Curing Corrective Rape: Socio-Legal Perspectives on Sexual Violence Against Black Lesbians in South Africa

Waruguru Gaitho

Follow this and additional works at: https://scholarship.law.wm.edu/wmjowl

Part of the Comparative and Foreign Law Commons, Criminal Law Commons, Law and Gender Commons, Law and Race Commons, Law and Society Commons, and the Sexuality and the Law Commons

Repository Citation
Waruguru Gaitho, Curing Corrective Rape: Socio-Legal Perspectives on Sexual Violence Against Black Lesbians in South Africa, 28 Wm. & Mary J. Race, Gender, & Soc. Just. 329 (2022), https://scholarship.law.wm.edu/wmjowl/vol28/iss2/3

Copyright c 2022 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository. https://scholarship.law.wm.edu/wmjowl
CURING CORRECTIVE RAPE: SOCIO-LEGAL PERSPECTIVES ON SEXUAL VIOLENCE AGAINST BLACK LESBIANS IN SOUTH AFRICA

WARUGURU GAITHO*

ABSTRACT

Corrective rape can be defined as a hate crime that entails the rape of any member of a group that does not conform to gender or sexual orientation norms, where the motive of the perpetrator is to “correct” the individual, fundamentally combining gender-based violence and homophobic violence. In the South African context, these biases intersect with systemic racism, producing a disproportionate impact on Black, queer, womxn. While the legal framework has evolved to better address sexual violence crimes, Black lesbians remain prone to falling through the legal cracks, and South African society continues to sanction the homophobia and misogyny that form the bulwark of continued unchecked violence against them. This Article utilizes a socio-legal approach to analyze both law and society in an effort to elucidate the complex interplay between both, in addressing—or failing to address thereof—corrective rape. The analysis shows the inherent need to employ a multifaceted approach that gives equal weight to societal transformation as it does legal protection, and further demonstrates the utility of looking to, and borrowing from, the field of public health to successfully engineer social change.

INTRODUCTION
I. SITUATING CORRECTIVE RAPE IN SOUTH AFRICA: A BRIEF CONTEXTUAL OVERVIEW
   A. Rape, Sexual Violence, and Racial Disparities: Prevalence Rates & Reporting
   B. Perceptions of the LGBTQIA+ Community by Mainstream Society

---

* Waruguru Gaitho (she/they) is a human rights lawyer, researcher, and lecturer of law at Leiden University’s Van Vollenhoven Institute of Law, Society and Governance. Her research is interdisciplinary, incorporating both law and sociology, with areas of specialization including SOGIESC, race, and gender, and in particular their intersection. Her career is dedicated to advocating for equal rights and dignity of marginalized communities not just through the law, but also via academia and community organizing. She holds an Advanced LLM (cum laude) in International and European Rights Law from Leiden Law School, focusing her academic work on the intersection of race, gender, and sexual orientation, particularly Black queer womxn on the African continent.
II. IN PURSUIT OF JUSTICE: PITTING SOUTH AFRICA’S LEGAL FRAMEWORK AGAINST CORRECTIVE RAPE
   A. An Audit of the Law: Constitutional Guarantees, Related Legislation and Rape Law Reform
   B. Reimagining Justice: Potentialities for Protection of Black Lesbians in South Africa
      1. Transformative Constitutionalism
      2. Hate Crime Legislation

III. ANCHORING CHANGE IN SOCIETAL TRANSFORMATION: A CROSS-DISCIPLINARY APPROACH
   A. Identifying Root Causes of Homophobia, Gender-Based Violence and Systemic Racism in South Africa
      2. Aggression, Emasculation & Control: Of Apartheid, Colonization & African Culture
   B. Social Interventions and Their Impact: Assimilating Public Health Strategies
      1. Education-Entertainment as a Powerful Force for Change
      2. Shifting Community Discourse Through “Organized Diffusion”

CONCLUSION

INTRODUCTION

In early March of 2020, shortly before Capetonians celebrated the Cape Town Pride festival, a lesbian woman was attacked by three men on her way to a shop in Lotus River, a suburb in Cape Town.¹ They proceeded to force her into a nearby shack, hold her down, and gang-rape her to “correct her sexuality.”² This is not a novel phenomenon. Nearly fifteen years earlier, Zoliswa Nkonyana, a nineteen-year-old lesbian in Khayelitsha, had been followed from a tavern she frequented by a group of young men who stoned her then took turns stabbing her with the same knife to “finish [her] off.”³ Less than a


year later, on July 7, 2007, in a field close to the Johannesburg township where they lived, Sikazele Sigasa and Salome Massooa’s bodies were discovered, tied up with their underwear, having been gang-raped and tortured, before being shot execution style through the head. Despite the heinous nature of these events, this pattern of targeted violence was only named in 2008, when the lifeless body of Eudy Simelane, a member of South Africa’s national soccer team, an activist and one of the first “out” lesbian women in the Kwa Thema region, was found naked and face down in Johannesburg near a drainage ditch, having also been gang-raped, brutally beaten, and stabbed twenty-five times. Simelane’s notoriety, the savagery, and motivation behind the attack galvanized the coinage of the term “corrective” rape.

Originally, corrective rape referred to rape perpetrated against lesbians by straight heterosexual men with the intent of “curing” their homosexuality, which was perceived as “unnatural.” Along that vein, Mieses described it as sexual and brutal sexual punishment of “lesbians and other women who have sex with women (WSW) . . . for being gay and violating traditional gender representation.” Verbal abuse by the perpetrators before, during, or after violation of the victim makes the motive apparent, with overt statements such as “teaching a lesson,” or “showing them . . . ‘what a real man tastes like.’” One survivor described it as an attempt by a male perpetrator to “turn you into a real African woman.” The term has now evolved to broadly encompass, per Doan-Minh, “the rape of any member of a group that does not conform to gender or sexual orientation norms where the motive of the perpetrator is to ‘correct’ the individual.”

5. Id.
11. Id. at 2.
Yet, the nature of corrective rape, including the specific vulnerabilities of particular groups, must also be elucidated and highlighted within its definition. Therefore, in addition to the “curative” intent element, corrective rape must also be described as a hate crime that combines gender-based violence and homophobic violence.\textsuperscript{14} In the South African context, this intersects with systemic racism due to its disproportionate impact on Black women.\textsuperscript{15}

Corrective rape is not unique to this geographical context; Eudy Simelane’s death and the consequent mainstreaming of this atrocity in academic discourse and media reporting shone a spotlight on this. In the USA, for example, a lesbian in Georgia filed a civil lawsuit after she was raped by a county police deputy.\textsuperscript{16} The officer had forced her into her apartment at gunpoint and raped her, vowing to “teach her a lesson”\textsuperscript{17} and that “the world needed . . . one less dyke and he was going to make sure that happened.”\textsuperscript{18} “[I]n Zimbabwe, a young lesbian woman was locked up by her family and forced to submit to rape by an older man to ‘correct’ her orientation.”\textsuperscript{19} She was raped until she fell pregnant.\textsuperscript{20} In Jamaica, the attack of a lesbian and her friend in Kingston brought attention to the regular occurrence of corrective rape on the island.\textsuperscript{21} In India, the use of family members by parents to orchestrate the “correction” of their homosexual children, which makes legal recourse all the more difficult,\textsuperscript{22} has been reported.\textsuperscript{23} In Cameroon, an eighteen-year-old girl deemed a lesbian

\textsuperscript{14} Luis Abolafia Anguita, Tackling Corrective Rape in South Africa: The Engagement between the LGBT CSOs and the NHRIs (CGE and SAHRC) and Its Role, 16 INT’L J. HUM. RTS. 489, 490 (2012).


\textsuperscript{17} Id.

\textsuperscript{18} Id.


\textsuperscript{20} Id.

\textsuperscript{21} David McFadden, Jamaica Woman Brings Attention to Rapes Targeting Lesbians, AP NEWS (Apr. 28, 2015), https://apnews.com/11dbdc605810419a9328311d8cc999b1 [https://perma.cc/TQ4Y-RXLP].

\textsuperscript{22} Rupam Jain, Parents Use ‘Corrective Rape’ to ‘Straighten’ Gays, TIMES INDIA (June 1, 2015), https://timesofindia.indiatimes.com/life-style/relationships/parenting/Parents-use-corrective-rape-to-straighten-gays/articleshow/47489949.cms [https://perma.cc/382P-4KUQ].

