries.com/definition/american_english/diversity [Accessed 9 May 2022].

² Section 9(3) of the Constitution of the Republic of South Africa, 1996. See also *Gay and lesbian rights*. Constitutional Court of South Africa. <https://www.concourt.org.za/index.php/gay-and-lesbian-rights> [Accessed 03 April 2022].

³ Rakhetsi, A. (2021). *‘Hear Our Cry’: South Africa’s LGBTQ+ Activists Demand Action Amid Homophobic Attacks*. Global Citizen. <https://www.globalcitizen.org/en/content/lgbtq-violence-homophobia-south-africa-action/> [Accessed 31 March].

⁴ Breen, D., & Nel, J. (2016). South Africa - a home for all? The need for hate crime legislation. *South African Crime Quarterly*, (38), p3.

orientation founded in the Constitution. In addition, a discussion on reasons why the terms “corrective rape” and “curative rape” should not be used to describe the misconduct. Correspondingly, these names encourage perpetrators to commit the crime, as it creates the idea that they are indeed “correcting” or “curing” their victims. Tamale states that to use the term “corrective rape” or “curative rape” to describe sexual violence against African lesbians suggests that: (a) one’s sexual orientation needs correcting; and (b) there are circumstances when rape can be warranted.⁵ Thus ‘homophobic rape’ adds a more punitive and hateful element to the act, as it describes the perpetrators homophobic characteristic and motive, making it a more reasonable term to use.

The laws in South Africa are more directed at the crime of rape, and not the hate motive that drives the rape. The prejudicial-hate motive of this crime is thus completely ignored. As a result of this, there are also no reliable statistics on incidents of homophobic rape, which makes it difficult to determine the true extent of the problem.⁶ One can reason that the South African legal system has failed the victims of homophobic rape by not recognising the conduct in its entirety. Lastly, the approach, language and interaction between agents of the CJS and survivors of homophobic rape will be analysed to determine how such interactions can produce secondary victimisation. It is important for the survivors to feel comfortable and safe throughout legal proceedings, and not to experience anything that would put doubt in the CJS. Therefore the overall idea is to identify and understand homophobic rape in South Africa, in order to determine what preventative measures can be put in place or developed to ensure an effective prosecution occurs.

1.2 RATIONALE FOR THE RESEARCH

The South African police do not compile homophobic rape statistics separately from other rape cases.⁷ In other words, all homophobic rape incidents are identified as rape cases. However, there is a need to distinguish rape cases from that of homophobic rape cases, in order to justifiably prosecute its perpetrators. Cherith Sanger stated that: “we believe that corrective rape warrants

⁵ Tamale, S. (2014). *Exploring the contours of African sexualities: Religion, law and power*. African Human Rights Law Journal, 14(1), p.158

⁶ Mwambene, L., & Wheal, M. (2015). *Realisation or oversight of a constitutional mandate? Corrective rape of black African lesbians in South Africa*. African Human Rights Law Journal, 15(1), p.81.

⁷ Gaitho, W. (2021). *Curing ‘corrective’ rape: Conceptualising a dual-pronged approach to sexual violence against Black lesbians in South Africa*. Leiden Law Blog. <https://www.leidenlawblog.nl/articles/curing-corrective-rape-conceptualising-a-dual-pronged-approach-to-sexual-violence-against-black-lesbians-in-south-africa>[Accessed 29 March 2022].

greater recognition on the basis that there are multiple grounds of discrimination”.⁸ With rape cases we have a serious matter involving sexual violence against another without their consent, whereas in cases of homophobic rape we have an additional element, namely a discriminatory and hate motive.

The Sexual Offences Act of 2007 states in its regulations, that it aims to include “all legal aspects of, or relating to sexual offences in a single statute”.⁹ Although it makes mention of the rape aspect, it has failed to include the homophobic-hate motive. The Sexual Offences Act emphasises the developed rape definition which includes “all forms of sexual penetration without consent, irrespective of gender”,¹⁰ thus instituting a gender-neutral rape definition. It defines rape as “any person (A) who unlawfully and intentionally commits an act of sexual penetration with a complainant (B), without the consent of B”.¹¹ The crucial question is whether it is sufficient to prosecute homophobic rape irrespective of its exclusion of the discriminative-hate motive.

The enactment of the Prevention and Combating of Hate Crimes and Hate Speech Bill (hereafter Hate Crimes Bill)¹² will also be a vital aspect in protecting victims of homophobic rape. This Bill has the potential to become the first piece of legislation that addresses and recognises hate crimes in South Africa. The intolerance, intimidation and dangers that victims face, especially black lesbians from informal settlements, make them vulnerable and in need of such protection. In the event that a black, lesbian woman is raped because of her gender identity and orientation in a setting such as a township, it sends a clear message to other lesbian women – if you are openly gay, you are at risk.¹³ The Hate Crimes Bill recognises hate crimes by identifying the victims with ‘one or more of the following characteristics, or perceived characteristics of the victim, or his or her family member, or the victim’s association with, or support for a group of persons who share the said characteristics.’¹⁴

The Bill then continues to name the different characteristics including; ‘gender or gender identity; sex, which includes intersex; or sexual orientation’.¹⁵ This gives way for the recognition of hate

⁸ Tamara Alfred sites Cherith Sanger in, Alfred, T. (2011). *The Growing Trend of “Corrective Rape” in South Africa - Impunity Watch*. Impunity Watch from <https://impunitywatch.com/the-growing-trend-of-%E2%80%9Ccorrective-rape%E2%80%9D-in-south-africa/>. [Accessed 21 September 2022].

⁹ Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 cite the regulations correctly, and also provide the specific section.

¹⁰ Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

¹¹ Section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

¹² The Prevention and Combating of Hate Crimes and Hate Speech Bill, 2018. At the time of writing this thesis the Bill had not yet been promulgated.

¹³ Thorpe, J. (2013). *‘Corrective rape’, hate crimes, and the law in South Africa*. Parliament of the Republic of South Africa. Available at: <https://static.pmg.org.za/130911corrective.pdf> [Accessed 30 March 2022].

¹⁴ Section 3(1) of the Hate Crimes Bill.

¹⁵ Section 3 of the Hate Crimes Bill.

crimes against the LGBTIQ+ community. Therefore, the passing of the Hate Crimes Bill will enable a more effective prosecution of homophobic rape, as it recognises all defining components of a hate crime.

The defining components of homophobic rape distinguishes it from that of rape, therefore it is clear that homophobic rape cannot be effectively prosecuted with merely rape legislation. The omission of hate crime legislation in the South Africa should therefore be placed under scrutiny, while an evaluation on existing legislatures will be deduced to determine whether it is enough to prosecute hate crimes, such as homophobic rape. This evaluation will determine whether there is an urgency in enacting the Hate Crimes Bill. Furthermore, the importance of providing training to agents and officials of the CJS will be emphasised so that survivors of homophobic rape are met with respect and protection, over that of secondary victimisation.

1.3 RESEARCH QUESTIONS

The main question asked within this thesis, is whether the South African CJS is effectively prosecuting homophobic rape?

This above question will be informed by the following sub-questions:

1. What are the current laws available in South Africa to effectively prosecute hate crimes?
2. What reforms to the CJS must be put in place to enable more homophobic rape survivors to report the crime to the police?
3. Is there a need to develop current laws pertaining to hate crimes to ensure effective and justifiable prosecution of homophobic rape?

1.4 LITERATURE REVIEW

Hate crimes are defined as “a crime committed against an individual, organisation or property belonging to an individual or organisation with a motive that is either completely or partially prejudicial.”¹⁶ This crime indirectly affects an entire community or group to whom the victim shares a similar characteristic or identity. Homophobic rape is indeed a hate crime as it covers the

¹⁶ Hlongwane, N. *Corrective Rape as an Anti-Lesbian Hate Crime in South African Law: A critique of the Legal approach* (Master of Law in Medical law, University of KwaZulu-Natal, Howard College, 2016.), p12.https://Researchspace.Ukzn.Ac.Za/Bitstream/Handle/10413/14196/Hlongwane_Nondumiso_2016.Pdf?Sequence=1&Isallowed=Y [Accessed 7 April 2022].

act of rape that is motivated by a prejudicial-hate towards the victim. There is currently no legislation pertaining to hate crimes, such as homophobic rape. In order to contextualise the literature, brief reference is made to relevant law. The Hate Crimes Bill will become the first form of hate crimes legislation, when enacted. Homophobic rape can be identified or found in section 3(1) of the Hate Crimes Bill where it defines a hate crime as,

an offence recognised under any law, the commission of which by a person is motivated by that person's prejudice or intolerance towards the victim of the crime in question because of one or more of the following characteristics or perceived characteristics of the victim¹⁷

It continues to list the characteristics where “gender or gender identity”, “sex” and “sexual orientation” is mentioned, therefore including the description of homophobic rape. The Hate Crimes Bill recognises hate crimes as criminal offences and in addition puts in place measures to prevent and combat these offences.¹⁸ Therefore, when passed, it could lead to the effective prosecution of homophobic rape in South Africa.

The crime of rape is another focal point in occurrence of homophobic rape. According to the South African Law Commission 1999, the common law definition of rape was defined as being committed by a man having intentional and unlawful sexual intercourse with a woman without her consent.¹⁹ This definition was problematic and unconstitutional, thus many developments occurred to a widened the notion of sexual penetration.²⁰ The *S v Masiya* case has been a vital case in this development, as the definition of rape fell short of including anal penetration. Namely whether non-consensual penetration of a vagina by a penis, should be extended to include anal penetration of victims.²¹ This extension was necessary as Mr Masiya, a 44-year old man, anally raped a nine year old girl. At the end of the case the majority of the Constitutional Court held that anal

¹⁷ Section 3(1) of the Prevention and Combating of Hate Crimes and Hate Speech Bill.

¹⁸ Mkize, N. (2021). *The Prevention and Combating of Hate Crimes and Hate Speech Bill* | ProBono.org. [online] Probono.org.za. Available at: <<https://probono.org.za/the-prevention-and-combating-of-hate-crimes-and-hate-speech-bill/>> [Accessed 1 October 2021].

¹⁹South African Law Commission. (1999). *Project 107. Sexual offences: The substantive law*. Discussion Paper 85, South African Law Commission, also see Jewkes, R. and Abrahams, N., 2002. *The epidemiology of rape and sexual coercion in South Africa: an overview*. Social Science & Medicine, 55(7), p.1232.

²⁰ van der Bijl, C., & Rumney, P. N. S. (2009). Attitudes, Rape and Law Reform in South Africa. *Journal of Criminal Law (Hertford)*, 73(5),p.417.

²¹ Bonthuys, E. (2008). Putting Gender into the Definition of Rape or Taking it Out? *Feminist Legal Studies*, 16(2), pp.249-260.

penetration of female victims should constitute rape and was added to the common law definition.²²

Furthermore, the rape definition similarly fell short as it excluded men as victims. Kelly Phelp argues that to exclude men from being victims of rape, ‘discriminates against some of the most vulnerable groups in society (such as young boys, homosexuals and prisoners) by denying them equal protection of, and recognition by, the law’.²³ In the *President of the Republic of South Africa v Hugo* case it continues to state that: ‘The more vulnerable the group adversely affected by the discrimination, the more likely it will be held to be unfair.’²⁴ The partial extension of the common-law definition of rape in the Masiya case was therefore an inconsistent situation that needed to be looked into. The current definition of rape may be found in the Sexual Offences Act, which states that a person will be guilty of rape if they unlawfully and intentionally commits an act of sexual penetration without consent.²⁵ This new sexual offence legislation has been drafted and indicates gender neutrality and that sexual penetration is to be unlawful if it occurs in any coercive circumstances. Therefore rape is subjected to an occurrence beyond penile penetration of a vagina to include a range of actions involving different body parts, objects and orifices.²⁶ This overtime development has proven that any flaw found within legislation can be altered, removed or developed to uphold the rights of our constitution.

It is clear that society developed overtime from close kinship groups into larger, complex, diverse communities doing more complex activities. Therefore, as societies develop, so must the law. In the past rape was not as complex as it is today. Today a rape victims can be anyone, with no regards to gender or identity. The occurrence of a transformed constitution has been encouraged by a transformed society. Therefore members of the LGBTIQ+ community can now be victims of rape, whereas in the past their identities were completely disregarded. Consequently, rape has developed into a much more complex misconduct, including a more diverse set of victims and more complex circumstances.

²² *Masiya v Director of Public Prosecutions Pretoria (The State) and Another* (CCT54/06) [2007] ZACC 9; 2007 (5) SA 30 (CC); 2007 (8) BCLR 827.

²³ Phelps, K. (2008). A dangerous precedent indeed—a response to CR Snyman's note on Masiya: notes. *South African Law Journal*, 125(4), 648-659.

²⁴ *President of the Republic of South Africa and Another v Hugo* (CCT 11 of 1996) [1997] ZACC 4, para 112.

²⁵ Chapter 3, subsection 3.

²⁶ Jewkes, R. & Abrahams, N. (2002). The epidemiology of rape and sexual coercion in South Africa: an overview. *Social Science & Medicine*, 55(7), p. 1232.

Davis states that one of the reasons that rape could have developed since 1994 is ‘because black women felt more comfortable to come forward’.²⁷ A new democratic nation with a new constitution has found a way to redress the unbalances of the past, by giving those who were historically disadvantaged a form of protection and equality. Women and the LGBTIQ+ community can be seen as marginalised groups of the past that are now a common victim to homophobic rape. Women and girls are said to be the most vulnerable, particularly to various forms of gender-based violence that is either directed against them because they are female, or because violence affects women and girls disproportionately.²⁸ The role of women in society has always been based on a secondary or inferior stance, resulting in men having the primary role and superiority. Homophobic rape is also seen as a form of punishment for a lesbian’s perceived violation of both heteronormative masculinity and femininity in an institutionally heterosexual society.²⁹ In addition, marital rape was not seen as a crime in past times, as the focus was placed on the male’s property rights over his wife.³⁰ A wife’s body was therefore observed as property of their husband.

Women are fearful of expressing love for other women because they are taught at a young age that it is only acceptable to say that they love men. A patriarchal society is prevalent within African societies, and that is why black ‘butch’ lesbians become targets of heterosexual men.³¹ Being lesbian is said to be an offence to male masculinity. Puzzo directly quotes an African male’s response to lesbianism saying, “These women want to be men. So, if you want to be a man, I’ll show you what a woman looks like and what a real man will do to you”.³² This shows a clear image of why men feel the right to commit or threaten homophobic rape. The cultural understanding is that heterosexual relationships are the only normal ones in society.³³ If anyone

²⁷ Davis, R. (2015). *How rape became South Africa’s enduring nightmare*. The Guardian. <https://www.theguardian.com/world/2015/sep/29/south-africa-rape-nightmare-crime-stats> [Accessed on 9 of May 2022].

²⁸ National Research Council. (1996). *Understanding Violence Against Women*. Washington, DC: The National Academies Press.

²⁹ Doan-Minh, S. (2019). Corrective Rape: An Extreme Manifestation of Discrimination and the State’s Complicity in Sexual Violence. *Hastings Women’s Law Journal*, 30(1), p.170.

³⁰ Phelps, K. (2008). *A dangerous precedent indeed-a response to CR Snyman’s note on Masiya: notes*. South African Law Journal, 125(4), 648-659.

³¹ Puzzo, A. (2021). In South Africa, LGBTQ bigotry raises concern of ‘corrective’ rape - Social Justice News Nexus. [online] Social Justice News Nexus. Available at: <https://sjnnchicago.medill.northwestern.edu/blog/2019/05/15/in-south-africa-lgbtq-bigotry-raises-concern-of-corrective-rape/> [Accessed 22 September 2021].

³² Puzzo, A. (2021). In South Africa, LGBTQ bigotry raises concern of ‘corrective’ rape - Social Justice News Nexus. [online] Social Justice News Nexus. Available at: <https://sjnnchicago.medill.northwestern.edu/blog/2019/05/15/in-south-africa-lgbtq-bigotry-raises-concern-of-corrective-rape/> [Accessed 22 September 2021].

³³ Puzzo, A. (2021). In South Africa, LGBTQ bigotry raises concern of ‘corrective’ rape - Social Justice News Nexus. [online] Social Justice News Nexus. Available at:

steps outside this norm they risk experiencing discrimination or violence. Thus the duty of all women is to avail themselves to their man as this has become part of various African traditions.

Victims often choose not to report to the police to avoid disclosing their sexual orientation, since the topic results in different treatment and reactions.³⁴ LGBTIQ+ survivors are commonly met with prejudice and discrimination from police officials, thus reaffirming why many survivors choose not to report misconducts. LGBTIQ+ persons are said to be met with hostile responses concerning their sexual orientation which calls for more progressive approaches to create safer spaces during the reporting stage of the CJS.³⁵ These hostile responses reflect instances of secondary victimisation. Not only are they exerted from the police, but can come from health care workers, defence attorneys, court officials, community members, family members of the perpetrator and face-to-face contact with their perpetrator as well. Secondary victimisation can be defined as ‘the re-traumatisation of the sexual assault and abuse’, where the responses of individuals and institutions to the victim include victim-blaming, inappropriate behaviour or biased language by other individuals or organisations with access to the victim post assault.³⁶ In order to prevent this crime moving forward, there is a need to provide training to agents of the CJS to desist from secondary victimisation throughout all procedural stages.

1.5 RESEARCH METHODOLOGY

This thesis will provide reasons on whether the South African legislation is sufficient to prosecute homophobic rape. This thesis will be deduced with conceptual research rather than that of empirical, as its reasoning and conclusions will be reached through the use of existing information and available literature. The use of analytical legal research and legislative research in the style of qualitative investigation, will critically examine primary sources such as legal principles, statutes and court orders surrounding the issues of homophobic rape and the laws protecting the LGBTIQ+ community. To conduct this mandate, legislation such as the Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (hereafter PEPUDA) will be pivotal sources. The rape definition will be studied to determine whether any further developments

<https://sjnnchicago.medill.northwestern.edu/blog/2019/05/15/in-south-africa-lgbtq-bigotry-raises-concern-of-corrective-rape/> [Accessed 22 September 2021].

³⁴ Wells, H., & Louise, P. (2006). Anti-gay hate crimes in South Africa: prevalence, reporting practices, and experiences of the police. *Agenda (Durban)*, 20(67), p 25. 10.1080/10130950.2006.9674694

³⁵ Wells, H., & Louise, P. (2006) (25).

³⁶ Department of Justice and Constitutional Development. (2006). *Conceptual framework: understanding the victims charter*. South African service charter for victims of crime. <https://www.justice.gov.za/vc/docs/projects/2007%20UNDERSTANDING%20THE%20CHARTER.pdf> [Accessed 8 April 2022].

are required to distinguish homophobic rape from non-homophobic rape within its definition. Secondary sources such as books and journal articles are valuable when observing how various authors view the position of homophobic rape in society and in our law. In addition, internet sources will be imperative to the desktop-based research on the study of homophobic rape; where it occurs often, who the common victim is found to be, the terms used to define the conduct and how it is understood by perpetrators. News reports will convey the different experiences of victims and the way they feel towards our justice system in relation to homophobic rape.

