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CORRECTIVE RAPE IN SOUTH AFRICA: A CONTINUING PLIGHT DESPITE AN INTERNATIONAL HUMAN RIGHTS RESPONSE

RODERICK BROWN*

I. INTRODUCTION

A young girl of 13 years was raped near Petroria, South Africa on May 4, 2011 because of her sexual orientation.¹ According to the 13-year-old victim, her assailant told her he was “curing” her of lesbianism. This was only one of the most recent attacks that have become unexpectedly common in the “Rainbow Nation”—a country known for its progressive constitution, and the first in the world to specifically proscribe discrimination based on sexual orientation.² Corrective rape, as it is called, has claimed many victims in South Africa and around the world. The crime has also resulted in the brutal killings of some victims, including the particularly well-known case of former South African soccer star, Eudy Simelane, who was gang raped and stabbed to death in 2008 because of her sexual orientation.

The term “corrective rape” stems from the prevalence of the crime in South Africa, where it is used to describe rape perpetrated by straight men against lesbian women in order to “correct” or “cure” their

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1. Navi Pillay, *No Place for Homophobia Here*, THE STAR (June 14, 2011), available at <http://www.iol.co.za/the-star/no-place-for-homophobia-here-1.1083306>.

2. *South Africa: New Constitution Protects Gays and Lesbians*, INTERNATIONAL GAY AND LESBIAN HUMAN RIGHTS COMMISSION (May 05, 1996), <http://www.iglhrc.org/cgi-bin/iowa/article/takeaction/resourcecenter/73.html>.

“unnatural” sexual orientation.³ The problem is not unique to South Africa, however, with recent reports of corrective rape in Uganda, Zimbabwe and Jamaica.⁴ The term is beginning to be used more broadly to include the rape of any member of a sexual minority in an effort to “correct” them. For the purposes of this paper, however, focus will be limited to the corrective rape of lesbians, as they are the most commonly targeted for this type of attack.⁵ It is not possible to accurately quantify the number of corrective rapes that occur each year because many, if not most, incidences go unreported, and of the number of reported rapes, it is not clear how many are done with the intent of correcting the victim’s sexuality.

It is a reflection of South African social and cultural mores that homosexuals are viewed as unnatural, and in need of “curing.” This is evidenced by the fact that the perpetrators of corrective rape are not the only ones who believe in its intended purpose. Other men, not involved in the crime, have said they understand why someone would commit corrective rape,⁶ while police often do not act in response to reports of corrective rape, threats or other discriminatory acts against lesbian, gay, bisexual, transgender, and intersex (LGBTI) individuals.⁷

The social and cultural mores that lead to crimes as egregious as corrective rape exemplify the particular vulnerability of LGBTI individuals in South Africa and around the world. Corrective rape is, unfortunately, only one of many crimes that LGBTI individuals face because of a lack of understanding and acceptance by the majority population. However, given the severity of such oppression, and the willingness of the community to either condone it or disregard it, corrective rape poses a particularly serious threat to the furtherance of human rights. It follows that the presence of corrective rape calls not only for domestic legal remedies, but for international action.

3. See J.A. Nel & M. Judge, *Exploring Homophobic Victimisation in Gauteng, South Africa: Issues, Impacts and Responses*, 21(3) ACTA CRIMINOLOGICA 19, 24 n.2 (2008) (“‘Corrective rape’ seeks to justify the rape of those people who are perceived to not conform—or to disrupt—expected gender roles, behaviour and/or presentation.”); see also Navi Pillay, *supra* note 1.

4. Navi Pillay, *supra* note 1.

5. The extent to which gay men, bisexual men, and transsexuals are victims of corrective rape lies outside the scope of this paper because of infrequency with which it is reported.

6. Alexa Mieses, *Gender inequality and corrective rape of women who have sex with women*, GMHC TREATMENT ISSUES (Dec. 2009), <http://www.gmhc.org/files/editor/file/ti-1209.pdf>.

7. Annie Kelley, *Raped and Killed for Being a Lesbian: South Africa Ignores ‘Corrective’ Attacks*, GUARDIAN NEWS AND MEDIA LIMITED (Mar. 12, 2009), available at <http://www.guardian.co.uk/world/2009/mar/12/eudy-simelane-corrective-rape-south-africa>.

Despite growing attention by the media, LGBTI rights organizations, human rights organizations and scholars, the incidence of corrective rape does not seem to be curtailing. This points to a failure in legislation and law enforcement. An appropriate legislative response would make corrective rape and the threat of corrective rape hate crimes, impose mandatory minimum punishments against violators, and impose strict police regulations and penalties for inadequate enforcement of the hate crime legislation. However, the effectiveness, or rather, ineffectiveness, of legislation and law enforcement cannot be the only reason for the continued prevalence of the crime. Laws and law enforcement exist in a society of political, cultural and economic circumstances and thus, should not be considered outside the context in which these factors overlap.

Aside from news reports and blog entries by activists in the field, little has been written concerning corrective rape. Indeed, little attention has been paid to corrective rape in the context of international human rights. This paper will serve to highlight the efforts that have been taken to address the problem of corrective rape, both at an international and domestic level, the effectiveness of those efforts, and what steps need to be taken to more effectively address the problem not only in South Africa, but also across the globe.

First, this paper will discuss the historical and societal basis for corrective rape, then, its scope and presence globally. Subsequently, the paper will introduce the laws and policies that should address the problem of corrective rape, and how the South African state and citizens violate them, including, first, the international human rights framework that existed before corrective rape came into the spotlight; then, it will address the recent developments that were instituted in response to violations of LGBTI rights globally. Finally, the paper will provide specific laws and policies that should be implemented in order to provide effective and durable solutions to the problem.