“witch” was chained to a wall and raped by a man who then forced her to marry.24

That being said, this Article delves into both South African law and society as they pertain to this sui generis phenomenon; a calculated choice to examine the context where its nomenclature was birthed. By conducting an in-depth analysis of both, in tandem, a clearer picture is drawn on the fundamental factors that enable and support corrective rape, and critical questions such as how they interact with each other to sustain or disrupt the current reality, are explored. The law on the books and the reality on the ground are considerably divergent, and social norms and attitudes lean heavier toward homophobia and reprobation of Black lesbians than they do toward equal treatment and acceptance.25

While various scholars have made the case for the law as the fulcrum on which making meaningful progress rests, at present, most legal scholars studying corrective rape do not make the case for societal transformation as inseparable from legal developments.26 The solutions, perhaps unsurprisingly, are therefore often one-dimensional, without consideration for the degree of complexity that the synergy between law and society produces. The observable inertia in the lived realities of Black lesbians in South Africa further strengthens the argument for the utility of a socio-legal approach. This Article therefore seeks to fill this specific gap, interrogating various issues in this relatively underexplored area via social-legal study.

Consequently, Part I situates corrective rape in South Africa by examining prevalence rates, and various related disparities, before analyzing how mainstream society perceives the LGBTQIA+ community, of which Black lesbians are an integral part. Part II hones in on the national legal framework of South Africa, reviewing national legislation and discussing the prosecution and adjudication of the crime of corrective rape under the criminal justice system. Potentialities for protection of Black lesbians under both the current legislative framework and an amended regime are explored. Part III then tackles societal transformation, by examining root causes of homophobia, gender-based violence, and systemic racism in South Africa.

Africa, followed by an investigation into social interventions and their impact. The final section evaluates the outcomes of the study, broadly concluding that legal reform must be applied in tandem with social transformation, in order to be effective. To that end, a dual-pronged, cross disciplinary approach that effectively bridges the law-society divide is proffered.

Before proceeding further, several caveats must be discussed. First, it is important to note that corrective rape as the preferred lexicon has been contested due to the risk of being misconstrued as supporting the notion that lesbian women (and all other individuals who are subjected to corrective rape) should be, and are capable of, being cured.\(^{27}\) Mulaudzi argues that this in fact speaks to the way that homosexuality is perceived in South Africa.\(^{28}\) In this Article, the term corrective rape is used, as it is the most widely recognized parlance for describing this particular type of violence, but it should be read paying mind to this dissonance, as well as its nuanced meaning.

Second, attention must be accorded to the terms “victim” and “survivor” which in and of themselves carry complex connotations. Spry asserts that these concepts “construct hegemonic linguistic categories” that deny a woman narrative agency by perpetuating a phallocentric perspective of their experiences, and by being reductive of the intimacy and diversity of sexual violence experiences.\(^{29}\) Essentially, feminist theory demands that self-identity be a central part of this discourse, and as far as third-party storytelling goes, there is no consensus (sans context) as to which terminology is preferable.\(^{30}\) Accordingly, this Article consciously uses both terms—victim and survivor—interchangeably, and if indicated, will respect the labels used by the womxn who have undergone this experience. Finally, womxn will be used interchangeably with women, as a nod to intersectional feminism and in recognition of the inclusion of trans women and women-aligned non-binary individuals in this research study. To be clear, the use of womxn is not aimed at invalidating the womanhood of trans women, or erasing the distinct identity of non-binary individuals, but is rather intended as an expansive and inclusive term that does not center cis-men.

---


\(^{28}\) Id.


\(^{30}\) See Kate Harding, *I’ve Been Told I’m a Survivor, Not a Victim. But What’s Wrong With Being a Victim?*, TIME (Feb. 27, 2020, 8:20 AM), https://time.com/5789032/victim-survivor-sexual-assault.
I. SITUATING CORRECTIVE RAPE IN SOUTH AFRICA: A BRIEF CONTEXTUAL OVERVIEW

A. Rape, Sexual Violence, and Racial Disparities: Prevalence Rates & Reporting

The gender inequality created and perpetuated by deeply rooted patriarchy in South Africa has, unsurprisingly, led to rampant sexual violence.31 Dubbed the rape capital of the world,32 South Africa’s figures on rape and gender-based violence are some of the highest globally for a country not at war.33 The number of sexual offenses reported in the period of 2018–2019 was 52,420, a near 5% increase from the previous year.34 At 90.9 per 100,000, this places South Africa’s recorded sexual offenses rate as one of the top rates per capita in the world.35 Distinct from other sexual offenses, the police recorded 41,583 rapes during this period, averaging 114 rapes daily.36 However, these statistics are far from accurate due to low reporting rates, influenced not only by gender disparities, but also astounding low conviction rates which deter women from reporting in the first place.37 Additionally, recent data is not available as there is no nationally representative estimate of annual rapes in South Africa.38 The statistics on corrective rape specifically are scanty and outdated at best, and non-existent at worst.39 Despite this dearth of information, one source placed the annual number of victims of corrective rape in South Africa at “[at least] 500,”40 and a sociological study reported that on average, ten women are correctively raped each week in South Africa.41 For the few cases reported, there is a large disparity

31. Brown, supra note 9, at 49.
35. Id.
36. Id.
37. Brown, supra note 9, at 49.
38. Africa Check, supra note 34.
39. Brown, supra note 9, at 46.
between accusations and convictions. In 2009, Action Aid reported that since 1998, thirty-one homophobic murders of lesbian women had been reported, yet of these, only two had made it to the courts, and only one conviction had been obtained. The other case was postponed at least thirty times, eventually being tossed out for insufficient evidence. A study found that only a third of hate crimes, which are crimes or acts of violence that are motivated by prejudice against a specific actual or perceived trait of a victim (such as race, religion, or sexual orientation), and of which corrective rape is a part, were reported to the police. Moreover, only one in ten complaints was properly investigated. Further, a hate crime was identified in only sixteen out of sixty-two convictions. In terms of racial disparities, a recent study of anti-gay hate crimes in Gauteng showed that Black lesbian women are 2.5 times more likely to experience sexual abuse or rape than white lesbians. Women living in townships form the majority of victims, indicating that class is also a contributing factor.

B. Perceptions of the LGBTQIA+ Community by Mainstream Society

Despite extensive legal protection and recognition of gender and sexual minorities, public attitudes around homosexuality perpetuate intolerance and more than 55% of South Africa’s Lesbian, Bisexual, Gay, Transgender, Queer, Intersex, and Asexual (LGBTQIA+) citizens live in fear that they will experience discrimination due to their sexual orientation or gender. A 2016 national representative survey,
which consisted of over 3,000 interviews with South Africans across
the country (an unprecedented scale on the continent), revealed that
seven out of ten South Africans, a sizeable majority, “feel strongly
that homosexual sex and breaking gender dressing norms is simply
‘wrong’ and ‘disgusting.’”\textsuperscript{52} Eight out of ten South Africans stated that
“they h[ad] not—nor would they ever consider—verbally or physically
abusing someone who was gender non-conforming.”\textsuperscript{53} But alarm-
ingly, based on the extrapolation of survey findings to the whole South
African population, it was estimated that close to half a million “South
Africans h[ad] physically harmed women ‘who dress and behave like
men in public’ in the prior 12 months.”\textsuperscript{54}

That being said, some of the findings showed a shift toward
progressive, inclusive attitudes, mainly among younger well-edu-
cated South Africans.\textsuperscript{55} For example, even though 72% of individuals
regarded homosexuality as immoral, 51% believed that gay people
should have the same human rights as all other citizens.\textsuperscript{56} Addition-
ally, 2 in 4 South Africans said they would accept a gay family
member, even though only one in four could identify a homosexual
friend or family member.\textsuperscript{57} Further, between 2012 and 2015, the
number of people who “strongly disagreed” with same sex marriage
was halved.\textsuperscript{58} Some of the hypothesized factors for this shift in
personal attitudes included personal experience of sexual orienta-
tion, gender identity, gender expression, and sex characteristics
(SOGIESC),\textsuperscript{59} contact or awareness with an LGBTQIA+ family
member or community,\textsuperscript{60} gaining knowledge or understanding of
SOGI\textsuperscript{61} and an individual’s moral frame,\textsuperscript{62} with a particular empha-
sis on tradition, religion, and culture.\textsuperscript{63}

Per the head of the Human Sciences Research Council, the seem-
ingly antithetical results of the study, i.e., where a majority of South


\textsuperscript{53} See id. at 33.

\textsuperscript{54} Id. at 37.