A further study will be directed at the Hate Crimes Bill to determine whether this bill indeed covers all forms of hate crimes, including homophobic rape. Historical research will aid the discussions on the development of laws overtime, especially the rape definition the and now, and how the constitutional reforms over time has encouraged alternative interpretations and meanings to our laws. In addition, the use of case law research will be essential throughout this thesis to understand laws in the past and how they have adjusted to today's societies and constitutions. A further study will be done on the urgency of enacting the Hate Crimes Bill, the question on whether or not the Hate Crimes Bill will be a sufficient form of legislation to prosecute homophobic rape, deciding on methods of prevention homophobic rape, as well as methods of superseding secondary victimisation will too be identified and analysed within the CJS.

1.6 DELIMITATION

This thesis will be limited to hate speech in the context of homophobic rape. According to the Hate Crimes Bill there are various forms of hate crimes alternative to that of homophobic rape, however this thesis will be limited to other forms of hate crimes based on age, race, culture, disability, ethnicity, HIV status, religion or language. Homophobic rape is discussed in the context of rape against lesbians. It will be limited to rape against other members of the LGBTIQ+ community, such as gay, bisexual, trans, intersex, queer or questioning victims. It will however discuss the LGBTIQ+ community as a whole when discussing gender inequalities within the country, and when discussing the difference between homophobic rape and non-homophobic rape. The study and discussion on the scopes and definitions of rape will be limited to the rape of children, men, the mental disabled, corpses and animals. The extent of this study will stay within the borders of South African law, leaving out comparative research involving international laws and approaches on hate crimes and homophobic rape. The only usage of international comparisons will be to

decide what international models of prevention South Africa can possibly adopt to ensure an effective prosecution of homophobic rape.

1.7 CHAPTER OUTLINE

Chapter one introduces the thesis question with a proposal comprising of an introduction, aim, research question, rationale, research survey, methodology and a chapter outline. This chapter summarises all the focal points of this thesis.

Chapter two studies the history and origin of homophobic rape in SA. The apartheid era will be reflected on to compare discriminations of the past to those of today. This chapter analyses the non-legislative issues faced by the LGBTIQ+ community and discuss how these issues play a part in the encouragement of LGBTIQ+ hate crimes such as homophobic rape.

Chapter three looks into the current legislation available for the prosecution of homophobic rape in South Africa. The common law rape definition is studied to determine whether it needs further development to include homophobic rape. Various legislations are critically evaluated, to determine how sufficient and effective it is in relation to the prosecution of hate crimes. This analysis determines whether the South African legislation is sufficient in the prosecution of homophobic rape.

Chapter four focuses more on procedural law and certain aspects of the legal proceedings, rather than the law itself. This chapter shifts focus onto certain aspects of the South African justice system and finds steps and models of hate crimes that can be applied when dealing with homophobic rape to ensure a fair and suitable court procedure. Some of the focal discussion points includes reporting to the police, medical examination, trial proceedings and sentencing. The prevention of re-traumatisation during these stages of the CJS are proven to aid in the prevention of homophobic rape, as more victims will come forward, allowing more perpetrators to be prosecuted.

Lastly, chapter five concludes and summarises all the main aspects of each chapter. It contains all central recommendations and conclusions to ensure that South Africa's CJS is effective in the prosecution of homophobic rape.

1.8 CONCLUSION

In order to determine whether South Africa's CJS can effectively prosecute homophobic rape, it needs to analyse various issues pertaining to the rape of the LGBTIQ+ persons. These issues pertain to what extent the law protects victims of hate crimes and how criminal proceedings ensure victims are not faced with secondary victimisation. The law falls short of defining homophobic rape, and therefore it can be observed as falling short of effectively prosecuting homophobic rape. In conjunction to the law failing victims of homophobic rape, the CJS is also in need of modification in order to ensure victims feel safe and respected when reporting such misconducts. This will also enable the prosecution of homophobic rape perpetrators to upsurge. This thesis will therefore allow for the discussion of how the prosecution of homophobic rape in South Africa can be perceived as insufficient and ineffective, and how certain measures can be put in place to remedy this concern. These discussions will include; the history of homophobic rape in South Africa, how it is defined, the discriminatory issues that exist with its terminology, the non-legislative and legislative shortcomings and how certain reforms to the CJS should be introduced to create a safe and just prosecution of homophobic rape.

CHAPTER TWO

AN OVERVIEW OF HOMOPHOBIC RAPE IN SOUTH AFRICA AND THE NON-LEGISLATIVE FACTORS THAT AFFECT ITS EXISTENCE

2.1 INTRODUCTION

This chapter two will consist of an overall study on what homophobic rape is, with the inclusion of various definitions. Another focal point of research in this chapter will surround the effects that South Africa's past has had on the intersecting identities of most homophobic rape victims. One needs to obtain a clear understanding of why this crime is so prominent in South Africa and how the apartheid years have played a part in projecting its existence. The non-legislative factors that encourage homophobic rape will also be evaluated to determine how these issues can be resolved. These factors includes the incorrect terminology and secondary victimisation. The incorrect use of defining terminology has played a significant part in encouraging homophobic rape, as terms such as "corrective rape" and "curative rape" carry rehabilitative meaning, therefore validating the misconduct instead of preventing it. The effects of secondary victimisation can deteriorate victim's dignity and sense of safety, thus resulting in victims staying silent, instead of reporting such misconduct. These two factors are addressed, as they can play a profound role in the prevention of homophobic rape.

2.2 WHAT IS HOMOPHOBIC RAPE?

Homophobic rape is observed as a form of hate or biased motivated misconduct. It is regarded as such because perpetrators use their hate or intolerance towards the victim's sexual orientation or gender identity as motivation to commit the crime of rape.¹ They reflect rejection or repugnance towards the victim, thus aiming at 'curing' or 'correcting' their said 'flaw'. There is more than one manner in which homophobic rape can occur. Just as any other means of rape, it can occur through non-penetrative genital contact, attempted or completed penetration, which can be done by using the penis, or by using objects, forcing oral-genital contact, anal and even vaginal penetration of the victim.²

¹ Roelofse, C. J. & Chabalala, O. R. (2015) A phenomenological description of corrective rape and a new terminological perspective of the phenomenon. *Acta Criminologica (Criminological Society of Southern Africa)*. 28 (3), p.50.

² Roelofse, C. J. & Chabalala, O. R., 2015(54).

The rape of the victim occurs with the addition of the homophobic-hate motive. The homophobic-hate motive is what formulates the crime, differentiating it from the general rape definition. Homophobic rape was initially defined as rape perpetrated against lesbians by straight (heterosexual) men.³ This definition can be seen as the narrow interpretation of the word as it specifically includes lesbians only. The broader interpretation includes the rape of victims that can emerge from any group that does not conform to gender or sexual orientation norms.⁴ The broader interpretation makes the inclusion of not only lesbians as the sole victims, but as well as any other member of the LGBTIQ+ community. Although this thesis will direct its focus more on the narrow interpretation, as lesbians have become a common victim of homophobic rape in South Africa, however it will not wavier from addressing means to protect all victims of homophobic rape.

Waruguru describes homophobic rape as a combination of gender-based violence and homophobic violence.⁵ When looking at this description, one can construct that the gender-based violence aspect comes from the rape of women in particular, while the homophobic violence is reflected through the notion of raping a victim because of their sexual orientation or gender identity. The discriminative-motive of the perpetrator is usually reflected through verbal abuse during the rape, which focuses on ‘teaching a lesson’ to the victim or ‘doing a favor’ by showing them how to be a ‘real woman’.⁶ This brings us to issues surrounding traditional gender and sexual orientation medians.

Mieses argues that South African women who have sex with women challenge dominant South African ideas of gender identity.⁷ Most societies and cultures see women as the individual that will take care of the children, cook, clean the home and be a loving wife to a husband in a heterosexual marriage. These stereotypical approaches make way for gender inequalities and discriminations against gender identities and sexual orientation. In conjunction this can also be seen as anti-feminist approach. This reasoning goes hand in hand with the definition given by Victoria Brownworth. Brownworth, suggests that homophobic rape be defined as a means “to cure or correct the sexual orientation of lesbians and to force them to act heterosexually and

³ Geldenhuys, K. (2021) Corrective rape - a shocking attack on homosexuality. *Servamus Community-based Safety and Security Magazine*, 114(7), p.27.

⁴ Doan-Minh, S., 2019 (167).

⁵ Waruguru, G., (2022). Curing Corrective Rape: Socio-Legal Perspectives on Sexual Violence Against Black Lesbians in South Africa, *William & Mary Journal of Race, Gender, and Social Justice* , 28(2), p. 332

⁶ Doan-Minh, S., 2019 (167).

⁷Mieses, A. (2009). ‘Gender inequality and corrective rape of women who have sex with women’. GMHC Treatment issues. https://www.poz.com/pdfs/gmhc_treatmentissues_2009_12.pdf [Accessed 25 October 2022].

therefore to behave more like women in accordance with the gendered stereotype”.⁸ This definition highlights the perpetrators anti-feminist and anti-homosexual motive.

2.3 THE EFFECTS OF SOUTH AFRICA’S PAST ON INTERSECTING IDENTITIES OF HOMOPHOBIC RAPE VICTIMS

It is unlikely to not bring up black lesbians, when discussing homophobic rape in South Africa. When discussing black lesbians it condenses three marginalised groups that played an enormous role in the countries past inequalities and discriminations. This being racial discrimination, gender inequality and discrimination on the bases of sexual orientation. These inequalities reflect South Africa’s past and still impact the issues faced today. The past has played an imperative role in the occurrence of homophobic rape in the country and therefore it is vital to discuss these aspects to recognise its point of induction and how it plays a part in the occurrence of homophobic rape in South Africa today.

2.3.1 Racial discrimination

During the apartheid era, race determined your position and quality of life in society. One of the most prominent political tools was state-approved violence which was used to keep black South Africans in order.⁹ The foremost duty of the police force during apartheid was designed to protect whites from blacks, not to protect black communities from crime. The Group Areas Act of 1950 provided that the cities and towns of South Africa needed to be divided into segregated residential and business areas.¹⁰ This resulted in many Coloured, Black, and Indian residents having to be removed from certain areas that were categorised for occupation only by White residents. The areas that were left for blacks such as townships were lawless, isolated, impoverished, lacked protection from police, and were designed like prisons or internment camps.¹¹ In addition, these areas were also crowded and cramped, leaving no room for privacy

⁸ Brownworth, V. (2013). ‘Op-ed: The other ex-gay “therapy”’. Advocate. <http://www.advocate.com/commentary/2013/07/10/op-ed-other-ex-gay-therapy?page=full> [Accessed 25 October 2022].

⁹ Di Silvio, L. (2011). Correcting corrective rape: Carmichele and developing South Africa's affirmative obligations to prevent violence against women. *Georgetown Law Journal*, 99(5), p. 1475.

¹⁰ Cobbing, J. R.D. (2022). *South Africa*. Britannica. <https://www.britannica.com/place/South-Africa> [Accessed 31 August 2022].

¹¹Di Silvio, L. (2011) (1476).

and safety. Therefore many perpetrators of crimes that occurred within these non-white townships had better odds of escaping punishment and conviction.

Homophobic rape intersects with the systemic racism in South Africa due to its disproportionate impact on particularly black women.¹² This is owed to South Africa's racially divided history, and its socio-economic imbalance between black and white citizens. Black citizens, especially women living in the townships lacked support systems, as they were disadvantaged by culture, the economy and social discrimination.¹³ Black women who lived in these townships were left with no choice but to survive through male sexual oppression and violence without sufficient protection from the police. The colour of their skin decided on the measurement of protection received. The police permitted violence in townships to continue unchecked and without investigation, because violence fuelled pro-segregation sentiments which was an important underpinning of the apartheid era.¹⁴

Race also has an influence on the division on the LGBTIQ+ community in the apartheid years, as white sexual minorities were more privileged than black sexual minorities. This is to say that black sexual minorities were not able to exercise their democratic rights as easily as white sexual minorities were.¹⁵ White LGBTIQ+ members faced certain societal prejudice and discrimination based on sexual orientation, however the black LGBTIQ+ members faced additional challenges. This included multiple forms of discrimination and victimisation simultaneously (race and sexuality-based discrimination), as well as unique forms of oppression, including racism from within the LGBTIQ+ community itself and heterosexism from their own black communities.¹⁶ Therefore because of South Africa's racial past, it was most likely for a black LGBTIQ+ member to feel excluded and discriminated against by not only whites, but also from communities and people with which they identified themselves with. One would suggest that being a black LGBTIQ+ person living in South Africa's past would leave one with an identity war, where acceptance of one's sexual orientation would need to be undisclosed in order to avoid experiencing additional forms of discrimination and violence.

¹² Gaitho, W. (2022). *Curing Corrective Rape: Socio-legal Perspectives on Sexual Violence Against Black Lesbians in South Africa*. Race, Racism and the Law. <https://racism.org/articles/intersectionality/sexual-orientation/10429-curing-corrective> [accessed 27 September 2022].

¹³ Roelofse, C. J. & Chabalala, O. R., 2015 (51).

¹⁴ Di Silvio, L. (2011) (1469-1516).

¹⁵ Ipeleng, P. (2020) *Political Parties and the Protection of Democratic Rights of Sexual Minorities*. University of the Western Cape.

¹⁶ Balsam, K. F., Molina, Y., Blayney, J. A., Dillworth, T., Zimmerman, L., & Kaysen, D. (2015). Racial/ethnic differences in identity and mental health outcomes among young sexual minority women. *Cultural diversity & ethnic minority psychology*, 21(3), p3. <https://doi.org/10.1037/a0038680>.

Black LGBTIQ+ members experience discrimination from their own communities, as their sexual orientation seemed to part with African cultural beliefs. The unacceptance experienced from one's own cultural group, decreased an individual's willingness to reveal their sexual identity.¹⁷ Many African cultures have denounced homosexuality as it is seen as a "white phenomenon" or in other cases, the causal effect of AIDS.¹⁸ Black homosexuals from the African communities are more prone to fall prey to homophobic violence because of their strict cultural and religious views. Individuals from a collectivist culture tend to emphasise sharing ideas for the good of the group, feelings of involvement in others' lives, fitting in with the group, and behaving according to the social norms that are designed to maintain social harmony among the members of the group.¹⁹ In many black societies, an important factor in anti-gay agitation is the moral weight assigned to having children as procreation ensures continuation of a biological heritage, through which the history of society enriches.²⁰ Being anything other than heterosexual can therefore be seen as against the beliefs of procreation and therefore unacceptable in many African cultures. This issue can thus, play a part in the perpetrators commission and mentality to encourage the act of homophobic rape, rather than provide resistance and prevention.

2.3.2 Gender inequalities and violence against women

South Africa is among the countries that have the highest prevalence of violent crimes which is more likely to be directed at women.²¹ Rape can be identified as gender-based violence, and was constantly and efficiently used against women during apartheid. In the apartheid times violence against women was said to be "a tool of political control", where threats of sexual violence were designed to subdue and control women.²² These violent incidents were rarely

¹⁷ Balsam, K. F., Molina, Y., Blayney, J. A., Dillworth, T., Zimmerman, L., & Kaysen, D. (2015). Racial/ethnic differences in identity and mental health outcomes among young sexual minority women. *Cultural diversity & ethnic minority psychology*, 21(3), p.3. <https://doi.org/10.1037/a0038680>.

¹⁸ Lewis, G. B. (2003). Black-White Differences in Attitudes toward Homosexuality and Gay Rights. *The Public Opinion Quarterly*, 67(1), p. 61. <http://www.jstor.org/stable/3521666>.

¹⁹ Donoghue, S., Strydom, N., Andrews, L., Pentecost, R., & de Klerk, H. M. (2016). Differences between Black and White South Africans in product failure attributions, anger and complaint behaviour. *International Journal of Consumer Studies*, 40(3), p259. . https://repository.up.ac.za/bitstream/handle/2263/52928/Donoghue_Differences_2016.pdf?sequence=1 [Accessed 3 November 2022].

²⁰ Odei Ajei, M. (2022). *Homosexuality and Africa: a philosopher's perspective*. The Conversation. <https://theconversation.com/homosexuality-and-africa-a-philosophers-perspective-185536> [Accessed 3 October 2022].

²¹ Roelofse, C. J. & Chabalala, O. R., 2015 (50).

²²Di Silvio, L. (2011) (1469-1516).

reported because of the impossibility of corroboration, due to the word of a female having no effect against male authority. Coloured, Indian and particularly Black women faced a great threat through three forms of oppression namely, racial, social and sexual.²³ During the apartheid regime women were met with strict restrictions and oppression, and this resulted in the prevention of them becoming thinkers, creators, or dreamers. They were rather left with little imaginative space to envision different lives, given their day-to-day difficulties of negotiating life under a repressive and brutal regime.²⁴ The apartheid government only sought to the benefit of white livelihoods, and deliberately made life harder for Black, Coloured and Indian women. These women were thus viewed as secondary citizens who were not only faced with racial discrimination, but that of gender discrimination too.

Women of colour were denied access to resources and freedom of movement as many were morally excluded by the apartheid policies in South Africa which lead to gender oppression.²⁵ Black women in particular had their own designated ‘place’ within the apartheid social order, which resulted in being either a labourer or producer of labour, making their sole purpose within the apartheid schema to be the maintenance of white hegemony and privilege.²⁶ Black women were deemed property of men as African customary law saw them to be under the perpetual tutelage of a male, thus pertaining to laws that deprived them of rights to rent or buy their own homes, have custody over their children, have an education or a have an income.²⁷ These laws were found and regulated by the apartheid system which thus codified and sustained the patriarchy system.

South Africa’s constitution has given women an equal stance as men, and this conflicts with the gender inequalities of the past. Traditional masculine ideals and norms were disrupted by the current changes in political economies and historical legacies, as well as institutions upholding gender equality. These changes have undermined men’s statuses and accentuated a gender identity crisis.²⁸ Thus many forms of gender based violence continued even after the

²³ *Women and the struggle against Apartheid* | *South African History Online*. Sahistory.org.za. (2019). <https://www.sahistory.org.za/article/women-and-struggle-against-apartheid> [Accessed 3 October 2022].

²⁴ Boswell, B. (2017). “Overcoming the “daily bludgeoning by apartheid”: black South African women writers, agency, and space”. *African Identities*, 15(4), 414–427. <https://doi.org/10.1080/14725843.2017.1319754>

²⁵ Segalo, P. (2015). *Gender, social cohesion and everyday struggles in South Africa*. *Psychology in Society*, (49), 70-82. <https://dx.doi.org/10.17159/2309-8708/2015/n49a6> [Accessed 15 April 2023].

²⁶ Boswell, B. (2017) (414–427).

