



CLASSIFYING 'CORRECTIVE' RAPE AS HATE CRIME: A CALL FOR JUSTICE

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South Africa has proven to be one of the most progressive countries on the African continent in terms of observing tolerance and people's rights, especially the rights of minority groups. However, although South Africa has made positive strides in equality and in guaranteeing rights, especially pertaining to sexual orientation, the country has seen a dramatic rise in brutal attacks against lesbians. This is in spite of Section 9 of the South African Constitution of 1996, which guarantees the right to equality and prohibits discrimination on the basis of sexual orientation, as well as in spite of South being a signatory to the 2008 United Nations Human Rights Council Resolution on Sexual Orientation & Gender Identity. One would also imagine that South Africa, being the only African country to recognize same sex marriage practice would make it safer for all, including lesbians. The reality unfortunately is not so. Despite this progressive legislation, corrective' rape – otherwise known as 'curative rape' – is a growing problem in many townships across South Africa.

One step forward, five steps backwards

During its transition from the horrors of apartheid, South Africa has been seen as a beacon of tolerance and understanding. However, incidences of violence against women are on the rise. Rape has become a huge problem for the country. One survey has shown that one in four men in South Africa admit to having raped at least one woman (Smith, Quarter of Men in South Africa Rape, Survey Finds, 2009). In spite of the high statistics on violence, South Africa is still seen as one of the most liberal countries in Africa. It has been lauded for its constitution, as it guarantees a life of dignity and equality for all, thus guaranteeing the right to equality and prohibiting discrimination on the basis of sexual orientation.

It is my position that South Africa needs to adopt both a legislative and judicial approach to hate crimes and ensure that 'corrective' rape – or any rape occurring due to the victim's sexual orientation – be included in that definition. South Africa already has the foundation it needs to make corrective rape a hate crime. The 1996 Constitution guarantees a life of equality and dignity and protects sexual orientation as a class. Under certain case law, the judiciary also has the right to create common law that brings the country into alignment with the Constitution and the Bill of Rights. The Promotion of equality and Prevention of Unfair Discrimination 4 of 2000 prohibits 'hate crimes'

committed against persons of a specific group. However, sexual orientation is not included under the section that grants a sentence enhancement for crimes based on certain protected classes.

Hate Crimes

A hate crime is any incident that constitutes a criminal offence perceived as being motivated, in whole or in part, by prejudice, hate, or bias. (International Association of Chiefs of Police, 1998) It is not just a crime committed against an individual, but also encompasses crimes against property, organisations or communities. The crucial element in a hate crime, which truly sets it apart from other crimes, is the motive. (Office for Democratic Institutions and Human Rights, 2009) Hate crimes differ from general crimes because the perpetrator is specifically targeting someone who identifies with a specific group. The perpetrator seeks to demean and dehumanise their victims based on their actual or perceived race, ethnicity, gender, age, sexual orientation, disability, health status, nationality, social origin, religious convictions, culture, language, or other characteristics (American Psychological Association, 1998). It is not just an attack on someone's physical self, but also an attack on someone's identity (American Psychological Association, 1998). Perpetrators target someone, not because of who they are as an individual, but because of what they represent thus denying victims the right to participate openly and equally in society. The Hate Crimes Act of 2000 eloquently states that:

Hate crimes do more than threaten the safety and welfare of all citizens. They inflict on victims incalculable physical and emotional damage and tear at the very fabric of free society. Crimes motivated by invidious hatred toward particular groups not only harm individual victims, but send a powerful message of intolerance and discrimination to all members of the group to which the victim belongs. Hate crimes can, and do, intimidate. (N.Y. PEN. LAW § 485.00: NY Code - Section 485.00: Legislative findings)

Hate crimes do intimidate and can disrupt entire communities and vitiate the civility that is essential to healthy democratic process. Women and girls in South Africa who are lesbians have been the recipients of some of the most brutal hate crime attacks.