\textsuperscript{55} Faraaz Mahomed & Guy Trangoš, An Exploration of Public Attitudes Toward LGBTI Rights in the Gauteng City-Region of South Africa, 63 J. HOMOSEXUALITY 1400, 1403 (2016).

\textsuperscript{56} Sutherland et al., supra note 52, at 3.

\textsuperscript{57} Id.

\textsuperscript{58} Id. at 54 (reporting that 48.5% “strongly disagreed” in 2012 compared to 23.5% in 2015).

\textsuperscript{59} Id. at 18.

\textsuperscript{60} Id.

\textsuperscript{61} Id.

\textsuperscript{62} Sutherland et al., supra note 52, at 18.

\textsuperscript{63} Id.
Africans believe LGBTQIA+ persons should have equal human rights protections, but also believe that same sex relations are morally wrong, are an indicator of the work that remains to be done “to ensure that society understands and respects the rights of LGBT people in the country.” An examination of the lived realities of sexual and gender minorities in South Africa supports this sentiment. A 2018 study revealed that in their lifetime, 73% of LGBTQIA+ individuals had experienced verbal harassment, 55% physical violence, and 48% sexual violence, with a significantly higher prevalence amongst gender minorities, i.e., transgender, intersex, and gender nonconforming persons, specifically.

II. IN PURSUIT OF JUSTICE: PITTING SOUTH AFRICA'S LEGAL FRAMEWORK AGAINST CORRECTIVE RAPE

Corrective rape is not an inexplicable aberration within the typologies of crime in South Africa. Instead, it exists at the intricate nexus of hate crimes and sexual assault crimes which are varyingly addressed under the law. Part II hones in on the national legal framework of South Africa, in particular reviewing the 1996 Constitution, the Equality Act, and current rape law. The examination seeks to answer the question of the content of the legal framework in South Africa regarding rape and hate crimes, in a bid to establish whether the framework sufficiently tackles corrective rape. This is then followed by an evaluation of what modifications can be made to better position the state to prosecute perpetrators of corrective rape, both in terms of the existing framework and new elements that ought to be introduced. Overall, though difficult, reimagining justice and protection for Black lesbians using the South African legislative machine is carefully mapped and deemed feasible.

A. An Audit of the Law: Constitutional Guarantees, Related Legislation and Rape Law Reform

The post-apartheid South African Constitution “provides a legal structure based on human rights and a framework for anti-prejudice,
While its political message is one of tolerance and non-discrimination, Lauded for being one of the most progressive in the world, the South African Constitution sets out an aspirational protective legal framework for LGBTQIA+ persons, most notably as the first Constitution in the world to include sexual orientation as a class in its national non-discrimination clause. Following its promulgation, a successful decade-long battle to strike down any provisions of law, policy, or procedure that would limit the rights of the LGBTQIA+ citizenry ensued. To date, South Africa prominently remains the only country in Africa to have legalized gay marriage. Apart from the equality clause wherein race, gender, and sexual orientation are listed grounds upon which discrimination is prohibited, section 12 of the Constitution explicitly guarantees the right to freedom from all forms of violence from either public or private sources. The insertion of the words “from either public or private sources,” is significant because it extends protection for acts such as domestic violence and—particularly relevant to corrective rape discourse—sexual assault, which are “predominantly committed in contexts, spaces, and relationships that are traditionally viewed as private.”

Additionally, the Constitution recognizes the right to life for everyone, and provides for the inherent dignity of every individual and the right to have that dignity respected and protected, as well as the right to bodily and psychological integrity which includes the right to security in, and control over, their body. The South African Constitutional Court held that at the heart of the prohibition of unfair discrimination, lay the recognition that the purpose of the

69. S. AFR. CONST., 1996 § 9(3).
74. S. AFR. CONST., 1996 § 11.
75. S. AFR. CONST., 1996 § 10.
Constitution and democratic order was “the establishment of a society in which all human beings [would] be accorded equal dignity and respect regardless of their membership of particular groups.” The constitutional court further held that “the right to dignity is not subject to abrogation or subordination” to other rights. An individual examination of various incidences of corrective rape clearly shows the violation of all the above rights by the perpetrators, including an impairment of the right to dignity, which is impermissible.

In the *Carmichele* case, which involved the sexual assault of the applicant by a man who had been released pending trial for the attempted rape of another woman, the constitutional court established the state’s positive obligation to protect and uphold the right to life, human dignity, and security of the person through laws and structures designed to afford such protection. In adopting the famous *Osman* test, the court held that this included “tak[ing] preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.” The state’s failure to take pointed measures to protect would-be victims of corrective rape, both at the judicial and policy level, thus constitutes a fundamental breach of these provisions.

Another critical piece of legislation for consideration is the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA/Equality Act), which manifests South Africa’s commitment to equality. Crucially, it non-exhaustively lists the grounds upon which discrimination is prohibited, including sexual orientation. The Act further enumerates special measures to promote equality with regard to race, gender, and disability, including the condition that

---

77. President of the Republic of South Africa and Another v. Hugo, 1997 (6) BCLR 708 (CC) at ¶ 41.
79. *Id.* at 100.
80. Carmichele v. Minister of Safety & Security 2001 (4) SA 938 (C C) ¶ 44.
81. The European Court of Human Rights stated that in order for the State to be found to be in breach of its duty to prevent the violation of the right to life by private actors, it must be established to its satisfaction that the authorities knew, or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. *Osman v. United Kingdom*, App. No. 87/1997/871/1083, ¶¶ 115–16 (Oct. 28, 1998).
84. *Id.* § 1 (defining “prohibited grounds”).
85. *Id.* § 28.
during prosecution, proof of unfair discrimination on the aforementioned grounds as having played a part in the commission of an offense be considered an aggravating factor.\textsuperscript{86} That being said, the grounds do not include discrimination based on sexual orientation.

Turning to rape law reform in South Africa, in December 2007 specific amended sections of the Sexual Offences Act passed into law after a protracted eleven-year reform period.\textsuperscript{87} The sweeping changes were largely driven by the feminist struggle to alter the South African criminal justice system’s responses to gender-based violence, the very site that has “historically treated sexual assault victims with indifference, suspicion and, at times, hostility.”\textsuperscript{88} The amendments were largely focused on substantive legal rules relating to sexual offenses in South Africa.\textsuperscript{89} Chief among these, the repeal of the common law offenses of rape and indecent assault, and their replacement with a materially wider range of statutory offenses.\textsuperscript{90} Statutorily, rape is broadly defined and is gender neutral.\textsuperscript{91} However, there is no specific mention of corrective rape as an offense “committed out of malice” against the victim’s identity.\textsuperscript{92} Sexual penetration is a crucial element of the offense and encompasses all acts of penetration, without distinction as to penile versus other penetration (such as oral genital violation) and includes the use of objects.\textsuperscript{93}

Another important definition introduced in the Act relates to “sexual violation” since it covers “‘every other conceivable sexual act that one person could do to another, which does not involve penetration.’”\textsuperscript{94} Inextricably linked to this, the Act also repeals the common law offense of indecent assault, replacing it with a new statutory offense of sexual assault, applicable to all forms of sexual violation without

\textsuperscript{86} Id. § 28(1).
\textsuperscript{88} Catherine Albertyn, Lillian Artz, Helène Combrinck, Shereen Mills & Lorraine Wolhuter, Women’s Freedom and Security of the Person, in GENDER, LAW AND JUSTICE 307 (E. Bonthuys & Cathi Albertyn eds. 2007).
\textsuperscript{89} Philip N. S. Rumney & Charnelle van der Bijl, Rape, Attitudes and Law Enforcement in South Africa, 13 NEW CRIM. L. REV. 826, 827 (2010).
\textsuperscript{90} Lillian Artz & Dee Smythe, Should We Consent?, in SHOULD WE CONSENT? RAPE LAW REFORM IN SOUTH AFRICA 8 (Lillian Artz & Dee Smythe eds. 2008).
\textsuperscript{91} Act No. 32 of 2007: Criminal Law (Sexual Offences and Related Matters) (S. Afr.) ¶ 3 (‘Any person (A) who unlawfully and intentionally commits an act of sexual penetration with a complainant (B), without the consent of B, is guilty of the offen[se] of rape.”).
\textsuperscript{92} Koraan & Geduld, supra note 26, at 1939.
\textsuperscript{93} Act No. 32 of 2007: Criminal Law (Sexual Offences and Related Matters) (S. Afr.) ch. 1.
\textsuperscript{94} Nikki Naylor, The Politics of a Definition, in SHOULD WE CONSENT? RAPE LAW REFORM IN SOUTH AFRICA 49 (Lillian Artz & Dee Smythe eds. 2008).
consent.\textsuperscript{95} Similarly noteworthy is the criminalization of any attempt, conspiracy, or incitement to commit a sexual offense.\textsuperscript{96} Regarding rules of evidence and procedure, the Act determinately scrapped the cautionary rule in sexual offense cases.\textsuperscript{97} Previously, the evidence of a rape complainant had to be treated with caution on the sole basis of being a victim of a sexual offense.\textsuperscript{98} Furthermore, the presumption that delayed reporting is an indicator that a claim was false and which was typically used to discredit the victim, was banned.\textsuperscript{99} Accordingly, the court may not draw any negative inference from such delay.\textsuperscript{100} These evidentiary and procedural reforms reflect an increased awareness of, and sensitivity towards, the way victims respond to rape trauma, including how this affects reporting patterns.\textsuperscript{101} Finally, with regard to sentencing, the Criminal Law Amendment Act prescribes minimum sentences for specific serious crimes, including rape.\textsuperscript{102}