A few important points should be noted at the outset of this paper. First, while corrective rape has recently been reported in states other than South Africa, including in particular, Jamaica, Uganda and Zimbabwe,⁸ this paper focuses on corrective rape in South Africa because of its prominence there, as well as the lack of information obtainable on corrective rape in other states. The recommendations in this paper should

8. Navi Pillay, *supra* note 1.

be regarded as being applicable in all states to the extent possible, however.

Second, while this paper refers to lesbians as the victims of corrective rape, it is important to keep in mind that some victims may identify as something other than lesbian. One other category of women that is sometimes referred to in studies on corrective rape and other forms of sexual violence is “women who have sex with women,” often shortened to WSW, to connote women who do not necessarily consider themselves lesbian because they may be attracted to both sexes or not identify as being exclusively attracted to women. Additionally, corrective rape might be, and undoubtedly is, committed against women who are imputed as lesbian, but who are not actually lesbian. Acting in a manner inconsistent with typical gender roles or associating with lesbians or other women who act in seemingly masculine ways, may impute the status to them, therefore placing them at risk of being raped on this assumption.

II. CORRECTIVE RAPE IS SOCIETAL

Corrective rape in South Africa is not an inexplicable phenomenon. It is steeped in culture, gender inequality, social mores, historical oppression, governmental segregation and a fear of cultural imports from the West. When all of this is unraveled, the crime of corrective rape and the hold that it has taken in this society is understandable—not in the sense that with this historical and cultural overview it becomes morally acceptable, but in that it is capable of being comprehended in a logical progression. Comprehension is important because in order to be able to address a problem, there first must be recognition of where it comes from and to what degree it exists.

A. GENDER INEQUALITY

Patriarchy is deeply rooted in South African culture.⁹ This ideology fundamentally asserts that men and women are not equal.¹⁰ This is typical of African culture in general, that men are considered to be the financial providers, while women the caretakers.¹¹ Women are supposed to work for men or with the approval of men. This ideology carries over into

9. See Audrey E. Pettifor, Diana M. Measham, Helen V. Rees, and Nancy S. Padian, *Sexual Power and HIV Risk, South Africa*, EMERGING SEXUAL DISEASE JOURNAL 10 (2004), CENTERS FOR DISEASE CONTROL AND PREVENTION available at http://wwwnc.cdc.gov/eid/article/10/11/04-0252_article.htm#suggestedcitation; see also, *A Country Study: South Africa*, LIBRARY OF CONGRESS, Call No. DT1719 .S67 1997, available at <http://lcweb2.loc.gov/frd/cs/zatoc.html>.

10. *Id.*

11. *Id.*

sexual relationships as well, where the men traditionally possess the power.¹² For example, men are permitted, even expected, to have multiple sexual partners while women cannot.¹³ Sexual refusal, questioning, or negotiating by women are not acceptable.¹⁴ More than just seeming backwards from a Western point of view, these patriarchic practices are deplorable, and paradoxical to human rights, because they are often enforced through coercion and violence.¹⁵

Largely owing to gender inequality, sexual violence in South Africa is rampant. Though statistics on rape, domestic violence, and other sexual crimes are not given great weight in most scholarly work because of the degree to which they are underreported, statistics from the United Nations evinced that South Africa has the highest recorded rates of rape per capita in the world—about 115 per 100,000 inhabitants.¹⁶ And while estimates of how many rapes actually occur, including the unreported, are even more speculative and prone to inaccuracy, they range from 360,000 to 1.6 million annually.¹⁷ High rates of rape are not only attributable to gender roles and disparities, however. Dismally low arrest and conviction rates for sexual violence deter and discourage women from reporting the assaults.¹⁸ In turn, the assumption that they will not be punished for their crimes inspires more men to commit acts of sexual violence, and to commit them more often.¹⁹

This gruesome picture for women in South Africa is not just rooted in African culture. Rather, the Apartheid government further instilled and exacerbated such gross inequities, leaving a lasting result that remains to the present day. Thus, in order to understand women's struggle for equality, and how it relays to the LGBTI struggle, we must understand the Apartheid regime's impact.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *See The Eighth United Nations Survey on Crime Trends and the Operations of Criminal Justice Systems (2001 - 2002)*, UNITED NATIONS OFFICE ON DRUGS AND CRIME, <http://www.unodc.org/pdf/crime/eighthsurvey/5678svr.pdf>.

17. Michelle J. Anderson, *Rape in South Africa*, 1 GEO. J. GENDER & L. 789, 789 (2000); also, Lorenzo di Silvio, *Correcting Corrective Rape: Carmichele and Developing South Africa's Affirmative Obligations to Prevent Violence Against Women*, 99(5) Geo. L.J. 1469, 1477 (2011).

18. Michele J. Anderson, *supra* note 17, at 811.

19. *See generally* Michele J. Anderson, *supra* note 17.