Corrective Rape

Corrective rape, also known as curative rape, is a brutal act of violence in which African women and teenagers who are, or are at least assumed to be, lesbians are raped to 'cure' them of their homosexuality. Although South Africa has some of the most progressive legislation pertaining to homosexuality (i.e. the legalisation of same-sex marriage and legalised adoption for

homosexuals) many still view homosexuality as a sin. Some see it as an 'imported white disease'. (Silvio, 2011) Perpetrators seek to 'correct' the women's behaviour through rape by 'teaching them a lesson' on how to behave like a 'real African woman' (J. A Nel, 2008). Some men view lesbians as a threat to their concept of masculinity because they fear that lesbians could possibly steal their girlfriends. In an interview with the BBC, Thulani Bhengu said "...when someone is a lesbian, it's like saying to us men that we are not good enough." (Fihlani, 2011) In a video featured on *The Guardian's* website, one man stated 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. For me, I have no time to rape them but if another guy wants to 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. (Miseses, 2009)

Lesbians, mostly those who live in poor black communities, live in constant fear. They could be attacked not just by strangers, but also by family members, friends, acquaintances or neighbours. They are taunted and harassed and are unable to live a life of dignity and equality. One victim told ActionAid: "We get insults every day, beatings if we walk alone...you are constantly reminded that you deserve to be raped. They yell '...if I rape you then you will go straight, you will buy skirts and start to cook because you will have learnt how to be a real woman.'" (Geen, Rise of 'Corrective Rapes' on Lesbians in South Africa, 2009)

The most well known case of 'corrective' rape involved Eudy Simelane, the former star of South Africa's Banyana Banyana national female football team. She was training to be the first female referee for the 2010 World Cup (Funda, 2011). On 28 April 2011, she was found in a creek in a park in Kwa Thema on the outskirts of Johannesburg. Her attackers had dragged her across the ground, stabbed her 25 times in the face, chest and legs, gang raped her, and left her, half-naked, in a ditch to die (Ahmed, 2009). Simelane's case has been one of the only cases so far that has resulted in a conviction when one of the perpetrators pleaded guilty. The two other men on trial were found not guilty due to lack of evidence (Bearek, 2009). During sentencing, however, the judge stated that Simelane's sexual orientation played no part in the crime. Moreover, the judge made no effort to hide his own prejudice when he showed how uncomfortable he was using the world 'lesbian' during the trial. At one point, he asked the prosecutor if there was another word he could use in its place (Bearek, 2009).

While Simelane's case brought international attention to the issue of 'corrective' rape, there have been many other victims – some as young as 13 years of age (Smith, Teenage Lesbian is Latest Victim of 'Corrective Rape' in South Africa, 2011).

BOX 1

Some reported cases of 'corrective' rape in South Africa

- Zoliswa Nkonyana: a 19-year-old lesbian was stabbed to death in Khayelitsha in 2006. She had been living openly as a lesbian and received constant taunts and threats from her community. Nine men stood trial for her murder. On 7 October 2011, five years after her death, judgment was finally delivered. Four of the men were found guilty, while the other five were released. The case has become infamous due to various failures of the criminal justice system. Proceedings were postponed more than forty times, suspects escaped, evidence had been collected improperly, and cases against most of the accused have been dismissed for lack of evidence (Treatment Action Campaign, 2011).
- Sizakele Sigasa: a gay rights activist, and her partner Salome Massoa were tortured, raped, and brutally murdered. Sizakele was found with her hands tied together by her underwear and her ankles tied with her shoelaces. She had three bullet holes in her head and three in her collarbone (Isaack).
- Millicent Gaika: Millicent was on her way home in Gugulethu when she was stopped by a man she recognised. He asked her for a cigarette, and as she was reaching for one, he pushed her into a nearby shack, beat and raped her for five hours. During the attack, she claims he said "You think you're a man, but I'm going to show you you're a woman" (Middleton, 2011).
- Zukiswa Gaca: a woman from Khayelitsha was raped by an acquaintance in 2009. During the attack, the perpetrator told her he was going to 'teach her a lesson'. (Middleton, 2011).

