



**The implications of the South African legislative framework on
sexual orientation: Reflections on violence against LGBTI people**

Boniwe Comfort Fayeti



orcid.org 0000-0003-3975-1971

Dissertation submitted in fulfilment of the requirements for the degree *Magister
Legum* in Public Law and Legal Philosophy at the North-West University

Supervisor: Professor Samuelson Freddie Khunou

Co-Supervisor: Doctor Kesolofetse Olivia Lefenya

Graduation: October 2018

Student number: 24768693

| | |
|----------------------------|---------------|
| LIBRARY MAFIXENG CAMPUS | |
| CALL NO.: | 2021 -02- 0 1 |
| ACC.NO.: | |
| NORTH-WEST UNIVERSITY | |

DECLARATION

I, Boniwe Comfort Fayeti, declare that this dissertation which I hereby submit for the fulfilment of the requirements for the degree of Master of Laws in Public Law and Legal Philosophy at the University of North West- Mafikeng Campus is my own work and has not been submitted by me for any degree at another University. I also declare that any secondary information used in this dissertation has been duly acknowledged and referenced in accordance with the requirements of the University.



SIGNATURE

31 MAY 2018

DATE

ACKNOWLEDGEMENTS

I would like to express my heartfelt gratitude to a number of role-players who have played a significant role in the successful completion of my dissertation.

Firstly, I would like to extend my sincere gratitude to my supervisors; Prof. Samuelson Freddie Khunou and Dr. Kesolofetse Olivia Lefenya, whose support, patience, constructive criticism and incredible insights have resulted in the successful completion of my dissertation and a born interest in Human Rights Law.

Secondly, I would like to thank the North West University for the financial support that I have received during the course of my dissertation.

Thirdly, a special thanks is extended to my family, especially my parents; Mr Johannes Shwalake Fayeti and Mrs Martha Kesenogile Fayeti, without whom this dissertation would not have been a success. Further gratitude is extended to Thabo Patrick Dumakude for all the patience, support and encouragement he gave me throughout completing this dissertation.

I would also like to thank Sivuyisiwe Junia Rolihlahla for his added inspiration, support and encouragement to complete my dissertation. Further gratitude is extend to Kagisho Kenneth Stoffel for the academic support, insights and peer review that he has offered me during the course of my dissertation.

Lastly, all thanks and praise to God, for having granted me the opportunity and courage to undertake such a fruitful academic journey.

DEDICATION

This dissertation is dedicated to my precious son, Lethabo Siphoesihle Ethan Fayeti, whom I have sacrificed a lot of time away from in order to complete my dissertation. My love for you is endless and much gratitude is extended to you for allowing mommy to complete this dissertation.

This dissertation is also dedicated to LGBTI people who have fallen victims to hate crimes in South Africa; justice is yet to come for you all.

ABSTRACT

Homosexuality has always been regarded as an unnatural conduct from as early as the colonial era, wherein homosexual people were put to death because of their homosexual conduct. The apartheid regime was also opposed to homosexuality, but instead of death, it subjected homosexual people to legal punishment such as long-term imprisonment. However, the adoption of the South African Constitution guaranteed legal recognition and protection to LGBTI people, because it prohibits unfair discrimination on the basis of sexual orientation, among other grounds. This constitutional dispensation brought about the current legislative framework, which repealed and amended discriminatory laws.

The South African legislative framework has been structured in such a manner that alleviates the injustices of the past through the promotion of constitutional values such as non-racism and non-sexism. However, the available legislative provisions seem to be ineffective in so far as preventing and prohibiting unfair discrimination and hate crimes against LGBTI people is concerned.

This is because the LGBTI community still faces extreme forms of hate crimes, more especially black lesbians, who have become victims of the brutal crime of corrective rape. Although corrective rape has been occurring at an alarming rate over the past decade in South Africa, majority of the perpetrators of such crimes have not been convicted on the basis of their motive in the commission of such crimes because of the lack of prosecutorial and sentencing guidelines on hate crimes.

This dissertation aims to assess the extent to which the South African legislative framework has assisted in preventing and prohibiting unfair discrimination on the basis on sexual orientation. Furthermore, it analyses hate crimes aimed at LGBTI people, and further proposes measures that can be employed to curb such homophobic crimes in South Africa.

Keywords: Sexual orientation, legislative framework, LGBTI people, hate crimes, corrective rape

LIST OF ABBREVIATIONS AND ACRONYMS

| | |
|---------|---|
| ANC- | African National Congress |
| ANCWL- | African National Congress Women's League |
| CODESA- | Convention for a Democratic South Africa |
| DP- | Democratic Party |
| GALA- | Gay and Lesbian Memory in Action |
| GASA- | Gay Association of South Africa |
| GLOW- | Gay and Lesbian Organisation of the Witwatersrand |
| HCWG- | Hates Crimes Working Group |
| HIV- | Human Immunodeficiency Virus |
| ICCPR- | International Covenant on Civil and Political Rights |
| ICESCR- | International Covenant on Economic, Social and Cultural Rights |
| IFP- | Inkatha Freedom Party |
| IT- | Information Technology |
| LGAO- | Lesbian and Gays Against Oppression |
| LGBTI- | Lesbian, Gay, Bisexual, Transgender and Intersex |
| NCGLE- | National Coalition for Gay and Lesbian Equality |
| NGO- | Non-governmental organisation |
| NP- | National Party |
| NPA- | National Prosecuting Authority |
| NPF- | National Policy Framework |
| OLGA- | Organisation of Gay and Lesbian Activists |
| PEPUDA- | Promotion of Equality and Prevention of Unfair Discrimination Act |
| SABC- | South African Broadcasting Corporation |
| SACP- | South African Communist Party |

| | |
|---------|--|
| SAHRC- | South African Human Rights Commission |
| SANDF- | South African National Defence Force |
| SAPS- | South African Police Service |
| STIs- | Sexually Transmitted Illnesses |
| TAC- | Treatment Action Campaign |
| TB- | Tuberculosis |
| TIA- | Transgender and Intersex Africa |
| TV- | Television |
| UDF- | United Democratic Front |
| UDHR- | Universal Declaration of Human Rights |
| VEP- | Victim Empowerment Programme |
| WCOLGA- | Western Cape Organisation of Lesbian and Gay Activists |
| WLC- | Women's Legal Centre |

TABLE OF CONTENTS

DECLARATION..... i

ACKNOWLEDGEMENTS..... ii

DEDICATION..... iii

ABSTRACT..... iv

LIST OF ABBREVIATIONS AND ACRONYMS..... v

TABLE OF CONTENTS..... vii

CHAPTER ONE: INTRODUCTION..... 1

1.1 Background to the study..... 1

1.2 Problem statement..... 3

1.3 Research question..... 4

1.4 Aim and objectives..... 4

1.5 Research methodology..... 4

1.6 Assumptions and hypotheses..... 5

 1.6.1 Assumptions..... 5

 1.6.2 Hypotheses..... 5

1.7 Significance of the study..... 5

1.8 Chapter outline..... 6

CHAPTER TWO: HISTORICAL BACKGROUND..... 7

| | | |
|-----|------------------------------------|----|
| 2.1 | Introduction..... | 7 |
| 2.2 | The pre-colonial era..... | 7 |
| 2.3 | The colonial regime..... | 10 |
| | 2.3.1 Dutch colonial regime..... | 10 |
| | 2.3.2 British colonial regime..... | 11 |
| 2.4 | The Union of South Africa..... | 12 |
| 2.5 | The apartheid regime..... | 14 |
| 2.6 | Conclusion..... | 18 |

**CHAPTER THREE: THE IMPLICATIONS OF THE NEW CONSTITUTIONAL-
DISPENSATION ON SEXUAL ORIENTATION..... 19**

| | | |
|-----|--|----|
| 3.1 | Introduction..... | 19 |
| 3.2 | Background perspective..... | 19 |
| | 3.2.1 The constitutional negotiations..... | 19 |
| | 3.2.2 The 1993 constitutional dispensation..... | 21 |
| | 3.2.2.1 The Constitution of the Republic of South Africa Act 200 of 1993..... | 21 |
| | 3.2.3 The National Coalition for Gay and Lesbian Equality..... | 23 |
| | 3.2.4 The 1996 constitutional dispensation..... | 24 |
| | 3.2.4.1 The Constitution of the Republic of South Africa, 1996..... | 24 |
| | 3.2.4.2 The equality clause..... | 25 |