B. Reimagining Justice: Potentialities for Protection of Black Lesbians in South Africa

1. Transformative Constitutionalism

Klare introduced the term “transformative constitutionalism” into the South African legal landscape in his seminal work \textit{Legal Culture and Transformative Constitutionalism} over two decades ago.\textsuperscript{103} In the poignant piece, he defines it as “a long-term project of constitutional enactment, interpretation, and enforcement committed . . . to transforming a country’s political and social institutions and power relationships in a democratic, participatory, and egalitarian direction.”\textsuperscript{104} Through transformative constitutionalism, large-scale social change could be introduced through “nonviolent political processes grounded in law.”\textsuperscript{105} For this to be successful, he argues

\textsuperscript{95} Act No. 32 of 2007: Criminal Law (Sexual Offences and Related Matters) (S. Afr.) § 5.
\textsuperscript{96} Id. § 55.
\textsuperscript{97} Id. § 60.
\textsuperscript{98} See Artz & Smythe, supra note 90, at 9.
\textsuperscript{99} Act No. 32 of 2007: Criminal Law (Sexual Offences and Related Matters) (S. Afr.) § 59.
\textsuperscript{100} See id.
\textsuperscript{102} Criminal Law Amendment Act 105 of 1997 (S. Afr.) § 51.
\textsuperscript{104} Id.
\textsuperscript{105} Id.
for a post-liberal account of the law, in which adjudication is politically and morally engaged.\(^{106}\) A post-liberal reading of the Constitution would mean that the South African Constitution is "social, redistributive, caring, positive, at least partly horizontal, participatory, multicultural, and self-conscious about its historical setting and transformative role and mission."\(^{107}\) Applied to the situation of corrective rape in the South African context, Koraan argues for the use of the law to transform the heteronormative South African society and its institutions.\(^{108}\) Despite the fact that there have been numerous cases of corrective rape and murder of Black lesbians, only three have gone to trial successfully.\(^{109}\) In one of these, the previously highlighted case of Eudy Simelane, when her murderers were brought to trial, the judge did not want to use the word "lesbian" at all, and asked the prosecutor if there was an alternative word he could use instead.\(^{110}\) There was no mention of hate crime, and though the judge convicted two out of the five men responsible for her death, on sentencing, he stated that her sexual orientation had "no significance" in her rape or murder.\(^{111}\) Simelane’s case was the first of the corrective rape cases to result in conviction, but during sentencing, her killers just laughed.\(^{112}\) Examining the conduct of the actors on both sides of the bench sheds some insight on the insidiousness of the problem. Corrective rape, per Doan-Minh, is "political, systemic, group-based violence."\(^{113}\) Laws that are therefore specifically targeted and "politically and morally engaged," are the appropriate vehicle for large-scale social transformation.

Along this vein, Di Silvio considers the aforementioned horizontal reach of the South African Constitution, submitting that under the 1996 Constitution, the state is under an affirmative duty, and "must prevent, investigate, and punish corrective rape . . . ."\(^{114}\) He bases this off a synthesis of the landmark Carmichele case and argues that only such imposition of affirmative obligation would allow women like Simelane “to fully and freely exercise their rights and enjoy the premise of a post-apartheid South Africa.”\(^{115}\) He thus proposes bringing

---

106. Id.
107. Id. at 153 (emphasis removed).
108. Koraan & Geduld, supra note 26, at 1944.
111. MARTIN ET AL., supra note 4, at 11.
112. See Brownworth, supra note 110.
113. Doan-Minh, supra note 8, at 167.
114. Di Silvio, supra note 68, at 1473.
115. Id.
a public interest suit against the government, preventative[y challenging the constitutionality of the state’s failure to protect women at risk of corrective rape.\textsuperscript{116} This is made feasible by the broad standing rights granted by the Constitution for anyone wishing to bring suit under the Bill of Rights.\textsuperscript{117} An alternative action, he suggests, would be to bring a delictual claim (similar to negligence under tort law)\textsuperscript{118} against the state, piggybacking on the \textit{Carmichele} ruling. In \textit{Carmichele}, the court, with due regard to the “spirit, purport and objects of the Bill of Rights” held that the police and prosecuting authority had a constitutional duty to protect the public in general and women in particular from violent crime,\textsuperscript{119} a duty to prevent harm developed in comport with the Bill of Rights.\textsuperscript{120} Knowledge and foreseeability on the part of the state is one of the factors that would be taken into account in considering the duty on the government to protect women from corrective rape.\textsuperscript{121} Given the statistics on violence against women in South Africa, and the specific vulnerability of Black lesbians, Di Silvio argues that one can infer the state’s awareness of the pattern of violence against women, and the unique position that it is in to end this violence.\textsuperscript{122} Therefore, with regard to corrective rape, a compelling case can be made that the requirements of \textit{Carmichele} have been triggered.\textsuperscript{123} Juxtaposed against Klare’s theory, Di Silvio’s proposals are effectually transformative constitutionalism in action, providing a roadmap for legislating against the state by using the Constitution to argue that the government has not met a sufficient standard of protection for Black lesbians, and thereby demanding more positive action by the state to realize the same.\textsuperscript{124}

2. Hate Crime Legislation

According to Breen and Nel, the existing legal framework does not provide sufficient tools to address hate crime.\textsuperscript{125} Hate crimes are “message” crimes that are designed to terrorize the group of people

\begin{footnotes}
\item[116] \textit{Id.} at 1499.
\item[118] Di Silvio, \textit{supra} note 68, at 1500.
\item[119] \textit{Carmichele} v. Minister of Safety & Security 2001 (4) SA 938 (CC) ¶¶ 34,62.
\item[120] \textit{Carmichele} v. Minister of Safety & Security 2001 (4) SA 938 (CC) ¶ 33.
\item[121] Di Silvio, \textit{supra} note 68, at 1501–02.
\item[122] \textit{Id.} at 1502.
\item[123] \textit{Id.}
\item[124] \textit{See id.}
\end{footnotes}
who share similar traits to that of the victim.\textsuperscript{126} In the South African context, this terrorization is evident in the results of a survey of Black lesbians, which revealed that a 86\% of them “lived in fear of sexual assault.”\textsuperscript{127} As such, hate crimes, as Iganski argues, are distinct from the same underlying crimes because they cause greater harm.\textsuperscript{128} He categorizes these harms as occurring in waves, affecting not just the individual victim, who experiences deep psychological trauma because of being specifically targeted on the basis of immutable innate traits, but also the victim’s close social circle, then the wider victim’s group in the neighborhood, other targeted communities, and finally the larger society.\textsuperscript{129} In a country built on the ideology of the “rainbow nation”—a metaphor for unity among, and acceptance of, all the diverse people in the nation—\textsuperscript{130} corrective rape strikes against this core societal value.\textsuperscript{131}

This extra harm justifies punishment of bias and prejudice motivation behind crimes.\textsuperscript{132} Currently, the South African legal system does not differentiate between acts of violence committed out of prejudice, and other violent acts.\textsuperscript{133} Therefore, in addition to not criminalizing hate crimes as a substantive criminal offense, South African criminal law also does not expressly require enhanced penalties when a crime is motivated by hate.\textsuperscript{134} The corrective rape of lesbians is thus investigated and prosecuted as ordinary rape, regardless of any perpetrator bias.\textsuperscript{135}

In jurisdictions where hate crime legislation exists, corrective rape (and murder committed with a hate/prejudiced motive) would be prosecuted under this law. Naidoo and Karels categorically state that the lack of hate crime legislation is “a further reason for the lack of reliable statistics and quantifiable data on the phenomenon of ‘corrective rape’ and murder of lesbian women in South Africa.”\textsuperscript{136} Mwambene and Brown therefore consider the passing of hate crime laws as critical

