

CORRECTIVE RAPE: A REFLECTION OF HOMOPHOBIA DISREGARDED BY LAW IN SOUTH AFRICA

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Abstract

Tokenisation of rights is the manifestation of political opportunism and broadcasted hypocrisy. South Africa is one of the only countries in the world that expressly mentions and prohibits in its Constitution the discrimination on the basis of sexual orientation. However, crimes based on sexual orientation are not expressly recognized. It remains a theoretical concept due to lack of recognition as an established crime category with no procedural patronage. Battles over LGBTQ+ rights are persistent and stubborn. Various forms of gender-biased offences are time again noted ranging from sodomy, sexual assault, rape to murder. The umbrella-term for all these prejudice-motivated crimes is Hate crimes. One of the popular hate-crimes in South Africa is corrective rape. South Africa is the foreground of homophobic violence, most widely vis-à-vis Black South Africans. Unfortunately, the sense of equality and justice enshrined in the Constitution does not trickle down to the targeted groups. The article attempts to highlight this lacuna created between the promise of equality preserved in the South African Constitution and the contradictory functioning of the statutes and the criminal justice system in the country with respect to corrective rape cases. The article further delves into the nuances of corrective rape practices prevalent in South Africa vis-à-vis current laws against sexual offences and indicates the impending need for a separate hate-crime legislation to obtain the true benefits of rights. Lastly, the article advocates for a discriminatory-model of prosecution and underlines deficiencies in the new hate crime legislative bill in South Africa.

Introduction

April 28, 2008: A bloody, lifeless body of a woman was found naked and face down in a drainage ditch near Johannesburg, South Africa. She had been gang raped, savagely beaten,

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and stabbed twenty-five times all over her body. Her name was Eudy Simelane, and she was a famous player on South Africa's national soccer team, an activist for equal rights, and one of the first openly lesbian women in the region.²

The term 'corrective rape' is an ironic misnomer used to describe an act of sexual assault that attempts to rectify perceived deviant, lesbian, or homosexual behaviour.³ It is a punishment for being gay and for violating the traditional gender roles. The most common victims are lesbians, transgender men, and asexual women. The frequent occurrences of this practice in South Africa and now in most other jurisdictions like Thailand, Zimbabwe, Ecuador, Uganda, Jamaica, and India can be attributed to the rooted misogyny and heteronormativity in the social order. Michael Warner defined the term heteronormativity as "the institutions, structures of understanding, and practical orientations that make heterosexuality not only seem coherent - that is organised as a sexuality - but also privileged."⁴ The beliefs of these heteronormative and homosexist cultures are driven by gender role expectations, failing which the homosexuals are subjected to violent practices like corrective rape. In addition to a profound form of brutality and vindictiveness from the society, the victims of corrective rape also experience uncertainty from within the legal system as highlighted above. In practice, the crimes based on sexual orientation either go unreported or do not reach the stage of trial. Further, it is inequitable to adjudicate corrective rape cases under the existing laws governing sexual offences in South Africa. Corrective rape is a hate crime and demands a specific hate crime legislation supported by necessary resources

²Sarah Doan-Minh, *Corrective Rape: An Extreme Manifestation of Discrimination and the State's Complicity in Sexual Violence* 30 HASTINGS WOMEN'S LAW JOURNAL 167 (2019)

³Marchant van der Schyff, *An Issue Of Social And Political Salience: A Content Analysis Of How South African Newspapers Report On 'Corrective Rape'* GLOBAL MEDIA JOURNAL (2018)
<https://globalmedia.journals.ac.za/pub/article/view/281>

⁴ Michael Warner, *Fear of a Queer Planet*, Social Text 3 (1991)

to investigate and bring this crime to the courts. This article seeks to grasp the status quo of corrective rape as an offence and propose recommendations under the existing law to effectively ascertain the culpability of the offenders.

Status quo

It is often assumed that instances of corrective rape occur in third-world countries which are less-civilized, and war torn or where homosexuality is considered a criminal offence. However, this assumption fails when grave instances of corrective rape are reported in the most sought after and progressive nations like South Africa and the United States. In the latter the cases of corrective rape are ignored or de-emphasized by framing it as a ‘family matter’ or the non-consensual nature of such acts is subsumed into the language of law. There have been cases where the perpetrator has gotten away with committing the crime due to lack of recognition of corrective rape as a crime. In the American case of *State v. Dutton*⁵, the complainant approached her therapist for counseling regarding suicidal thoughts and low self-esteem. She stated her desire to be asexual. During their discussion about sex, she was told that they would be working on her ‘sexuality’ together. He had sexual intercourse with her multiple times, all the while claiming it to be ‘consistent with her treatment’. The accused claimed that he had a right to participate in consensual sexual activity with another adult. However, the fact that the complainant was a counselling patient unable to withhold consent was overlooked by the Court. Eventually, the accused was set free.