²⁷ Penelope, A. (2001). *The Stepchild of National Liberation: Women and Rights in the New South Africa*. *Articles & Chapters*. 1298 https://digitalcommons.nyls.edu/fac_articles_chapters/1298 [Accessed 5 May 2023].

²⁸ Naidoo, K. (2018). *Sexual Violence and “Corrective Rape” in South Africa*. *Globaldialogue.isa-sociology.org* from <https://globaldialogue.isa-sociology.org/articles/sexual-violence-and-corrective-rape-in-south-africa>. [Accessed 2 October 2022].

Constitution was enacted. Today violence against women have limited their ability to freely exercise their rights, have negatively affected their health, caused many to fear for their safety, distrust in men, and decreased their economic productivity, causing inevitable re-victimisation.²⁹ South Africa has failed to produce a safe environment for women as violence against women have yet to be properly addressed. South Africa was labelled “the rape capital of the world” and studies have found that as few as one in twenty-five South African women who have been raped, reported the crime to the police.³⁰

In addition, a woman is killed by her intimate partner every eight hours in South Africa, which is the highest prevalence rate in the world.³¹ These facts have shown that although our constitution prevents discrimination on the bases of gender, our past has made it difficult to fully adapt to the implementation of gender equality and the prevention of discrimination. Even with legislation purported to the prevention of sexual offences, domestic violence and sexual harassment, violence against women have not come to a halt. It is believed that men’s responses to changes in gender relations have ranged from defensive to progressive, thus explaining why gang formations, sporadic acts of brutality, and the reassertion of sustained violence against women continue to occur.³² In instances of rape, men use this act of violence as a means of policing gender norms or as a form of social control.

Women who identify themselves as lesbian are targeted by homophobic violence and rape as their sexual orientation contusions the male ego and represent a direct or specific threat to the present state of affairs. Some men feel as though lesbians are “stealing their girlfriends”, and therefore taking what men feel more “entitled” to.³³ Other men feel as though women are lesbians because they have not experienced sexual relations with a man yet. Alexa Mieses quotes the words of a male interviewee, stating that:

If there is someone who is trying to rape a lesbian, I can appreciate their thing.
It’s just to let them know that they must be straight...if another guy wants to

²⁹ Di Silvio, L. (2011) (1477).

³⁰ Colpitts, E. (2019). Engaging men and boys to prevent gender-based violence in South Africa: possibilities, tensions and debates. *Revue Canadienne D’études Du Développement*, 40(3), 426.
<https://doi.org/10.1080/02255189.2018.1491393>

³¹ Colpitts, E., 2019 (427).

³² Naidoo, K. (2018). *Sexual Violence and “Corrective Rape” in South Africa*. Globaldialogue.isa-sociology.org from <https://globaldialogue.isa-sociology.org/articles/sexual-violence-and-corrective-rape-in-south-africa>.

³³ Fihlani, P. (2011). *South Africa's lesbians fear 'corrective rape'*. BBC News.
<https://www.bbc.com/news/world-africa-13908662> [Accessed 4 October 2022].

teach them the way, they must rape them, they must rock them. Once she gets raped, I think she'll know which way is nice.³⁴

It is clear that lesbianism goes against the idealism of a heterosexual marriage and its purpose of procreation in most of the cultures and traditions within South Africa, and therefore it is assumed that their identity is unacceptable or unnatural. Furthermore there are still many men who see lesbians as women who are aiming at taking their position and 'superiors' status, and therefore react with hatred and aggression. Consequently homophobic rape can be seen as a form of power and control over women, however with South Africa's adoption of the new constitution, it should allow for new realities rather than aspirations. Women should therefore not be seen as inferior beings that can be controlled by men, but should rather have the freedom to be who they are without being scared of enduring violence through discrimination and hate.

2.3.3 A homophobic characterised past, where the LGBTIQ+ community faced many discriminations

South Africa's past also gave way to violence, discriminations and unfair treatments towards the LGBTIQ+ community. The apartheid government justified apartheid in terms of a Christian doctrine and instituted many laws that supported their form of Christianity.³⁵ Rendering to the ways of Christianity, being homosexual was seen as a sin, and therefore was intolerable and deemed a crime. One of the many Acts that were passed to curb same-sex relationships was the Prohibition of Mixed Marriages Act of 1949 (Mixed Marriage Act) which prohibited marriage and any form of cohabitation between white and black people, yet also prohibited 'unnatural' sexual acts between males.³⁶ This Act was one of many that gave way to criminalising homosexuality, even though it was first directed at only gay men. The Immorality Act contained a "men at a party" clause which prohibited all sexual acts between men.³⁷ In conjunction the common law was also used to criminalise sodomy during the apartheid era. In 1967 religious conservative groups pushed for anti-gay legislation to include the

³⁴ Mises, A. (2009). 'Gender inequality and corrective rape of women who have sex with women'. GMHC Treatment issues. https://www.poz.com/pdfs/gmhc_treatmentissues_2009_12.pdf [Accessed 25 October 2022].

³⁵ Constitutionhill. (2017). *Sexual Orientation Timeline | South Africa's Constitution*. Our Constitution from <https://ourconstitution.constitutionhill.org.za/timelines/sexual-orientation/>.

³⁶ Section ... of the Prohibition of Mixed Marriages Act 55 of 1949 ; also read with Constitutionhill. (2017). *Sexual Orientation Timeline | South Africa's Constitution*. Our Constitution from <https://ourconstitution.constitutionhill.org.za/timelines/sexual-orientation/>.

³⁷ Section 20A of the Immorality Act 23 of 1957

criminalisation of private same-sex relations between lesbians as the prior legislation only prevented relationships between men.³⁸

From 1969 to 1987, psychiatrists of the South African Defence Force were implicated in serious abuses, stemming from efforts to cure homosexual conscripts where they regarded homosexuality as subversive, and as a result severe penalties were prescribed, although attitudes were often inconsistent.³⁹ Homosexuality was deemed a disease or a psychiatric issue that needed treatment. The subjects of these treatments were screened for homosexuals by doctors and chaplains where treatments went as far as subjects being threatened with punishment if they did not comply and become heterosexual.⁴⁰

The enactment of the Constitution of 1996 brought the biggest transformation to the lives of the LGBTIQ+ community in South Africa. It contained the equality clause which not only stated that “Everyone is equal before the law”⁴¹, but went further as to say that “The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds”, containing several grounds with the inclusion of gender, sex and sexual orientation.⁴² One of the cases that followed was the *National Coalition for Gay and Lesbian Equality v Minister of Justice*, where the Constitutional Court declared the common law offences of sodomy and unnatural sexual acts between men as unconstitutional. It found that all offences aimed at prohibiting sexual intimacy between gay men on the basis of their sexual orientation violated the fundamental constitutional rights to not only equality, but dignity and privacy in addition.⁴³ Another break through case would be the *Lesbians and Gay Equality Project and Eighteen others v Minister of Home Affairs* case which found that the common law definition of marriage and the prescribed marriage formula in section 30(1) of the Marriage Act of 1961 was unconstitutional as it violated the right to equality, dignity and privacy.⁴⁴ The issue was obtained through the formula reading “husband and wife”, making it seem as though a marriage can only occur amongst heterosexual couples. The decision was to declare that the words ‘or

³⁸ Constitutionhill. (2017). *Sexual Orientation Timeline | South Africa's Constitution*. Our Constitution from <https://ourconstitution.constitutionhill.org.za/timelines/sexual-orientation/>.

³⁹ Kaplan, R. M. (2004). Treatment of homosexuality during apartheid. *BMJ (Clinical research ed.)*, 329(7480), p.1415.

⁴⁰ Kaplan, R. M. (2004) (1415).

⁴¹ Section 9(1) of the Constitution of the Republic of South Africa, 1996.

⁴² Section 9(3) of the Constitution.

⁴³ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* (CCT11/98) [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517, para 30.

⁴⁴ *Lesbian and Gay Equality Project and Eighteen Others v Minister of Home Affairs* (CCT 10/05) [2005] ZACC 20; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC), para 34.

spouse' was to be read into the prescribed marriage formula immediately after the words 'or husband'.⁴⁵ This would then result in a gender-neutral effect, with its homosexual inclusion.

Many cases followed to challenge and strike out all homophobic and heteronormative Acts and regulations, following the rights and values of the Constitution. Although the South African law protected and accepted the rights of the LGBTIQ+ community, the societal and cultural factors had a conflicting effect. Homophobic rape continues to occur in various African cultures and townships, due to the unaccepting views on their sexual orientation. Homosexuality was describe by a political party as “being a sinner who ‘practice’ acts that undermine African values and religion”.⁴⁶ Robert Mugabe in addition argues that homosexuality is “contrary to African values and that homosexuals are worse than pigs or dogs”.⁴⁷ South Africa’s former leader Jacob Zuma also added that it was “a disgrace to the nation and to God”.⁴⁸ Therefore homosexuality comes with many problematic and discriminative descriptions, one in particular being ‘unnatural’.

In many instances it is also described as being “un-African”. This notion creates the idea that being homosexual, or simply part of the LGBTIQ+ community, could not be affiliated with Africanism. The ‘un-African’ notion derives from the idea that homosexuality was brought to Africa through the colonial period by the west, however African culture is no stranger to homosexuality.⁴⁹ History shows otherwise through several examples, where homosexuality occurred even before colonial times. Some examples include: the Hausa term “yan daudu” from Nigeria, used to described effeminate men who are considered to be wives to men; the Buganda Kingdom where Uganda King Mwanga was openly gay and faced no hate from his subjects until white men brought the Christian church and its condemnation; and lastly researchers finding “explicit” Bushman artwork that depicts men engaging in same-sex sexual

⁴⁵ *Lesbian and Gay Equality Project and Eighteen Others v Minister of Home Affairs* (CCT 10/05) [2005] ZACC 20; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC), para 34.

⁴⁶ Igual, R. (2020). *ANCWL LGBTIQ+ Desk slams ACDP for unAfrican gay sinners statement*. MambaOnline - Gay South Africa online. <https://www.mambaonline.com/2020/03/04/ancwl-lgbtqi-desk-slams-acdp-for-unafrican-gay-sinners-statement/> [Accessed 14 September 2022].

⁴⁷ Mokgoroane, L. (2019). *Homosexuality is not ‘unAfrican’*. New Frame. <https://www.newframe.com/homosexuality-is-not-unafrican/> [Accessed 1 September 2022].

⁴⁸ Mokgoroane, L. (2019). *Homosexuality is not ‘unAfrican’*. New Frame. <https://www.newframe.com/homosexuality-is-not-unafrican/> [Accessed 1 September 2022].

⁴⁹ Alimi, B. (2015). *If you say being gay is not African, you don't know your history* | Bisi Alimi. the Guardian. <https://www.theguardian.com/commentisfree/2015/sep/09/being-gay-african-history-homosexuality-christianity> [Accessed 29 September 2022].

activity.⁵⁰ Therefore, with a history of homosexuality in Africa, it would be incorrect to imply that homosexuality comes from outside the country as history would state otherwise. Therefore, many have argued that the meaning of ‘Africanisms’ is an evolving notion that needs to change to include lesbian and gay identities.⁵¹

2.4 ADDRESSING THE NON-LEGISLATIVE FACTORS THAT ENCOURAGE HOMOPHOBIC RAPE

2.4.1 Deciding on the terminology of the misconduct

A definition can be defined as “a statement of the meaning of a word” or a means of explaining through clarification and further explanation what is trying to be said with one or a few short words.⁵² One cannot use just any words to name and define a crime, as the words need to match the perception, emotion and behaviour of the crime. The power of words thus lie within its meaning and interpretation. The meaning of words crystallises perceptions that shape our beliefs, drive our behaviour, and ultimately, create our world.⁵³ Negative words generate negative emotions and reactions, while positive words generate positive emotions and reactions. Words like ‘peace’, ‘equality’ and ‘freedom’ generate positive emotions and reactions, while words such as ‘war’, ‘murder’ and ‘rape’ generate negative emotions and reactions. Therefore when naming and defining rape, an immediate reciprocation of a negative emotion is observed, as it directs our thoughts to something immoral and wicked. Rape can be defined as the “Intentional, unlawful sexual intercourse with a woman without her consent”.⁵⁴ It is clear that to rape someone is to take away their human rights and invade their bodily autonomy. Such an action would demand a punitive judgment and sentencing to obtain justice. “Corrective rape”, “curative rape” and “homophobic rape” are names used to define the same crime. These words can be described as synonyms describing the type of rape taking place.

⁵⁰ Alimi, B. (2015). *If you say being gay is not African, you don't know your history* | Bisi Alimi. the Guardian. <https://www.theguardian.com/commentisfree/2015/sep/09/being-gay-african-history-homosexuality-christianity> [Accessed 29 September 2022].

⁵¹ Reygan, F., & Lynette, A. (2014). Heteronormativity, homophobia and “culture” arguments in KwaZulu-Natal, South Africa. *Sexualities*, 17(5-6), 718. <https://doi.org/10.1177/1363460714531267>

⁵² Unified Compliance (2022). *What is a Definition?* - <https://www.unifiedcompliance.com/education/what-is-a-definition/> [Accessed 18 August 2022].

⁵³ S, Habib (n.d.). *Power of words - how words affect our lives & behavior* - goop. <https://goop.com/wellness/mindfulness/the-scary-power-of-negative-words/> [Accessed 21 June 2022].

⁵⁴ South African Police Service. *Sexual Offences Guidelines - SAPS*. Justice.gov.za. https://www.justice.gov.za/policy/guide_sexoff/sex-guide01.html. [Accessed 22 September 2022].

However, these words should not be seen as the same as they do not convey the same perception, emotion and behaviour. In fact they have the opposite effect on describing the conduct, as “corrective” and “curative” imply that something needs correcting and curing, while homophobic implies the homophobic intentions behind the rape. Therefore it is important to decide on a suitable name that does not confuse its purpose or hold room for discrimination. Choosing between these terminologies can make a difference in the causal effect of the crime.

2.4.1.1 The issue with defining the conduct as “corrective rape” and “curative rape”.

To “correct” or to “cure” suggest there is something wrong and by claiming these terms we pathologise ourselves.⁵⁵ The terms “corrective” and “curative” aligns with notion of changing and improving the victim’s sexual orientation. The terms “correct” and “curative” also directs attention to the idea that something is being rectified or remedied. When these two words are used to describe the type of rape, it creates the idea that this type of rape is the right thing to do or that it is necessary. Both these terms therefore encourage the conduct, rather than aim at its prevention. The use of “corrective rape” and “curative rape” implies that rape has some inherent ‘rehabilitative focuses.’⁵⁶ This would also imply that what the victims are doing is wrong and in need of fixing. Roelofse and Chabalala state in their article that using the terms “corrective” and “curative” implies that the rape of the victim has a rehabilitative focus and contributes to the idea that a non-heterosexual identity has “corrective” or “curative” capabilities, this being similar to an opinion implemented by the church wherein it is believed that the “gay” can be “prayed away”.⁵⁷ They suggest that one should refrain from using the term “corrective” and “curative” completely.

This can also be seen as an oxymoron with two contradictory figures being placed in conjunction to each other. “Corrective” and “curative” generates a positive reaction and emotion, while rape generates a negative. The term contradicts itself, as something good is being placed in conjunction to something bad. It relates to terms similar to ‘hot snow’, ‘friendly war’ or ‘living dead’. This oxymoron effect creates confusion and leaves room for

⁵⁵ Hames, M. (2011). Violence against black lesbians: Minding our language. *Agenda: Empowering Women for Gender Equity*. 25(4). <https://www.jstor.org/stable/23287206>.

⁵⁶ Roelofse, C. J. & Chabalala, O. R., 2015 (50).

⁵⁷ Roelofse, C. J. & Chabalala, O. R., 2015 (60).

discrimination against the LGBTIQ+ community, as their rape is seen as remedial. This goes against the values and rights found within our constitution, which protects the LGBTIQ+ community from discrimination on the grounds of sexual orientation.⁵⁸ Therefore it can be reasoned that to use “corrective” and “curative”, conflicts with the values and rights founded in our constitution.

Therefore if the pervasiveness of homophobic rape is to be curbed, it is vital that the correct terminology is used. A term that encourages the crime should be refrain from using. If “corrective” and “curative” is used to describe the type of rape, then it will indeed make perpetrators feel as if they are doing the victims a “favour” rather than to create a sense of restriction and restraint. These terms makes room for discrimination and furthermore encourages perpetrators to commit the conduct therefore it would be rational and impartial to scratch these terms and rather turn to the name homophobic rape.

2.4.1.2 Determining whether “heteronormative rape” can be observed as a justifiable name for the conduct

‘Heteronormative rape’ is another term used for the misconduct. The term “heteronormative” refers the idea that being heterosexual is deemed as the norm. The focus of this definition shifts back to the victim, as it determines why they were selected by the perpetrator. The traditional gender representation of a heteronormative society, is that heterosexual relationships normal while anything else is deemed abnormal. It can be defined as “the institutions, structures of understanding, and practical orientations that make heterosexuality not only seem coherent, that is organised as a sexuality, but also privileged”.⁵⁹ The intention of the perpetrator is to punish the victim, as they are said to be violating traditional heteronormative gender representations.

Heteronormativity can go hand in hand with a patriarchy system which is found in many African cultures. If one interprets home in a heteronormative light, it is a site for the creation and maintenance of patriarchal practices in what appears to be natural and ordinary.⁶⁰ In other words a heteronormative belief is that a heterosexual relationship, with a man being the head

⁵⁸ Section 9 of the Constitution.

⁵⁹ Doan-Minh, S. (2019) (167-196).

⁶⁰ Robbertze, G., & Muller, G. (2020). Conceptualising the home in law and gender. *De Jure*, 53, 332-352. doi: 10.17159/2225-7160/2020/v53a21.

of the house and a woman doing the care-taking, cleaning and cooking, is normal. This is similar to that of a patriarchal system found in many African cultures where a female's sexuality and fertility are controlled and ordered in most instances by men. Thus 'heteronormative rape' has a similar effect to that of "corrective rape" and "curative rape", as it links the victim's sexual orientation to something that is 'abnormal' or 'wrong'. Therefore this would suppose that the perpetrator is raping the victim to conform them to a normal sexual orientation, which thus has a discriminatory effect on the victim's sexual orientation.

2.4.1.3 Defining the conduct as "homophobic rape", and why this term should be suggested over others

Homophobia plays a significant part in the occurrence of homophobic rape. Perpetrators of the conduct use homophobia as a means to discriminate and hate, consequently this is then used as motivation to commit the misconduct. The intention therefore is to exert homophobic actions onto the victim because they are not following the heteronormative protocol, and to further absolve them of their "abnormal" homosexuality. There are two words found within this term namely, homophobic and rape.