\textsuperscript{126} Goodall & Walters, \textit{supra} note 47, at 13.
\textsuperscript{129} See \textit{id.} at 629 fig.1.
\textsuperscript{130} Valerie Møller, Helga Dickow & Mari Harris, \textit{South Africa’s “Rainbow People”, National Pride and Happiness}, 47 SOC. INDICATORS RSCH. 245, 246 (1999).
\textsuperscript{131} Iganski, \textit{supra} note 128, at 631.
\textsuperscript{132} See \textit{id.} at 632.
\textsuperscript{134} Koraan & Geduld, \textit{supra} note 26, at 1941.
\textsuperscript{135} \textit{Id.}
\textsuperscript{136} Naidoo & Karels, \textit{supra} note 43, at 259.
to turning the tides on this phenomenon.\footnote{Mwambene & Wheal, supra note 50, at 82; Brown, supra note 9, at 63.} If corrective rape were to be considered a hate crime and not merely a crime of rape, Mwambene argues that it would be easier to successfully prosecute perpetrators of this offense.\footnote{Id. at 82–83.} To continue to prosecute it as just rape ignores the underlying prejudice that motivates the crime and as explained earlier, the greater harm generated.\footnote{Id. at 35.} Action Aid further calls for the placing of hate crimes against lesbian and trans women in a specific crime category, bolstered by the requisite resources to ensure investigation, prosecution and conviction.\footnote{Id. at 34–35.} Further, this would shine a much-needed spotlight on corrective rape, and its continued large radius of harm.

However, the framing of such proposed legislation is a key consideration. There are two conflicting schools of thought, based on two models, as to how one ought to approach hate crimes in the criminal justice system.\footnote{Mwambene & Wheal, supra note 50, at 84.} The first model is the “hostility model,” which regards hate crimes as crimes motivated by hatred for, or hostility toward, certain protected characteristics (such as race).\footnote{Breen & Nel, supra note 125, at 34–35.} Conviction based on this model requires evidence of such hatred.\footnote{Id. at 35.} The second model is called the “discriminatory selection model” and is more expansive in its definition of hate crime; whereby a “perpetrator’s deliberate selection of a victim based on . . . [a] protected characteristic would constitute a hate crime.”\footnote{Id.} Under this model, mixed motivation for perpetrating a crime is allowable, and such crimes would still constitute hate crimes.\footnote{Id.} The first school of thought advocates that evidence of hate ought to be presented during the trial in order to prove it was a hate crime, whereas the other contends that such evidence ought only to be presented as an aggravating factor during sentencing.\footnote{Id. at 35.} Though making hate an element of the crime may appear logical, women’s advocate Sanja Bornman argues that in practice this is challenging, and creates a heavier evidentiary burden.\footnote{Rebecca Davis, SA’s Gay Hate Crimes: An Epidemic of Violence Less Recognised, DAILY MAVERICK (June 27, 2012), https://www.dailymaverick.co.za/article/2012-06-27-sas-gay-hate-crimes-an-epidemic-of-violence-less-recognised [https://perma.cc/FT5V-DFVR].} The second model is thus preferable from an evidentiary standpoint, but also draws criticism for creating perhaps
too wide a berth for defining hate crimes, compared to the hostility model’s far narrower parameters. That being said, the discriminatory selection model is also functionally bolstered by the Equality Act, as discussed earlier.\(^{148}\) This approach was also applied in the Zoliswa Nkonyana case—the second conviction on the corrective rape and/or murder of a Black lesbian—where the presiding judge named and recognized sexual orientation as an aggravating factor, after a guilty verdict had been entered.\(^{149}\)

As discussed in Part I, the dissonance between reporting and convictions is a large part of the problem, and with the lower threshold of culpability established by the discriminatory selection model, more convictions can be secured, while also guaranteeing enhanced punishment when hate is proven during sentencing. Regardless, Bornman emphasizes that “[w]hether an element of the crime, or an aggravating factor, it is critical to have the hate element exposed and interrogated in open court.”\(^{150}\)

In further contemplation of such legislation, Brown suggests another crucial component: that there must be specific sanctions for state agents, such as police officers and prosecutors, who fail to carry out such hate crime legislation in good faith.\(^{151}\) This is in order to guarantee that the law is enforced to its fullest extent when possible.\(^{152}\) He proposes a “reasonable professional standard” to determine whether a state agent acted in good faith, and asserts that the consequent penalties will prevent authorities from “allowing . . . friends . . . [and] colleagues to go unpunished.”\(^{153}\)

III. ANCHORING CHANGE IN SOCIETAL TRANSFORMATION: A CROSS-DISCIPLINARY APPROACH

In 1999, with the post-apartheid “new” South Africa only five years old, a media campaign on gender-based violence featuring South African actress Charlize Theron was broadcast on TV and in some commercial cinemas.\(^{154}\) This was the first time in the history

\(^{148}\) See Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, \(\text{supra}\) note 83, at 28(1).


\(^{150}\) Davis, \(\text{supra}\) note 147.

\(^{151}\) Brown, \(\text{supra}\) note 9, at 64.

\(^{152}\) \(\text{Id.}\)

\(^{153}\) \(\text{Id.}\) It is also important to note that whereas the resounding position with regards to corrective rape is pro–hate crime legislation, such legislation is not without its problems, including, for example, that it assesses mens rea through a moral judgement lens.

\(^{154}\) Moffett, \(\text{supra}\) note 33, at 132.
of anti-rape campaigns in South Africa that rapists or potential rapists had been directly addressed; prior to this, campaigns addressed potential victims only, by, for example, telling women to avoid “dark alleys” and “short skirts.”\textsuperscript{155} The campaign drew overwhelming backlash for being “offensive to South African men”\textsuperscript{156} by stereotyping them as “either being involved in rape or being complacent about it”\textsuperscript{157} and was subsequently banned, never airing again. As Moffett observes, the Theron ad campaign had “all the markers of a South African society transformed not only in racial but gender terms, reflecting the constitutional enshrinement of equality for all.”\textsuperscript{158} This led to a flawed assumption that “this amounted to a socially endorsed and cohesive view that, in such a society, women should not be raped, and men should be held responsible for their acts of violence.”\textsuperscript{159} Gontek describes this disparity as a “[f]ield of [t]ension between [the] [l]iberal Constitution and [s]ocially [s]anctioned [g]ender [r]elations.”\textsuperscript{160} Understanding therefore that corrective rape is a complex phenomenon requiring the application of a multifaceted strategy, this penultimate third section begins by disinterring and investigating the root causes of homophobia, gender-based violence and systemic racism in South Africa, which have cultivated and facilitated this epidemic. With the goal of understanding how to engineer a change in social attitudes, this is then followed by an exploration of two social interventions that aimed to achieve a shift in socio-cultural norms.

\textbf{A. Identifying Root Causes of Homophobia, Gender-Based Violence and Systemic Racism in South Africa}


Patriarchy is a social system set up to “promote male privilege by being male dominated, male identified and male centered.”\textsuperscript{161} In its wider definition, patriarchy means the “manifestation and institutionalization of male dominance over women and children in the

\textsuperscript{155.} Id.
\textsuperscript{156.} Id. at 132.
\textsuperscript{157.} Id. (quoting W. Johnson, Are Whites (and Men) Ready for Democracy? 14 (2003) (unpublished paper) (presented at the Centre for African Studies at the University of Cape Town)).
\textsuperscript{158.} Id. at 133.
\textsuperscript{159.} Id.
\textsuperscript{160.} Gontek, supra note 133, at 2 (emphasis removed).
\textsuperscript{161.} ALLAN G. JOHNSON, THE GENDER KNOT: UNRAVELING OUR PATRIARCHAL LEGACY 5 (Temple Univ. Press 2005) (arguing that in order to maintain power relations, this society is “organized around an obsession with control and involves as one of its key aspects[,] the oppression of women”) (emphasis removed).
family and the extension of male dominance over women in society in general.”

This ideology of superiority and dominance is so powerful, and is so ably reinforced by institutions such as the church, the family and school, that women are convinced of, and consent to, their own oppression. Under this system, “women’s labour [sic] power, women’s reproduction, women’s sexuality, women’s mobility and property and other economic resources—are under patriarchal control.”