B. APARTHEID

During apartheid, the South African government employed, and in fact, officially sanctioned violence as a tool to obtain and keep control.²⁰ Consequently, this notion spread to the apartheid opponents, who recognized the necessity of using violence in order to achieve their goals.²¹ In this struggle between controlling government forces and anti-apartheid forces, women became targets of violence. The threat of rape and other sexual assault was regularly used as a political tool against female prisoners by both apartheid and anti-apartheid forces.²² “Almost all former female detainees reported that they were very afraid of being raped by their captors. Jailers exploited this fear to extract information and confessions.”²³ Other tactics included electric shocks to the breasts and genitals, unnecessary strip searches and body cavity searches, verbal insults and threats of a sexual nature.²⁴ Outside of prisons and political detentions, state forces committed acts of sexual violence against women in the general public as well.²⁵ While rape was not formally a police tactic, hospitals and human rights bodies reported that government security forces were raping countless women.²⁶

Separately, police inaction against rape and other sexual violence perpetrated by citizens was a significant source of uncontrolled violence against women.²⁷ This was a deliberate act by the apartheid government, as they intentionally segregated races, creating townships in rural areas for black and colored citizens.²⁸ Cut off from industrialization, employment and social programs, townships became pockets of extreme poverty.²⁹ In turn, these areas became overrun with acts of sexual violence due to police refusal to protect the “inferior” races.³⁰ Police were used to protect whites from blacks, not blacks from whites, and certainly not blacks from blacks.³¹

With this history of apartheid, it is hardly surprising that South Africa suffers from systemic segregation, discrimination and violence. The apartheid regime, having been the law of the land for fifty years and

20. Lorenzo di Silvio, *supra* note 16, at 1475.

21. *Id.*

22. Michele J. Anderson, *supra* note 17, at 811.

23. *Id.* at 796.

24. *Id.*

25. *Id.* at 797-798.

26. *Id.* at 798.

27. *Id.* at 796-798.

28. Lorenzo di Silvio, *supra* note 16, at 1476.

29. Michele J. Anderson, *supra* note 17, at 801-802.

30. *Id.* at 793-794.

31. *Id.*

coming to an end less than twenty years ago, can hardly be considered fleeting or a distant relic. Rather, the brutal system of fundamental inequality is something that lives on in most South Africans' psyche. "Traditional identity markers that have served so long as vital pillars of power - nation, race, gender, ethnicity, and sexual orientation - are all powerful anchoring-points both for the establishment and perpetuation of difference."³² Hence, the predisposition of South Africans to form stigmatizing judgments about what are "normal" and "abnormal" human characteristics is explicable.

C. HOMOSEXUALITY IS AFRICAN

A common conception among some African communities, including within South Africa, is that homosexuality, bisexuality and any deviation from heterosexuality is "un-African."³³ This belief is based on the idea that homosexuality was imported by whites.³⁴ The main reasons for this common misconception are three-fold: historical Southern African culture wherein homosexuality was taboo; colonial and post-colonial Christian evangelizing; and the perception that homosexuality in Africa is a product of the recent, post-apartheid, emergence of Western-backed sexual rights organizations.

While this article does not seek to explore the complete history of southern African culture, as it is an extensive subject on which entire books have been written, there are some marked commonalities among the many tribes and divergent populations that continue to impact traditions and ideologies of the region. To begin, the traditional culture that permeates South Africa and surrounding areas is very religious and very much based on long traditions of family.³⁵ Family in most parts of southern African culture is much broader than it is in the West; families are large and often extend to the entire community.³⁶ The concept of

32. J.A. Nel & M. Judge, *supra* note 3, at 21.

33. Scott Long, A. Widney Brown, and Gail Cooper, *More Than A Name: State-Sponsored Homophobia and Its Consequences in Southern Africa*, THE INTERNATIONAL GAY AND LESBIAN HUMAN RIGHTS COMMISSION 187 (2003), available at <http://www.iglhrc.org/binary-data/ATTACHMENT/file/000/000/160-1.pdf> (noting that, "In communities across South Africa, people reported to us that a concept of homosexual conduct as 'un-African' remains powerful, and repressive. Many of our interviewees, straight and gay, called it the single most common condemnation they hear").

34. *Id.*

35. See Marc Epprecht, *Understanding Homophobia in Africa Today, Struggle for Equality: Sexual Orientation, Gender Identity and Human Rights in Africa*, in *Perspectives: Political Analysis and Commentary from Africa*, THE HEINRICH BOLL FOUNDATION SOUTHERN AFRICA 10-11 (2010), available at http://www.boell.org.za/downloads/Perspectives_4-10.pdf.

36. *Id.*; see also MARC EPPRECHT, HUNGOCHANI, *THE HISTORY OF A DISSIDENT SEXUALITY IN SOUTHERN AFRICA* 25-49 (2004); see also WILLIAM J. GOODE, *WORLD REVOLUTION AND FAMILY PATTERNS* 188-190 (1963).

family in most southern African societies places significant importance on marriage and children.³⁷ These large families, and the need to produce offspring, played many functional roles: physical, for labor; political, for marital alliances and business relationships; and religious, for spiritual fulfillment.³⁸ Consequently, “sexuality was...not regarded as an individual choice or orientation but in a sense belonged to the wider community.”³⁹ Additionally, religious beliefs require secrecy, or at least modesty in public, about sexual activities.⁴⁰ Social constructions and stereotypes that accompany homosexuality, bisexuality or any other sexual “deviance” run afoul to such norms.

Religious lobbyists and other Western peddlers of strict Christian theology have considerably exacerbated the extant cultural prejudices in the region.⁴¹ During the 19th Century, European missionaries inundated Africa, believing it their duty to evangelize the supposedly godless natives.⁴² They preached the King James Bible, which specifically proscribes homosexuality.