- 3.3 The effects of the Constitution on LGBTI people’s lives..... 27
 - 3.3.1 The right to human dignity..... 30
 - 3.3.2 The right to life..... 31
 - 3.3.3 The right to freedom and security of the person..... 31
 - 3.3.4 The right to freedom of expression and assembly..... 32
 - 3.3.5 The right to freedom of association..... 33
 - 3.3.6 Language and culture..... 34
 - 3.3.7 The right of access to housing, healthcare and employment..... 34
 - 3.3.8 South African National Defence Force (SANDF)..... 35
 - 3.3.9 The rights of immigrants..... 36
 - 3.3.10 The rights of refugees..... 36
 - 3.3.11 The right to be protected from domestic violence..... 37
 - 3.3.12 The rights of LGBTI families..... 37
 - 3.3.12.1 Donor insemination process..... 38
 - 3.3.12.2 Adoption..... 38
 - 3.3.12.3 Custody of and access to minor children..... 39
 - 3.3.12.4 Parenting rights..... 40
 - 3.3.12.5 Marital rights..... 42
 - 3.3.13 The right to partnership benefits..... 42
 - 3.3.13.1 Private pensions..... 42

| | | |
|---|---|----|
| 3.3.13.2 | State pensions..... | 43 |
| 3.3.13.3 | Medical aid benefits..... | 44 |
| 3.3.14 | Publicity..... | 44 |
| 3.3.15 | The establishment of LGBTI support centres..... | 46 |
| 3.3.15.1 | Legal support centres..... | 46 |
| 3.3.15.2 | Chapter 9 Institutions..... | 46 |
| 3.3.15.3 | LGBTI resources, advocacy and support centres..... | 47 |
| 3.4 | International human rights instruments..... | 48 |
| 3.4.1 | Universal Declaration of Human Rights (UDHR), 1948..... | 48 |
| 3.4.2 | The International Covenant on Civil and Political Rights (ICCPR), 1966..... | 49 |
| 3.4.3 | The International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966..... | 51 |
| 3.5 | Conclusion..... | 51 |
| CHAPTER FOUR: THE STATUTORY AND POLICY FRAMEWORK ON UNFAIR DISCRIMINATION BASED ON SEXUAL ORIENTATION..... | | |
| 4.1 | Introduction..... | 53 |
| 4.2 | Government Bills and Policies..... | 53 |
| 4.2.1 | Set of Bills..... | 53 |
| 4.2.1.1 | Women Empowerment and Gender Equality Draft Bill of 2012..... | 53 |

| | | |
|---------|--|----|
| 4.2.1.2 | Prevention and Combating of Hate Crimes and Hate Speech Bill of 2018..... | 53 |
| 4.2.2 | Government Policies..... | 58 |
| 4.2.2.1 | National Policy Guidelines for Victim Empowerment (2009)..... | 58 |
| 4.2.2.2 | The National Policy Framework on Management of Sexual Offences..... | 59 |
| 4.2.2.3 | The National Intervention Strategy for the LGBTI Sector (2011)..... | 59 |
| 4.2.2.4 | The Draft South African National LGBTI HIV Framework 2017-2022 (2016)..... | 60 |
| 4.3 | Scope of Legislation..... | 60 |
| 4.3.1 | Labour Relations Act..... | 60 |
| 4.3.2 | South African Schools Act..... | 61 |
| 4.3.3 | Employment Equity Act..... | 61 |
| 4.3.4 | Promotion of Access to Information Act..... | 61 |
| 4.3.5 | Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA)..... | 62 |
| 4.3.6 | Alteration of Sex Description and Sex Status Act..... | 63 |
| 4.3.7 | Civil Union Act..... | 63 |
| 4.3.8 | Criminal Law (Sexual Offences and Related Matters) Amendment Act..... | 64 |
| 4.4 | Conclusion..... | 64 |

| | |
|--|-----------|
| CHAPTER FIVE: INCIDENTS OF VIOLENCE AGAINST LGBTI PEOPLE AND RELATED CAUSES | 65 |
| 5.1 Introduction..... | 65 |
| 5.2 Hate crimes against LGBTI people..... | 65 |
| 5.2.1 Corrective rape incidents..... | 66 |
| 5.3 Possible causes of hate crimes against LGBTI people..... | 87 |
| 5.3.1 Morality..... | 87 |
| 5.3.2 Religion..... | 89 |
| 5.3.2.1 Genesis 19: 4-5..... | 90 |
| 5.3.2.2 Leviticus 18: 22..... | 91 |
| 5.3.2.3 Romans 1: 26-27..... | 91 |
| 5.3.2.4 1 Corinthians 6: 9..... | 92 |
| 5.3.2.5 1 Timothy 1: 9-10..... | 92 |
| 5.3.3 Culture..... | 93 |
| 5.3.4 Stigmatisation..... | 94 |
| 5.3.4.1 Criminal justice system..... | 94 |
| 5.3.4.2 Health institutions..... | 96 |
| 5.3.4.3 Workplace..... | 96 |
| 5.3.4.4 Institutions of learning..... | 97 |
| 5.3.4.5 The community..... | 98 |
| 5.3.5 Shortcomings in the criminal justice system..... | 100 |

| | | |
|--|---|------------|
| 5.4 | Conclusion..... | 107 |
| CHAPTER SIX: CONCLUSIONS, FINDINGS AND RECOMMENDATIONS..... | | 108 |
| 6.1 | Concluding remarks..... | 108 |
| 6.2 | Findings..... | 109 |
| 6.3 | Recommendations..... | 110 |
| 6.3.1 | Different ways of implementing laws..... | 110 |
| 6.3.1.1 | To create and distribute brochures..... | 110 |
| 6.3.1.2 | To create LGBTI billboards..... | 111 |
| 6.3.1.3 | LGBTI TV and Radio adverts..... | 111 |
| 6.3.2 | Education..... | 112 |
| 6.3.3 | The institution of criminal charges against perpetrators..... | 114 |
| 6.3.4 | Empowerment of LGBTI people through legal education..... | 115 |
| 6.4 | An afterword..... | 115 |
| BIBLIOGRAPHY..... | | 118 |

CHAPTER ONE: INTRODUCTION

1.1 *Background to the study*

This study is mainly concerned with the effects that the South African legislative framework has had on preventing the unfair discrimination and violence that Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI)¹ people experience on a daily basis in South Africa. The need to protect LGBTI people; a vulnerable group in the human race, has become a matter of particular importance because there has been an alarming rate of violence against them, which is perpetuated by homophobia.² It is for this reason that the study explores the effects that the South African legislative framework has had on protecting LGBTI people against the unfair discrimination and extreme violence they face on the basis of their sexual orientation.

There occurs to be limited literature that suggests that homosexuality actually existed in South Africa during the pre-colonial era; however, it has been reported that during this era, homosexuality was accepted on a situational basis, as opposed to the notion that it never existed until colonisation.³ It is suggested that homosexuality was especially common among Zulu people, who attributed homosexuality to strength and masculinity.⁴ For instance, King Shaka Zulu was identified as a “latent homosexual”.⁵ This was because he preferred intracural or thigh sexual intercourse.⁶ It is reported that he occasionally instructed his soldiers to abstain from

1 LGBTI is an abbreviation that refers to lesbian, gay, bisexual, transgender and intersex people, which is often used when dealing with issues that concern sexual orientation. Although neither transgender nor intersex is classified as sexual orientations, but rather classified as gender identities, transgender and intersex people experience similar forms of exclusion, discrimination and victimization in a heteronormative and heterosexist society, which is enough justification for their inclusion in efforts to ensure equality before the law and equal protection by the law, regardless of sexual orientation. See Lynch and Van Zyl *Research Study by Triangle Project* ix.

2 Homophobia is defined as the fear of homosexual and transgender people, which ranges from all forms of discrimination, hostility, harassment, bullying and extreme forms of violence such as rape, assault and murder. See Lynch and Van Zyl *Research Study by Triangle Project* ix for definition.

3 Sanders 1997 *Journal of African Law* 103.

4 Ntuli *Nguni urban-township homosexual subculture* 51-52.

5 A sexual tendency towards members of the same sex that is not consciously recognised or one that is not expressed overtly.

6 Sanders 1997 *Journal of African Law* 103.

having sexual intercourse with women, but rather to have sex with their young boy servants for purposes of gaining more strength for the battle ahead.⁷

Historical texts that can be found on studies regarding homosexuality in the pre-colonial South Africa suggest that there was no form of violence or hostility that was directed towards people who would occasionally engage in homosexual acts,⁸ and that homosexuality only became an “unnatural” act during the colonial era, which brought about Christianity- which dictates that homosexuality is sinful and an abomination. This is when missionaries began to notice such homosexual acts, and were therefore quick to put an end to such acts.⁹ Consequently, the colonial system introduced laws that harshly discriminated and punished LGBTI people.