Heteronormativity and heterosexism are closely related to patriarchy. The former is predicated on a consistent pairing of men with women, assigning specific gender roles, wherein women are subordinate to men, and rules to each sex, including the demarcation of women’s bodies as male property. The latter embodies the belief that one way of loving is superior to all others. Under this framework, “sexuality has often been regarded as a source of male power and female oppression,” and rape in general, is the “violent instantiation of a patriarchal logic within which women’s bodies are not their own.”

Central to this discourse is heterosexuality, whose definition may appear deceptively simple but is the fulcrum on which this system turns: attraction for the opposite sex, but also, an attraction for the opposite gender as well. This distinction arises from the understanding that sex is biologically intractable and gender is culturally and socially constructed. Accordingly, the importance of heterosexual desire and its practices is to regulate gender as a

162. Abeda Sultana, Patriarchy and Women’s Subordination: A Theoretical Analysis, 4 ARTS FAC. J. 1, 3 (2012).
163. Id.
164. Id. (quoting SYLVIA WALBY, THEORIZING PATRIARCHY 20 (Wiley-Blackwell ed. 1990)).
167. Mwambene & Wheal, supra note 50, at 58.
168. Oesterreich, supra note 166, at 288.
170. Larry Baron & Murray A. Straus, Four Theories of Rape: A Macrosociological Analysis, 34 SOC. PROBS. 467, 467 (1987) (arguing feminist theory positions rape as a “function[... of social control in patriarchal societies”).
binary relation, differentiating the masculine from the feminine.\textsuperscript{174} Heterosexuality can thus both be defined as a “sexual or relational identity (belonging to individuals or groups) and also as a social institution (which structures daily life).”\textsuperscript{175} Heterosexist discourse pathologizes homosexuality and attaches perversion to same-sex relationships,\textsuperscript{176} normalizing hate and prejudiced behavior toward queer individuals (homophobia).\textsuperscript{177} Lesbianism is thus perceived as a threat to patriarchy and heteronormativity, evidenced by the increased risk faced by masculine-presenting “butch” women.\textsuperscript{178}

As Sanger posits, “this violence should be understood as centrally located within heteronormative values,”\textsuperscript{179} because lesbians often challenge gender expectations through their sexuality as well as their expression of masculinity.\textsuperscript{180} In South Africa, this means increased visibility within their communities, which in turn puts them in grave danger; the men perceive them as “both threatening and unavailable” which often results in corrective rape and physical attacks.\textsuperscript{181} At their core, these acts are punitive and “corrective” because lesbians, by their very existence, undermine “monolithic notions of masculinity,” and heteronormativity, by resisting the demarcation of their bodies as male property.\textsuperscript{182} Equally important but less explored, lesbians expose the vulnerabilities of male masculinities, since “putatively successful masculinity depends on men’s need to control women and force them to follow gendered conventions of heterosexual conduct.”\textsuperscript{183}

At the intersection of discourse on masculinity and violence pertinent to understanding corrective rape, is Kimmel’s insightful observation that “violence is often the single most evident marker of manhood.”\textsuperscript{184} Men often default to violence when they feel that

\begin{itemize}
  \item \textsuperscript{174} See \textit{Judith Butler, Gender Trouble: Feminism and the Subversion of Identity} 31 (Routledge 1990).
  \item \textsuperscript{175} Panteá Farvid, \textit{Heterosexuality}, in \textit{The Palgrave Handbook of the Psychology of Sexuality and Gender} 92, 92 (Christina Richards & Meg John Barker eds., 2015).
  \item \textsuperscript{176} Wells & Polders, supra note 15, at 21.
  \item \textsuperscript{177} See id.
  \item \textsuperscript{178} See Mufweba, \textit{supra} note 12. For Zanele Muholi’s research where 24 out of 33 participants who were either corrective rape survivors or who had been subjected to other related hate crimes were masculine presenting, see id.
  \item \textsuperscript{179} Nadia Sanger, ‘The Real Problems Need to Be Fixed First’: Public Discourses on Sexuality and Gender in South Africa, \textit{Agenda}, 2010, at 114.
  \item \textsuperscript{180} Amanda Lock Swarr, \textit{Paradoxes of Butchness: Lesbian Masculinities and Sexual Violence in Contemporary South Africa}, \textit{37 J. Women Culture & Soc’y} 961, 962 (2012).
  \item \textsuperscript{181} Id.
  \item \textsuperscript{182} Id.
  \item \textsuperscript{183} Id.
\end{itemize}
their power or privilege are challenged or under threat. Violence as an appropriate response to this transgression of norms is legitimized by South Africa’s history, the culture, and norms of acceptance. Ultimately, homophobic violence, and in this specific context violence against lesbians, is driven by a fundamental “fear of deviance from normative masculinities.” The lesbian body is a “body out of control in a heteropatriarchal sense,” and corrective rape is a drastic, violent “attempt to bring these bodies back under the control” of the heteropatriarchal society.

2. Aggression, Emasculation & Control: Of Apartheid, Colonization & African Culture

While the egregious regime of white imperialism and racial segregation that was apartheid may have come to an end, its legacy continues to color the South African landscape, especially as regards to racialized violence against women. The current rape crisis, as Anderson argued, was facilitated by apartheid’s cruel history. Race as a socio-cultural, economic and political concept was created by apartheid as a mechanism of violence. Through it, operated repression and violence and racism was “institutionalised, legalised and internalised.” Before apartheid, slavery and colonialism laid the foundation upon which apartheid would build. Both were rooted in the violation of, and violence against, Black bodies; the “tearing apart of families,” “the negation of some lives,” for example, people who dared to resist, non-able-bodied persons, and “the ingraining of self-hate.”

The white minority government’s response to pro-democracy political organizing was “repressive, excessive and indiscriminately violent,” and ultimately fostered a culture of violence in the country,

---

186. Gontek, supra note 133.
187. Msibi, supra note 185, at 53.
188. Doan-Minh, supra note 8, at 170.
189. Id.
190. Di Silvio, supra note 68, at 1475.
193. Id.
normalizing and legitimizing it in both the public and private sphere. For example, children who ran away from security forces or who dared to throw stones at armored vehicles were shot on sight. Penning down what he had observed in 1992, South African writer Allister Sparks stated:

Neither these police nor any others I have seen in similar situations in South Africa carried riot shields or batons the way crowd controllers do everywhere else in the world. They wore camouflage battle dress and carried only lethal weapons—12-gauge shotguns loaded with buckshot and submachine guns. It meant shooting was their first, not their last, resort in case of trouble.

Beyond employing it themselves, the South African government also sanctioned the use of violence, in order to obtain and maintain control. Due to “enforced conscription that helped prop up” the apartheid state, the government ensured that white South Africans were heavily armed. However, apartheid capitalized not only “on the physical violence of contestation,” but also on structural economic violence; Black people were systematically brutalized “through various forms of impoverishment, displacement, disenfranchisement and military occupation. . . .” Children were therefore socialized into societies that had violence interwoven into their very fabric. Thus, the failure to dismantle what Cock refers to as the “ideology of militarism” which “regards violence as a legitimate solution to conflict and a crucial means of obtaining and defending power” in a new South Africa is, Gqola asserts, “directly implicated in what ails post-apartheid South Africa.”

Not only was the apartheid state violent in its bones, but it was also defined at its core by antagonistic social identities.

197. Id. at 791.
200. Brown, supra note 9, at 50.
201. Gqola, supra note 195, at 60.
202. Id.
203. Id.
205. Id.
206. Gqola, supra note 195, at 60.
207. See Nevin T. Aiken, Post-Conflict Peacebuilding and the Politics of Identity: Insights
were based not only in the obvious racial identities, but also functioning in contrast to and in concert with, the gendered dimension.\textsuperscript{208} To both Black men and Black women, apartheid applied a policy of rendering “adult Africans as designated boys and girls, legally and economically infantilized.”\textsuperscript{209} This was perceived as an attack on African male masculinity and “left deep seated feelings of aggression.”\textsuperscript{210} Traditional male masculinity, which was conceptualized as independence and autonomy, was challenged comprehensively through the consistent “policing and surveillance of [B]lack men’s daily lives and the violent assertion of state authority in demeaning ways.”\textsuperscript{211} The emasculation of Black men took many forms, and resulted in—as Matshoba writes of himself—“that component of me which is man has died countless times in one lifetime.”\textsuperscript{212} The aim of the state, through its “calculated and specific assertion of . . . authority,” was to deny Black men the ability to manifest their masculinity “as protectors and economic providers.”\textsuperscript{213} Masculinities were also framed in relation to and dependent on women: whether in labeling African men as “hypersexual, innately lascivious, sexually violent and physically strong”\textsuperscript{214} or in meting out punishment to men through the subjugation and dehumanization of African women.\textsuperscript{215}

Meanwhile, Black women were impacted very specifically by this authoritarian regime: coupled with colonization, apartheid ravaged and depleted the democratic strength remaining in African traditions, emphasizing “vertical power and patriarchy” and leaving African women in what Romany describes as the “pitiless zone where the different patriarchies meet.”\textsuperscript{216} On the one hand, apartheid’s laws and system of migrant labor “devastated [B]lack women’s everyday lives,” making decent work of depriving them of companionship and support and rending their families,\textsuperscript{217} while its enforcers used the

\textit{for Restoration and Reconciliation in Transitional Justice, 40 CAN. J. PEACE & CONFLICT STUD. 9, 17 (2008).}


\textsuperscript{210.} Id.