Reliable statistics are few and far between because police do not systematically collect data on suspected hate crimes based on sexual orientation (Long, 2003). Some officers, because of their beliefs, refuse to even consider sexual orientation as a motivating factor, and simply refuse to investigate because of their hatred of homosexuality. When interviewed by the BBC, Thando Sibya, a lesbian from Soweto said that... "Some policemen in the township mock you saying: 'How can you be raped by a man if you are not attracted to them?' They ask you to explain how the rape felt. It is humiliating." (Fihlani, 2011)

Consequently, many women are too afraid to make a police report when they have been raped. According to one study, at least 500 lesbians are victims of 'corrective' rape each year (Middleton, 2011). On record, 31 lesbians have been reported murdered in homophobic attacks since 1998, and yet there have only been two convictions. Support groups claim that the actual number is much higher. A report from Triangle, a South African gay rights organisation, revealed that a staggering 86 percent of black lesbians from the Western Cape said they lived in fear of sexual assault. The group says it is dealing with up to 10 new cases of 'corrective' rape every week.

"What we're seeing is a spike in the numbers of women coming to us having been raped and who have been told throughout the attack that being a lesbian was to blame for what was happening to them," said Vanessa Ludwig, the chief executive at Triangle" (Kelly, 2009).

There have been numerous documented side effects for victims of hate crimes. In fact, victims of such crimes suffer greater harm than victims of ordinary crimes. Some of the effects include psychological injury, and increased feelings of vulnerability, depression, and anxiety (American Psychological Association, 1998). Hate crimes not only impact the victim; they are unique because they have a serious impact on the entire group to which the victim belongs. Often times, perpetrators commit these crimes to 'send a message' to the groups as a whole.

Some argue, however, that there is no need for specific hate crime legislation. South African police ministry spokesman Zweli Mnisi told the BBC that "to us, murder is murder, whether somebody is Zulu, English, male or female – we don't see colour, we don't see gender." (South Africa Killing of Lesbian Nogwaza 'A Hate Crime', 2011) However, there are many arguments that support such legislation. First, it would mean that the government officially recognises that there is a problem and take actual steps to find a solution. Discussing legislation creates public discourse on the subject. It raises awareness country-wide. If hate crime legislation is enacted, it would require professional training, which would then increase police awareness of the issue and hold police officers accountable. As noted earlier, there is a serious lack of statistical data on 'corrective' rape in South Africa. Creating legislation would require systematic data collection, and make it more efficient and effective and lead to an accurate portrayal of the problem. It would lead to the lesbian community feeling more confident that there is a proper course of action and that rape will be taken seriously. Creating a specific penalty for hate crimes would also lead to a more effective punishment for the perpetrator and serve as a deterrent to future perpetrators. Moreover, South Africa has an affirmative duty based on current legislation, international legal obligations, and under case law to classify corrective rape as a hate crime.

South Africa's Duty

South Africa has an affirmative duty based on the 1996 Constitution, The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, international legal obligations, and cases like *S v. Champan and Carmichele v. Minister of Safety and Security* to classify corrective rape as a hate crime and provide extended protection to lesbians across South Africa. The 1996 Constitution creates a legal obligation and the judicial foundation upon which the government can seek to prevent and properly punish corrective rape. Cases like *S v. Chapman and Carmichele v. Minister of Safety and Security* provide further obligations to bring the common law in alignment with the 1996 Constitution and the Bill of Rights. The Equality Act, if expanded to include sexual orientation as a protected class, would provide victims with a foundation upon which they could take justice into their hands and have perpetrators receive a sentence enhancement for their acts. South Africa also has various international legal obligations, which obligate the government to provide further protection from corrective rape. Under various laws, South Africa could:

1. Define specific bias-motivated acts as distinct crimes;
2. Include sexual orientation as a protected class under a penalty-enhancement criminal law;
3. Make a distinct civil cause of action for any bias-motivated crime; and,
4. Require various administrative agencies to collect hate crime statistics.

The Constitution as the bedrock

A closer look at each of the above laws and legislation shows how South Africa can use them as avenues and tools to fulfil its duty to all its citizens. The first is the Constitution: the bedrock of all citizens' rights. South Africa has been lauded internationally for its constitution. It is one of the most progressive constitutions in the world, and the first to grant equality on the basis of sexual orientation (Silvio, 2011). 'Corrective' rape violates numerous principles designated in the Constitution. Section 9 of the 1996 Constitution, known as the Equality Clause, guarantees the right to equality and prohibits discrimination on the basis of sexual orientation. Specifically, it states that neither the state, nor any person can unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, or sexual orientation. Section 10 states that everyone has inherent dignity and the right to have their dignity respected and protected. Section 11 grants everyone the right to life, and Section 12 grants the right to freedom and security of the person. This includes the right to be free from all forms of violence, including private sources, and the right not to be treated or punished in a cruel, inhuman or degrading way. Corrective rape robs its victims of their dignity and forces them to fear for their lives on a daily basis.