In a relatively less developed country like India, non-recognition of the crime is even more prevalent. According to data from the Crisis Intervention Team of LGBT Collective in Telangana, there were fifteen reported instances of corrective rape from 2009-2014.⁶ However,

⁵ *State v. Dutton*, 450 US 189, 191 (1990)

⁶ MM Veticad, Anna, *India's Bollywood Speaks Out Against Rape Aljazeera* (Delhi, 10 July 2014)

these cases never went to trial because of the entrenched heteronormative beliefs and the lacuna created due to the gendered language of rape laws. Interestingly, this was a period when the LGBTQ+ community in India was under the microscope because of the on-going proceedings around decriminalization of homosexuality under Section 377 of the Indian Penal Code, 1860.

In South Africa, a gay advocacy group estimated the number of corrective rape cases to an even ten per week in Cape Town.⁷ For every twenty-five men brought to trial for rape in South Africa, twenty-four walk free.⁸ One of the primary reasons for which is that corrective rape reports are not separated from general rape reports.⁹ In South Africa, evidence of specific prejudice as a motivating factor in an offence is rarely investigated by the police.¹⁰ This is a classic reflection of what is called procedural injustice. The aforementioned case of Eudy Simelane was the very first reported and highlighted case of corrective rape in South Africa. The term corrective rape was devised after this incident. The motive of prejudice against sexual orientation was never established at the trial. The judges were uncomfortable with the term lesbian itself. The prosecutor was specifically asked if he could use any other word instead.¹¹ Eventually, the accused were only sentenced for murder. Such grave miscarriage of justice reflects the failure of the South African Parliament and Courts to uphold the post-apartheid promise of equality. Corrective rape is indeed the homophobic fallout of post-apartheid South Africa.¹²

⁷ IRIN, *South Africa: Activism makes inroads on 'corrective rape'* (IRIN, 15 March 2011) <https://www.refworld.org/docid/4d82fb0fc.html>

⁸ Lisa Vetten, *Tracking Justice: The Attrition of Rape Cases through the Criminal Justice System in Gauteng* TSHWARANANG LEGAL ADVOCACY CENTRE TO END VIOLENCE AGAINST WOMEN (TLAC) (2008) https://www.csvr.org.za/docs/tracking_justice.pdf

⁹ Mabuse, Nkepile. *Horror of South Africa's 'corrective rape'* CNN CABLE NEWS NETWORK (28 October, 2011) <https://edition.cnn.com/2011/10/27/world/wus-sa-rapes/index.html>

¹⁰ Hate Crimes Working Group, *Why Does South Africa Need Hate Crime Legislation* <https://www.saferspaces.org.za/uploads/files/Advocacy-Brief.pdf>

¹¹ Doan-Minh, *Supra* note 1

¹² Daniel Sanderson et al., *Corrective rape: The homophobic fallout of post-apartheid South Africa* THE TELEGRAPH (2015) <https://www.telegraph.co.uk/women/womens-life/11608361/Corrective-rape-The-homophobic-fallout-of-post-apartheid-South-Africa.html>

The role of criminal law is to not only to punish, but also have an effect where members of society abide regardless of whether the statutory obligations are applied or not. Particularly with the offence of corrective rape, there must be a separation of the teaching function from the mere threat of punishment as these cases ordinarily go unreported. It is difficult to achieve the former as according to the perpetrator he is helping the victim by raping them. The motive behind the act is thought to be assistance. The perpetrator's psychological attitude is that the act is in the victim's interest as if they are able to regain their heterosexuality they would not have to suffer anymore. Apparently, the perpetrator's conscience is clear because, in their minds, it was the victim's choice to violate gender norms.¹³ In case of transgender men having female genitalia, corrective rape constitutes a large part of violence. It is a reminder from the perpetrator that the trans men are women after all, and they will be treated as such, as biology is destiny, and these individuals have no right to act as if they are men. Thus, punishment in the form of deterrence needs to be established or else the perpetrators will start believing that there is a need for these individuals belonging to these groups to be raped. This conditioning and culture of rape is dangerous and unfortunately it has already been passed onto the younger generation. A report by South Africa's Human Rights Commission revealed that the phenomenon of corrective rape is growing in schools across the country as young boys have started believing that lesbian girls need to be raped for correction of their sexual orientation.¹⁴

Locating corrective rape under the law

The terms hate crime and bias crimes were coined in the United States during the 1980s. Boyd defines hate-motivated crimes as 'crimes committed against persons or property that are

¹³Susan Hawthorne, *Ancient Hatred and Its Contemporary Manifestation: The Torture of Lesbians* 4 JOURNAL OF HATE STUDIES 33, 47 (2005)