Homophobic, describes the type of rape being committed. Perpetrators are characterised as being homophobic, thus making it clear that they committed the conduct based on their feelings towards the victim's sexual orientation or gender identity. Homophobia therefore generates a negative emotion and reaction; this creates the idea that the perpetrator of this conduct has a bias and prejudicial intention, thus grounding his actions on it. Instead of making it seem as though the rape is "correct" or a "cure", it shifts its attention onto the perpetrators motive and bad homophobic character, leaving no room for discrimination against the victim. In addition there lies no oxymoron confusion as both words generate negative emotions, therefore leaving no room for tolerance. Therefore homophobic rape will be used throughout this thesis as the name of the crime, instead of "corrective rape" and "curative rape". It is also vital that 'homophobic rape' is brought to light as the sole term of the crime that should be used in dictionaries, through word of mouth, media, and academic.

2.4.2 The effects of secondary victimisation on victims of homophobic rape

Primary victimisation transpires when someone is victimised by a perpetrator during the occurrence of a crime. This is experienced by LGBTIQ+ members when they are faced with homophobic rape. They are victimised because of a certain characteristic or identity that the perpetrators do not accept, in this case the victim's sexual orientation. It is enough for victims to be victimised during the course of the misconduct, but for them to experience secondary victimisation thereafter is erroneous to their dignity and therefore needs to be addressed and prevented. Secondary victimisation occurs when LGBTIQ+ persons experience indifferences, rejections or stigmatisations from family, friends and their communities after they have been faced with primary victimisation. They face a possibility of further victimisation because of society's willingness to condone prejudice, discrimination, and violence against them.⁶¹

Furthermore, they are afraid to report such crimes because their sexual orientation can become publicly known and as a result they can risk the loss of employment, eviction from housing, denial of public accommodations, even loss of child custody.⁶² These factors all play a part in the effect of secondary victimisation and in the perpetuation of homophobic rape. This is because victims of homophobic rape are left silent after the occurrence of such a misconduct, since they are afraid and embarrassed to have people find out about their sexual orientation or gender identity. They have an expectation to be treated differently and with judgment, this therefore creates a fear amongst victims and may embolden perpetrators to commit these acts knowing that their victims will not report it.

2.5 CONCLUSION

The overall understanding of homophobic rape is that it encapsulates two components, namely; a discriminative-hate towards the victim's identity or characteristics which motivates the second component, being the action of rape. South Africa's racial, sexist and homophobic past has made it difficult for homophobic rape victims to acquire justice in the past. During apartheid being black, a women and homosexual would have led to multiple forms of

⁶¹ Berrill, K., & Herek, G. (1992). *Primary and Secondary Victimisation in Anti-Gay Hate Crimes: Official Response and Public Policy*. Ojp.gov from <https://www.ojp.gov/ncjrs/virtual-library/abstracts/primary-and-secondary-victimisation-anti-gay-hate-crimes-official> [Accessed 14 September 2022].

⁶² Berrill, K., & Herek, G. (1992). *Primary and Secondary Victimisation in Anti-Gay Hate Crimes: Official Response and Public Policy*. Ojp.gov. <https://www.ojp.gov/ncjrs/virtual-library/abstracts/primary-and-secondary-victimisation-anti-gay-hate-crimes-official> [Accessed 14 September 2022].

oppression and violence. Black lesbians are usually found to be the most common victims of homophobic rape. South Africa's past inequalities and discriminations has allowed instances of homophobic rape to be overlooked as being a serious offence. Today we have a transformed South Africa, with a constitution that protects everyone against discrimination on the grounds of race, gender and sexual orientation. Therefore it can be reasoned that hate crimes such as homophobic rape, which discriminates against intersecting identities, infringes on the foundations of our constitution.

Furthermore, the intention to "correct" or "cure" the victims has resulted in discriminative terminology that should be renounced from being used, whether it be within our law or word of mouth. "Corrective rape" and "curative rape" creates the idea that homophobic rape has rehabilitative characteristics, therefore suggests that victims are doing something that is in need of "correcting" or "curing". The term "homophobic rape" should be decided on and recognised as the exclusive name of the misconduct as it holds no discriminatory effects on the victim's sexual orientation. It rather shifts the focus onto the malicious character and intent of the perpetrator. Other than the terminology, there are other non-legislative issues that also play a part in the existence of homophobic rape, such as secondary victimisation which includes the biased and prejudicial treatment of the victim after they have reported a conduct. Secondary victimisation from friends, family members, and communities should be prevented as it encourages victims to stay silent and ashamed, rather than supported and safe.

CHAPTER THREE

ARE SOUTH AFRICAN LAWS ABLE TO EFFECTIVELY PROSECUTE HOMOPHOBIC RAPE?

3.1 INTRODUCTION

To determine whether the South African law provides effective protection to victims of homophobic rape, one needs to carefully analyse the extent of protection given by available legislation. This chapter will determine whether the current legislation is enough to prosecute homophobic rape or whether there is a need for development. The only form of hate crimes legislation is that of the Hate Crimes Bill, which is yet to be enacted. However, there are various legislatures that provide protection from unfair discrimination and rape separately. This includes the Constitution, PEPUA and Sexual Offence Act which will be analysed throughout this chapter. The interpretation and study on these legal bodies will conclude whether there is effective protection given to victims of homophobic rape and whether there is an effective means to prosecuting perpetrators of this misconduct.

3.2 CONSTITUTIONAL PROTECTION TO VICTIMS OF HATE CRIMES

The first legal framework that will be analysed is the constitution. The preamble of the constitution encapsulates its aim and purpose of existence. This includes the purpose to heal the injustices and suffrage of the past, achieve equality and unite South Africa's diversities.¹ The Constitution has been put in place to ensure that the discriminations of the past are not repeated, thus making sure that South Africa would not return to a state of disarray. In most instances of homophobic rape in South Africa, most victims are seen to be lesbians from the African communities.² In this circumstance we can comprehend that the common victim consists of three marginalised groups, namely being black, a women and a member of the LGBTIQ+ community. Thus when reading the preamble one can argue that the Constitution should include sections that aim at protecting these three historically disadvantaged and vulnerable groups in particular. There are sections found within the Constitution that affords protection against such discriminations. It makes use of the words "Everyone" in several

¹ The Constitution of the Republic of South Africa, 1996, hereafter the constitution. (The Preamble).

² Koraan, R. (2015) 'Corrective rape' of lesbians in the era of transformative constitutionalism in South Africa. *Potchefstroom Electronic Law Journal*, 18 (5) 1937.

sections, thus aiming at protecting every individual regardless of their differentiating identities and characteristics. The extent of protection afforded by the constitution will thus be evaluated, to determine which various section can be used to protect victims from hate crimes, such as homophobic rape.

3.2.1 The extent of protection provided to victims of homophobic rape, by the right to equality

The Constitution of South Africa was the first in the world to protect individuals from discrimination on the grounds of sexual orientation.³ The Constitution advanced many forms of human protections, especially those that were ignored in the past. Section 9 of the constitution provides that “Everyone is equal before the law and has the right to equal protection and benefit of the law”.⁴ This section encapsulates the importance of treating everyone equal notwithstanding their differences. This section is known as the ‘Equality clause’ and aims at putting every individual on an equilibrium, not only in relation to each other but also before the law itself. The Equality clause continues to state in subsection 3 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, region, conscience, belief, culture, language and birth.⁵

In this list of grounds the focus can be shifted to race, sex, gender and sexual orientation. One can reason that these grounds provides protection from discrimination to black lesbians. Victims of homophobic rape are generally chosen or selected by the perpetrator on the basis of their sexual orientation or gender identity. This can therefore be observed as infringement of the equality clause found within the Constitution, as victims are endangered primarily because of their sexual orientation. These victims are expressly protected through the mentioning of the ‘sexual orientation’ ground, and therefore to undermine or disregard this clause would be an infringement of the supreme law of the country.

The importance of formal and substantive equality also comes to mind when discussing the equality clause in relation to homophobic rape. It is important to first understand the difference

³ Youth Policy Committee. (2021). *Hate crimes against members of the LGBTQIA+ community in South Africa*. SAIIA. <https://saiia.org.za/youth-blogs/hate-crimes-against-members-of-the-lgbtqia-community-in-south-africa/> [Accessed 10 November 2022].

⁴ Section 9 (1) of the Constitution.

⁵ Section 9 (3) of the Constitution.

between formal as opposed to substantive equality. Formal equality refers to scenarios whereby individuals in similar circumstances are treated alike, contra to that of substantive equality which requires equality of outcome by tolerating disparity of treatment to achieve the said goal.⁶ In other words formal equality is based solely on treating everyone equal, while substantive believes that to achieve equality one needs to focus a little more on those who have been disadvantaged or more discriminated against to achieve equality. Theories embracing formal equality norms implicitly depend on the idea that identical treatment equates to fair treatment, while substantive equality theorists maintain that formal equality is sufficient only if the underlying population is itself sufficiently homogeneous.⁷ From a simplistic thought, in relation to substantive equality, one cannot give a rich man and a poor man an equal amount of coinage in hopes that both will find an equal outcome from it.

Consequently, a formally equal system, may afford identical rights and treatment to all persons, yet still be functionally discriminatory when the people invoking those rights face very different paths and obstacles due to their race, gender, or other characteristics.⁸ In relation to homophobic rape, substantive equality would be the best approach. Mwambene argues that the common victim of homophobic rape are women, they are black and they are homosexual, which ultimately increases their vulnerability to violence.⁹ These victims form part of more than one vulnerable group of people that were oppressed and highly discriminated against in the past. Therefore in order to even the plain field one cannot simply treat them as equals to those who have not faced similar obstacles. They require additional protection and attention, for they have a higher chance of facing violence and discrimination.

In the case of the *National Coalition for Gay and Lesbian Equality v Minister of Justice*,¹⁰ the common law crime of sodomy was challenged and in the *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* the court was asked to declare section 25 of the Aliens Control Act 96 of 1991 unconstitutional as it unfairly discriminated against same-sex couples.¹¹ In addition the case of *Minister of Home Affairs v Fourie* was also a breakthrough case as it found the common law definition of a “marriage” to be unconstitutional, as it did not permit same-sex couples to enjoy the status and benefits it accorded to heterosexual couples. It

⁶ Mwambene, L., & Wheal, M. (2015) (68).

⁷ Stancil, P. (2017). Substantive equality and procedural justice. *Iowa Law Review*, 102(4), p1633.

⁸ Stancil, P., 2017 (1637).

⁹ Mwambene, L., & Wheal, M. (2015) (68).

¹⁰ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* (CCT11/98) [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517.

¹¹ *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) para 1 & 2.

therefore extended the wording of section 30(1) of the Marriage Act 25 of 1961 (hereafter Marriage Act) to include same-sex couples by adding “or spouses” to the marriage formula which previously read “or wife” and “or husband” only.¹² The Constitution therefore resolved many conflicting attributes, especially those faced by the LGBTIQ+ community. The *Lesbian and Gay Equality Project and Eighteen Others v Minister of Home Affairs* case continued to state that the Marriage Act was not only in conflict with section 9 of the constitution, but in addition section 10 and 12 as well.¹³ This is a clear indication that laws can be altered to align with the values and rights of our Constitution, to enforce the protection of all individuals.

Therefore it is clear that section 9 of the constitution provides protection from hate crimes only in so far as it includes the prevention of discrimination. The inclusion of grounds such as race, gender and sexual orientation provide direct protection to victims of homophobic rape. The constitution is the only form of legislation that makes mention of ‘sexual orientation’, viewing the constitution as the only form of LGBTIQ+ protection. The question that remains is whether it is sufficient to effectively prosecute homophobic rape?

3.2.2 The extent of protection provided to victims of homophobic rape, by the right to human dignity

Section 10 provides that “Everyone has inherent dignity and the right to have their dignity respected and protected”.¹⁴ The Constitutional Court decided 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.¹⁵ The impairment of one’s dignity occurs through the course of homophobic rape, as the victim is stripped of their solidarity, bodily respect and value of life. Perpetrators of homophobic rape select their victims based off their sexual orientation or gender identity, and tend to advance statements that mock or discriminate against them during the course of the misconduct. The action of targeting a victim, and mocking or harassing them can be seen as an infringement of the victim’s dignity. Homophobic rape lessens an LGBTIQ+ person’s value life over that of a heterosexual individual, and demonstrates a lack of respect towards the latter. This can be seen as a violation of section 10

¹² *Minister of Home Affairs and Another v Fourie and Another* (CCT 60 of 2004) [2005] ZACC 19.

¹³ *Lesbian and Gay Equality Project and Eighteen Others v Minister of Home Affairs* (CCT 10/05) [2005] ZACC 20; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC).

¹⁴ Section 10 of the constitution.

¹⁵ *President of the Republic of South Africa and Another v Hugo*, para 41.

of the Constitution as the victim's integrity, humanity and dignity is being violated. Therefore it is clear that the infringement of section 10 occurs during the occurrence of homophobic rape. However, this infringement does not cover the overall concept of homophobic rape. It only embodies the protection of the victim's dignity, and therefore it is directed at protecting the victim, rather than prosecute the perpetrator.

3.2.3 The extent of protection provided to victims of homophobic rape, by the right to freedom and security of the person

Section 12 of the Constitution guarantees everyone the right to freedom and security of the person.¹⁶ This section highlights the protection and safety of each individual. In terms of this right, every person has the right to be free from all forms of violence from public or private sources.¹⁷ This case deals with private sources as it does not include the state but rather an individual against another individual. It is clear that this crime includes the infringement of section 12 as individual's protection and safety is diminished or taken away. Section 12(2) states that: "Everyone has the right to bodily and psychological integrity, which includes the right - (a) to make decisions concerning reproduction and (b) to security in and control over their body."¹⁸ When we think of reproduction and control over one's body, then we can direct our attention to one's sexuality and gender identification. Every individual has the freedom to decide on how to reproduce, whether it be through surrogacy, adoption or pregnancy, and to choose with whom to do so. The subsection speaks on the security and control over one's body, therefore to rape with the intention to "cure" or "correct" another's homosexuality, takes away the victim's control over their body. Therefore there is a clear infringement of section 12 of the Constitution when homophobic rape is committed.

¹⁶ Section 12 of the constitution.

¹⁷ Mwambene, L., & Wheal, M., 2015 (71).

¹⁸ Section 12 of the constitution.

3.2.4 The extent of protection provided to victims of homophobic rape, by the right to freedom of expression

Section 16(1) states that, “Everyone has the right to freedom of expression”.¹⁹ Section 16(2) continues to say that:

subsection (1) does not extend to; (a). propaganda for war; (b). incitement of imminent violence; or (c). advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.²⁰

Section 16(2)(c) is the closest constitutional component that references the hate motive driven in hate crimes. It describes hatred being redirected to a person because of their race, ethnicity, gender or religion and in addition it also makes mention of the hate causing one to incite harm onto another person. This therefore defines and describes of the components that make up a hate crime. In homophobic rape the perpetrator allows their hate towards an LGBTIQ+ victim to motivate their actions of rape or sexual violence. Perpetrators tend to verbally express their hate towards the victim’s sexual orientation before or during the cause of the rape.²¹ These harmful expressions are therefore an infringement of the right to freedom of expression, as it incites sexual violence and discrimination on the grounds of sexual orientation.

There is however a need to develop this section as sexual orientation is not mentioned in section 16(2). Race, ethnicity, gender and religion is the only mentioned grounds within this section. Instead of mentioning only these four grounds, the hatred mentioned here should be extended to include all grounds found within section 9(3) of the Constitution. Therefore, allowing the for grounds such as sexual orientation to also be included. This will enforce a measure of protection to members of the LGBTIQ+ community from experiencing the homophobic expressions exerted from perpetrators of hate crimes, such as homophobic rape. This inclusion of all grounds will also encourage the effects of the Equality clause, as it will reflect that all grounds found within section 9 of the constitution should be equally recognised.

¹⁹ Section 16(1) of the constitution.

²⁰ Section 16(2) of the constitution.

²¹ Doan-Minh, S. (2019) (167).

3.2.5 The extent of protection provided to victims of homophobic rape, by the right to health care services

Section 27(1)(a) of the Constitution provides for the right to health care services. It states in this subsection that everyone has the right to “health care services, including reproductive health care”.²² It continues to state in subsection 3 that “No one may be refused emergency medical treatment”.²³ This section of the constitution allows assurance to victims of homophobic rape that health care services are provided to them despite their sexual orientation, gender or sex. Some of the health care services provided to survivors of rape can include; rape counselling, taking specimens for evidence with their consent, giving them emergency contraceptives and offering them the anti-Aids drug.²⁴ These procedures should be similar to that experienced by homophobic rape survivors. Therefore making it unconstitutional to turn down health care services to a person because of their sexual orientation or gender identity.

3.2.6 The effectiveness of the Constitution in prosecuting homophobic rape justifiably.

The Constitution provides the foundational protections to all forms of human rights violations. Even though it does not make specific mention of particular crimes, such as homophobic rape, it still serves as a general and foundational form of protection. Victims of hate crimes such as homophobic rape are protected by the equality clause, which aims at protecting individuals from discrimination on grounds such as gender, sex and sexual orientation. Hence, the Equality Clause being a symbol of both the progressive aims of the post-apartheid constitution and the appalling clash between those aspirations and reality.²⁵ Thus protection to the LGBTIQ+ community is provided for, one that was non-existing prior to the Constitution of 1996. The equality clause therefore offers the most direct form of protection to LGBTIQ+ persons from the discriminative-hate motive that encourages hate crimes.

In addition to the equality clause, the Constitution provides various forms of protection to victims of homophobic rape, through the right to human dignity, freedom and security of a

²² Section 27(1)(a) of the constitution.

²³ Section 27(3) of the constitution.

²⁴ (2014). *Treatment for Sexual Abuse/Rape* . Western Cape Government.

<https://www.westerncape.gov.za/service/treatment-sexual-abuserape> [Accessed 3 May 2023].

²⁵ Christiansen, E. C. (2016). Substantive equality and sexual orientation: Twenty years of gay and lesbian rights adjudication under the South African Constitution. *Cornell International Law Journal*, 49(3), p568.
<https://doi.org/10.2139/ssrn.3040966>

person, and freedom of expression, which protects victims from hateful expressions that lead to the incitement of harm. In addition, section 27 of the constitution prevents the refusal of medical services to homophobic rape survivors.

3.3 ANALYSING THE EXTENT OF PROTECTION GIVEN TO VICTIMS OF HATE CRIMES BY SOUTH AFRICAN LEGISLATION

The Constitution provides protection to victims of homophobic rape, however it is not the only means of protection provided to victims of homophobic rape. Other than the constitution of South Africa, there are other forms of legislations that can also be interpreted to provide protection from homophobic rape. In the *Carmichele v Minister of Safety and Security* it was held that the state had a positive duty to protect individuals through laws and structures and that, 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.²⁶ This would suggest that the state has a duty to enact statutes that protect those who are more prone to experiencing violence and discrimination. South African LGBTIQ+ persons, particularly in poorer communities, routinely experience condemnation, discrimination, and homophobic violence.²⁷ Therefore it is expected of certain legal bodies to provide a form of protection to such vulnerable groups, to ensure that they are lawfully protected from hate crimes, like homophobic rape.