When the apartheid government gained power over South Africa, it retained the colonial laws that prohibited homosexuality and even enacted a statute that expressly prohibited homosexuality; the *Immorality Amendment Act*,¹⁰ which is an amendment of the 1957 *Immorality Amendment Act*,¹¹ which repealed the *Immorality Act*¹² and the 1950 *Immorality Amendment Act*.¹³ This then led to the need to develop homosexual movements, which were then established in the late 1980s and formed political alliances with anti-apartheid organisations, the affiliation of which brought about the need to assert homosexual rights as human rights in the African National Congress’ (ANC) agenda.¹⁴

In 1991, there were constitutional negotiations that were attended by nineteen political parties; the result of which was the drafting of the *Constitution of the Republic of South Africa Act* 200 of 1993.¹⁵ All parties that participated in the drafting process reached an agreement to include an equality clause in the Interim Constitution which provides that everyone is equal before the law. This is provided for in section 8, which stipulates that direct or indirect unfair discrimination on the ground of sexual orientation is prohibited, which is enshrined in section 8(2).

7 Ntuli *Nguni urban-township homosexual subculture* 51.
8 Ntuli *Nguni urban-township homosexual subculture* 30.
9 South African History online 2015 <http://www.sahistory.org.za>.
10 57 of 1969.
11 23 of 1957.
12 5 of 1927.
13 21 of 1950.
14 De Ru 2013 *Fundamina* 222; 228.
15 Hereinafter referred to as the Interim Constitution.

In 1996, South Africa adopted the *Constitution of the Republic of South Africa, 1996*¹⁶ as the supreme law of the country, which protects all the rights contained in the Bill of Rights.¹⁷ One of the rights is the right to equality, which eliminates any form of unfair discrimination on the grounds stipulated in section 9(3). In terms of section 7(2), the State is obliged to uphold and protect the rights contained in the Bill of Rights. Furthermore, section 9(4) stipulates the State must enact national legislation that prohibits unfair discriminatory practices on the grounds provided for in section 9(3). As a result, sexual orientation has become a fundamental human right. This resulted in unfair discriminatory conduct based on sexual orientation to be unconstitutional and therefore illegal.

By adopting the Constitution and enacting anti-discriminatory statutes, which include the *Civil Union Act*,¹⁸ and the *Promotion of Equality and Prevention of Unfair Discrimination Act* (PEPUDA),¹⁹ Parliament anticipated prohibiting unfair discriminatory practices and violence experienced by LGBTI people. It is for this reason that the study provides an exposition of the implications that the South African legislative framework has had on sexual orientation, particularly focusing on the extreme forms of violence experienced by LGBTI people.

1.2 Problem statement

The South African legislative framework aims to combat unlawful discrimination based on sexual orientation among other grounds. However, despite such legal guarantees, social, cultural and religious discrimination against LGBTI people continues.²⁰ This legal protection does not seem to address the harmful impact of prejudice and stigmatisation that is prevalent in South African societies. This indicates that there is a gap that exists between the provisions that protect LGBTI people and what actually happens in reality. This then leads to the questions of whether these legislative instruments are acknowledged and upheld by South Africans and all those who live in it; whether these legal instruments are sufficient and effective; and lastly, whether there are measures that can be employed to assist

16 Hereinafter referred to as the Constitution.

17 Chapter 2 of the *Constitution of the Republic of South Africa, 1996*- Sections 9-35.

18 17 of 2006.

19 4 of 2000.

20 Butler and Astbury "South African LGBT youth" 815.

in combating the violence that is directed at LGBTI people. It is for that reason that this dissertation considers the effects of the South African legislative framework on sexual orientation-based violence with a further intention of proposing measures that can be employed to overcome the overwhelming violence that LGBTI people are forced to deal with on a daily basis due to their sexual orientation. As a result of this violence, a lot still needs to be done to bridge the gap between the law and the reality of sexual orientation-based violence.

1.3 Research question

This study is concerned with how the South African legislative framework has assisted in preventing the violence directed at LGBTI people because of their sexual orientation.

1.4 Aim and objectives

The aim of the study is to determine how the South African legislative framework has assisted in preventing unfair discrimination based on sexual orientation; with a specific focus on the violence that is directed at LGBTI people. At the end, this dissertation seeks to achieve the following objectives:

- To clearly identify the legal provisions that grant equal recognition and protection to LGBTI people;
- To recommend instituting criminal charges in cases where violence against LGBTI people has been reported to the appropriate authorities; and
- To recommend different ways that can be employed to make the implementation of the legislative framework more effective in preventing violence against LGBTI people.

1.5 Research methodology

The study employed a qualitative methodology, where research was carried out by collecting and consolidating data that was comprehensively analysed and assessed for purposes of formulating an argument that reaches to the solution of the problem.

The data that was used include primary sources of legal information, which are: the Constitution, case law, legislation and government policies as well as secondary sources of law such as academic textbooks, as well as journal and newspaper articles so as to gain an understanding of people's perceptions regarding violence based on sexual orientation. Therefore, the study is based on a literature study.

1.6 Assumptions and hypotheses

1.6.1 Assumptions:

- Everyone is entitled to equal protection, enjoyment and benefit of the law.
- No one should be unfairly discriminated against based on their sexual orientation.
- There is sufficient and effective legislation preventing unfair discriminatory practices and violence on the basis of sexual orientation.

1.6.2 Hypotheses:

- The violence directed at LGBTI people is caused by social, cultural and religious discrimination, which lead to stigmatisation and prejudice.
- The existing legislative framework is not effective in preventing the violence that LGBTI people experience because of their sexual orientation.

1.7 Significance of the study

This study is important to society as a whole, because it contributes towards the advancement of the body of knowledge, particularly qualitative insights on the violence faced by LGBTI people and the effectiveness of the South African legislative framework regarding unfair sexual orientation discrimination. It is also important because it contributes towards the betterment of the lives of LGBTI people, in that less homophobic attacks will less likely occur if effective measures for implementing our legislative framework are taken. Furthermore, it may assist the government in what to consider during the statutory and policy making process for purposes of

effectively implementing legislation and policies that prevent and/or prohibit unfair discrimination and violence against LGBTI people.

1.8 Chapter outline

Chapter 1 introduced all the aspects that are discussed in the dissertation.

Chapter 2 focuses on the historical background of homosexuality and the effects that the pre-colonial, colonial and apartheid eras had on sexual orientation-based violence.

Chapter 3 explores the implications that the new constitutional dispensation has had on unfair discrimination and violence based on sexual orientation.

Chapter 4 elaborates on the statutory and policy framework that prohibits unfair discrimination and violence based on sexual orientation.

Chapter 5 reflects on hate crimes experienced by LGBTI people and the aspects that cause such crimes.

Chapter 6 provides findings and recommendations regarding the violence and challenges faced by the LGBTI community.

CHAPTER TWO: HISTORICAL BACKGROUND

2.1 *Introduction*

This chapter provides a historical synopsis of homosexuality in South Africa from as far back as the pre-colonial era and to determine when and how violence aimed at homosexual people because of their sexual orientation began. It further examines the influence of a combination of traditional South African rules during the pre-colonial era and the prolonged effects of the colonial and apartheid era on homosexuality. In essence, it takes cognisance of the evolution of laws that were introduced to prohibit and punish homosexuality from as early as the colonial era to the period of the apartheid regime.

2.2 *The pre-colonial era*

The legal system during the pre-colonial era was not similar to how it currently is. Before Africa was colonised, it was characterised by cultural pluralism and flexibility in that there were unchanging unique cultures which incorporated outsiders into their community as long as they accepted and respected their customs.²¹ These African societies were either kingdoms led by chiefs or by a council of elders which all had a political system, rules and regulations that had to be adhered to. In essence, these societies were founded on the principles of communalism in that these entities were self-governing and all community members participated in the daily running of the tribe.²² It is from the above statement that an inference can be drawn that the rules and regulations in this era were uncodified; they were just customs which were commonly practiced throughout the different tribes.

Because of the nature of how South Africans lived in this era, a lot of things, such as their rules, regulations and cultural philosophies were uncodified. This is the reason there is limited literature that thoroughly explains how South Africans in this era felt about homosexuality. As a result of this limited information, a lot of people believe that homosexuality is “unAfrican”; that it is a western import. Ilyayambwa²³ elucidates that:

21 Kentworthy news media 2010 <https://stiffkitten.wordpress.com>.

22 Kentworthy news media 2010 <https://stiffkitten.wordpress.com>.

23 Ilyayambwa 2012 *International Journal of Humanities and Social Science* 50.

The study of homosexuality has in the past been greatly curtailed by what some authors referred to as academic amnesia or academic defiance since there was a lot of stigma surrounding the issue. Some authors came to a conclusion that since virtually no work had appeared on the history of homosexuality anywhere in sub-Saharan Africa, let alone in South Africa, and some would claim that there is no story to be written on Homosexuality.

In support of the above statement, Dlamini²⁴ also states that:

...in examining the relationship between homosexuality and African spirituality – one must keep in mind that there are very few studies of African sexuality and that these studies tend to focus on heterosexual genital expression. Furthermore, given the predominantly oral character of African traditional religions and the tendency to privacy in sexual matters that is characteristic of most societies, there has been very little opportunity for anthropologists or other observers to acquire a systematic understanding of African attitude about homosexuality.