¹⁴South African Human Rights Commission, *Report of the Public Hearing on School-based violence* (HR Comm 2008) 9

motivated by the perpetrator's hatred or prejudice against the racial, ethnic, religious, or sexual identity of the victim.¹⁵ In other words, it materialises from the prejudice that the perpetrator holds against an entire group of people but is targeted at the available victim. Corrective rape is a form of hate crime committed against the members of the LGBTQ+ community due to the prejudice against their sexual orientation. Thus, it is a bias-motivated crime. The most fundamental role of a legal system in a country is to provide justice and adequate remedy to individuals whose rights have been hampered with. In the political paradigm, if Plato were correct and democracy does 'dispense a sort of equality to equals and un-equals alike', then the current laws in South Africa on sexual offences would appear to be successful in implementing this rule of law for the benefit of only the equals i.e. heterosexual victims.¹⁶ Despite a new amendment in the Sexual Offences Act in 2007 with respect to gender-neutralisation of the language of provisions, the general tenor of the statute is still homophobic and fails to take into account that rape, especially corrective rape, can be used as a weapon for discriminating against a minority group. Corrective rape of lesbians is investigated and prosecuted like any other rape case, regardless of whether the crime was committed because of the accused's bias towards the group as a whole.¹⁷

The Sexual Offences Act makes no mention of corrective rape and thus fails to address its punishment in terms penal consequences and thereof its interpretation by the courts under the statute. Meanwhile, the equality courts provide only a civil-avenue alternative. The equality courts may be seen as providing a civil remedy for equality infringements due to the procedures in place, but it cannot be argued that they can present a remedy in the case of hate crimes such

¹⁵EA Boyd, RA Berk, KM Hamner, *Motivated by hatred or prejudice": categorization of hate-motivated crimes in two police divisions* LAW & SOCIETY REVIEW 819 (1996)

¹⁶Plato, *The Republic* (first published in 1943, Books, Inc.) 558

¹⁷Naidoo K and Karels M *Hate Crimes Against Black Lesbian South Africans: Where Race, Sexual Orientation and Gender Collide (Part I)* OBITER 236-259 (2012)

as corrective rape and murder motivated by prejudice to sexual orientation unless such jurisdiction is granted to them by law.

The decision-making in the criminal courts in relation to corrective rape cases is unconvincing for the victims. The theory of criminal law suggests that intention is a criminal element and the motive of the perpetrator with which the crime is committed is extrinsic to it. According to Naidoo 'the South African court system refuses to recognise motive in its pure form'¹⁸. It follows the general rule of intention laid down in the criminal law theory that the motive is admissible when it is used to implicate the accused in the commission of a crime or to establish intention, but that intention may be proved without any reference to motive. Thus, under the existing rape laws motive can be used in proving the element of intention, but the accused cannot be held liable on the basis of a biased motive. Hence, corrective rape cannot be prosecuted under the existing rape laws.

Distinguishing corrective rape as a hate crime from other types of crimes in policy and legislation is essential. Firstly, it will allow greater scrutiny over such violence and enable the authorities to keep track of hate crime patterns across the country in order to decide where specific measures are required. It will help in recognising the social impact of hate crimes because of the message such crimes send to a victim's community.¹⁹ Currently, an assault motivated by a person's sexual orientation may only be treated as an assault, thus the criminal justice system fails to appropriately respond to it. The failure of categorising corrective rape as a separate hate crime makes it difficult to convict the accused and almost impossible to determine how many of these assaults were against females or how many were committed with a biased motive. Hate crimes should be addressed systematically through the courts and public

¹⁸*Id.*

¹⁹Hate Crimes Working Group, *Why Does South Africa Need Hate Crime Legislation*
<https://www.saferspaces.org.za/uploads/files/Advocacy-Brief.pdf>

pronouncements to send a clear message that hate crimes will not be allowed and that criminals will not be able to perpetrate them with a law-enabled immunity. Lastly, recognising it as a hate crime will usher in a multi-sectoral and comprehensive response to hate crimes, which is currently absent in government and civil society responses. Hate crimes necessitate the development of policies by a number of stakeholders and service providers, including police officers, hospital and clinic staff, and court officials, to prevent and discourage future hate crimes. According to the Hate Crimes Working Group, this may include forcing police to investigate evidence of a prejudice motive, hospitals and clinics to take efforts to minimise secondary victimisation while supporting hate crime victims, and prosecutors and courts to use the available tools.

Intersectionality of biases also arises in cases of corrective rape of black-lesbian-women with multiplicity of motives. Thus, if the rape is committed with a biased-motive of hatred towards a particular group or groups, then it should have a more rigorous punishment as the victim is targeted solely because of their association with a particular group. Hence, it is contended that there is an urgent need to recognise corrective rape as a hate crime and institute a separate legislation along with procedure to follow up on violation.