3.3.1 The Promotion of Equality and Prevention of Unfair Discrimination Act of 2000

The purpose of the Act is found within its name, as it promotes equality and protects persons against unfair discrimination. The PEPUA gives effect to the Constitution's section 9 and section 23(1) of schedule 6, in order to protect or advance persons disadvantaged by past and present discriminations.²⁸ Section 9 of the Constitution emphasises equality and prevents discrimination against many groups and communities of people who tend to be disadvantaged or marginalised, therefore with the PEPUA Act giving effect to section 9 one would assume that it affords a similar protection. The Act's preamble continues to specifically acknowledge

²⁶ *Carmichele v Minister of Safety and Security* (2001) (para 44 and 45)

²⁷ Christiansen, E. C., 2016 (568).

²⁸ The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (hereafter PEPUA).

the necessity of eradicating social and economic inequalities, and furthermore addresses social structures and practices which encourage or perpetuate unfair discrimination.²⁹ Through deduction one can comprehend that PEPUDA prohibits hate crimes, which includes the unfair discrimination of another because of their specific identity or characteristics.

Chapter 2 of the PEPUDA is the ‘prevention, prohibition and elimination of unfair discrimination, hate speech and harassment’ chapter. This chapter specifically includes the prohibition of unfair discrimination against the grounds of ‘race’, ‘gender’ and ‘disability’. It allows all other grounds to fall within the “general prohibitions and unfair discriminations”.³⁰ The method of directly mentioning certain grounds under chapter 2, gives consequence to the idea that these three grounds are more important, or in need of more attention to that of other grounds. All grounds are therefore not approached with equality, therefore contradicting its ‘effect to section 9’, as intended. In order to protect the LGBTIQ+ community from facing discrimination the sexual orientation ground would need to be recognised, and not simply placed under the ‘general prohibition’. It would not be enough to add ‘sexual orientation’ to the other mentioned grounds (race, gender, disability), as it will still subvert all other grounds. Therefore it would be preeminent to place all grounds on equal footing, thus either mentioning them all, or placing them all under the “general prohibition”. The latter can however face scrutiny as “general” might be too vague and indefinite. Therefore if all grounds are to be placed under the “general prohibition” then it should be specified that the grounds will entail ‘all grounds found within section 9(3) of the Constitution’, to ensure clarity. This will present the product of equality as all groups would be viewed as equally important under chapter 2 of the PEPUDA.

The prosecution of a hate crime would not be wholly justifiable under PEPUDA, as the intention of the Act is to prohibit discrimination, hate speech and harassment from being committed against specific groups of persons. The PEPUDA does however not recognise criminal offences such as murder, theft and rape. Therefore it only covers the discrimination, hate speech and harassment aspect of a hate crime. This being the biased-hate which motivates a hate crime. Therefore perpetrators of a hate crime, such as homophobic rape, can be prosecuted with the infringement of PEPUDA only with regards to their discriminative- hate which stipulates the hate crime. The infringement of PEPUDA can also include hate speech,

²⁹ PEPUDA (preamble).

³⁰ Chapter 2(6) of the PEPUDA.

as verbal abuse can be used before, during and after the occurrence of a hate crime.³¹ However the PEPUDA would not be effective in prosecuting a hate crime in its entirety, as only half of the conduct is covered within this Act.

Therefore two issues exist with the PEPUDA when it relates to the prosecution of hate crime, such as homophobic rape. Firstly, its failure to place all grounds on an equilibrium. 'Sexual orientation' is assumed to be positioned under the definition of "general prohibition", whereas grounds like race, gender and disability are verbally and individually cited. Therefore not only does it fail to see all grounds as equal, in addition the omission of the grounds of 'sexual orientation' deteriorates the effectiveness of the Act to prosecute unfair discrimination against the LGBTIQ+ community. Secondly, although the discrimination aspect of the perpetrator is recognised within this act, the second component of a hate crime is not. The criminal offence of a hate crime is omitted within the PEPUDA and therefore cannot be used to effectively prosecute hate crimes.

3.3.2 The Criminal Law (Sexual Offences and Related Matters) Amendment Act of 2021

The Sexual offences Act is where we look into the prosecution of the crime of rape. In chapter 1(2) of the Sexual Offences Act we find the objects of the Act also known as the interpretation or purpose of the Act. It states that its object is;

to afford complainants of sexual offences the maximum and least traumatising protection that the law can provide, to introduce measures which seek to enable the relevant organs of state to give full effect to the provisions of this Act and to combat and, ultimately, eradicate the relatively high incidence of sexual offences committed in the Republic.³²

In other word the purpose of the Sexual Offences Act is to provide the ultimate protection to sexual offence victims, for the state to give full effect to its provisions and to combat the existence of sexual offences in South Africa. Rape falls within the parameters of a sexual offence and is defined in Chapter 2(2) as: "Any person ('A') who unlawfully and intentionally

³¹ Doan-Minh, S. (2019) (167).

³² Chapter 1(2) of the Sexual Offences Act.

commits an act of sexual penetration with a complainant ('B'), without the consent of B".³³ Consent being the key objective in differentiating general sex from that of rape.

Rape is the primary offence taking place during the course of homophobic rape. The act of rape is motivated by the hatred that the perpetrator has towards the victim's sexual orientation or gender identity. The perpetrator's intention is to "correct" or "cure" the victim of their homosexuality, through the coercion of heterosexual sex. Therefore it is clear that the perpetrator of homophobic rape can be prosecuted with the Sexual Offences Act for raping the victim. The only issue with the Sexual Offences Act is that it does not make mention of the discriminative-hate motive which drives the perpetrator to rape.

There are no chapters or sections within the Sexual Offences Act that concerns itself with homophobic rape, but rather just the offence of rape. One would ask whether the factor that makes the rape a hate crime, is relevant when prosecuting the perpetrator. Another would argue that rape itself, whether homophobic or non-homophobic, is itself a hate crime against women. However, most cases involving rape are not always identified as a hate crime. Studies have shown that most men who rape, have childhood experiences related to abuse, trauma, alcohol use, and criminal activities in the household, or where their community had been associated with an increased risk for violence perpetration in adulthood.³⁴ Other reasons have amounted to boredom, feelings of entitlement or purely based on sexual drive.³⁵ Rape does not always occur because the perpetrator hates the victim's identity or characteristics. In these circumstances rape cannot be viewed as a hate crime. Only when rape is motivated by perpetrator's hate towards the victim's specific characteristic or identity, then rape can be seen as a hate crime.

Therefore it is important to differentiate hate crimes from general crimes. If an individual is raped because of her race, gender or sexual orientation, then such rape amounts to a hate crime. Comparably, when a victim is raped because their sexual orientation then it is no longer deemed as rape, but rather homophobic rape. Hate crimes thus amount to two components; a criminal offence and a discriminative-hate motive. A hate crime also has an indirect effect on those who share the same identity or characteristics as the victim. Therefore if homophobic rape occurs against a black lesbian, the crime consequently affects all black, lesbians, who will now live in

³³ Chapter 2(3) of the Sexual Offences Act.

³⁴ Ngubane L.B., Nöthling J., Moletsane R., Wilkinson A. and Qulu L. (2022) Why Men Rape: Perspectives From Incarcerated Rapists in a KwaZulu-Natal Prison, South Africa. *Frontiers in Psychology*. 13:805289. doi: 10.3389/fpsyg.2022.805289. p.2.

³⁵ Ngubane L.B., Nöthling J., Moletsane R., Wilkinson A. and Qulu L. (2022) (2).

fear of being faced with the same outcome. Chapter 1(2)(a) states that the object of the Sexual Offence Act is “enacting all matters relating to sexual offences in a single statute”.³⁶ Therefore one would question whether the Sexual Offences Act needs development, as it does not include “all matters relating to sexual offences”, such as homophobic rape. It is clear that rapes which amount to a hate crime should be recognised and defined in this Act. Similarly to that of the PEPUDA, the Sexual Offences Act only accounts for half of the components of a hate crime. It recognises the criminal offence of rape, but does not acknowledge or recognise the discriminative-hate motive found within homophobic rape. Therefore it is clear that the Sexual Offences Act is not sufficient in effectively prosecuting homophobic rape.

3.3.3 The Prevention and Combating of Hate Crimes and Hate Speech Bill, 2018

A hate crime is generally defined as a crime committed against another where the offender “intentionally selects a victim, because of the actual or perceived race, colour, religion, national origin, ethnicity, gender, disability, or sexual orientation.”³⁷ Hate crimes have not been wholly recognised within the South African law until the introduction of the Hate Crimes Bill. The Hate Crimes Bill was introduced in 2016 and is yet to be passed. Its delay was reasoned by a large volume of submissions and petitions, and many political and public contestation regarding its content.³⁸ Until then there is currently no dedicated legislation which is directly tailored to specifically address the prosecution of hate crimes in South Africa.³⁹ Consequently with no recognition of a hate crime within the law, there can be no recognition of homophobic rape likewise. Therefore in order for homophobic rape to exist within our law, there has to be acknowledgment and direct recognition of a hate crime in legislation.

The recognition of such a legislation will result in the police and the CJS being obligated to treat it with special care and in addition to allow such cases to be brought before the Equality Court for prosecution.⁴⁰ The common law that prosecutes rape, theft and murder covers the

³⁶ Chapter 1(2)(a) of the Sexual Offences Act.

³⁷ Mollema, N., & Van der Bijl, C. (2014). Hate crimes : the ultimate anathematic crimes : notes. *Obiter*, 35(3) p. 673.

³⁸ Singo, D. (2023). *The Hate Crimes and Hate Speech Bill is a step closer to becoming law*. Werksman Attorneys. <https://www.werksmans.com/legal-updates-and-opinions/the-hate-crimes-and-hate-speech-bill-is-a-step-further-to-becoming-law/> [Accessed 3 May 2023].

³⁹ Mollema, N., & Van der Bijl, C. (2014) (674).

⁴⁰ Kinama, E. (2011). *Classifying 'Corrective Rape' as a Hate Crime in South Africa*. Institute for security studies. <https://issafrica.org/iss-today/classifying-corrective-rape-as-a-hate-crime-in-south-africa>. [Accessed 1 May 2023].

crime component of a hate crime. The discriminative-hate and biased motive component is found within certain aspects of our law such as section 9 of the Constitution and the PEPUDA. However, the South African law falls short of recognising a hate crime in its entirety. Perpetrators of hate crimes can therefore not be effectively prosecuted.

In section 3 of the Hate Crimes Bill, a hate crime is defined as:

an offence recognised under any law, the commission of which by a person is motivated by that person's prejudice or intolerance towards the victim of the crime in question because of one or more of the following characteristics or perceived characteristics of the victim or his or her family member or the victim's association with, or support for, a group of persons who share the said characteristics.⁴¹

It is clear that the Hate Crimes Bill identifies the first component of a hate crime, which is "an offence recognised under the law". This refers to a criminal act, whether it be murder, theft, rape or assault. This section continues to mention various types of perceived characteristics and identities of victims which usually motivates perpetrators to commit hate crimes. Amongst these characteristics are; "gender or gender identity",⁴² "sex which includes intersex"⁴³ and "sexual orientation".⁴⁴ The inclusion of these grounds make it clear that homophobic rape might not be directly mentioned, yet its description and definition is wholly recognised within the Hate Crimes Bill. Therefore once the Hate Crimes Bill is passed it will become the first form of national legislation to recognise hate crimes, such as homophobic rape, in South Africa.

Section 11 of the Hate Crimes Bill introduces amendments to certain laws such as the Criminal procedure Act 51 of 1977 (hereafter CPA). These amendments include substitutions or additions that extend legal definitions to the inclusion of hate crimes. An example of this would be section 18(f) of the CPA which is the right to institute a prosecution for the offence of "rape or compelled rape as contemplated in section 3 or 4 of the Sexual Offences and Related Matters Amendment Act, 2007, respectively".⁴⁵ This section would thus be amended to include an additional sentence, that being; "including rape or compelled rape which constitutes a hate crime as contemplated in section 3 of the Prevention and Combating of Hate Crimes and Hate

⁴¹ Section 3(1) of the Hate Crimes Bill.

⁴² Section 3(h) of the Hate Crimes Bill.

⁴³ Section 3(p) of the Hate Crimes Bill.

⁴⁴ Section 3(q) of the Hate Crimes Bill.

⁴⁵ Section 18(f) of the CPA.

Speech Act, 2018;’’. An additional amendment would be that added onto section 270 of the CPA, creating a section 270A that will state that,

“If the evidence on a charge for a hate crime as contemplated in section 3 of the Prevention and Combating of Hate Crimes and Hate Speech Act, 2018, does not prove the commission of the offence so charged but proves the commission of the underlying offence on which the hate crime is based, the accused may be found guilty of the underlying offence in question so proved.”⁴⁶

Amendments will also be afforded to the Criminal Law Amendment Act of 1997, as well as the Child Justice Act of 2008. All these additional texts and interpretations will create an overall recognition of hate crimes within the law, and emphasise the serious implications and effects of committing such a conduct.

This form of legislation will not only have the potential to provide legal remedy, but also spark social transformation.⁴⁷ The Hate Crimes Bill is yet to be passed, however is a few steps closer to being enactment. On the 14th of March 2023 the Hate Crimes Bill was passed by the National Assembly, and in course to be considered by the National Council of Provinces (hereafter NCP).⁴⁸ The NCP has currently approved the Hate Crime Bill under amendment conditions. Once these amendments have been approved, then the Hate Crimes Bill will be given to the president to sign. Introducing hate crime legislation would create an avenue through which to positively decry and punish the homophobic and sexist biases that spur on the perpetrators of homophobic rape.⁴⁹ However, until the Hate Crimes Bill is passed there is no recognition of a hate crime in national legislation, therefore providing no justifiable prosecution for hate crimes, such as homophobic rape.

⁴⁶ Section 11 of the Hate Crimes Bill.

⁴⁷ Gaitho, W. (2021). *Curing 'corrective' rape: Conceptualising a dual-pronged approach to sexual violence against black lesbians in South Africa*. Universiteit Leiden. <https://www.leidenlawblog.nl/articles/curing-corrective-rape-conceptualising-a-dual-pronged-approach-to-sexual-violence-against-black-lesbians-in-south-africa> [Accessed 21 June 2023].

⁴⁸ Singo, D. (2023). *The Hate Crimes and Hate Speech Bill is a step closer to becoming law*. Werksman Attorneys. <https://www.werksmans.com/legal-updates-and-opinions/the-hate-crimes-and-hate-speech-bill-is-a-step-further-to-becoming-law/> [Accessed 3 May 2023].

⁴⁹ Gaitho, W. (2021). *Curing 'corrective' rape: Conceptualising a dual-pronged approach to sexual violence against black lesbians in South Africa*. Universiteit Leiden. <https://www.leidenlawblog.nl/articles/curing-corrective-rape-conceptualising-a-dual-pronged-approach-to-sexual-violence-against-black-lesbians-in-south-africa> [Accessed 21 June 2023].

3.4 CONCLUSION

In order to justifiably prosecute a crime, that crime must be recognised within the law. Specifically, one cannot be prosecuted for a conduct which is not officiated or documented within the law itself. Homophobic rape can be classified as a hate crime.⁵⁰ Thus homophobic rape can only be justifiably prosecuted with the existence of a hate crime legislation. The Constitution provides a general protection to victims through; protecting them from discrimination on the grounds of 'sexual orientation', protecting their human dignity, giving them the freedom and security of their body, providing protection from hateful expressions which can lead to incitement of harm and ensuring freedom to health care services. These section give victims and survivors of homophobic rape a sense of protection, yet provided no legal punishments for perpetrators of hate crimes. Contravening the Constitution is usually seen as a civil offence which is usually taken to the Equality court. The Equality court does not prosecute criminal offences, but rather civil (such as complaints that include unfair discrimination, hate speech or harassment).⁵¹ Therefore an alternative form of protection is needed from the law to recognise hate crimes as a criminal offence, rather than just a civil offence.

Furthermore, national legislation is sufficient in prosecuting rape cases, however falls short when it comes to the prosecution of homophobic rape cases. The South African legal system does not differentiate between acts of violence committed out of prejudice, and non-prejudicial violent acts.⁵² Homophobic rape of lesbians is thus investigated and prosecuted as ordinary rape, regardless of any bias by the accused.⁵³ In other words there is no law that recognises a

⁵⁰ Kinama, E. (2011). *Classifying 'Corrective Rape' as a Hate Crime in South Africa*. Institute for security studies. <https://issafrica.org/iss-today/classifying-corrective-rape-as-a-hate-crime-in-south-africa>. [Accessed 5 May 2023].

⁵¹ *Prevention and Combating of Hate Crimes and Hate Speech Bill & International Crimes Bill: briefing, with Minister and Deputy Minister*. Parliamentary Monitoring Group. <https://pmg.org.za/page/Prevention%20and%20Combating%20of%20Hate%20Crimes%20and%20Hate%20Speech%20Bill%20&%20International%20Crimes%20Bill:%20briefing,%20with%20Minister%20and%20Deputy%20Minister> [Accessed 5 May 2023].

⁵² Gaitho, W. (2021). *Curing 'corrective' rape: Conceptualising a dual-pronged approach to sexual violence against black lesbians in South Africa*. Universiteit Leiden. <https://www.leidenlawblog.nl/articles/curing-corrective-rape-conceptualising-a-dual-pronged-approach-to-sexual-violence-against-black-lesbians-in-south-africa> [Accessed 21 June 2023].

⁵³ Gaitho, W. (2021). *Curing 'corrective' rape: Conceptualising a dual-pronged approach to sexual violence against black lesbians in South Africa*. Universiteit Leiden. <https://www.leidenlawblog.nl/articles/curing-corrective-rape-conceptualising-a-dual-pronged-approach-to-sexual-violence-against-black-lesbians-in-south-africa> [Accessed 21 June 2023].

criminal offence in conjunction with a prejudicial-hate motive that drives the offence. The PEPUDA presents inadequacies when it comes to prosecuting unfair discrimination against the LGBTIQ+ community. It fails to provide the ground of 'sexual orientation' directly. In relation to hate crimes it does not include the recognition of a criminal offence or act. In homophobic rape, the act of rape would be the criminal offence committed. Instead the only protection afforded to victims of homophobic rape, by the PEPUDA, is to protect victims from being unfairly discriminated against because they belong or identify themselves to a specific group of people. It therefore only presents protection from the discriminative-hate motive found within hate crimes.

The Hate Crimes Bill on the other hand can provide a justifiable prosecution of hate crimes. It recognises a hate crime in its entirety, with all its components. It identifies the criminal offence or act combined with a discriminative-hate against a victim because of their identity or characteristic. It continues to mention many grounds including 'sexual orientation' which therefore directs attention to offences committed against the LGBTIQ+ community, such as homophobic rape. Once this Hate Crimes Bill is enacted, it will provide the first form of hate crime legislation, allowing for the effective prosecution of hate crimes in South Africa.