“Indeed, the earliest documented fulminations against homosexual practice in Africa were by Europeans and Americans.”⁴³ This tradition has continued into present day, where Western “faith-based NGOs” pour considerable wealth and resources into evangelizing Africa.⁴⁴

Lastly, an absence of formal sexual education and a social stigma of sexual discourse perpetuate the idea that homosexuality did not exist before colonialism.⁴⁵ Though historical research shows that homosexuality was around long before colonialism, many Africans understand their ignorance of homosexuality as evidence that it is a social import of the West. When homosexuality, feminism, or sexual education do come to the attention of Africans it is often in the context of Western media, or Western-backed organizations, like LGBTI rights organizations.⁴⁶ Today, more than ever before, more Africans are espousing their homosexuality, there is more discussion of homosexuality and sexuality in public, and it is largely due to the emergence of Western-financed and Western-supported organizations

37. Marc Epprecht, *supra* note 35, at 12.

38. *Id.*

39. *Id.* at 12.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *See id.*; *see also*, Scott Long, *supra* note 33.

46. Marc Epprecht, *supra* note 35, at 11.

that advocate homosexual acceptability, feminism, gender equality, safe-sex practices, and open sexual dialogue.⁴⁷ This trend—that there was no discussion of homosexuality, and no apparent homosexual Africans, until Western money and influence began infiltrating the society—lends to the idea that it is a Western phenomenon, non-existent in traditional African culture.

Because LGBTI persons represent a minority, they are susceptible to being denounced as “abnormal” or “different” in any given country; but in South Africa, abnormality poses a particularly reprehensible threat to the heterosexual, patriarchal norm. When women pose this threat, the customary response of straight men is to meet it with violence. In turn, the public tacitly, or sometimes explicitly, approves violence against lesbian women.⁴⁸ For example, in a study on state-sponsored homophobia in Southern Africa conducted by Human Rights Watch and the International Gay and Lesbian Human Rights Commission, one heterosexual woman described homosexuals as “loud, alcoholic, and untrustworthy.” Another heterosexual woman said, “they are possessed by the devil, they have forked tongues. If we find them, we beat it [the devil] out of them. If we can’t, we drive them out of our village.”⁴⁹ In another report regarding corrective rape in South Africa, one man even said:

If there is someone who is trying to rape a lesbian, I can appreciate their thing. It’s just to let them know that they must be straight. For me, I have no time to rape them but if another guy wants to teach them the way, they must rape them, they must rock them. Once she gets raped, I think she’ll know which way is nice.⁵⁰

To many straight men in South Africa lesbianism is an affront to their masculinity, their power. For instance, one man who was asked about his opinion of lesbians said, “it’s like saying to us men that we are not good enough.”⁵¹

47. *Id.*

48. Scott Long, A. Widney Brown, and Gail Cooper, *supra* note 33; *See also* Andrew Martin, Annie Kelly, Laura Turquet, and Stephanie Ross, *Hate Crimes: The Rise of “Corrective Rape” in South Africa*, ACTIONAID (2009), available at http://www.actionaid.org.uk/doc_lib/correctiveraperep_final.pdf; *see also* Pumza Fihlani, *South Africa’s lesbians fear corrective rape*, BBC NEWS (June 29, 2011), available at <http://www.bbc.co.uk/news/world-africa-13908662>.

49. Scott Long, A. Widney Brown, and Gail Cooper, *supra* note 33, at 190.

50. Alexa Mieses, *supra* note 6, at 2.

51. Pumza Fihlani, *supra* note 47.

In sum, deep-rooted patriarchy, a history of state-based discrimination and violence, negligible risk of arrest or prosecution for sexual violence, and cultural and religious intolerance of homosexuality form the severe animosity towards homosexuality and other minority sexual orientations that results in widespread corrective rape. The following examination of responses by South African law and policy makers and the international community's human rights initiatives will highlight the extant framework within which South African lesbians can seek protection and redress.

III. LEGAL FRAMEWORK PROTECTING AGAINST CORRECTIVE RAPE

A. EXISTING INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

LGBTI individuals in South Africa and elsewhere in the world are provided many rights in international human rights instruments including the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Convention on the Rights of the Child; the Convention on the Elimination of All Forms of Discrimination Against Women; and the African Charter on Human and People's Rights. These instruments are intended to protect individuals from the kinds of discrimination and violence that lesbians in South Africa are facing. However, the inherent flaw in all international human rights treaties is that there is the absence of an enforcement mechanism. If states do not take an active role by implementing legislation, institutionalization, and other domestic enforcement procedures, then the treaties only provide lip service to the human rights they are intended to bestow. South Africa is a party to all of the following international human rights instruments and is therefore bound by them.

First, the International Covenant on Civil and Political Rights (ICCPR) embodies several rights that require action by the state to protect lesbians from being subjected to corrective rape. Article 2, paragraph 1 and article 26 provide for the freedom of expression. Article 2, paragraph 1 states:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex,

language, religion, political or other opinion, national or social origin, property, birth or other status.⁵²

And article 26 declares:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁵³

While sexual orientation is not specifically enumerated as a class for protection against discrimination, the Human Rights Committee, the body that oversees the implementation of the ICCPR, held in *Nicholas Toonen v. Australia*,⁵⁴ that sexual orientation was a protected status under the Covenant because “the reference to ‘sex’ in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation.”⁵⁵ Moreover, *Nicholas Toonen v. Australia*, though not binding on any state,⁵⁶ has been cited by the Constitutional Court of South Africa, when it overturned the state’s sodomy laws.⁵⁷

Officially, the South African Constitution prohibits sexual orientation-based discrimination,⁵⁸ but, in effect, it still exists. According to the Human Rights Committee, the ICCPR articles proscribing discrimination should be understood to include any act or policy that is discriminatory in purpose *or effect*.⁵⁹ Therefore, police refusal or reluctance to act when they receive reports of corrective rape, and their insufficient attempts to

52. International Covenant on Civil and Political Rights, article 2(1), Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171.

53. *Id.*, at article 26.