Recommended solutions and the way ahead

The notion of equality is a fundamental one in the South African Constitution. This means that it is concerned not only with providing equal opportunity for everybody, but also with ensuring that each individual has an equal experience with others. In order to achieve this, the equality clause focuses itself on providing relief. Substantive equality says that we are not all treated equally, but that we might be treated differently as long as the ultimate effect is that we are all

treated equally.²⁰ Thus, in consistence with the constitutional principles of South Africa a discriminatory-selection model for prosecuting hate crimes is advocated. A report by International Association of Prosecutors on prosecuting hate crimes suggests a discriminatory-selection model where, ‘the victim is targeted purely for his or her membership of a specific group. No hatred towards the person or group needs to be proven. Only a causal link needs to be proven between the conduct of the accused and the particular characteristic of the victim which makes them be recognized as part of a specific group.’²¹ Employing such a model for prosecuting cases of corrective rape will reduce subjectivity in proving the element of hatred which is otherwise mandatory to be proven in Hate crime cases. In the public domain, inculcation of such a discriminatory-selection model will serve the twin-purpose of improved conviction rates and restoration of public faith in the criminal justice system.

In addition to institution of separate hate-crime legislation the South African government can employ quick solutions for kick-starting the protection of LGBTQ+ rights. Firstly, demonstrate their commitment by withdrawing abstinence to the UN Human Rights Council’s resolution of 2016 on ‘Protection against violence and discrimination based on sexual orientation and gender identity’.²² Secondly, by providing adequate resources and training to police and the judiciary. Thirdly, to highlight the rooted hatred, the South African government should include sexual orientation as ground for protection against hate speech – already a recognised crime.

On 13 March 2011, ‘Ndumie Funda petitioned the South African government to fight corrective rape of lesbians. 171,000 people joined from 175 countries, mobilizing a protest in

²⁰*Id.*

²¹ Office for Democratic Institutions and Human Rights (ODIHR), *International Association of Prosecutors, Prosecuting Hate Crimes: A Practical Guide* <https://www.osce.org/odihr/prosecutorsguide?download=true>

²² Human Rights Council, *Protection against violence and discrimination based on sexual orientation and gender identity* (15 July 2016 A/HRC/RES/32/2) https://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/RES/32/2

front of Parliament.²³ Owing to the intense international pressure and scrutiny, the South African Parliament agreed to launch a National Task Team to end corrective rape. However, no formal legal mechanism was drawn out. Up until 2018, in the absence of any official monitoring of corrective rape cases the work of recording hate crimes was prepared by several different civil society organisations in South Africa. These efforts attempted to create a systematic and accurate evidence base that would force policymakers to consider the nature and scope of hate crimes in South Africa, their influence on social cohesion, and trends in government and civil society responses to hate crimes.

Owing to the international pressure, the South African Parliament in 2018 introduced the Prevention and Combating of Hate Crimes and Hate Speech Bill. The Bill provides for penal consequences of committing a hate crime including the ones based on the prejudice against sexual orientation. However, the Bill only provides the substantive part of the law, thereby neglecting the procedural backing which is imperative for successful integration and implementation of the new law into the criminal justice system. The objective of hate crimes legislation is not only to increase consciousness towards occurrences of corrective rape but also to provide the victims with a sound legal mechanism to exercise their right to equality and dignity violated by such crimes. The Bill is currently being contested at the Parliament and it is hoped that a suitable procedural aid will be provided in the final legislation.

Conclusion

In wake of increasing consciousness towards LGBTQ+ rights all over the world, institution of hate crime legislation for protection against violence of corrective rape and others is crucial and urgent. This ‘awareness factor’ of hate-crime legislation holds dominance over mere

²³IRIN, *supra* note 6

retributive measures of justice. It has a symbolic value which sends a clear message to society that such crimes are not tolerated. The law remains oblivious to the enrooted conditioning of corrective rape practices in the society. Even the law goes for a slump in cases where the practice is consensual. It is often introduced to children who come out to their parents as a 'reparative therapy' which they need to undergo. Law can only protect the victim if the act is non-consensual and prosecute the accused. Sexuality and bodily autonomy is central to one's personhood and thus the false idea of correcting sexual orientation either in the form of rape or therapy, assaults the very core of one's idea of self, causing a great moral injury. It is a legal fiction to bring an end to the practice of corrective rape altogether. However, recognizing it as a separate hate crime is a substantial step towards inducing deterrence and consciousness in the society. Thus, a hate crime legislation that includes robust duties for stakeholders, availability of appropriate resources for tackling cases and is fully implemented will be a powerful tool to combat these crimes.