CHAPTER FOUR

THE PROCEDURAL IMPLICATIONS AND CHALLENGES IN PROSECUTING HOMOPHOBIC RAPE

4.1 INTRODUCTION

The enactment of the Hate Crimes Bill will ensure the recognition of all hate crimes, and create an opportunity that allows for a direct prosecution of homophobic rape within our CJS. This will differentiate from the legal status quo, where homophobic rape is prosecuted under the Sexual Offences Act.¹ The Hate Crimes Bill will provide an additional layer of protection to that of the Sexual Offences Act. It will not only observe the act of rape as the offence, but as well as the discriminative-hate motive. The recognition of hate crimes as a criminal offence in South Africa, would mean that certain elements of the CJS would have to be altered to reduce or prevent re-victimisation and re-traumatisation for these victims.² Therefore a discussion will be introduced in this chapter, where steps and methods can be taken to limit or completely remove re-victimisation and re-traumatisation of victims throughout certain procedural stages of the CJS to ensure a fair, effective and justiciable procedure for all victims of homophobic rape.

4.2 CHANGES TO CRIMINAL PROCEDURES TO ENABLE A JUSTICIABLE PROSECUTION OF HOMOPHOBIC RAPE

Homophobic rape has always been prosecuted under the general rape legislation in South Africa. Consequently resulting in many cases recognising such a conduct as rape without a prejudicial-hate motive. With the enactment of the Hate Crimes Bill, the questions that remains is whether the CJS will put measures in place to ensure that victims of these hate crimes are met with justifiable and unbiased reactions from agents and officials of the CJS. This chapter will focus on the treatment faced by homophobic rape victims throughout selective procedural stages of the CJS and determine what improvements can be made to ensure that such victims do not face re-victimisation and re-traumatisation.

¹ Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

² Roelofse, C. J. & Chabalala, O. R., 2015 (54).

In various rape cases that proceed to prosecution, victim's experiences are generally negative because of the insensitive treatment faced by the criminal justice personnel.³ Victims of homophobic rape can face re-victimisation in various stages of the CJS by experiencing similar homophobic responses to that experienced in the primary offence. This can include a prejudicial treatment from police officials during the reporting stage, as well as insensitivity from defense lawyers, judges and even health care service providers. It is important to recognise the intersection between gender and sexual orientation in the case of homophobic rape in South Africa. Women have already become marginalised groups within various communities in South Africa, where patriarchy has become a way of living. In addition, being a lesbian in South Africa would result in two marginalised groups intersecting, that being gender and sexual orientation. It can only be presumed that when such an intersection becomes compounded then it most likely becomes harder to navigate through the CJS without prejudice.

Therefore it is important to assure a victim that their privacy and interests are protected, motivating them to report the crime and to be present during all stages of the criminal proceedings. If a victim experiences isolation from the CJS, after being violated, this feeling is usually described as being "similar to that of being abandoned by humanity".⁴ The biased and discriminatory behaviour experienced by survivors during these stages can be observed as secondary victimisation. This can include the feeling of abandonment by structures whose mandate is protection such as the police or courts, as well as abandonment by family members and the community.⁵ The role of the CJS is to protect and create a safe environment for recovery, thus failing to do so would result in the omission of their duties and responsibilities.

This chapter will discuss and evaluate four stages of the CJS where secondary victimisation can be observed as most prominent to survivors of homophobic rape. These four stages will include the reporting stage, gathering evidence, trial proceedings and sentencing. The reporting stage is concerned with how police officials treat survivors, this stage is a vital stage as unfair or biased treatment from police can cause the victim to feel regret for reporting such misconduct. The second selected stage is how evidence is gathered for the trial. The importance

³ (2021). *Sexual assault victims can easily be re-traumatised going to court — here's one way to stop this*. The conversation. <https://theconversation.com/sexual-assault-victims-can-easily-be-re-traumatised-going-to-court-heres-one-way-to-stop-this-157428> [Accessed 29 May].

⁴ Swemmer, S. (2019). Ethical loneliness and the development of a victim-focused approach to rape cases in South Africa. *Aggression and Violent Behavior*, 47, 298–306. <https://doi.org/10.1016/j.avb.2019.01.014>.

⁵ Swemmer, S. (2019) (298–306).

of this stage is to ensure that survivors are treated with sensitivity by health care workers. In addition to collecting physical evidence to prove a case, there should also be other means of proving that a hate crime has occurred. In order to do so, an evaluation will be done on which methods or models can be adopted by the South African CJS. Trial proceedings will also be analysed to determine how re-victimisation can be caused by delay tactics, language used and face to face communications with the perpetrator. The final selected stage that will be discussed is the sentencing stage, in other words what sentence would be reasoned as a justifiable sentence for perpetrators of homophobic rape? This chapter will determine how developments in the CJS can also enable effective prosecution of homophobic rape in South Africa.

4.2.1 Reporting the violation to the police

One of the factors which results in survivors withholding or not report sexual offences is the psychological trauma faced thereupon. Reporting a case to the police can be viewed as the first procedural stage of the CJS encountered by survivors. Therefore this stage of the CJS should be met with extreme sensitivity as victims are at their most vulnerable. In section 66(1)(a) of the Sexual Offences Act, the role of the National Commissioner of SAPS is outlined, giving national instructions to all police officials who are tasked with receiving reports of and the investigation of sexual offence cases.⁶ It is expected of all police officials to have a thorough and professional investigation of every reported case by applying not only efficiency, but particularly sensitivity. The police are known to routinely fail and undermine the standard operating protocols, when applying a prejudicial responds and reaction to vulnerable victims.⁷ Victims of homophobic rape can be observed as vulnerable victims, and therefore can easily become victims of prejudice and biased-judgment by police officials during the reporting stage. This type of prejudice and biased judgement can re-victimise a victim of homophobic rape, resulting in the occurrence of secondary victimisation.

Secondary victimisation usually occurs when victims of a crime feel they have been subjected to inadequate, insensitive or inappropriate treatment and responses by CJS and social agencies, which compound their original trauma.⁸ Reasons for this kind of treatment in such interactional

⁶ Section 66(1)(a) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

⁷Karels, M.G. & Naidoo, K. (2016). Prosecuting “hate”: an overview of problem areas relating to hate crimes and challenges to criminal litigation. *Tydskrif Vir Regswetenskap*, 41(1), p75.

⁸ Gekoski, Adler, J. R., & Gray, J. M. (2013). Interviewing women bereaved by homicide: Reports of secondary victimisation by the criminal justice system. *International Review of Victimology*, 19(3), p308. <https://doi.org/10.1177/0269758013494136>.

settings with the CJS and social agencies are because of the unfamiliar and unaccepting nature towards the LGBTIQ+ community. Individuals are expected to perform gender following traditional norms on femininity and masculinity, anything that upsets them or deviates from them runs the risk of provoking unexpected, insensitive and inappropriate reactions.⁹ This secondary victimisation creates a sense of regret to survivors who, as a result, decide to rather retract their report. This can in addition place an emphasis on victim's subjective feelings, as they experience indifferences or rejections from the police that in effect victimises them a second time.¹⁰ This can occur through the questions asked to victims, which may imply that they are blameworthy, or when they explicitly state to victims that their sexual orientation has contributed to the rape.¹¹ Their questions and reactions could suggest that the victim's sexual orientation encouraged the conduct, suggesting that if the victim had not been homosexual then the crime would not have occurred. This kind of reaction directs fault to the victims, creating a monotonous discriminatory effect. This can be seen as one of the reasons victims deflect from reporting homophobic rape.

Training should be provided to police officials on how to address survivors of homophobic rape. This can include how to inform the victim of investigative procedures, making support available including taking the victim to a healthcare centre for the medical examination, ensuring the safety of child victims, and obtaining information from the victim through a preliminary and in-depth handwritten statement in private.¹² Other training can include the sensitivity and empathetic aspect of it, in other words the language used, the questions asked and the attitudes exerted onto the victim. It should also be clarified that an in-depth statement of the victim should only be taken once the victim has recuperated and is fit to give a good statement.¹³

⁹ Girardi, R. (2022) 'It's easy to mistrust police when they keep on killing us': A queer exploration of police violence and LGBTQ+ Victimization. *Journal of gender studies*, 31 (7), p854.

¹⁰ Gekoski, Adler, J. R., & Gray, J. M. (2013)(309).

¹¹ *Secondary Victimisation by Police and Courts*. Whatwhenhow.com. <http://what-when-how.com/interpersonal-violence/secondary-victimisation-by-police-and-courts/#:~:text=Victims%20may%20experience%20secondary%20victimisation,credibility%20and%20character%20and%20question> [Accessed 5 June 2023].

¹² Machisa, M., Jina, R., Labuschagne, j., Vetten, L., Loots, L., Swemmer, S., Meyersfeld, B., Jewkes.R. (2017). *Rape Justice In South Africa: A Retrospective Study Of The Investigation, Prosecution And Adjudication Of Reported Rape Cases From 2012*. Rape Justice in South Africa. <https://www.samrc.ac.za/sites/default/files/attachments/2022-09/RAPSSAreport.pdf>.

¹³ Machisa, M., et.al. (2017). *Rape Justice In South Africa: A Retrospective Study Of The Investigation, Prosecution And Adjudication Of Reported Rape Cases From 2012*. Rape Justice in South Africa. <https://www.samrc.ac.za/sites/default/files/attachments/2022-09/RAPSSAreport.pdf>. [Accessed 2 July 2023].

It is also important that the police does not mistake empathy for sympathy. While sympathy is often used in good faith, it can have a negative impact when a victim needs you to relate to them, than to rather be detached.¹⁴ In other words sympathy might indicates that the officials feel sorry or pity for the victim, while empathy reflects inwards compassion and understanding. If secondary victimisation is prevented by police officials, and throughout criminal proceedings, it can enable more victims to report such offences. In the case of *S v Staggie*, it was held that greater assistance ought to be provided for women who report sexual offences, as this would encourage more women to report sexual offences and become witnesses in these proceedings if they saw that they would be protected from wide-scale humiliation and embarrassment.¹⁵ Similarly, victims of homophobic rape will feel more at ease to report, if they are made aware of previous instances where survivors of homophobic rape were met with support and protection rather than being faced with re-victimisation.

Homophobic rape statistics are currently not compiled separately from other rape cases.¹⁶ However once the Hate Crimes Bill is enacted, it is expected for this to change. This kind of statistics can provide more clarity on the seriousness of the crime, and also point out which areas and locations it occurs in most. This can allow the police to pay more attention to the high risk areas, and to start working out better methods of prevention. In order to gain the best results in the statistics of homophobic rape, survivors should never feel unsafe or anxious to report such a conduct to the police. It is therefore “critical that the police respond to reports of sexual abuse with empathy, patience, professionalism and sensitivity”.¹⁷ Thus emphasising the seriousness of SAPS undergoing the necessary training to create a safe space for survivors of homophobic rape.

4.2.2 Gathering evidence for the prosecution of homophobic rape cases

There is currently a void with hate crimes not being provided for in the description of specific crimes, and a lack of training in identifying evidence to support such claims.¹⁸ In order to prove the occurrence of a crime, there needs to be evidence gathered that indicate that the

¹⁴ (2021) *Sympathy & Empathy*. Robert Glazer. <https://robertglazer.com/friday-forward/sympathy-empathy-compassion/> [Accessed 25 May 2023].

¹⁵ *S v Staggie and Another* [2003] ZAWCHC 2, p.36 paragraph b.

¹⁶ Mabuse, N. (2011). *Horror of South Africa's 'corrective rape'*. Cnn.com. <https://edition.cnn.com/2011/10/27/world/wus-sa-rapes/index.html>. [Accessed 16 August 2023].

¹⁷ *S v Staggie and Another* [2003] ZAWCHC 2. p.36, para 2.

¹⁸ Karels, M.G. & Naidoo, K., 2016 (75).

offender has committed an offence. The first factor to prove with a homophobic rape case is to prove that rape occurred through the collection of physical evidence from the survivor. Rape survivors will have physical evidence on their bodies and clothes which connects the rapist to the crime, therefore making it important to collect this evidence as soon as possible.¹⁹ Survivors are examined by clinical forensic practitioners or specialised health care workers who are trained to gather evidence and offer medical treatment.²⁰ This kind of evidence is usually the strongest form of proof during the prosecution of rape cases and therefore should be completed accurately, yet with the utmost sensitivity.

Secondary victimisation can also occur in this procedural stage. This can occur when forensic practitioners or health care workers exert a negative attitude or emotion towards survivors of homophobic rape during rape examinations and forensic evidence gathering.²¹ Patients need to be treated with sensitivity and care. Health care workers should be concerned for the welfare of the patient to ensure that they maintain their dignity after an assault that caused them to feel humiliated and degraded.²² Discomfort and uneasiness for survivors could result in the discontinuation of the case. Therefore it is imperative that health care workers are provided with the necessary training and guidelines, not only in relation to completing their physical work efficiently, but also their emotional interaction with survivors of crimes.²³ During medical tests and examinations survivors are expected to re-expose their bodies, making them even more sensitive and vulnerable to interactions with health care workers. Health care workers should be trained on how to communicate with empathy and handle victims' bodies with care. Equal respect and support should be conveyed to all survivors, regardless of their sexual orientation or gender identity.

International cases that prosecute hate crimes, can be used as a guideline for future hate crimes prosecutions in South Africa. According to the Organisation for Security and Co-Operation in Europe, guidelines for Prosecuting hate crimes include looking at the victim's identity or characteristics, circumstances connecting the offender with the victim, the conduct of the

¹⁹ *Rape from the courts perspective*. Rapecrisis.org. <https://rapecrisis.org.za/evidence-rape-court-case/> [Accessed 7 May 2023].

²⁰ *Rape from the courts perspective*. Rapecrisis.org. <https://rapecrisis.org.za/evidence-rape-court-case/> [Accessed 7 May 2023].

²¹ Campbell, R. (2005). What Really Happened? A Validation Study of Rape Survivors' Help-Seeking Experiences With the Legal and Medical Systems. *Violence and victims*. 20. p57.

²² World Health Organization, (2003). *Guidelines for medico-legal care for victims of sexual violence*. WHO Publications. <https://iris.who.int/bitstream/handle/10665/42788/?sequence=1> [Accessed 24 September 2023].

²³ Ludes, B., Geraut, A., Väli, M., Cusack, D., Ferrara, D., Keller, E., Mangin, P., & Vieira, D. N. (2018). Guidelines examination of victims of sexual assault harmonization of forensic and medico-legal examination of persons. *International Journal of Legal Medicine*, 132(6), p1671. <https://doi.org/10.1007/s00414-018-1791-y>

offender, the perceptions of the victim and the absence of other motives.²⁴ These guidelines can be proven useful once the Hate Crimes Bill is enacted, as there are no existing guidelines or approached that prove the existence of a hate crime in South Africa.

Other methods that can be used in proving a bias motive are the two models of hate crime-law, which is used in the United States. The first model is known as the discriminatory selection model, which is an ‘objective model’, defined by the perpetrator’s discriminatory selection of his victim.²⁵ In the case of homophobic rape, victims are selected by their sexual orientation or gender identity. Therefore it needs to be proven that the offender has a homophobic mannerism which is directed at the victim’s specific identity or characteristic. The second model is the ‘hostility model’ which is subjective and requires proof of animosity towards a specific group or person.²⁶ This can be identified through the language used before, during or after the conduct. This subjective language is usually biased judgments, opinions and comments that discriminate against communities or groups with specific identities or characteristics. In the case of homophobic rape, it discriminates against members of the LGBTIQ+ community. These two models can be used to identify the occurrence of a hate crime.

4.2.3 Protecting the victim during their engagement and testimony through the trial proceedings

In the case of *Mpithi v S*, the accused was found guilty for the murder, robbery and accessory to rape of Eudy Simelane.²⁷ The case of Simelane has become a significant case in the recognition of homophobic rape. Although the court ruled out her sexual orientation as motive, Mtetwa, executive director of the Lesbian and Gay Equality Project stated that Simlane was well known for being ‘butch’ and therefore emphasised that “people are killed because of who they are”.²⁸ The case was postponed several times, thus putting the victim through a longer period of emotional strain and pressure. Reasons for its postponement included the defence

²⁴Karels, M.G. & Naidoo, K. (2016) (76).

²⁵Karels, M.G. & Naidoo, K. (2016) (67).

²⁶ Karels, M.G. & Naidoo, K. (2016) (76).

²⁷ *Mpithi v S* (A830/2014) [2015] ZAGPPHC 535; Smith, D. (2009). *Life for man in rape and killing of lesbian South African footballer*. The Guardian. <https://www.theguardian.com/world/2009/sep/22/eudy-simelane-gangrape-and-murder>. [Accessed 30 September 2023].

²⁸ Smith, D. (2009). *Life for man in rape and killing of lesbian South African footballer*. The Guardian. <https://www.theguardian.com/world/2009/sep/22/eudy-simelane-gangrape-and-murder>. [Accessed 30 September 2023].

counsel representing one of the accused asking for more time to consult his client²⁹ and giving the state more time to compile its case against the five perpetrators.³⁰ The Judge who allowed all these postponements argued after an extensive amount of postponement that “no more stories will be entertained”.³¹ This directs at the idea that the judge recognised that these postponements were used as a means to delay the case. It is however, questionable why the judge did not prevent this sooner, knowing that such delays would have a negative impact on the victim’s emotional state and wellbeing. Delay tactics should be prevented at best, as excessive adjournments and postponements can result in delaying the victim’s right to justice and delaying their means to heal from the effects of crime.

In addition, it was stated that the level of homophobia in the courtroom was appalling as Mokgothleng J objected to the use of the word ‘lesbian’ in his court.³² This confirms that the language used during court proceedings can also negatively affect a homophobic rape survivor during court proceedings. The discomfort and restraint in using the word ‘lesbian’ is a reflection of homophobia. It is contended by the International Gay and Lesbian Human Rights Commission 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.³³ Insensitive language during trial proceedings can further embarrass or harm the dignity of survivors. Homophobia is experienced by the survivor during the cause of the crime, henceforth for the survivor to face homophobia again during court proceedings would be detrimental to the victim’s wellbeing, as they further victimised by those who are expected to protect them.

There exist many myths and stereotypes that reinforce intrusive defence questioning at trial.³⁴ Questions about the sexual history of the victim can create a false narrative and perception about the victim’s character. This includes the idea that the victim consented to sexual activity

²⁹ Grant, J. (2009). *South Africa’s Trial Postponed for Eudy Simelane’s Alleged Killers*. Queerty. <https://www.queerty.com/south-africas-trial-postponed-for-eudy-simelanes-alleged-killers-20090212> [Accessed 28 September 2023].

³⁰ Staff Writer. (2008). *Simelane trial delayed again*. Mamba online. <https://www.mambaonline.com/2008/08/07/simelane-trial-delayed-again/> [Accessed 30 September 2023].

³¹ Staff Writer. (2008). *Simelane trial delayed again*. Mamba online. <https://www.mambaonline.com/2008/08/07/simelane-trial-delayed-again/> [Accessed 30 September 2023].