It is for this reason that not much in-depth information has been found and reported on homosexuality during this era. This also indicates why there exists the assertion that homosexuality is “unAfrican”. In this regard, Sanders²⁵ provides that one should distinguish between situational homosexuality and a homosexual lifestyle so as to answer the question of whether or not homosexuality is “unAfrican”. He explains that a homosexual lifestyle is culturally unAfrican, however, situational homosexuality, especially among men, is not.

The information that was able to be documented with regards to homosexuality in the pre-colonial period indicates that this practice was in fact existent during this era. The reports show that homosexuality existed in various forms and was acceptable on a situational basis.²⁶ These situations include cases of homosexuality existing in royal households where bachelor male warriors used their “boy-wives” for sexual gratification, and the existence of sexual relations among female members of large polygamous households, and within the military.²⁷

Furthermore, in South Africa, King Shaka Zulu was reported to have had remarkable sexual limitations which he imposed upon himself, which resulted in him being labelled as a “latent homosexual”. This was because he preferred intracural or thigh

24 Dlamini 2006 *Agenda* 129.

25 Sanders 1997 *Journal of African Law* 101.

26 South African History online 2015 <http://www.sahistory.org.za>.

27 Sanders 1997 *Journal of African Law* 101-102.

sexual intercourse.²⁸ He also occasionally instructed his soldiers to abstain from having sexual intercourse with women and encouraged them to have sexual intercourse with their young boy servants for purposes of gaining strength for the battle ahead.²⁹ What is even more is that the Zulu people, during this period, tolerated transgender men and allowed them to marry other men, and this was a normal part of their lives.³⁰

In view of the above discussion, it is evident that homosexuality has always been part of the African culture,³¹ what only lacked was the truthful image presented to the audience about sexuality during this period. To indicate that many African writers felt the need to portray a sexually “correct” portrait, so as to move away from the “unAfricanness” of homosexuality, Lopang³² mentions that:

... African writers were writing during a time when there was a strong need to project an African perspective of what constituted the African image. This surprisingly did not involve a look at homosexuality among Africans although the practice was widespread during the time of colonialism and even prior to that. As such one gets the feeling that there were some inconsistencies between the content in the novels and what was happening in Africa. Much of this problem could be a result of external pressure or the desire to project an image that is idealised, an image that is sexually ‘correct’ if you will. So, though the cultural aspects of the African were carefully mapped out for the local and European audience there was a concerted effort to present homosexuality as alien to Africa.

This is a clear indication that societies were coerced to not mention any homosexual activity in all its varied forms, regardless of the fact that it existed. What only mattered was the heteronormative ideal that sexual intercourse is only meant for two people of different genders, for purposes of procreation.³³ However, regardless of the secrecy of homosexuality, there were no rules that criminalised and punished homosexuality. There was also no indication of any form of hostility or violence towards homosexual people. This can be deduced from Ntuli,³⁴ who states that:

28 Sanders 1997 *Journal of African Law* 103.

29 Ntuli *Nguni urban-township homosexual subculture* 51.

30 Ibrahim 2015 *African Human Rights Law Journal* 268.

31 Dlamini 2006 *Agenda* 129.

32 Lopang 2014 *International Journal of Humanities and Social Science* 77.

33 Lopang 2014 *International Journal of Humanities and Social Science* 77.

34 Ntuli *Nguni urban-township homosexual subculture* 30.

It must be remembered that even in pre-colonial Africa same-sex activities were done discreetly, but they were neither criminal nor shameful. So, if there was any degree of homophobia in precolonial Africa, it was no greater than a mild dislike.

In line with the above discussion, it is therefore indicative that the pre-colonial South Africa that had self-governing rules and regulations did not abolish homosexuality, and that it was not a homophobic nation and that no form of violence towards homosexual people was encouraged and commended.

2.3 The colonial regime

South Africa was colonised by both the Dutch and the English. The first colonisation occurred on the 6th of April 1652 when Jan Van Riebeeck, on behalf of the Dutch East India Company, established a supply station and fortifications at the Cape.³⁵ The second colonisation occurred when the British took over the colony in 1795, returned it during the Peace of Amiens in 1802, and then re-occupied it in 1809.³⁶ It was during the era of colonisation when missionaries began to scrutinise the "unusual" and "unnatural"; as it were to them, sexual behaviours that occurred in South Africa. They then started labelling such sexual behaviour and declared it an abomination.³⁷

2.3.1 Dutch colonial regime

During the primary years of colonialism in the Cape, the city of Cape Town was reported to have had more occurrences of legal punishments against homosexuality than any other colonial post.³⁸ This is because the colonial authorities were basically homophobic, and as such felt the need to totally put a stop to the homosexuality that was somewhat normal to South Africans.³⁹ This homophobia propelled the colonialists to create sodomy⁴⁰ laws that prevented homosexuality in all its forms as a crime even before slavery began.⁴¹

35 South Africa *Date unknown* <http://overcomingapartheid.msu.edu>.

36 South Africa *Date unknown* <http://overcomingapartheid.msu.edu>.

37 Ntuli *Nguni urban-township homosexual subculture* 44.

38 Ntuli *Nguni urban-township homosexual subculture* 44.

39 Ntuli *Nguni urban-township homosexual subculture* 46.

40 Sodomy has been defined as "Anal or oral intercourse between human beings". It is said that the word "sodomy" acquired different meanings over time, in that under Common Law, it meant anal intercourse. It is an act which has often been referred to as a "crime against nature" or as copulation "against the order of nature." The term eventually included anal sex as well as oral sex. This term refers to the homosexual activities of men in the story of the city

The Dutch colonialists emphasised the need to demolish homosexuality among their black African colonies and slaves to a point where they even came up with brutal forms of punishment which included torture and imprisonment on Robben Island.⁴² The colonial government even forced numerous communities to expose known homosexuals or those suspected of homosexual engagements. If such communities refused to comply or had no knowledge of such people, the authorities would destroy their property just to scare them and show them that they do not tolerate homosexual acts.⁴³ It is reported that in order to show that the missionaries were intolerant of homosexuality, on the 13th of May 1728, two slaves were put to death by drowning because of their homosexual relationship, and in 1753 three more slaves were bound and thrown in the harbour for engaging in anal sexual intercourse.⁴⁴

2.3.2 *British colonial regime*

South Africa was under the Dutch colonisation for almost 200 years and eventually, the British troops occupied it in 1795.⁴⁵ However, the British Empire only gained South Africa completely in 1806 as part of its global territories.⁴⁶ Be that as it may, nothing changed with regards to homosexuality, in that the British colony inherited and executed the already existing laws that were put in place and implemented by the Dutch which promoted homophobia, because they also possessed a deep hatred for homosexuality.⁴⁷ The British colonial regime was especially detrimental towards homosexual relations that existed in colonial societies. From 1860 onwards, the British Empire spread a specific set of colonial penal codes throughout its colonies which specifically criminalised male-to-male sexual relations, by long-term imprisonment.⁴⁸

of Sodom in the Holy Bible. The destruction of Sodom and Gomorrah because of their residents' immorality became a central part of Western attitudes toward forms of non-procreative sexual activity and same-sex relations.

41 Ntuli *Nguni urban-township homosexual subculture* 46.

42 Ntuli *Nguni urban-township homosexual subculture* 47.

43 Ntuli *Nguni urban-township homosexual subculture* 47.

44 Ntuli *Nguni urban-township homosexual subculture* 47.

45 Gomes da Costa "Decriminalising homosexuality in Africa: lessons from the South African experience" 313.

46 Gomes da Costa "Decriminalising homosexuality in Africa: lessons from the South African experience" 313.

47 Ntuli *Nguni urban-township homosexual subculture* 48-49.

48 Han and O'Mahoney 2014 *Cambridge Review of International Affairs* 272.

Some of the penal codes that were passed by the British Empire included the Queensland Penal Code and the Indian Penal Code, which were standardised and enforced on all the legal systems of British colonies, including Africa and Asia.⁴⁹ This resulted in the British colonial regime succeeding in imposing and institutionalising penal codes that criminalised homosexuality in all its colonies.⁵⁰ What seemed to have at least changed during the British takeover were the forms of punishment that homosexual people faced. Ntuli⁵¹ denotes that:

...because the system of Calvinism⁵² was not in existence in the British society, the punishments that had been carried out by the Dutch for sexual misconducts were lightened or abolished. However, homosexuality remained a crime. The only thing that changed with regards to the homosexual crime from the Dutch to the British was the manner of punishing homosexual perpetrators. Instead of drowning sodomy perpetrators as the Dutch had previously done, the British hanged them.