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SEXUAL VIOLENCE AND THE THREAT OF SEXUAL VIOLENCE GOES TO THE CORE OF WOMEN'S SUBORDINATION IN SOCIETY. IT IS THE SINGLE GREATEST THREAT TO THE SELF-DETERMINATION OF SOUTH AFRICAN WOMEN.

In the case *S v. Chapman*, the Supreme Court denounced rape as “a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim.” The court noted that:

The rights to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilisation. Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives. Sexual violence and the threat of sexual violence goes to the core of women's subordination in society. It is the single greatest threat to the self-determination of South African women.

The court then went on to declare the courts duty to the victim:

The courts are under a duty to send a clear message to the accused, to other potential rapists and to the community. We are determined to protect the equality, dignity and freedom of all women, and we shall show no mercy to those who seek to invade those rights.

Victims of 'corrective' rape are owed a similar protection by the courts. The victims, and those similarly situated, are unable to exercise their fundamental human rights because they live in a constant state of fear. They are continuously harassed, tormented, and attacked – in serious violation of the principles listed above. Under the rights granted in the Constitution, lesbians in South Africa deserve to be protected from this heinous practice of corrective rape.

Similarly, in the case *Carmichele v. Minister of Safety and Security*, the Court held that courts in South Africa have an obligation to develop common law consistently with the Constitution where the common law is deficient. The Court reasoned that lower courts were best equipped to develop the common law in light of the Bill of Rights. The court reasoned that:

The Constitution is the supreme law. ...Section 173 of the Constitution gives to all higher courts, including this Court, the inherent power to develop the common law, taking into account the interests of justice. In section 7 of the Constitution, the Bill of Rights enshrines the rights of all people in South Africa, and obliges the state to respect, promote and fulfil these rights. Section 8(1) of the Constitution makes the Bill of Rights binding on the judiciary as well as on the legislature and executive. Section 39(2) of the Constitution provides that when developing the common law, every court must promote the spirit, purport and objects of the Bill of Rights. It follows implicitly that where the common law deviates from the spirit, purport and objects of the Bill of Rights the courts have an obligation to develop it by removing that deviation.¹

Since sexual orientation is a protected class designated in Section 9 of the Constitution, courts are obligated to extend further protection to victims of 'corrective' rape thus bringing common law into alignment with the Bill of Rights and the Constitution. And this goes beyond mere discretion. It includes granting extra protection against corrective rape and creating either a specific crime with a specific punishment, or creating sentence enhancements to those found guilty of corrective rape.

The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

The second tool is the existence of an equality courts mechanism. South Africa is unique in that victims do not have to wait for a criminal case to be brought by a prosecutor. They can seek justice for themselves in the Equality Courts. The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (otherwise known as The Equality Act) gives victims another opportunity to seek justice against perpetrators. It prohibits hate crimes committed against persons of a specific group. Harassment, which is prohibited under Chapter 2, section 11 is defined as:

...unwanted conduct which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by act or threatened adverse consequences which is related to

- (a) sex, gender, or sexual orientation, or
- (b) person's membership or presumed membership of a group identified

by one or more of the prohibited grounds or a characteristic associated with that group.

However, it is important to highlight that Chapter 5, Section 28, entitled "Special measures to promote equality with regard to race, gender, and disability," fails to include sexual orientation in its protected classes. That section states that:

(1) If it is proved in the prosecution of any offence that unfair discrimination on the grounds of race, gender or disability played a part in the commission of the offence, this must be regarded as an aggravating circumstance.

And

(2) ...