54. The case was a landmark human rights decision where the Human Rights Committee held that a Tasmanian law that criminalized sodomy was in violation of the ICCPR’s antidiscrimination provisions. As a result, Australia passed federal legislation repealing the law, and prohibiting future laws from arbitrarily interfering with the sexual activities of adults in private. See Gus Bernardi, *From Conflict to Convergence: The Evolution of Tasmanian Anti-Discrimination Law*, 7(1) AUSTL. J. HUM. RTS 134 (2001).

55. *Nicholas Toonen v. Australia*, Human Rights Committee, 50th Session, Case no. 488/1992, UN Doc. CCPR/c/50/D/488/1992, at 8.7.

56. MALCOLM N. SHAW, *INTERNATIONAL LAW* (6th ed. 2008), at 320.

57. *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* (CCT11/98) [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 (9 October 1998), at 46-47.

58. Constitution of the Republic of South Africa, 1996, article 9(3).

59. General Comment 18: Nondiscrimination, Human Rights Committee, 37 Session, 1989, UN Doc. HRI/GEN/1/Rev.1, at ¶ 7.

investigate, arrest, and prosecute perpetrators violates this obligation because it, in effect, does not provide lesbians and other victims of such crimes full protection of the law that other members of society receive.

ICCPR article 19, paragraph 2 provides for the freedom of expression:

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.⁶⁰

Very similarly to the right to freedom from discrimination, this right should be state practice in South Africa due to the constitution. However, LGBTI individuals are denied this right when they are mocked, ridiculed and harassed by police and other state agents after disclosing their sexual orientation to them.⁶¹

Article 21 of the ICCPR asserts that, “[t]he rights of peaceful assembly shall be recognized,” and article 22, paragraph 1 imparts that, “[e]veryone shall have the right to freedom of association with others.” Lesbians are unable to exercise these rights when police are unwilling to protect them from being subject to violence for gathering or identifying with other LGBTI individuals in bars, clubs, and other public places.⁶² Not being able to associate with other LGBTI persons while walking down the street, not being able to join a LGBTI rights group, and not being able to join in pro-LGBTI rallies for fear of corrective rape or other sexual violence that the police will not prevent or respond to are all violations of these rights that occur throughout South Africa regularly.⁶³

Article 7 of the ICCPR protects people from “torture...cruel, inhuman or degrading treatment or punishment.”⁶⁴ This provision should be understood to extend beyond the actions of state agents to include actions of private individuals if they act with impunity.⁶⁵ That is, states have a

60. International Covenant on Civil and Political Rights, article 19(2), Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171.

61. See Scott Long, A. Widney Brown, and Gail Cooper, *supra* note 33, at 198-200.

62. *Id.* at 235.

63. See *id.* at 190-196.

64. International Covenant on Civil and Political Rights, article 7, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171.

65. According to the Human Rights Committee, the body which oversees implementation of the ICCPR, stated:

duty not only to make torture, cruel, inhuman and degrading treatment a crime, but also to actively ensure that state and private actors are not violating this right. It follows that the state's inaction to prevent corrective rape and other sexual abuse against LGBTI individuals is a violation of this right.

Second, the Covenant on Economic, Social and Cultural Rights (ICESCR), article 13, paragraph 1 provides for the right to education:

The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.⁶⁶

By not providing education on homosexuality, bisexuality, transgenderism and gender identity, the state is neglecting its duties under this treaty provision. Reports from South Africa show that there is little to no education about sex, especially regarding anything that breaks from heterosexuality. In a study on state-sponsored homophobia, two women shared their experiences with the inadequacy of sexual education in their communities:

It is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity.... The Committee notes that it is not sufficient for the implementation of article 7 to prohibit such treatment or punishment or to make it a crime. States parties should inform the Committee of the legislative, administrative, judicial and other measures they take to prevent and punish acts of torture and cruel, inhuman and degrading treatment in any territory under their jurisdiction.

General Comment 20: Article 7 (Prohibition of Torture or cruel, inhuman or degrading treatment or punishment), Human Rights Committee, 44 Session, 1992, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994), at ¶¶ 2 and 8. *See also, Velasquez Rodriguez v. Honduras*, 4 Inter-American Court of Human Rights, Ser. C, No. 4, 1988, at ¶ 174 (declaring that:

The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.)

66. International Covenant on Economic, Social and Cultural Rights, article 13(1), Dec. 16, 1966, S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967), 993 U.N.T.S. 3.

In the black community it says that there is no such thing as gay and lesbian. In white and coloured communities, there is no culture and so they learned about things in school. Black communities didn't have the same kind of education and so we didn't have the opportunity to learn about these things in school.... For example I was told in school that bisexual meant someone with two sex organs. It wasn't until I got to the Triangle Project [an LGBTI advocacy organization] that I understood.⁶⁷

This lack of education about sex and sexual minorities is what leads most people to have misconceptions about LGBTI individuals, which in turn, creates antipathy.