\textsuperscript{211.} Swarr, supra note 180, at 964.

\textsuperscript{212.} Mtutuzeli Matshoba, \textit{CALL ME NOT A MAN AND OTHER STORIES} 18 (1979).

\textsuperscript{213.} Swarr, supra note 180, at 964.

\textsuperscript{214.} \textit{Id.} at 964–65.

\textsuperscript{215.} See MATSHOBA, supra note 212, at 18 (describing as part of the demeaning treatment of Black men that “sometimes calling my sisters into the game to get amorous with my captors, allowing myself to be slapped on the mouth in front of my womenfolk and getting sworn at with my mother’s private parts[.]”)


\textsuperscript{217.} Id.
threat of, and actual, sexual violence as a tool of political control. On the other hand, the driving of violence into intimate and domestic spaces, perceived by Black males as a way to reassert their masculinities in areas where they still had power, led to the proliferation of sexual violence against Black women in their homes. Resultantly, rape statistics escalated exponentially but went unaddressed. Additionally, the police apparatus, created for the protection of whites on the one hand, and the control and neglect of Blacks on the other, meant that violence against women in the isolated, poor, repressive townships (ergo Black women) went unchecked and uninvestigated. Permitting violence in the townships, as Di Silvio argues, was also in part due to the fact that “reports of violence fueled pro-segregation sentiments, an important underpinning of apartheid.” Today, the criminal justice system is not faring much better: victims, who are predominantly from the townships, are often too scared to report anti-gay hate crimes, especially if they are Black or womxn. This is at least partially attributable, according to Wells’ study, to the racialized schism in experiences with police, which is disproportionately negative amongst Blacks. For those that do, they are subject to secondary victimization by the police—their testimonials are rife with narratives of violence peppered with homophobia, such as being told that “[t]hey are raping you because you act as a man.”

Social relations, down to the nuclear family unit, were constructed to comply with apartheid’s white-centric rubric: aversion to racial integration was closely linked to the “preservation of the white, heterosexual reproductive family.” However, this centering of whiteness also made space for, and extended to homosexual desire, wherein white male homosexuality was presented as normal and

---

220. Moffett, * supra* note 33, at 139.
223. *Id.*
225. See *id.* at 26–27.
acceptable in South African society. A direct response, then, following emancipation from the oppressive racial regime, was a construction of heterosexuality as a “natural South African characteristic,” and the cultural acceptance of homosexuality solely as the province of whiteness. Bajaha terms this phenomenon “post-colonial amnesia” — a choice to ignore the proven existence and acceptance of homosexuality on the African continent long before colonization and Western influence. This amnesia is propped up by colonial and post-colonial evangelizing. Since culture determines acceptable behavior and identities, the entrenched “homosexuality is un-African” ideology is particularly harmful, further marginalizing Black queer identities. Speaking specifically to the situation of Black lesbians, cultural rhetoric has for decades been filled with accusations that they are “betraying their traditional roles asbearers and reproducers of cultural traditions.” During apartheid, lesbians remained largely invisible to the state government, because they were assumed to be far fewer compared to homosexual men. Today, the visibility of African lesbians, facilitated in part by a protective Constitution, has acquired, according to Currier and Migraine-George, “a punitive quality.” This is bolstered by the “cultural valorization of corrective rape,” further entrenching the normalization of this form of violence in South African society. As Deane aptly puts it, corrective rape is viewed as a “rite of passage” back into African culture, and thus acceptable as it fulfills the role of bringing these womxn back to their “proper’ role in society.”

The complex interplay between African culture, and the legacy of apartheid and colonization, birthed hierarchical social stratifications, violent masculinities, pernicious heteronormative underpinnings of
social relations, vitriolic patriarchal imperatives, repressive silence, elusive justice and stifling poverty, amidst other outcomes, that have, and continue to, determine the fate of Black lesbians in South Africa.

B. Social Interventions and Their Impact: Assimilating Public Health Strategies

1. Education-Entertainment as a Powerful Force for Change

To successfully tackle corrective rape, disrupting heteronormativity and the violent, hierarchical masculinities it breeds in the South African context, is mandatory. This is part of the huge project that is the dismantling of patriarchies globally.241 Education is paramount to such disruption. Over the last couple of decades, the use of education-entertainment (edutainment or infotainment) has emerged as an effective intervention in tackling various socio-political problems.242 In South Africa, the television and radio entertainment program “Soul City” that airs weekly, has been extremely successful at addressing intimate partner violence and was labelled a “transformative force” due to the change in thinking, cultural and social norms that it instigated.243 In fact, it is the most well-developed and studied edutainment program targeting gender norms,244 and as such its impact has been widely measured and analyzed. An initiative of the non-profit organization Soul City Institute for Health and Development Communication, the core of Soul City’s strategy is “harnessing popular culture and communication to bring about social change.”245 One particular storyline centering around the character of a well-respected teacher who chronically abused his wife was pivotal, highlighting the initial reactions from the community and her family and the subsequent progressive shift in perceptions around the abuse, from being in favor of the teacher to expressing support and protection of the wife.246 Soul City targets what are known as

241. Moffett, supra note 33, at 144.
244. ELIZABETH LEVY PALUCK, LAURIE BALL, CHLOE POYNTON & SARAH SIELOFF, INT’L RESCUE COMM., SOCIAL NORMS MARKETING AIMED AT GENDER BASED VIOLENCE: A LITERATURE REVIEW AND CRITICAL ASSESSMENT 22 (2010).
246. Soul City: A Strategy for Small-Screen Education, SOUTH AFRICAN INSTITUTE OF
injunctive norms, a person’s belief about what others will look at with approval or disapproval, by portraying neighbors who disapprove of a man who abuses his wife, thereby communicating the notion that domestic violence or interpersonal violence (IPV) should not be acceptable in such a community. It also seeks to replace old norms with new ones, by “modeling desirable community responses to domestic violence.” For example, the neighbors begin to disapprove vocally of the teacher’s abusive behavior by banging pots and pans outside his door. The show also utilizes key characters to erode harmful descriptive norms, one’s belief about how others will behave such as the normalcy of domestic abuse.

Media-stimulated change has been studied extensively in India, including through an impact analysis of a radio soap opera which challenged casteism. Here, there is a distinction between first- and second-order social change. First-order change “occurs within the given system which itself remains unchanged,” while second-order change is changing the system itself. The latter traverses behavioral modification to encompass a change in values—a value modification. For value modification to occur, several conditions must be met. First, audience members must be introduced to new stories that resonate with their own realities, which prompts them to reflect on the characters’ actions, helping them to identify behavioral alternatives in their lives. These stories must “embody dramatically different solutions to old problems,” and these solutions must be comprised of techniques that deal with the “here and now”
to effect a change. However, learning new behaviors through media is merely the first step; clarifying any fears or doubts about enacting the new behavior is crucial to their seamless introduction into the social context. This is best addressed through collective efficacy because such change is “embedded within a network of social influences.” Collective efficacy is rooted in the belief that as a group, individuals can execute actions geared toward joint goals. Discussions among audience members regarding the media content bolster their will to act collectively. Afterward, a new “critical action” must be introduced that “reframes an existing reality.” For example, the banging of pots by neighbors in Soul City inspired a neighborhood in a local township to intervene in a domestic abuse situation, which within a year spread to other neighborhoods across the country. Once a second-order change has gained legitimacy in any social setting, “amplification” occurs. This involves the spread of that norm to a different setting through a natural modification. For example, disapproval of intimate partner violence outside the home, for example at a bar, may take the form of banging bottles as opposed to pots and pans. Eventually, amplification leads to the normalization of new “values, norms and actions” in a society.