The situation seemed to have somewhat changed with regards to the punishment of homosexual relationships, but the punishment still carried out the same outcome; being death.⁵³ As such, there were a number of appeals to the British government in 1871 for killing homosexual people.⁵⁴ Consequently, the death penalty for homosexual crimes was finally abolished. The last man to have been put to death for being a homosexual was a Zulu man named *Hogoza* in the colony of Natal in 1868.⁵⁵ However, homosexuality continued to be a crime and instead, the punishment was in the form of imprisonment.⁵⁶

2.4 The Union of South Africa

There were several conflicts which were ignited by the British expansion in South Africa with both the Dutch colonisers, who were known as the *Boers*, and the native people. Such conflicts were created by the discovery of diamond natural deposits

49 Han and O'Mahoney 2014 *Cambridge Review of International Affairs* :273.

50 Han and O'Mahoney 2014 *Cambridge Review of International Affairs* :273.

51 Ntuli *Nguni urban-township homosexual subculture* 49.

52 The system that follows the teachings of the French Protestant, John Calvin, which has very strict moral attitudes and which emphasises predestination and salvation by the grace of God.

53 Ntuli *Nguni urban-township homosexual subculture* 49.

54 Ntuli *Nguni urban-township homosexual subculture* 49.

55 Ntuli *Nguni urban-township homosexual subculture* 49.

56 Ntuli *Nguni urban-township homosexual subculture* 49.

and gold, and only ended during the Anglo-Boer War in 1899.⁵⁷ In 1902, the British Empire won the war and a peace agreement was entered into which led to the Boer Republics joining Natal and the Cape Colony in the Union of South Africa in 1910.⁵⁸

On the 31st of May 1910, the *South Africa Act*⁵⁹ was enacted for purposes of granting dominion to the white minority over all other races and to bring Natal, the Cape Colony, Orange Free State and Transvaal together under a single Government referred to as the "Union of South Africa".⁶⁰ Its Preamble provides that:

Whereas it is desirable for the welfare and future progress of South Africa that the several British Colonies therein should be united under one Government in a legislative union under the Crown of Great Britain and Ireland.⁶¹

This Union ended colonial supremacy; however, it retained characteristics of the colonial regime, which were the exclusion and oppression of civil rights of South Africa's majority population.⁶² During the Union, the colony of Natal enacted a statute prohibiting "indecent assault and conduct",⁶³ while Transkei enacted a penal code prohibiting "unnatural sexual offences."⁶⁴ Moreover, sodomy and "unnatural sexual offences" were criminalised by the Roman-Dutch common law.⁶⁵ These anti-homosexual laws became uniformly applicable throughout South Africa.⁶⁶

During the Union, the *Immorality Act*⁶⁷ was also enacted to prohibit sexual relations between white South Africans and black South Africans and other South Africans, until it was amended in 1950, bringing about the *Immorality Amendment Act*.⁶⁸ This *Act* extended the already existing prohibition to further prohibit all sexual relations among white people and non-white people, which included people who were of

57 Gomes da Costa "Decriminalising homosexuality in Africa: lessons from the South African experience" 313.

58 Gomes da Costa "Decriminalising homosexuality in Africa: lessons from the South African experience" 314.

59 *South Africa Act*, 1909. Hereinafter referred to as the 1910 Constitution.

60 South African History online 2016 <http://www.sahistory.org.za>.

61 Preamble of the 1910 Constitution.

62 Botha and Cameron "South Africa" 5.

63 *Natal Criminal Act*, section 10.

64 *Trenskei Penal Code*, section 121.

65 Early Roman-Dutch common law branded almost every form of nonconformist sexual behaviour as sodomy.

66 Botha and Cameron "South Africa" 6.

67 5 of 1927.

68 21 of 1950

mixed origin and those of Asian origin. The two *Acts* were then repealed in 1957 by the *Immorality Amendment Act*,⁶⁹ which was then renamed the *Sexual Offences Act*.⁷⁰ This *Act* was passed to amend and merge laws regarding, *inter alia*, unlawful carnal intercourse.⁷¹

It is therefore apparent that during colonisation, there was an extreme disregard for homosexual people's rights, because they were not afforded any form of legal protection in that the 1910 Constitution and anti-homosexual laws did not afford any rights to homosexual people, and homosexuality was regarded as a criminal offence that was punishable by law. Furthermore, this shows that the cruelty that homosexual people were subjected to in this era, was from the colonial authorities and not from fellow South Africans. This is therefore suggestive that South Africans had no business in vilifying their fellow brothers and sisters because of the occasional homosexual acts that they engaged in.

2.5 The apartheid regime

From one hostile regime to another, South Africa emerged from the colonial regime right into the power of another systematic and cruel racial segregation regime; apartheid,⁷² which developed from the oppression of indigenous black people and non-whites, by those which were descendants of the British- speaking English, and those which were descendants of the Dutch, French and German- speaking Afrikaans.⁷³

This regime came into power in 1948 until 1994, and came about after the National Party (NP) won the general elections.⁷⁴ After such victory, The NP-led government immediately began enforcing existing policies of racial segregation⁷⁵ under the

69 23 of 1957.

70 Botha and Cameron "South Africa" 6.

71 Defined in section 1 of the *Act* as "carnal intercourse otherwise than between a husband and a wife"- which entailed that such sexual acts, which can be interpreted to include homosexual acts, were a criminal offence.

72 The word "apartheid" means "separateness" and was used to name the racial segregation policy implemented after the victory of the National Party in 1948.

73 Gomes da Costa "Decriminalising homosexuality in Africa: lessons from the South African experience" 315.

74 History.Com 2010 <http://www.history.com/topics/apartheid>.

75 The aim of apartheid was to separate whites from non-whites, in that non-whites were forced to live in and use separate areas and public facilities from whites, and contact between them was limited.

apartheid system of legislation.⁷⁶ The apartheid regime was opposed to homosexual people's rights, in that it subjected sexual intercourse and sexuality to particularly restrictive conditions and oppressive policing.⁷⁷ This Government was particularly obsessed with prohibiting sexual intercourse between different races, because it was influenced by colonial anxieties about rapacious black sexuality; hence it spread various regulations that controlled sexual intercourse practices.⁷⁸

The apartheid regime enacted statutes such as the 1950 *Immorality Amendment Act*,⁷⁹ which amended the 1927 *Act* so as to include the prohibition of sexual intercourse between whites and non-whites- which meant people of mixed origin and people of Asian origin, whereas the 1927 *Act* was limited to black people and other South Africans only. It is evident that the apartheid government was obsessed with racial segregation. This then gave rise to the government noticing homosexual activities that were slowly arising in South Africa. Gomes da Costa⁸⁰ makes note that:

It was in the efforts to regulate relationships among different racial groups that homosexuality gained visibility in South Africa. From the beginning of the NP government, racist policies had always been associated with sexual policing. The obsessive interest of the authors of apartheid in controlling sexuality in South Africa was based on interpretations of Christianity, and more specifically Calvinism, ideologies that underpinned the 'separate development' idea. It was necessary to keep the white nation sexually and morally pure as a way to fight against the "black danger" (*swart gevaar*).

The emergence of a growing gay sub-culture in big South-African cities, associated with the increasing visibility of places frequented by homosexuals, blew the whistle and caught the attention of the NP, whose high command saw homosexuality as a threat to South African civilisation. To make sure the country would not have the same destiny as Rome or Esparta, the falls of which were intimately associated with the dissemination of homosexuality in the eyes of the NP, in 1968 the party imposed a major repression of homosexuality by proposing an act amending the *Immorality Act* of 1957.

The *Immorality Amendment Act*⁸¹ was then enacted for purposes of consolidating and amending laws that relate to "unlawful carnal intercourse and other acts in

76 History.Com 2010 <http://www.history.com/topics/apartheid>.

77 Posel 2005 *Africa* 128.

78 Posel 2005 *Africa* 128.

79 21 of 1950.

80 Gomes da Costa "Decriminalising homosexuality in Africa: lessons from the South African experience" 317.

81 23 of 1957.

relation thereto”, and it repealed the *Immorality Act* and the 1950 *Immorality Amendment Act*. This *Act* was further amended by the *Immorality Amendment Act*,⁸² which was enacted for purposes of making a provision that explicitly prohibited homosexual conduct which stimulated and gave sexual pleasure between men. The provision; section 20A of the *Act* stipulates that:

1. A male person who commits with another male person at a party any act which is calculated to stimulate sexual passion or to give sexual gratification shall be guilty of an offence.
2. For the purposes of subsection (1) ‘a party’ means any occasion where more than two persons are present.

This was as a result of a police raid that occurred in January 1966 at a house party in Forest Town; Johannesburg, where they found men cuddling, dancing and kissing each other in a passionate manner, which led to a strong moral outcry from the community.⁸³ The former Minister of Justice, PC Pelsler, then ordered that Parliament should monitor such homosexual behaviours. He was of the view that if such behaviours remained unmonitored, they will constitute the “utter ruin of white civilisation and the onslaught of black communism”.⁸⁴ Consequently, a Parliamentary Committee was established to particularly abolish homosexual behaviours.⁸⁵ The Committee recommended that sexual intercourse among men at a party be prohibited, the result of which was the incorporation of the clause that stipulates that “A male person who commits with another male person at a party...” in the *Act*.⁸⁶ Their report particularly focused on white gay men, while black lesbians and gay men were only considered as an afterthought.⁸⁷

Parliament modified the *Sexual Offences Act* so as to convert such recommendations into laws, by widening its scope to declare homosexuality as an unnatural sexual act.⁸⁸ Moreover, lesbians were slandered because they chose not to bear children and used objects which were seen as replacing male sexual organs, resulting in the Committee’s recommendation that the use of any object intended to

82 57 of 1969.