Third, the Convention on the Rights of the Child (CRC) article 29, paragraph 1, expands the right of education to affirm that, for children,

States Parties agree that the education of the child shall be directed to:...The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;...The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;⁶⁸

Accordingly, when schools and other educational institutions become hubs for the dissemination of prejudice and practice of hatred towards lesbians and other sexual minorities, they are in direct violation of these rights.⁶⁹

Fourth, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) provides several rights particular to women in order to fully manifest the human rights foundation. Indeed, the importance of women's rights is vital for the realization of human rights as a whole. UN Secretary-General Ban Ki-moon stressed this in his remarks on International Women's Day 2011, stating,

67. Scott Long, A. Widney Brown, and Gail Cooper, *supra* note 33, at 188.

68. Convention on the Rights of the Child, article 29(1), Nov. 20, 1989, 1577 U.N.T.S. 3.

69. Scott Long, A. Widney Brown, and Gail Cooper, *supra* note 33, at 241.

Women and girls...continue to endure unacceptable discrimination and violence, often at the hand of intimate partners or relatives. In the home and at school, in the workplace and in the community, being female too often means being vulnerable.... Only through women's full and equal participation in all areas of public and private life can we hope to achieve the sustainable, peaceful and just society promised in the United Nations Charter.⁷⁰

Articles 5, part a, and 10, part c, of CEDAW assert the rights of women to social equality with the view of eliminating cultural and educational patterns of conduct that are based on or promote the inferiority of women or stereotyped roles of women.⁷¹ Lesbian women in South Africa who are subjected to, or suffer constant fear of, corrective rape are victims of educational and cultural gender-based inequalities. These two articles place a positive obligation on the state. Accordingly, the state's refusal or inability to counter these social inequalities is in direct violation of the convention.

Fifth, on a regional level, the African Charter on Human and People's Rights (ACHPR) closely resembles the other international legal instruments. In article 28, where discrimination is addressed, rather than set forth a right of non-discrimination, the Charter identifies the duty that each person owes to others, "to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance."⁷² Article 3 affirms the right to freedom before the law, article 4, affirms the right to integrity of person and article 5, inscribes the right, among others, to freedom from cruel, inhuman or degrading treatment.⁷³ According to article 2, all of these rights and duties are appointed to every person, "without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status."⁷⁴ Accordingly, lesbians are denied protection under the ACHPR both by the perpetrators of corrective rape and state agents such as police who violate their duty to respect their

70. Ban Ki-moon, *Secretary-General's Message on International Women's Day* 8 March 2011, UNITED NATIONS, available at http://www.un.org/en/events/women/iwd/2011/sg_message_2011.shtml.

71. Convention on the Elimination of All Forms of Discrimination Against Women, articles 5(a) and 10(c), Dec. 18, 1979, 1249 U.N.T.S. 13.

72. African Charter on Human and People's Rights, article 28, OAU Doc. CAB/LEG/67/3 rev. 5; 1520 UNTS 217; 21 ILM 58 (1982).

73. *Id.* at articles 3, 4, and 5.

74. *Id.* at article 2.

fellow beings without discrimination and to protect them equally under the law.

B. NEW INTERNATIONAL RIGHTS RESOLUTIONS

In addition to the above international instruments, several international resolutions and declarations have been established in light of the oppression, discrimination, abuse, and violence that has been inflicted on LGBTI individuals, including some in direct response to the endemic of corrective rape. Resolutions and declarations are considered “soft law” in international legal discussions, as they are generally not binding law; rather, they are recommendations made by international bodies with the intention that they will be carried out in good faith.⁷⁵ Consequently, the following instruments are not per se binding on South Africa, but they form persuasive authority and pressure on states like South Africa to take action to curb corrective rape and other violence against LGBTI individuals.

In early 2008, the General Assembly of the Organization of American States adopted a resolution condemning the violence and discrimination on the basis of sexual orientation and gender identity.⁷⁶ Entitled *Human Rights, Sexual Orientation and Gender Identity*, the resolution was the hailed as a major stepping-stone. It condemned discrimination and violence against LGBTI individuals and recommended that other committees within the OAS include the topic in their discussions, and requested reports on its implementation.⁷⁷ This step was considerable not only because it marked the first international resolution specifically on the rights and challenges based on sexual orientation and gender identity, but also because a consensus was reached to pass the resolution in the 34-member organization that includes several members which still criminalize homosexual relations.⁷⁸

By the end of 2008, France and the Netherlands, urged by several large human rights organizations, joined together to present the *Declaration on Human Rights, Sexual Orientation and Gender Identity* to the UN

75. MALCOLM N. SHAW, *supra* note 52, at 117-119.

76. Human Rights, Sexual Orientation, and Gender Identity, *adopted at the fourth plenary session, June 3, 2008*, Organization of American States, AG/RES. 2435 (XXXVIII-O/08).

77. *Id.*

78. See Daniel Ottosson, *State-Sponsored Homophobia: A world survey of laws prohibiting same sex activity between consenting adults*, INTERNATIONAL LESBIAN AND GAY ASSOCIATION (2008), available at http://ilga.org/historic/Statehomophobia/ILGA_State_Sponsored_Homophobia_2008.pdf.

General Assembly.⁷⁹ The original intention was that it would be adopted as a resolution, but because there was not enough support, it was reduced to a declaration.⁸⁰ This was the first time the UN General Assembly addressed the issues of sexual orientation and gender identity.⁸¹ Still, there was tremendous outcry over the declaration, led by the Vatican and the Organization of the Islamic Conference.⁸² Though the Vatican supported an end to violence against homosexuals and decriminalization of same-sex relations, it opposed full-fledged human rights for homosexuals because of its disapproval of same-sex marriage and inclusion in seminaries among others.⁸³ Originally, 66 nations signed onto the declaration, while 60 states signed an opposing declaration.⁸⁴ The United States was not an original signatory, but then signed on in 2009.⁸⁵

The Organization of American States again adopted resolutions condemning violence and discrimination on the basis of sexual orientation and gender identity in 2009, 2010, and 2011, each one being slightly more elaborative than the last.⁸⁶ 2011 has been a significant year for recognition of LGBTI discrimination and violence. In March of 2011, a joint statement was delivered at the UN Human Rights Council on behalf of 85 countries, including South Africa, all EU member states, and the United States.⁸⁷ Then in June 2011, the UN Human Rights Council made a groundbreaking achievement when it adopted the first UN resolution on LGBTI rights.⁸⁸ Proposed by South Africa, the resolution,

79. *UN: General Assembly Statement Affirms Rights for All*, HUMAN RIGHTS WATCH (Dec. 19, 2008), available at <http://www.hrw.org/news/2008/12/18/un-general-assembly-statement-affirms-rights-all>.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. Sue Fleming, *In Turnaround, U.S. Signs UN Gay Rights Document*, REUTERS (Mar. 18, 2009), available at <http://www.reuters.com/article/2009/03/18/us-rights-gay-usa-idUSTRE52H5CK20090318>.