(3) The state, institutions performing public functions and all persons have a duty and responsibility to-

- (a) Eliminate discrimination on the grounds of race, gender and disability;*
- (b) Promote equality in respect of race, gender and disability*

My argument is that if sexual orientation is included in the prohibition against harassment, it should also be included as an aggravating circumstance under Chapter 5. Including sexual orientation as a prohibited ground for discrimination and as an aggravating circumstance would allow victims to seek redress against perpetrators, and even police officers who specifically ignore complaints due to their own bias, in the Equality Courts. This would also force the police to take appropriate action when an individual claims to be a victim of corrective rape. Failure to do so could result in the police officers being brought before the Equality Courts. The Equality Courts' role is to adjudicate matters specifically pertaining to the infringement of the right to equality and unfair discrimination. Complainants need only prove a prima facie case – or that it was probably the case that some sort of discrimination did occur – and then the respondent must prove that it did not happen or that it was not unfair. Although Equality Courts are most similar to a civil court, there is a punitive aspect in that the judge could require:

- An unconditional apology;
- Instruction to the respondent to do or not to do something, or to restrain from an unfair discriminatory practice;
- Payment of damages to victims for actual financial loss, loss of dignity, or pain and suffering (including emotional and psychological suffering);
- Payment of a fine to an appropriate organisation; and
- A declaratory order.

On the progressive side, Chapter 5 also creates an affirmative duty for the State to promote and achieve equality:

(1) *The state must, where necessary with the assistance of the relevant constitutional institutions*

- (a) *Develop awareness of fundamental rights in order to promote a climate of understanding, mutual respect and equality;*
- (b) *Take measures to develop and implement programmes in order to promote equality; and*
- (c) *Where necessary or appropriate –*
 - (i) *Develop action plans to address any unfair discrimination, hate speech or harassment;*
 - (ii) *Enact further legislation that seeks to promote equality and to establish a legislative framework in line with the objectives of the Act.*

Therefore, it can be argued that under the Equality Act, the South African government has an affirmative duty to also create legislation and programming that addresses 'corrective' rape.

International Legal Obligation

The third avenue is using South Africa's obligations under international law. South Africa has a duty under international legal obligations to develop legislation on corrective rape. South Africa is a signatory to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). CEDAW was signed by South Africa on 29 January 1993 and ratified on 15 December 1995. The United Nations Committee on the Elimination of Discrimination Against Women, which was established under the Convention, recommended in 1992 that:

...States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.

In the case Carmichele, the Court referred to CEDAW, noting that:

...one finds positive obligations on members of the police force both in theConstitution and in statute. In addressing these obligations in relation to dignity and the freedom and security of the person, few things can be more important to women than freedom from the threat of sexual violence...South Africa also has a duty under international law to prohibit all gender-based discrimination that has the effect or purpose of impairing the enjoyment by women of fundamental rights and freedoms to take reasonable and appropriate measures to prevent the violation of those rights (Charmichele v Minister of Safety and Security and Others, 2001).

CEDAW not only requires legal measures, but also support services, training for police officers, and the gathering of statistics. Failure to do so could result in responsibility of the state when violence occurs.

CEDAW is not the only source of an international legal obligation to address corrective rape. The Universal Declaration of Human Rights requires all states to promote human rights and ensure equal and effective recognition of those rights. The International Covenant of Civil and Political Rights impose a duty to respect civil and political rights and to take steps to effect those rights and provide adequate remedies for violations.

Conclusion

For South Africa to truly be a haven for equal protection under the law for all of its citizens, clear signals need to be sent that 'corrective' rape is a crime that the government takes seriously. It is important to note that South Africa has taken the first steps necessary to address the issue. In May 2011, a government task force was formed to develop a legislative plan, a public awareness strategy and LGBTI-sensitive shelters. The team will consist of six people representing the judiciary, police and department of social development and six people from the gay and lesbian community (News 24, 2011). However, in a country where 24 of every 25 accused rapists walk free, the government has a very long way to go (Geen, South Africa Lesbians Campaign Against Corrective Rape, 2011). Fortunately, South Africa already has the legal framework necessary to create effective change. Its constitution, the Equality Act, international legal obligations, and the holdings of various cases provide the necessary foundation upon which the government can formulate a judicial and legislative approach to eradicate corrective rape.



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