83 Dedaić *Singing, Speaking and Writing Politics* 149.

84 Dedaić *Singing, Speaking and Writing Politics* 149.

85 Dedaić *Singing, Speaking and Writing Politics* 149.

86 Section 20A of the *Immorality Amendment Act* 57 of 1969.

87 Dedaić *Singing, Speaking and Writing Politics* 149.

88 Dedaić *Singing, Speaking and Writing Politics* 149.

perform an unnatural sexual act should be prohibited;⁸⁹ the provision which was also incorporated in the *Act* as section 18A.⁹⁰ Police officials then spent two decades monitoring and eradicating this “non-conformist eroticism.”⁹¹

Against this background, it is indicative that the apartheid regime retained the British penal codes that criminalised homosexuality, because it also passed statutes that criminalised homosexuality. This resulted in the existence of a widespread homophobia, which prohibited people from expressing or declaring their sexuality.⁹² Furthermore, during this era, homosexual people suffered a harsh fate, because they were categorised as criminals, they were also regarded as outcasts and perverts and were therefore rejected by the community.⁹³ This form of exclusion was especially experienced by South Africans who already suffered injustices and oppression by the apartheid regime because of their sex, race and economic status.⁹⁴

In the late 1980s, homosexual groups were established by homosexual rights activists, and became politically associated with anti-apartheid organisations, because their struggle was to end the oppression against racism and homosexuality by the apartheid regime.⁹⁵ The Gay Association of South Africa (GASA) became the first established homosexual group in Johannesburg during 1982, with the objective to serve as a social meeting place for white, middle class gay men. Furthermore, the establishment a group from Cape Town called the Lesbian and Gays Against Oppression (LGAO) followed in 1986, and it became the first organisation with explicit associations to anti-apartheid organisations.⁹⁶

The Gay and Lesbian Organisation of the Witwatersrand (GLOW) was later formed in 1988,⁹⁷ committing itself to a democratic future that promoted non-sexism and non-racism.⁹⁸ Moreover, the Western Cape Organisation of Lesbian and Gay Activists (WCOLGA) was also later established, affiliating itself with the United Democratic

89 Dedaić *Singing, Speaking and Writing Politics* 149-150.

90 *Immorality Amendment Act* 57 of 1969.

91 Dedaić *Singing, Speaking and Writing Politics* 150.

92 Posel 2005 *Africa* 128.

93 De Ru 2013 *Fundamina* 226.

94 De Ru 2013 *Fundamina* 226.

95 De Ru 2013 *Fundamina* 222.

96 De Ru 2013 *Fundamina* 227.

97 It was established by gay anti-apartheid activist Simon Nkoli, and the organisation was the first mass-based black gay and lesbian organisation.

98 De Ru 2013 *Fundamina* 227.

Front (UDF), which was aligned with the ANC's Freedom Charter,⁹⁹ the affiliation which brought about the need to declare homosexual rights as human rights in the ANC's agenda.¹⁰⁰

As a result of such homosexual organisations, South Africa moved from being an oppressive State that promoted violence and unfairly discriminated against homosexual people because of their sexual orientation. Furthermore, these homosexual organisations resulted in homosexual people being afforded legal recognition and protection.

2.6 Conclusion

This chapter has indicated that homosexuality was acceptable on a situational basis during the pre-colonial era; however, it was forbidden during the colonial era and apartheid era and was therefore punishable as a crime. This resulted in the rise of a widespread homophobia displayed by authorities of these regimes. However, anti-apartheid homosexual organisations were established during the late 1980s for purposes of eradicating oppression by the apartheid government. This raised awareness on homosexuality, the need for the protection of homosexual people's rights, and the prevention of unfair discriminatory practices and violence based on sexual orientation and gender identity.

The next chapter will analyse the implications that the new constitutional dispensation has had on discrimination based on sexual orientation.

99 De Ru 2013 *Fundamina* 228.

100 By the time the South African political parties began drafting the Interim Constitution, the ANC had formally recognised gay and lesbian rights and had agreed to include a prohibition of discrimination on the basis of sexual orientation in its proposed Bill of Rights.

CHAPTER THREE: THE IMPLICATIONS OF THE NEW CONSTITUTIONAL DISPENSATION ON SEXUAL ORIENTATION

3.1 Introduction

This chapter seeks to comprehensively analyse the constitutional provisions which have been brought about by both the Interim and Final Constitutions, which have a direct and/or indirect impact on unfair discrimination based on sexual orientation. It should be noted that both the Interim and Final Constitutions provide for the promotion of equality and the prohibition of unfair discrimination on the basis of sexual orientation, which led to the decriminalisation of homosexuality.

3.2 Background perspective

In 1990, the NP-led government's president, FW De Klerk,¹⁰¹ unconditionally released the political leaders who were arrested for a very long time for fighting for freedom, which included the late Nelson Mandela;¹⁰² and this remarkable gesture paved the way for a long-lasting democratic constitutional dispensation.¹⁰³ De Klerk addressed Parliament and announced that amongst other political parties, the ANC, South African Communist Party and the Pan African Congress were to be unbanned.¹⁰⁴ This guaranteed the possibility of a new and better South Africa, based on political negotiations.¹⁰⁵

3.2.1 The constitutional negotiations

The discussions regarding the drafting of a Constitution between the ANC and NP commenced in February 1990. The first official multiparty meeting, referred to as the Convention for a Democratic South Africa (CODESA I), was held in the World Trade Centre in Kempton Park on the 20th of December 1991.¹⁰⁶ At the meeting, five

101 FW de Klerk was the seventh and last State President of the apartheid government in South Africa. He served his presidential term from 1989-1994.

102 The late Nelson Madiba Rolihlahla Mandela was the first democratically elected President of South Africa, who served his term from 1994-1999. He was given the name Nelson by his teacher during his early school years.

103 Makhari *The South African Judiciary* 24.

104 Makhari *The South African Judiciary* 24.

105 Makhari *The South African Judiciary* 24-25.

106 South African History online 2014 www.sahistory.org.za/article/interim-south-african-constitution-1993.

working groups¹⁰⁷ were established and each group was given specific issues to handle.¹⁰⁸ Nineteen political parties and organisations attended the historic meeting, and among those were the ANC, NP, Inkatha Freedom Party (IFP), South African Government, the Bophuthatswana Government, the National People's Party, South African Communist Party (SACP), Democratic Party (DP) and the United People's Front.¹⁰⁹

During December 1991, all parties that were present at the meeting, except the Bophuthatswana Government and the IFP, signed a Declaration of intent, which committed all the parties to unite South Africa for purposes of healing the divisions of the past, for improving the quality of people's lives, creating an environment that promotes peaceful constitutional change through the elimination of violence and promoting free political participation, discussion and debate.¹¹⁰

CODESA II started in May 1992; however, the ANC withdrew from the negotiation table due to the massacre that occurred in Boipatong in June 1992, which resulted in CODESA II ending.¹¹¹ Furthermore, there were protest marches that occurred in Bisho during September 1992, and about twenty eight protesters of the ANC were murdered by the Ciskei Defence Force.¹¹² This led to the incident being named the Bisho massacre; the event which motivated CODESA I and II participants to reach a political agreement, the occurrence of which led to the ANC and NP-led Government agreeing on a record of understanding on the 26th of September 1992.¹¹³

The Multiparty Negotiating Forum began in April 1993, having the objective of compiling a Constitution that would bring an end to the legal order imposed by the

107 Among those working groups, group 4 focused on the political, legal and constitutional implications, while working group 5 was given time frames and a responsibility to implement the decisions taken at CODESA I.