86. Human Rights, Sexual Orientation, and Gender Identity, *adopted at the fourth plenary session, June 4, 2009*, Organization of American States, AG/RES. 2504 (XXXIX-O/09); Human Rights, Sexual Orientation, and Gender Identity, *adopted at the fourth plenary session, June 8, 2010*, Organization of American States, AG/RES. 2600 (XL-O/10); Human Rights, Sexual Orientation, and Gender Identity, *adopted at the fourth plenary session, June 7, 2011*, Organization of American States, AG/RES. 2653 (XLI-O/11).

87. *UN Human Rights Council: A Stunning Development Against Violence*, HUMAN RIGHTS WATCH (Mar. 22, 2011), available at <http://www.hrw.org/news/2011/03/22/un-human-rights-council-stunning-development-against-violence>.

88. *Landmark UN Vote on Sexual Orientation*, HUMAN RIGHTS WATCH (June 17, 2011), available at <http://www.hrw.org/news/2011/06/17/landmark-un-vote-sexual-orientation>.

Requests the High Commissioner [of Human Rights] to commission a study to be finalised by December 2011, to document discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, in all regions of the world, and how international human rights law can be used to end violence and related human rights violations based on sexual orientation and gender identity.⁸⁹

It also mandates a panel discussion during the 19th session of the council on the information resulting from the study that will consist of “constructive, informed and transparent dialogue” on discrimination and violence against persons based on their sexual orientation or gender identity and “discuss appropriate follow-up to the recommendations.”⁹⁰ It is worth noting, however, that the resolution passed by a slim margin: 23 in favor, 19 opposed, and 3 abstentions.⁹¹ Yet, this resolution and the other declarations are extremely important. They indicate the willingness of the international community to begin taking LGBTI rights seriously. Before this movement, the topic was not discussed in influential international forums like the United Nations.

Valuable as this movement is, the problem of corrective rape in South Africa needs to be addressed expeditiously on a domestic level. In response to the prevalence of corrective rape, and likely in large part due to the international spotlight that has come with it, the South African government convened a task force in July 2011 to address the issue of discrimination and violence against LGBTI persons.⁹² The task force, which is composed of six members of the government and six representatives of the LGBTI rights community, is intended to discuss possible hate crime legislation, public awareness and other strategies for reducing the rate of corrective rape.⁹³ This has the potential to be exactly the kind of action needed. Unfortunately, no information has yet been released about what progress has been made.

IV. SUGGESTED LEGAL AND POLICY-BASED CHANGES

Serious developments in law and policy need to be implemented in South Africa in order to effectively address the grievous problem of corrective

89. Human Rights, Sexual Orientation, and Gender Identity, UN Human Rights Council, A/HRC/17/L.9/Rev.1, June 17, 2011.

90. *Id.*

91. *Id.*

92. Melanie Nathan, *South Africa: Historic Task Force for LGBT Hate Crimes Legislation – Corrective Rape, Lez Get Real*, May 03, 2011, available at <http://lezgetreal.com/2011/05/south-africa-historic-task-force-for-lgbt-hate-crimes-legislation-corrective-rape/>.

93. *Id.*

rape. While headway is finally being made in the international community for LGBTI rights, there is no reason for South Africa to wait idly for more action on the international level. In fact, quite the opposite is true. South Africa has had a systemic problem with homophobic violence for a considerable period of time. It is the responsibility of the state and the government to address it. Soft law in the international human rights framework is only recognition that there is a grave problem that needs to be addressed. It is not intended to be the answer to the problem. Rather, the international human rights framework is intended to raise awareness of the problem and pressure states to act. South Africa should lead the way in acknowledging the problem it faces and implementing vigorous reform in order to bring it to an end.

Most critically, South Africa needs to pass hate crimes legislation. A hate crime is a criminal offense committed against a person, property, or society because of his or her actual or perceived membership in any particular group or identifying class, such as race, religion, disability, sexual orientation, gender identity, disability, ethnicity, national origin, social status or political opinion, because of perpetrator's bias, prejudice or hate.⁹⁴ Hate crimes are a particularly detestable and harmful form of offense. The New York State Legislature described the impact of hate crimes in a particularly poignant manner when it passed hate crime legislation as follows:

Hate crimes do more than threaten the safety and welfare of all citizens. They inflict on victims incalculable physical and emotional damage and tear at the very fabric of free society. Crimes motivated by invidious hatred toward particular groups not only harm individual victims but send a powerful message of intolerance and discrimination to all members of the group to which the victim belongs. Hate crimes can and do intimidate and disrupt entire communities and vitiate the civility that is essential to healthy democratic processes.⁹⁵

94. Please note, the classes or groups listed are not exhaustive, but are intended to give examples of potential identifying classes that can be the basis for hate crime. See *Federal Bureau of Investigation, Hate Crime Statistics, 2009*, U.S. DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION (Nov. 2010), available at <http://www2.fbi.gov/ucr/hc2009/index.html>; see also J.A. Nel & M. Judge, *supra* note 3, at 20.