³² Mwambene, L., & Wheal, M. (2015) (85).

³³ Mwambene, L., & Wheal, M. (2015) (85).

³⁴ (2021). *Sexual assault victims can easily be re-traumatised going to court — here’s one way to stop this*. The conversation. <https://theconversation.com/sexual-assault-victims-can-easily-be-re-traumatised-going-to-court-heres-one-way-to-stop-this-157428> [Accessed 29 May].

or is the “type” of person who is more likely to consent.³⁵ The discussion of consent is usually used as a defence, putting the victim on trial instead of the accused. The victim’s state of mind and behaviour at the time of the commission of the offence, consequently comes under scrutiny.³⁶ In the case of lesbians, who are raped by men, one would suggest that the victim could not have consented because their sexual identity does not relate to relationships with men. However, if prosecutors, defence lawyers and judicial officers are not educated and accepting of sexual minorities, then it is most likely that they allow discriminative questioning that harms the victim’s right to dignity, equality, and privacy. In some cases it might be proven that the lesbian had prior relations with a man, which could have been a time where the survivor was still finding herself or finding her identity through ‘trial and error’. It remains to be highly inappropriate to ask a complainant about their sexual history.

Section 227 of the CPA states that,

(2) No evidence as to any previous sexual experience or conduct of any person against or in connection with whom a sexual offence is alleged to have been committed, other than evidence relating to sexual experience or conduct in respect of the offence which is being tried, shall be adduced, and no evidence or question in cross examination regarding such sexual experience or conduct, shall be put to such person, the accused or any other witness at the proceedings pending before the court unless- (a) the court has, on application by any party to the proceedings, granted leave to adduce such evidence or to put such question; or (b) such evidence has been introduced by the prosecution.³⁷

Questioning the victim’s past relationships and why the victim is not heterosexual should not be the subject of the case, and therefore it is vital that prosecutors, defence lawyers and the judiciary are educated on these matters to prevent discriminative questions from being asked. The primary purpose of section 227 is to prevent irrelevant information from being admitted as evidence.³⁸ In other words a women is not asked why she is a women during rape proceedings, so a LGBTIQ+ victim should not be asked why they are homosexual or

³⁵ (2021). *Sexual assault victims can easily be re-traumatised going to court — here’s one way to stop this*. The conversation. <https://theconversation.com/sexual-assault-victims-can-easily-be-re-traumatised-going-to-court-heres-one-way-to-stop-this-157428> [Accessed 29 May].

³⁶ Germanos, L. (2019). *Sexual assault - part 1: sexual offences in the criminal justice system*. Helen Suzman Foundation. <https://hsf.org.za/publications/hsf-briefs/sexual-assault-i-sexual-offences-in-the-criminal-justice-system> [Accessed 10 June 2023].

³⁷ Section 227 of the Criminal procedure Act 51 of 1977.

³⁸ Omar, J. (2016). South Africa’s rape shield : does section 227 of the Criminal Procedure Act affect an accused’s fair trial rights? *South African Journal of Criminal Justice*, 29(1), p1.

transsexual. Discriminative questions can therefore also lead to re-traumatisation and re-victimisation during court proceedings.

In the case of *S v Zuma* evidence pertaining to the victim's previous sexual history lead to a victim-blaming approach, which the media used to tarnish the reputation of the victim.³⁹ The provision in section 227 of the CPA puts emphasis on the matter that the questions must be relevant to the offence at hand. It was argued that the provision ensures that the court should not grant an application requiring evidence of the complainant's sexual history and her cross-examination based on such history unless the court is satisfied that such evidence is relevant to the offence being charged.⁴⁰ In the same sense questions about a victims' sexual history should only be asked if it is relevant to the offence being charged. It is clear that such issues can further traumatise, humiliate and degrade a victim's dignity during trial proceedings. One method of preventing this type of effect is to adopt a "victim-focused" or "victim-centered" approach in court. This method explores options such as having victims formally represented in trials and having their 'own story' form part of their testimony.⁴¹ Secondary victimisation can continue through the unsupportive responses of communities to victims of homophobic rape, by exerting judgmental reactions and unsupportive responses to victims because of their sexual orientation or gender identity.

Intimidation by the defendants or the defendant's friends and family can also contribute to survivors disappearing from court proceedings.⁴² A method for the prevention of intimidation from perpetrators and their supporters, would be to curb face-to-face contact with the offender throughout proceedings. This can be viewed as special measures in the case where victims feel that seeing or being in the presence of the defendant might cause intimidation and fear, which can affect their testimony or eagerness to continue proceedings. Special measures can include allowing screens around the witness box to prevent the defendant from seeing the offender, giving evidence through a closed circuit television link outside the courtroom, giving evidence

³⁹ Swemmer, S. (2019) (298).

⁴⁰ Moloj, J. (2006). The case of *S v Zuma* : implications of allowing evidence of sexual history in rape trials. *SA Crime Quarterly*, 2006(18), p27.

⁴¹ Swemmer, S. (2019) (299).

⁴¹ <https://theconversation.com/sexual-assault-victims-can-easily-be-re-traumatised-going-to-court-heres-one-way-to-stop-this-157428>.

⁴² Swemmer, S. (2019) (301).

⁴²(2021). *Sexual assault victims can easily be re-traumatised going to court — here's one way to stop this*. The conversation. <https://theconversation.com/sexual-assault-victims-can-easily-be-re-traumatised-going-to-court-heres-one-way-to-stop-this-157428> [Accessed 29 May 2023].

in private, having a video recorded interview before the trial or simply having a communicator or interpreter with you during the trial.⁴³

These measures will be the best solution to prevent intimidation during homophobic rape cases. This can also apply to witnesses, particularly those who are testifying in relation to gender-based violence, child abuse, racially motivated crimes, homophobic crimes, as well as the family members of homicide victims.⁴⁴ The South African Law Reform Commission has recommended the recognition of a category of vulnerable witnesses who are complainants or children testifying in sexual offence cases, however the legislature chose not to adopt this recommendation.⁴⁵ The failure to adopt this recognition can result in many reliable witnesses refusing to testify because of their vulnerability. These factors can play a part in affecting the complainant's case, giving the defendant a better chance at getting away.

It was suggested that the Sexual Offences Court (hereafter SOC) be reinstated into the CJS to curb secondary victimisation against all victims who have faced any form of sexual offence. One of the objectives of the SOC was to act as an intervention mechanism against the secondary victimisation experienced by rape survivors when they engaged with the CJS.⁴⁶ These courts focused on sexual offences thus if reestablished would be a useful tool in the prosecution of homophobic rape. Methods that the SOC used in reducing secondary victimisation was to make sure that victims did not come into contact with their accuser or other members of the public, cases were speedup to allow the matter to be resolved more promptly where court decisions and judgments were made by individuals who were better equipped in skill and experience to deal with the matter more effectively.⁴⁷ This meant that secondary trauma was lessened as all factors to consider the prevention of secondary victimisation was addressed. Such proceedings would result in more survivors coming forward, knowing that the justice system will not conform to actions and language that diminish their dignity and privacy. It was also reasoned that since these courts are focused on only sexual offence matters, meant that there would be

⁴³ *Witness services and special court measures*. Indirect government businesses.

<https://www.nidirect.gov.uk/articles/witness-services-and-special-court-measures> [Accessed 10 March 2023].

⁴⁴ Wolhuter, L., & Hamman, A. (2010). A comparative analysis of protective measures for vulnerable and intimidated victim-witnesses in South African and English law. *Criminological and Victimological Society of Southern Africa (CRIMSA)*, p2.

⁴⁵ Wolhuter, L., & Hamman, A., 2010 (2).

⁴⁶ Chinnian, K., & Petersen, A. (2020). Gender construction in sexual offences cases: A case for fully reviving the Sexual Offences Courts. *Juta*, p.150.

⁴⁷ Chinnian, K., & Petersen, A. (2020) (152).

more convictions where more perpetrators will be sent to jail.⁴⁸ Such court proceedings would reflect a safer environment to all sexual offence survivors, whether it be women or members of the LGBTIQ+ community. The SOC might just be the answer to the prevention of secondary victimisation against victims of homophobic rape, as members of the court will be equipped and skilled to use the appropriate language in court and use methods or actions that will prevent victims from feeling vulnerable or intimidated.

4.2.4 Passing a justifiable sentence for homophobic rape offenders

The sentencing of a crime depends firstly on the seriousness of the offence. The sentence passed to perpetrators of homophobic rape should vary from that of the current rape legislation cases. It is believed that greater punishment should be given to crimes that inflict greater harm. When determining the seriousness of homophobic rape in a court case, it is important to identify that there are two offences occurring concurrently. The act of rape and the selective discrimination against the victim because of their specific characteristic or identity. In the case of *Masiya v Director of Public Prosecutions Pretoria (The State) and Another* the Constitutional Court describes rape to be “not simply an act of sexual gratification, but one of physical domination.”⁴⁹ One of the core motives for homophobic rape is to “correct” or “cure” victims of their sexual orientation and therefore it would seem that perpetrators of this crime feel as if they have physical authority over the victims. Therefore perpetrators feel as if they have ‘the right’ to commit this crime, to ‘teach’ the victims a ‘lesson’. The Constitutional Court in *Carmichele v Minister of Safety and Security* went on to state that, sexual violence goes to the core of women’s subordination in society and is the single greatest threat to the self-determination of a women.⁵⁰ Homophobic rape would therefore be the destruction of not only women’s self-determination, but victims belonging to the LGBTIQ+ community as well.

In the case of *Zibathini v S*, the Kimberley High Court charged the perpetrator for rape, even though the court a quo recognised his conduct as “a typical corrective rape”.⁵¹ Even so the court’s decision was that the perpetrators actions fell within the ambit of s 51(1) of the

⁴⁸ The Shukumisa Coalition. *Sexual Offences Courts*. <https://shukumisa.org.za/wp-content/uploads/2017/11/Shukumisa-fact-sheet-sexualoffences-court.pdf> [Accessed 8 September 2023].

⁴⁹ *Masiya v Director of Public Prosecutions Pretoria (The State) and Another* (CCT54/06) [2007] ZACC 9; 2007 (5) SA 30 (CC); 2007 (8) BCLR 827, para 36.

⁵⁰ *Carmichele v Minister of Safety and Security* (CCT 48/00) [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC), para 62.

⁵¹ *Zibathini v S* (CA & R 99/17) [2019] ZANHC 30, para 16.

minimum sentence legislation.⁵² In terms of the minimum sentence legislation, first offenders get a minimum sentence of 10 years, second offenders get 15 years, while third offenders get a minimum of 30 years.⁵³ This applies to serious offences, which in this case would be applicable to cases of homophobic rape. The prescribed sentence for the crime of rape is divided into two categories where the first is a part one offence which prescribes a sentence of life imprisonment.⁵⁴ Part one offences include certain categories of rape, where a life sentence demonstrates its extent of seriousness. This category of rape include instances where the victim is raped more than once, where the offender has committed gang rape, where the offender has been convicted of two or more offences of rape or compelled rape, where the offender has committed rape knowing he was HIV positive or where the victim was underage, disabled or severely injured.⁵⁵ It can be suggested that adjustment be made to the part one offences, to place homophobic rape within this category as soon as hate crimes are recognised within South Africa. A recommendation was made within the Nkonyana case that sentencing should reflect the ‘extremely brutal nature’ of the crime, in addition to acknowledging and specifically mentioning that the discrimination is based on sexual orientation, thus gender should be an aggravating factor in sentencing.⁵⁶ In other words there is a whole new level of violence added to the sexual offence, which is the violence against the victim and an indirect harm on others who have similar or identical identities or characteristics.

Hate and intolerance based on sexual orientation should be used as an aggravating factor in determining ones sentence.⁵⁷ This biased-hate motive can also be observed as a form of harassment, unfair discrimination or hate speech. It violates ones human dignity, freedom and privacy. In the Hate Crimes Bill section 6 explains the penalties that should come from committing hate crimes. Section 6(1)(a) states that with the consideration of appropriate penalty and the courts penal jurisdiction, a court can sentence a hate crimes offender to;

⁵² *Zibathini v S* (CA & R 99/17) [2019] ZANCHC 30, para 16; section 51(1) of the Criminal Law Amendment Act.

⁵³ Section 51(2)(a) of the Criminal Law Amendment Act 105 of 1997.

⁵⁴ Spies, A. (2016). Perpetuating harm: The sentencing of rape offenders under South African law. *South African Law Journal*, 133(2) p. 394.

⁵⁵ Spies, A., 2016 (394).

⁵⁶ Henderson, J., & Arnott, J. (2012). *Evidence for sentencing in the Zoliswa Nkonyana murder trial: Press statement by the Triangle Project*. <http://feministssa.com/2012/01/31/evidence-for-sentencing-in-the-zoliswa-nkonyana-murder-trial/>. [Accessed 5 September 2023]; Wheal, Maudri, and Lea Mwambene. “Realisation or Oversight of a Constitutional Mandate? Corrective Rape of Black African Lesbians in South Africa.” *African Human Rights Law Journal* 15(1), 77-78.

⁵⁷ UN Human Rights office (2012) *Ending impunity for homophobic killing*. United Nations. <https://www.ohchr.org/en/stories/2012/02/ending-impunity-homophobic-killings>. [Accessed 28 June 2023].

Imprisonment, periodical imprisonment, declaration as an habitual criminal, committal to any institution established by law, a fine, correctional supervision or imprisonment from which a person may be placed under correction supervision, as contemplated in section 276 of the CPA.⁵⁸

The Hate Crimes Bill therefore enforces a punishment on hate crimes offenders, and therefore identifies a hate crime as a criminal offence. As the Hate Crimes Bill awaits its enactment, the conduct is not yet recognised as a criminal offence, but rather considered as indecent assault.⁵⁹ The appropriate and proportionate sentence for assault with intent to cause grievous bodily harm is imprisonment for a period of three years.⁶⁰ A three year sentence would be deemed unjust for homophobic rape perpetrators, as it does not reflect the seriousness of the conduct. It creates the idea that homophobic rape is a less serious crime that can be prosecuted in any magistrate's court. Research supports the theory that hate crimes hurt more than parallel crimes in respect of the experience of post-victimisation distress, and how it can serve as a painful reminder of the cultural heritage of past and ongoing discrimination, stereotyping, or stigmatisation of the victim's identity.⁶¹ Failure of state institutions to prosecute such a conducts in a just manner indicates that the state is willing to tolerate them.⁶²

There are countries that have decided to increase the penalty for hate crimes while other states have developed substantive offences to deal with this form of offence, or to even regard it as an aggravated variation of existing crimes.⁶³ Hate crimes should therefore be considered as a serious offence, as it aggravates hostility towards members of the LGBTIQ+ community. In *S v Combrink* the court mentioned that hate crimes goes far beyond the victims and serve to traumatise whole communities and damage South African society, thus without the decision makers in the CJS being attuned to these issues it will not be possible to properly combat hate crimes.⁶⁴ Therefore if the sentencing of a crime should reflect the seriousness of that crime, it is clear that indecent assault would be an unreasonable sentence to perpetrators

⁵⁸ Section 6(1)(a) of the Prevention and Combating of Hate Crimes and Hate Speech Bill.

⁵⁹ Thorpe, J. (2019). *Part 1: The History of Sexual Offences Courts in South Africa*. Rape Crisis Cape Town Trust. <https://rapecrisis.org.za/part-1-the-history-of-sexual-offences-courts-in-south-africa/> [Accessed 10 September 2023].

⁶⁰ *Gabela v S* (A60/2020) [2020] ZAGPJHC 280, paragraph 49.

⁶¹ Iganski, P. & Lagou, S. (2015). Hate Crimes Hurt Some More Than Others: Implications for the Just Sentencing of Offenders. *Journal of Interpersonal Violence*, 30(10), 1696–1718. <https://doi.org/10.1177/0886260514548584>

⁶² Arifi, B. (2018). Effective Prosecution of Hate Crimes as a Precondition for Their Prevention. *Ceza Hukuku Ve Kriminoloji Dergisi*, 6(1), 1–14. <https://doi.org/10.26650/JPLC400906>

⁶³ Mollema, N., & Van der Bijl, C., 2014 (677).

⁶⁴ *S v Combrink* 2012 (1) SACR 93 (SCA) para 25.

of homophobic rape. An unjust sentence would result in the CJS failing the victims of homophobic rape, as offenders would be prosecuted with unjust sentences. The minimum sentence legislation should be applied to perpetrators of homophobic rape, thus ensuring that such cases are concluded within the high court.

4.3 CONCLUSION

Therefore it is clear that there are some procedural implications that exist in the South African CJS, and therefore needs addressing when it comes to the prospects of prosecuting homophobic rape. Police officials, health care workers, legal representatives and the judiciary should be provided with the necessary training to prevent secondary victimisation from all procedural stages. This being from the moment survivors report their cases, to the extraction of evidence, up until the end of their trial. The CJS should provide a safe and comfortable environment for all, including LGBTIQ+ victims of homophobic rape. Therefore it is important to provide the necessary training to police officials to ensure that survivors of homophobic rape feel comfortable and safe when reporting the offence. This is to also prevent them from retracting their report because they feel judged or victimised.

The retraction of reports will not only allow less survivors to get the necessary justice, but also allow perpetrators to escape punishment resulting in the continuation of the offence. This will also prevent accurate statistics from being collected by police, on homophobic rape, in order to determine methods of prevention. Training should not only be given to police officials during the reporting stage, but also be extended to health care workers when examining a survivor for evidence. Extreme caution should be taken during this stage as victims are found to be at their most vulnerable, since their bodies are being re-exposed to a stranger. Therefore it is imperative that the language and attitudes of health care workers do not conform to secondary victimisation, as it can also embarrass victims and influence their decision to continue with the prosecution.

The victim's engagement is also a vital part during the prosecutorial stages of homophobic rape. This includes the victim's interaction with others during the trial and the victim's testimony itself. The victim should firstly not be asked personal questions that are detrimental to their dignity or questions that does not fall within the subject of case at hand. Therefore legal representatives should be aware of the questions asked and statements made during trial. In

addition, judicial officers should prevent the usage of questions and language that reveal homophobia. The revival of SOC can be the answer to curbing re-victimisation and re-traumatisation of homophobic rape survivors during trial procedures. Court officials should all be skilled and equipped on how survivors should be questioned and what language and actions should be prevented. These actions can include coming into contact with the accuser, the accuser's family or the public. Delay tactics can also be used to prolong cases, and as a result prevents the victim from receiving a swift justice. Victims are rather forced to endure trial proceedings, therefore extending their trauma. Although SOC are not yet fully equipped on homophobic rape matters, if such courts are put in place for the prosecution of homophobic rape then such skills and experiences will be acquired through training and educating officials beforehand.