108 South African History online 2014 www.sahistory.org.za/article/interim-south-african-constitution-1993.

109 South African History online 2014 www.sahistory.org.za/article/interim-south-african-constitution-1993.

110 South African History online 2014 www.sahistory.org.za/article/interim-south-african-constitution-1993.

111 South African History online 2014 www.sahistory.org.za/article/interim-south-african-constitution-1993.

112 South African History online 2014 www.sahistory.org.za/article/interim-south-african-constitution-1993.

113 South African History online 2014 www.sahistory.org.za/article/interim-south-african-constitution-1993.

apartheid regime.¹¹⁴ On the 18th of November 1993, CODESA participants reached an agreement on the drafting process and issues to be addressed, which led to the initiation of the Interim Constitution.¹¹⁵ However, although the agreement was finalised, there were still conflicts regarding the drafting process between the NP and ANC. The parties then proposed and agreed on a solution that the drafting process be a two-stage¹¹⁶ process.¹¹⁷

3.2.2 *The 1993 constitutional dispensation*

3.2.2.1 *The Constitution of the Republic of South Africa Act 200 of 1993*¹¹⁸

The aim of the Interim Constitution was to essentially remedy the disadvantages experienced by South African in the past, to facilitate the continued governance of South Africa, to recognise human rights, peaceful co-existence of all South Africans, and democracy; and to establish the Constitutional Court, as can be deduced from its Preamble.¹¹⁹

This Constitution was largely restricted to civil and political rights¹²⁰ which guaranteed rights that are protected by international human rights conventions.¹²¹

114 South African History online 2014 www.sahistory.org.za/article/interim-south-african-constitution-1993.

115 South African History online 2014 www.sahistory.org.za/article/interim-south-african-constitution-1993.

116 The first stage involved drafting an Interim Constitution, planning elections, and setting up a new Parliament that would elect a new president. The second stage involved drafting a "Final constitution" by the newly elected Parliament in its role as the Constitutional Assembly.

117 De Ru 2013 *Fundamina* 229.

118 Hereinafter referred to as the Interim Constitution.

119 The Interim Constitution's preamble reads as follows:

In humble submission to Almighty God,
We, the people of South Africa declare that -

Whereas there is a need to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms;

And whereas in order to secure the achievement of this goal, elected representatives of all people of South Africa should be mandated to adopt a new Constitution in accordance with a solemn pact recorded as Constitutional Principles;

And whereas it is necessary for such purposes that provision should be made for the promotion of national unity and the restructuring and continued governance of South Africa while an elected Constitutional Assembly draws up a final Constitution.

120 Civil rights include, *inter alia*, protection from discrimination on grounds such as race, gender and sexual orientation, while Political rights include, *inter alia*, the right to seek redress or a legal remedy; and rights of participation in a civil society and politics such as freedom of association.

The parties to the drafting process, in upholding the constitutional principles contained in Schedule 4 of the Interim Constitution,¹²² approved for an equality clause to be included in the Interim Constitution; which provided that everyone is equal before the law and that discrimination is therefore unconstitutional.¹²³ Furthermore, the parties agreed to include an explicit or implied clause against discrimination in order to protect homosexual people.¹²⁴ However, no express reference to sexual orientation was contained in the clause.¹²⁵ As such, the parties agreed to include an equality clause that prohibits discrimination on certain grounds, which include sexual orientation.¹²⁶

Consequently, section 8(2) of the Interim Constitution prohibited direct or indirect unfair discrimination based on sexual orientation, among other grounds.¹²⁷ Accordingly, the apartheid Government endorsed and enforced the Interim Constitution on the 27th of April 1994,¹²⁸ for purposes of administering the first democratic elections, in which South Africans experienced their first one-person-one-

121 International human rights conventions such as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

122 Schedule 4 of the *Constitution of the Republic of South Africa Act 200 of 1993*:

- I. The Constitution of South Africa shall provide for the establishment of one sovereign state, a common South African citizenship and a democratic system of government committed to achieving equality between men and women and people of races.
- II. Everyone shall enjoy universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to, *inter alia*, the fundamental rights contained in Chapter 3 of the this Constitution.
- III. The Constitution shall prohibit racial, gender and all other forms of discrimination and shall promote racial and gender equality and national unity.
- IV. The Constitution shall be the supreme law of the land. It shall be binding on all organs of state at all levels of government.
- V. The legal system shall ensure the equality of all before the law and an equitable legal process. Equality before the law includes laws, programmes or activities that have as their object the amelioration of the conditions of the disadvantaged, including those disadvantaged on the grounds of race, colour or gender.
- VI. There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness,
- VII. The judiciary shall be appropriately qualified, independent and impartial and shall have power and jurisdiction to safeguard and enforce the Constitution and all fundamental rights.

123 De Ru 2013 *Fundamina* 229.

124 De Ru 2013 *Fundamina* 230.

125 De Ru 2013 *Fundamina* 230.

126 De Ru 2013 *Fundamina* 230.

127 De Ru 2013 *Fundamina* 230.

128 South African History online 2014 www.sahistory.org.za/article/interim-south-african-constitution-1993.

vote and non-racial elections; the act of which eventually gave rise to the democratic status of South Africa.¹²⁹ Because a democratically elected Constitutional Assembly was to draft the Final Constitution, the Interim Constitution remained in effect for six months.¹³⁰

3.2.3 *The National Coalition for Gay and Lesbian Equality (NCGLE)*

The insertion of sexual orientation as one of the prohibited grounds of discrimination in the Interim Constitution led to the establishment of the NCGLE in December 1994,¹³¹ which was a remarkable occasion, because for the first time in South Africa, a number of homosexual organisations became united to work for a common goal.¹³² Some of the founding aims of the Coalition were to campaign for the decriminalisation of homosexual conduct, to initiate litigation challenging discriminatory legislation, and to train representative homosexual leadership on racial and gender equality.¹³³ Louw¹³⁴ explains that:

The Coalition sought to change this by not only being representative of all interests but also by taking on an overtly political stance. However, a number of important factors had contributed to the protection in the Interim Constitution. These included the openly gay stance of ANC Delmas treason trialist; Simon Nkoli, who went on to found the first predominantly black and pro-ANC gay and lesbian organisation, the stand taken by small groups of activists within the liberation movement particularly those in the Organisation of Gay and Lesbian Activists (OLGA) who successfully applied for affiliation to the United Democratic Front in the early 1980s, the broad commitment to human rights that emerged in the anti-apartheid struggle, and finally, the negotiators who drafted the Interim Constitution at the Kempton Park talks were also lobbied.

The NCGLE began a comprehensive lobbying campaign for purposes of succeeding in its aim of retaining the equality clause in the Final Constitution; it even established a campaign office in Cape Town and employed a lobbyist.¹³⁵ There were two submissions that were suggested to the Constitutional Assembly during the drafting

129 South African History online 2014 www.sahistory.org.za/article/interim-south-african-constitution-1993.

130 South African History online 2014 www.sahistory.org.za/article/interim-south-african-constitution-1993.

131 Louw 1997 *South African Human Rights Yearbook* 245.

132 One of the principle aims of the Coalition was to lobby for the inclusion of the prohibition in the final Constitution.

133 Louw 1997 *South African Human Rights Yearbook* 245.

134 Louw 1997 *South African Human Rights Yearbook* 245-246.

135 Louw 1997 *South African Human Rights Yearbook* 246.

process of the Final Constitution. With regards to the two submissions, Louw¹³⁶ explains that:

The first dealt principally with the homophobic arguments of the African Christian Democratic Party and focussed on the history of gay and lesbian discrimination and legislative exclusion. The second submission placed the debate within an international context. Successful inclusion in the Final Constitution was a remarkable victory for the NCGLE, particularly as no other country in the world had a similar provision in its national Constitution. Since then the improvement in the legal status of gays and lesbians has been little short of breath-taking.

3.2.4 *The 1996 constitutional dispensation*

3.2.4.1 *The Constitution of the Republic of South Africa, 1996*¹³⁷

On the 8th of May 1996, South Africa's Final Constitution was adopted. In its Bill of Rights, it prohibits discrimination based on certain grounds, including sexual orientation.¹³⁸ The Constitution was approved on the 16th of December 1996, however, it only came into effect on the 4th of February 1997.¹³⁹ It can be deduced from its Preamble that it was essentially adopted to rectify the injustices that were experienced by South Africans in the past; which reads as follows:

We, the people of South Africa, recognise the injustices of our past; honour those who suffered for justice and freedom in our land; respect those who have worked to build and develop our country; and believe that South Africa belongs to all who live in it, united in our diversity. We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to–

Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; lay the foundations for a democratic and open society in which Government is based on the will of the people and every citizen is equally protected by law; improve the quality of life of all citizens and free the potential of each person; and build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.¹⁴⁰

Furthermore, a number of values form the foundation of Constitution, as indicated in section 1; values which include non-sexism and non-racism. This signified that

136 Louw 1997 *South African Human Rights Yearbook* 246.

137 *Constitution of the Republic of South Africa, 1996* (Act No. 108 of 1996) as it was then referred to. It was then changed to the *Constitution of the Republic of South Africa, 1996* because it is the supreme law of the country, as such; it cannot be referred to as an Act of Parliament. Hereinafter referred to as the Constitution.