However, social change is non-linear and rather proceeds in a circuitous manner. Individuals may develop collective efficacy but jointly devise an ineffective solution. Further, there may be community resistance to new behaviors. Additionally, power and power distributions mediate the extent to which one can overcome restrictions to change, and where one is situated in a social system, is determinative of how and to what extent one can resist and subvert the system. Scholars emphasize that this is a complex interplay and encourage further study of the same.

Applied to socio-cultural attitudes on lesbianism and corrective rape in local communities in South Africa, edutainment appears to

262. Singhal et al., supra note 253, at 273.
263. Papa et al., supra note 259, at 36.
264. Singhal et al., supra note 253, at 273.
265. Id. at 274.
266. Id.
267. Id.
268. Id.
269. Id.
270. Singhal et al., supra note 253, at 274.
271. Papa et al., supra note 259, at 37.
272. Id.
273. Id.
274. Id.
hold the potential to instigate second-order social change. By targeting injunctive norms around homophobia and gender-based violence— for example by portraying an accepting community that is welcoming of visibly “out” lesbians—and challenging harmful prescriptive norms such as the banality and frequency of corrective rape especially of masculine presenting “butch” lesbians, or the “un-African” nature of homosexuality, South Africans can begin to challenge their biases and prejudices. New injunctive norms can then replace old norms, for example by assigning a protective role to community members who carry out citizens’ arrests of known perpetrators, corroborate survivors’ testimonies and fundamentally denounce bigotry.

2. Shifting Community Discourse Through “Organized Diffusion”

Despite education being a powerful avenue for change, Nel argues that it is insufficient, and he instead advocates for “community rhetoric disruption” aimed at tackling intolerance present in communities.275 Such interventions have been analyzed by global health experts with regard to changing social norms in order to improve health outcomes in communities.276 An effective tool that is widely accepted is community discussions where “members of the same group identify local harmful practices and the norms that sustain them, eventually renegotiating both to achieve greater health, well-being, and empowerment for themselves and others in their group.”277 However, community dialogues are limited in reach, due to their resource and labor-intense nature.278 As a modification, some argue for “organized diffusion.”279 Here, program participants, encouraged by health practitioners, lead the sharing of knowledge with non-participants such that discussions are diffused further and wider in communities.280 This aligns with Lundgren’s emphasis on stakeholder engagement as critical to successfully scaling up change.281 Mackie and LeJeune identified six phases in the knowledge diffusion process,282 which have been summarized as follows:

276. See id. at 5.
277. Cislaghi et al., supra note 247, at 936.
278. Id. at 937.
279. See, e.g., id.
280. Id.
Phase one includes the discussions happening before the program, as rumors about the intervention generate curiosity. Phase two refers to the creation of the new knowledge with a selected group of participants. In phase three, participants share their knowledge with one ‘adopted’ member in their community: usually a family member with whom they discuss what was interesting to them during project activities that day. Then, in phases four to six, information spreads out from the intervention community to new communities, eventually reaching people across the entire larger group (ethnic group, region, or country).283

Applying this theory to three interventions mostly focused on violence against women, Cislaghi et al. demonstrate the potential for organized diffusion, finding that it did indeed increase the positive changes in behaviors which were sustained by social norms that were harmful.284 For example, findings from one of the interventions showed that “[l]iving in a high diffusion community was associated with greater odds of assisting a survivor. . . .”285 The efficacy of organized diffusion rests on communication; for the listener’s opinions to be affected, the speaker needs to tailor an appropriate message.286 Diffusion is facilitated better when the parties know each other well, for example a spouse or neighbor.287 Additionally, “a core group of motivated activists” who can increase awareness of individual and collective dissatisfaction of the status quo is crucial.288 As more people are reached in the community, conversations generate new visions of a transformed status quo, and this in turn strengthens the collective will to address the dissatisfaction.289 The success of diffusion is also predicated on participants being properly equipped with the skills and knowledge to engage others in their network of transformative conversations.290

The effectiveness of organized diffusion is supported by research findings that “community-level norm change holds great promise for substantially reducing the perpetration of interpersonal violence (IPV) in low-resource settings,”291 and that “community norms have a significant role in mediating violence.”292 Transposing these findings

283. Cislaghi et al., supra note 247, at 937.
284. Id. at 944.
285. Id. at 941.
286. Id. at 943.
287. Id. at 944.
288. Id.
289. See Cislaghi et al., supra note 247, at 944.
290. Id.
291. SOCIAL AND CULTURAL NORMS, supra note 281, at 2.
292. Id.
to corrective rape, community interventions in the impoverished townships—which have the worst rates of hate crimes against lesbians—may benefit greatly from incorporating not only community dialogues but also organized diffusion. This would mean participants cultivating increased accountability of community members they influence, and challenging them to protect lesbians in their neighborhoods, moving toward zero tolerance of corrective rape.

**CONCLUSION**

Corrective rape is not a novel phenomenon. While the term was coined in 2008, reports citing the existence of this particular form of targeted, abhorrent violence emerged as early as 2006 and had likely begun much earlier. The definition of corrective rape has evolved since, and broadly encompasses two key features, *viz*; a corrective or curative element, and a component of hate or prejudice that determines who is targeted by a perpetrator, and why. Corrective rape is therefore best described as such: a hate crime entailing the rape of any member of a group that does not conform to gender or sexual orientation norms where the motive of the perpetrator is to “correct” the individual, fundamentally combining gender-based violence and homophobic violence. In the South African context, these biases intersect with systemic racism, producing a disproportionate impact on Black, queer, womxn. This Article strives to reconcile South Africa’s seemingly robust legal advancements with a society whose mores and attitudes do not reflect the same progressiveness. This is done by identifying the substantive and procedural gaps that have allowed this specific type of violence against Black lesbians to go unabated, as well as by diving deep into the historical and sociological background of modern-day South African society.

In interrogating the legislative framework and criminal justice system of South Africa, the complex, contrarian-in-nature relationship that exists between the state and the victim of a sexual offense was highlighted. In particular, the dual role played by the state as both “a locus of control over women’s sexuality and agency, as well as a site for protection, liberation and justice.” Constitutional entitlements as well as the reform of rape laws can, on the one hand, be described as the long-awaited and needed catalyst to revolutionize criminal justice responses to victims of sexual offenses. However, on the other hand, significant omissions such as “sexual orientation”

---


294. *Id.*

295. See Koraan & Geduld, *supra* note 26, at 1932.
as a ground contemplated in the “special measures” clause of the
Equality Act, and the failure to expressly, and separately, outline
corrective rape in the criminal law amendment Act, severely denigrate
the impact of these laws, as applied to corrective rape in particu-
lar.296 Further, the absence of hate crime legislation entirely ignores
the waves of extra harm caused by corrective rape, beyond the indi-
vidual. That being said, the law can still be a site for protection;
the enactment of hate crime legislation, framed pragmatically, as well
as constitutional challenges to the state’s current failure to curb this
phenomenon, may yet be the portended elixir for a nation with a
sexual violence pandemic.

With regard to society, the roots of homophobia, gender-based
violence and systemic racism in South Africa run deep. While colo-
nialism and apartheid are ostensibly dead, their legacies persist,
intersecting with a strict post-colonial/apartheid conception of
African culture to legitimize the worst forms of violence against
women, specifically Black lesbians. While undeniably instrumental,
uprooting these entrenched systems and structures cannot solely be
the law’s province. Social interventions are therefore inherently
necessary to change patriarchal, heterosexist and homophobic socio-
cultural norms that facilitate and endorse at worst, and tolerate at
best, the corrective rape of Black lesbians in South Africa. Further, not
only would changing attitudes reduce the crime rate, but also trig-
ger greater prosecution within law enforcement, and reduce second-
ary victimization of survivors. However, adopting a new cultural nar-
rative and unlearning traditional norms around gender and sexual-
ity takes time,297 and as demonstrated by the Theron Campaign,
merits a very careful consideration of context.298 Two proven social
interventions, edutainment and organized diffusion, are analyzed and
found to be suitable, albeit unexplored, strategies to effectively
transform social norms and attitudes around the corrective rape of
Black lesbians in South Africa. That being said, the study of societ-
ies and community behavior is a complex field, and an appreciation
of the intricacies involved in societal transformation warrants
further research before the implementation of serious interventions
to deal with corrective rape (and other social issues).

296. See Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000,
supra note 83, at 28(1); Koraan & Geduld, supra note 26, at 1939. 297. Erika Carpenter,
Impact of School-Based Sex Education on College Students’ Rape Myth Acceptance: An Exploratory
298. See Moffett, supra note 33, at 133.