Then it is also important to pass a justifiable sentence onto perpetrators of homophobic rape. It should differ from that of the general rape legislation, as two offences are being prosecuted rather than one. The sentence should also be harsher because of psychological effect it has on not only its victims, but the entire LGBTIQ+ community. Therefore a justifiable sentence would be to prosecute the perpetrator with rape, and in addition to that also prosecute the perpetrator for the discrimination against the victim's sexual orientation, that motivated the offence. These changes to the CJS will be essential when it comes to the prosecution of hate crimes, so that the seriousness of the offence is emphasised and its intolerance is reflected. These changes will prevent re-victimisation, and rather ensure a safe and unbiased system, motivating more victims to come forward, allowing more perpetrators to be prosecuted. It is therefore important for the CJS to adopt these modifications as it can lead to the prevention of hate crimes, such as homophobic rape.

CHAPTER FIVE

RECOMMENDATIONS AND CONCLUSION

5.1 INTRODUCTION

The research gathered throughout this thesis was examined to determine whether the South African CJS is effective in prosecuting homophobic rape. The scope of this research is limited to three research questions. The first research question is to determine what current laws are available in South Africa to effectively prosecute hate crimes such, as homophobic rape. The second question is to decide whether current legislation is in need to development to include hate crimes prosecution. The third question is based on procedural law thus determining what reforms the CJS can adopt to prevent survivors of homophobic rape from being faced with intimidation and fear. These three questions surround the main issue of this thesis, where the efficiency of the CJS is analysed to decide what methods can be put in place to allow for a justifiable and effective prosecution of homophobic rape.

The first research question was predominantly addressed in chapter three. This chapter completed a legal study on which legislation can be applied in the prosecution of homophobic rape. It was concluded that various legislatures fell short of wholly recognising hate crimes. The second research question addressed in chapter two provides reasons on the importance of introducing hate crimes legislation. These reasons included the differentiating factors that separate a hate crime from other crimes. The last question is discussed in chapter four, where particular stages of the CJS are analysed to determine what steps can be put in place to enable more victims to report the crime to the police, thus increasing the possibility of more perpetrators being prosecuted

This thesis has argued that substantive and procedural law is in need of development to justifiably prosecute homophobic rape. In relation to substantive law, the prosecution of a misconduct can only be accomplished if it is recognised by the law. Homophobic rape is identified as a hate crime, however with no existing hate crimes legislation such prosecution can never occur. The procedural stages of the CJS has also proven to re-victimise and re-traumatise victims. The unjust treatment of victims throughout numerous procedural stages of the CJS has resulted in victims either dropping the charges or abandoning procedures. This

leads to fewer perpetrators facing prosecuted, thus decreasing homophobic rape survivor's confidence in the CJS.

Once hate crimes are recognised within South Africa, it is vital that the procedural stages are developed to ensure that victims feel confident in the CJS and are not met with discrimination, traumatising and victimisation. This chapter will provide recommendations and conclusions to address all issues that prevent the justiciable and adequate prosecution of homophobic rape in South Africa. Some of these recommendations will include the urgency of enacting the hate crime bill, the prevention of secondary victimisation within the CJS and the importance of selecting a justifiable name for the conduct. Each of these three focal points emanate from different chapters of this thesis. These focal points will not only encourage the prevention of homophobic rape, but also ensure its effective prosecution.

5.2 IT IS IMPORTANT TO DISTINGUISH RAPE FROM HOMOPHOBIC RAPE

In the case of this thesis topic, rape and homophobic rape are to be deduced as two separate misconducts rather than observing them as one or the same. Rape is defined in Chapter 2(3) of the Sexual Offences Act as: "Any person ('A') who unlawfully and intentionally commits an act of sexual penetration with a complainant ('B'), without the consent of B".¹ Homophobic rape contains the act of rape together with a discriminative motive towards the victim's specific identity or characteristic. This is observed as a form of hate or biased motivated misconduct, as perpetrators use their hate or intolerance towards the victim's sexual orientation or gender identity as motivation to commit the crime of rape.² One can reason that hate crimes, such as homophobic rape, therefore comprise of two misconducts.

Arguments can be made that all rape cases should be defined as a hate crime, however for rape to be seen as a hate crime, the perpetrator's motive would need to be investigated. In most rape cases perpetrators' childhood experiences related to abuse, trauma, alcohol use, and criminal activities in the household, or where their communities have been associated with an increased risk for violence perpetration in adulthood.³ Other motives have amounted to boredom, feelings of entitlement or purely based on sexual drive.⁴ These reasons do not give consideration to the

¹ See chapter 3.3.2; Chapter 2(3) of the Sexual Offence Act.

² See chapter 2.2; Roelofse, C. J. & Chabalala, O. R., 2015 (50).

³ See chapter 3.3.2; Ngubane L.B., Nöthling J., Moletsane R., Wilkinson A. & Qulu L., 2022 (2).

⁴ See chapter 3.3.2; Ngubane L.B., Nöthling J., Moletsane R., Wilkinson A. & Qulu L., 2022 (2).

ideas of perpetrators being motivated to commit rape because of their prejudicial or biased-hate towards the victim, but rather attend to the perpetrators' personal incentives. Rape cases can be defined as a hate crimes if the perpetrators motive was based on misogyny, sexism or any form of discrimination against the victim's gender or sex. In the case of homophobic rape the perpetrators' motive is based on homophobia, heteronormative beliefs or simply a biased-hate against members of the LGBTIQ+ community.

Therefore it is important to understand the difference between general crimes and hate crimes, such as that of rape and homophobic rape. This difference will deduce that the same preventative approaches cannot be used in both instances. The separation of hate crimes from general crimes will allow for separate preventative measures and steps to be put on place. This chapter will discuss three vocal recommendations highlighted throughout this thesis. Including why hate crimes would require its own legislation such as that of the Hate Crimes Bill. Therefore emphasising the urgency to enact the Hate Crimes Bill. Furthermore, it will also discuss the prevention of secondary victimisation throughout all procedural stages of the CJS and why it is imperative to select a justifiable name for the misconduct.

5.3 A SENSE OF URGENCY IS REQUIRED TO ENACT AND ENFORCE THE PREVENTION AND COMBATING OF HATE CRIMES AND HATE SPEECH BILL

The Hate Crimes Bill will become the first form of hate crimes legislation once enacted. Hate crimes will continue to be unheeded and disregarded if no law allows for its recognition. A misconduct can also not be prosecuted if it is not officiated by law. Therefore for the effective prosecution of homophobic rape to occur, there is an urgency for the Hate Crimes Bill to be enacted, to allow for the recognition of hate crimes within the South African law. This form of legislation will have the potential to provide legal remedy, and also result in social transformation.⁵ Therefore without any hate crimes legislation in place, homophobic rape can only be prosecuted as rape, regardless of any discrimination or bias by the accused.⁶ The

⁵ See chapter 3.3.2; Gaitho, W. (2021). *Curing 'corrective' rape: Conceptualising a dual-pronged approach to sexual violence against black lesbians in South Africa*. Universiteit Leiden. <https://www.leidenlawblog.nl/articles/curing-corrective-rape-conceptualising-a-dual-pronged-approach-to-sexual-violence-against-black-lesbians-in-south-africa> [Accessed 21 June 2023].

⁶ See para 3.4; Gaitho, W. (2021). *Curing 'corrective' rape: Conceptualising a dual-pronged approach to sexual violence against black lesbians in South Africa*. Universiteit Leiden. <https://www.leidenlawblog.nl/articles/curing-corrective-rape-conceptualising-a-dual-pronged-approach-to-sexual-violence-against-black-lesbians-in-south-africa> [Accessed 21 June 2023].

omission of hate crimes legislation in South Africa mirrors a sense of tolerability and irrelevance towards the issue.

Despite the need for legal reform surrounding the issues of hate crime, there are various non-legislative issues that also encourage the enactment of the Hate Crimes Bill. Even though prohibited by the Constitution, patriarchy systems still prevail in many of South Africa's black communities, where women are deemed property of men, or as inferior beings to that of men.⁷ This gives reason to why black lesbians have become the common victim of homophobic rape in South Africa. It is clear that lesbianism goes against the idealism of a heterosexual marriage and its purpose of procreation in most of the cultures and traditions within South Africa, and therefore it is assumed that their identity is unacceptable or unAfrican.⁸ Many South African communities are also built on heteronormative beliefs which views homosexuality as unnatural or abnormal. In other words a heteronormative belief is that a heterosexual relationship, with a man being the head of the house and a woman doing the care-taking, cleaning and cooking, is normal. This is similar to that of a patriarchal system found in many African cultures where a female's sexuality and fertility is controlled and ordered by men.

Most men believe their acts of homophobic rape to be remedial to a woman's homosexuality. In other words it will "cure" or "correct" what they believe to be wrong. It forces lesbians to act heterosexually and therefore to behave more like women in accordance with the gendered stereotypes.⁹ Once hate crimes are recognised, it will emphasise the seriousness and intolerance towards the act, as the belief of 'curing' or 'correcting' victims will be directly contradicted by the law. Homophobic rape will no longer be seen to have a remedial effect, but rather be seen as an illegal or criminal offence. The enactment of the Hate Crimes Bill will therefore strengthen resistance against hate crimes and therefore reflects the urgency in enacting such legislation.

Therefore the enactment of the Hate Crimes Bill will display how serious the issues surrounding hate crimes have become in South Africa. It will ensure that hate crimes are no

⁷ See para 2.3.2; Penelope, A. (2001). *The Stepchild of National Liberation: Women and Rights in the New South Africa. Articles & Chapters*. 1298 https://digitalcommons.nyls.edu/fac_articles_chapters/1298 [Accessed 5 May 2023].

⁸ See chapter 2.3.2; Odei Ajei, M. (2022). *Homosexuality and Africa: a philosopher's perspective*. The Conversation. <https://theconversation.com/homosexuality-and-africa-a-philosophers-perspective-185536> [Accessed 3 October 2022].

⁹ See chapter 2.2; Brownworth, V. (2013). 'Op-ed: The other ex-gay "therapy"'. Advocate. <http://www.advocate.com/commentary/2013/07/10/op-ed-other-ex-gay-therapy?page=full> [Accessed 25 October 2022].

longer tolerated within the country, and therefore aid in its prevention. A hate crimes legislation will also give way to section 9(3) of the Constitution, which prevent discrimination on various grounds including sexual orientation. Thus, proving that South Africa has transformed from its past inequalities, and thus aims at protecting all from discrimination based on their identity or characteristics. The existence of hate crimes legislation will also create awareness of the misconduct, allowing more South Africans to stand against its continuation. Awareness of hate crimes will also allow for the people of South Africa to start accepting and living in harmony with another, thus demolishing the ideology of homophobia, sexism and racism. This will also make hate crimes an official criminal offence, thus resisting more perpetrators from committing such an offence. Therefore the amalgamation of the Hate Crimes Bill will ensure an effective prosecution of all hate crimes, as there will finally be the existence of legislation that recognises hate crimes in its entirety. It will also aid South Africa in creating understanding and awareness in what hate crimes are, so that preventative methods can be adopted.

5.4 ALL ROLE PLAYERS OF THE CJS REQUIRE THE NECESSARY TRAINING IN ORDER TO PREVENT RE-VICTIMISATION

Many victims are met with negative experiences when it comes to the prosecution of rape. This is reasoned by the insensitive treatment they are faced with from the criminal justice personnel.¹⁰ Therefore it is important for victims of homophobic rape to feel protected by the CJS rather than to feel abandoned, so that victims are not hesitant when it comes to reporting such misconducts. Secondary victimisation usually occurs when victims of a crime feel they have been subjected to inadequate, insensitive or inappropriate treatment and responses by criminal justice and social agencies, which compound their original trauma.¹¹ The existence of secondary victimisation can result in many victims not reporting the conduct, not showing up mid-trial or simply dropping the charges so that they do not have to endure humiliation and intimidation.

To remedy this issue, the necessary training should be provided to all justice officials and agents of the court, to limit or completely remove secondary victimisation. Training should

¹⁰ See chapter 4.2; (2021). *Sexual assault victims can easily be re-traumatised going to court — here's one way to stop this*. The conversation. <https://theconversation.com/sexual-assault-victims-can-easily-be-re-traumatised-going-to-court-heres-one-way-to-stop-this-157428> [Accessed 29 May].

¹¹ See chapter 4.2.1; Gekoski, Adler, J. R., & Gray, J. M. (2013) (308).

commence from the reporting stage, where police officials should learn how to be sensitive and empathetic with the language used, the questions asked and the attitudes exerted onto the victims.¹² The reporting stage is such a vital stage, as it takes survivors of homophobic rape a considerable amount of courage to report the misconduct, thus exposing their vulnerability. Therefore any form of judgment or homophobia coming from police officials, can result in a loss of trust and confidence in the CJS. In addition health care workers should also undergo training on how to withstand judgmental gestures or communications, as victims are even more vulnerable during their physical examinations, where evidence is directly extracted from their bodies. Victims are placed in cold hospital facilities, where they open themselves up to re-traumatisation, as their bodies are exposed to a stranger once again. Therefore health care workers have to be extra sensitive when it comes to the examination of survivor's bodies, and ensure that they feel safe and respected.

The language used by judges, defence lawyers and court agents should not embarrass or harm the dignity of survivors. Irrelevant questions about their sexual history and sexual preferences should be refrained from asking¹³. Comments that reflect homophobia should also held in contempt, as this would take away from the effectiveness of the CJS in prosecuting homophobic rape. Other forms of secondary victimisation can be a result of delay tactics such as continuous, unreasonable postponements made during trial. This should be prevented so that the victim's emotional trauma is not elongated. Another would be the intimidation experienced by the defendants or the defendant's friends and family. This type of secondary victimisation can also contribute to survivors disappearing from court proceedings.¹⁴ Face-to-face communications or contact between survivors and perpetrators should thus be curtailed to ensure that the survivor is emotionally and physically protected from being intimidated by any opposing parties. There should be compulsory post-training follow ups and monitoring, to evaluate whether all trainings were followed and applied as required. This will also ensure that the trainings are not taken lightly. There should also be contact numbers or authoritative officials made available to survivors to report secondary victimisation, in order to keep wrongdoers accountable.

¹² See chapter 4.2.1; *S v Staggie and Another* [2003] ZAWCHC 2. p. 36, para 2.

¹³ See chapter 4.2.3; Moloi, J. (2006). The case of *S v Zuma* : implications of allowing evidence of sexual history in rape trials. *SA Crime Quarterly*, 2006(18), p27.

¹⁴ See chapter 4.2.3; Swemmer, S. (2019) (301).

Another recommended solution to the prevention of secondary victimisation throughout all the procedural stages of the CJS would be to bring back SOC. The objective of the SOC were to act as an intervention mechanism against the secondary victimisation experienced by rape survivors when they engaged with the CJS.¹⁵ These courts aim at lessening the effects of secondary victimisation and traumatising. Therefore these courts would be a useful tool in the prosecution of homophobic rape. The SOC has taken several steps to overcome secondary victimisation, such as making sure survivors do not come into contact with their accuser or other members of the public, it ensured swift trials to allow the matter to be resolved more promptly, and court decisions and judgments were made by individuals who were better equipped in skill and experience to deal with the matter more effectively.¹⁶ In other words face-to-face contact was prohibited, continuous and unreasonable postponements were prevented and since court officials were skilled and experienced with the matter, it can only be presumed that the language used, the comments made and questions asked did not reflect bias, intimidation or humiliation. Therefore these types of courts should be brought back to ensure effective prosecution of homophobic rape, to ensure that survivors are met with respect and empathy, instead of secondary victimisation and re-traumatisation. This would increase the confidence and trust in the CJS, resulting in effective prosecutions.

5.5 A JUSTIFIABLE NAME SHOULD BE GIVEN TO THE CRIME

The terminology or name given to a conduct should match its action and description. One cannot use just any words to name and define a crime, as the words need to match the perception, emotion and behavior of the crime. ‘Homophobic rape’ is a term very seldom used in South Africa. Instead the terms commonly used are “corrective rape” and “curative rape”. However, these two terms create a rehabilitative meaning by directing attention to the idea that something is being rectified or remedied. A recommendation can be made to strike out the terms “corrective rape” and “curative rape” from all platforms, whether it be academic journals, newspaper articles, internet references, speeches and even the law itself. These two terms suggest that the perpetrator is doing something right, whereas ‘homophobic rape’ describes the perpetrator’s homophobic motive behind the rape. In addition these terms not only suggest what perpetrator is doing is right, but suggest that the victim is doing something wrong.

¹⁵ See chapter 4.2.3; Chinnian, K., & Petersen, A. (2020) (150).

¹⁶ See chapter 4.2.3; Chinnian, K., & Petersen, A. (2020) (152).

Therefore to curb homophobic rape, and decide on methods of prevention, a justifiable term should be used to define the conduct. The effective prosecution of homophobic rape cannot occur if unjust terms are being used during criminal proceedings. The terms “corrective rape” and “curative rape” encourage the conduct instead of prevent, as it reflects the idea that being homosexual is wrong. The usage of the terms “corrective rape” and “curative rape” during any stages of the criminal procedure should be prevented, as it can be deemed as unjust terms. Therefore to ensure an effective prosecution of homophobic rape, all terms that infringe the rights of the survivor and their sexual orientation should be completely averted.

5.6 FINAL CONCLUSION

In summary, the South African CJS has proven to be ineffective when it comes to the prosecution of homophobic rape. In order for it to be effective in prosecuting homophobic rape, it would first need to enact a hate crimes legislation, such as the Hate Crimes Bill. Without the enactment of the Hate Crimes Bill, hate crimes would go unrecognised, thus encouraging the misconduct instead of preventing it. The enactment of the Hate Crimes Bill would also reflect the seriousness of South Africa in protecting marginalised groups, thus impeding all forms of discrimination. Thus in order for a misconduct to be effectively prosecuted, it would first need to be wholly recognised as a crime, within the law.

The prosecution of homophobic rape can also not be achieved if the homophobic terms are being used to name the crime. “Corrective rape” and “curative rape” are terms that imply that homosexuality is ‘wrong’ or in need of a ‘cure’. These two terms allow perpetrators to presume that they are doing something right, while victims are doing something wrong. To imply that homosexuality is ‘wrong’ reflects discrimination on the grounds of sexual orientation and in addition reflects homophobia. One cannot prosecute a crime effectively if the terms use discriminate against the victim, as the use of wrongful terminology and language can result in secondary victimisation.

Secondary victimisation can also occur through procedural stages of the CJS. From the initial report to the police, to the physical examination done by health care workers to the treatment of survivors during trial proceedings. Re-victimisation plays a significant part in the survivor’s decision to prosecute the perpetrator. Some survivors have dropped cases or decided to not show up to court proceedings because of intimidation and prejudice faced during proceedings.

Their sexual orientation had resulted in their prior victimisation during the course of the misconduct, and now it has also made their experience in the CJS uncomfortable. Such experiences should be prevented from the CJS, as it is their role to protect and reflect justice, rather than to produce discomfort. Secondary victimisation and traunitisation can be observed as another result of making the prosecution of homophobic rape in South Africa, ineffective. Therefore in order for the South African CJS to effectively prosecute homophobic rape, there are various hindrances that need urgent addressing and development.

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