95. J.A. Nel & M. Judge, *supra* note 3, at 21 (citing Hate Crimes Act of 2000, Laws of New York, 2000).

Corrective rape affects South African society in this exact way. Therefore, a domestic hate crime law must be instituted in order to give appropriate redress to victims and to deter future violations.

In order for hate crime legislation to work effectively, there must be specific mandated sentences for each crime perpetrated out of hate. For instance, someone caught for committing corrective rape and convicted of rape, as a hate crime, should have to serve a minimum time that is set out in the law, without discretion on part of the prosecutor, judge or jury. This will serve to ensure that criminals convicted of these crimes, which society deems to be more offensive than those without the aggravating element of having been committed in hate, in fact serve that time. Moreover, it will also bolster the deterrence effect.

To truly ensure that hate crimes offenders serve their mandated time, though, there is another critical component to effective legislation. There must be specific penalties or punishments for state agents, like police, prosecutors, and judges, who do not carry out the hate crimes legislation in good faith. That is, they must act to enforce the law to its full extent whenever appropriate. A reasonable professional standard should be the effective standard to judge whether a state agent acted in good faith. For example, if a police officer was informed by a victim that she was raped because of her homosexuality, and the officer then charged the perpetrator with rape, rather than with hate-based rape or corrective rape, he may be punished according to the law if a reasonable police officer with his knowledge would have charged the perpetrator with the aggravating offense under the hate crime legislation. These penalties must also have mandated punishments or penalties to prevent authorities from allowing their friends or colleagues to go unpunished.

Next, educational training for law enforcement officers, prosecutors, judges and magistrates should be implemented to inform them of the particular vulnerabilities of LGBTI victims of hate crime. The extreme distrust of police and other authorities in South Africa means that without drastic changes, corrective rape and other hate crimes will continue to go unreported. State agents in the criminal justice system need to be respectful of victims' situations. In order for this to happen there must be education about what hate crimes victims might look and act like, what kind of information they will disclose, and what is offensive to them.

With this comes a responsibility to prevent hateful speech and conduct within police departments, prosecutor's offices and courts. All government employees should be prohibited from engaging in hateful

speech and conduct. Enforcement mechanisms, like anonymous reporting systems, and of course, specific penalties and punishment must be in place to ensure implementation.

Educational programs should be mandated in schools and other educational facilities at all levels, to teach about sex, sex safety, gender equality, LGBTI acceptance, gender identity and human rights. Currently, schools do not provide adequate education in these subjects, resulting in homophobic and intolerant children, families and communities. And as another consequence, schools are a hotbed for hateful, discriminatory speech and conduct targeted at LGBTI students. Adequate education is invaluable in the fight against corrective rape.

Incumbent with the need for better educational programs is the need for strict policies against discriminatory or hateful speech and conduct. Policies must be in place to discipline teachers and other school staff who foment hateful speech or conduct or allow it to take place in their schools or classrooms. Children, parents, and staff must have access to anonymous reporting procedures, and strict disciplinary actions must be taken in response to violations. For staff members, dismissal from position, barring from future work at a school, and criminal charges should be options for repeat offenders and serious violations.

A commission within the government should be established to address LGBTI rights and violations thereof, including quarter, semi-annual or annual reports on the implementation of LGBTI rights legislation. Members of civil society in LGBTI rights should work with the commission and should offer recommendations for more effective or adequate implementation of laws and policies. The commission should also include a forum for citizens to express grievances, comments or concerns.

A nation-wide campaign should be commissioned for education in LGBTI rights and the protections provided for LGBTI individuals under the constitution, hate crime legislation, international law and other laws created in the effort for LGBTI rights. Awareness about corrective rape should be a focus of the campaign, including the prejudices that lead to it, the dangers associated with it, how a person can try to prevent it, what a person can do if they feel like they may be targeted, and what a person should do if they or their friend is victimized, including how and why to report it, where to seek physical and mental help afterwards, and how to be active in the movement against corrective rape. Civil society should facilitate the campaign and make recommendations for improvement. The message of the campaign should be taken to all levels of society,

including family, community, township, city, healthcare providers, law-making and other state bodies.

Lastly, but not least significantly, the South African government must take a strong stance against corrective rape and other forms of violence or intolerance of any sort towards LGBTI individuals, in South Africa and abroad. In furtherance of this position funding and other incentives should be provided to civil society for initiatives focused on ending corrective rape and promoting LGBTI rights. Funding and other incentives should also be made available to attorneys who provide pro bono work for LGBTI individuals, particularly, victims of corrective rape.

V. CONCLUSION

South Africa suffers from an endemic of corrective rape that poses a threat not only to international human rights principles, but also to the national human rights standards of non-discrimination and equality that give it the name, "Rainbow Nation." Most South Africans are probably proud, and rightfully so, of this title. However, the name can only be lived up to if true equality is reached. Until the scourge of corrective rape becomes a rare occurrence that is met with strict criminal punishment and society's contempt, no such goal will have been attained.

While gender inequality, homophobia and violence are deeply engrained in the society because of the country's burdened past, the appropriate reaction is to rise above that past and achieve what had been denied in those dreadful years of apartheid. To do this, the South African government and South African people must take strong action against discrimination and violence towards LGBTI persons. This paper proposes specific legislation and policies that the government should undertake to achieve this, including: hate crime legislation, education for state agents and school children, a nationwide campaign for LGBTI rights, and funding for civil society and attorneys to protect those rights, all of which must be enforced through specific, mandated language so as to not allow for deviation.