138 Dunton and Palmberg *Human Rights and Homosexuality in Southern Africa* 34.

139 Dunton and Palmberg *Human Rights and Homosexuality in Southern Africa* 34.

140 Preamble of the *Constitution of the Republic of South Africa, 1996*.

LGBTI people were now to be afforded legal recognition, protection and equality as their heterosexual counterparts. Against that background, it is therefore indicative that the Constitution had the objective to introduce, promote and effect affirmative action. Moreover, Schedule 4 of the Constitution provides for the establishment of an independent democratic government that upholds racial and gender equality wherein every person will enjoy fundamental rights, freedom and civil liberties.¹⁴¹

3.2.4.2 The equality clause

It has been reported that South Africa was the first country in the world to have approved a Constitution that contained an equality clause that includes sexual orientation as one of the prohibited grounds for discrimination, which aimed at protecting LGBTI people against unfair discrimination.¹⁴² The equality clause; section 9, stipulates that:

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender,¹⁴³ sex,¹⁴⁴ pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more grounds listed in subsection (3) is unfair unless it is established that it is fair.

141 Makhari *The South African Judiciary* 29.

142 Dunton and Palmberg *Human Rights and Homosexuality in Southern Africa* 34.

143 Gender is defined as the socially constructed roles, behaviour, activities and attributes that a particular society considers appropriate for women and men based on society's conceptions of femininity and masculinity. See Lynch and Van Zyl *Research Study by Triangle Project* ix for definition.

144 Sex is defined as the biological and psychological characteristics socially agreed upon as defining men and women. See Lynch and Van Zyl *Research Study by Triangle Project* x for definition.

The equality clause has been phrased in a manner that requires an interpretation that is applicable to the orientation of all homosexual, bisexual or transsexual people, and one which prohibits all forms of stigma, prejudice and stereotypical treatment which negatively affects the human dignity of LGBTI people.¹⁴⁵ This then infers that any Government action that adversely impacts LGBTI people will be subjected to thorough examination and such action must be proven to be justifiable.¹⁴⁶

The inclusion of the sexual orientation clause marked a momentous stride towards the development of a human rights culture in that it indicated how South Africa is mindful of the need to respect sexual diversity; which ought to have been a reason for celebration for South Africa.¹⁴⁷ However, some individuals were of the view that such an inclusion was a shameful decision. This reasoning was influenced by their cultural and religious beliefs. Even after the adoption of the Constitution, some people did not change their perception on homosexuality being an unnatural and immoral conduct, and that LGBTI people deserved to be punished. Theoretically, there has been progress in so far as upholding constitutional values, such as non-sexism, however, the same cannot be said to have been achieved in reality.

Regardless of the perceptions held by heterosexual people on the inclusion of sexual orientation in the Constitution as a basic human right, it cannot be argued that the Constitution indeed promoted the prohibition of unfair discriminatory practices against LGBTI people and that any such discrimination is illegal and therefore unconstitutional. In support of the invalidity of discrimination based on sexual orientation, Mwambene and Wheal¹⁴⁸ denote that:

The only way to recognise sexual orientation as an impermissible ground of discrimination is to base it on a claim to equal protection of the law, which asserts that discrimination on the ground of homosexuality is untenable as sexual orientation should be a matter of indifference, morally as well as constitutionally. To that end, Sachs J has rightly observed that equality should not be confused with uniformity and that such uniformity may be the enemy of equality as equality does not presuppose the elimination or suppression of difference.

145 Mwambene and Wheal 2015 *African Human Rights Law Journal* 70.

146 Mwambene and Wheal 2015 *African Human Rights Law Journal* 70.

147 Dunton and Palmberg *Human Rights and Homosexuality in Southern Africa* 34.

148 Mwambene and Wheal 2015 *African Human Rights Law Journal* 69.

To this end, it is therefore evident that LGBTI people are equal before the law and entitled to enjoy their right to equality and non-discrimination, as opposed to the opinions held by their heterosexual counterparts.¹⁴⁹

3.3 The effects of the Constitution on LGBTI people's lives

The Constitution envisioned a non-sexist and non-racist country. This then resulted in a reformed statutory framework that protects the vulnerable members of the society, such as LGBTI people. This is indicative of the fact that South Africa has had a very progressive constitutional and legislative framework globally, which promotes and protects LGBTI people's rights.¹⁵⁰

As an indication of a nation that has adopted an exceptional commitment to recognising and upholding the rights of LGBTI people, the Constitution effected a limitation of unfair discrimination based on sexual orientation. This then led to the amendment and/ or repeal of many laws which were unfairly discriminatory towards LGBTI people, because such laws were inconsistent with it and therefore unconstitutional.

Although this is the position, a number of cases, specifically concerning violence against LGBTI people remain unknown due to the fact that hate crimes do not form part of South Africa's official statistics and such cases are usually not reported.¹⁵¹ As such, it may prove to be challenging to point out how the Constitution has had an impact on the violence directed at LGBTI people. However, it has undeniably improved the status *quo* of LGBTI people regarding the unfair discrimination they were subjected to during previous years.

For the past few years, the Constitution has guided the legal transformation towards promoting equality and preventing unfair discriminatory practices¹⁵² on the basis of sex, gender identity¹⁵³ or sexual orientation.¹⁵⁴ The Constitutional Court addressed

149 Mwambene and Wheal 2015 *African Human Rights Law Journal* 70.

150 De Vos and Barnard 2007 *South African Law* 708.

151 South African Hate Crime Working Group *Report* 3.

152 Nel 2014 *South African Journal of Psychology* 145.

153 Gender identity is defined as a person's inner sense of an authentic gendered self, which could range along a continuum from femininity to masculinity, and which varies across social spaces, i.e. locations, cultures and contexts. See Lynch and Van Zyl *Research Study by Triangle Project* ix for definition.

the rights to equality and to freedom from discrimination based on sexual orientation in two ground-breaking cases, namely:¹⁵⁵

- The case of the *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*,¹⁵⁶ also referred to as the decriminalisation case, where the Court held that the common-law crime of sodomy and section 20A of the *Sexual Offences Act* were inconsistent with the provisions of the Constitution and therefore unconstitutional. The court ordered that the ruling be applied retroactively to acts that were committed during the enforcement of Interim Constitution.¹⁵⁷
- The case of the *National Coalition for Gay and Lesbian Equality and Another v Minister of Home Affairs and Others*,¹⁵⁸ also referred to as the immigration case, where the Court found that certain provisions of the *Aliens Control Act*¹⁵⁹ constituted unfair discrimination on the basis of sexual orientation and marital status of immigrants and were therefore unconstitutional.¹⁶⁰

With regards to these two landmark cases, Isaack¹⁶¹ explains that:

In both these cases, the Constitutional Court emphasised the fact that equality does not mean that differences are to be eliminated, but that equality demands tolerance and respect for diversity; and that unfair discrimination must be understood in the context of the experiences of those primarily affected.

Another celebrated Constitutional Court case that indicated legal developments on the issue of homosexuality, and that the Constitutional Court employed appropriate measures in giving effect to the equality clause, is the case between the *Minister of*

154 Sexual orientation is defined as the way in which a person's sexual and romantic desires are directed; which describes whether a person is attracted primarily to people of the same or other sex, or both. See Lynch and Van Zyl *Research Study by Triangle Project* x for definition.

155 Isaack 2003 *Human Rights* 19.

156 *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC).

157 *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC) par 106.

158 *National Coalition for Gay and Lesbian Equality and Another v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC).

159 96 of 1991.

160 *National Coalition for Gay and Lesbian Equality and Another v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) par 98.

161 Isaack 2003 *Human Rights* 19.

Home Affairs and Fourie,¹⁶² in which the Court confirmed that section 30(1) of the *Marriage Act*¹⁶³ and the South African common-law definition of marriage, which both implied that spouses ought to be a man and woman, were unconstitutional because of being inconsistent with the constitutional provision that prohibits practices that are discriminatory towards same-sex couples.¹⁶⁴

The court ordered that Parliament be given a year to promulgate the necessary legislation that prohibits unfair discriminatory practices towards LGBTI people.¹⁶⁵ As a result of this case, the *Civil Union Act*¹⁶⁶ was passed, thus permitting LGBTI couples to get married.¹⁶⁷

While the Constitution embeds the need to promote, protect and fulfil the right to equality, among other rights, the Yogyakarta Principles¹⁶⁸ are in support of this right. The second Yogyakarta principle provides that:

Everyone is entitled to enjoy all human rights without discrimination on the basis of sexual orientation or gender identity. Everyone is entitled to equality before the law and the equal protection of the law without any such discrimination whether or not the enjoyment of another human right is also affected. The law shall prohibit any such discrimination and guarantee to all persons equal and effective protection against any such discrimination.

Discrimination on the basis of sexual orientation or gender identity includes any distinction, exclusion, restriction or preference based on sexual orientation or gender identity which has the purpose or effect of nullifying or impairing equality before the law or the equal protection of the law, or the recognition, enjoyment or exercise, on an equal basis, of all human rights and fundamental freedoms. Discrimination based on sexual orientation or gender identity may be, and commonly is, compounded by discrimination on other grounds including gender, race, age, religion, disability, health and economic status.¹⁶⁹

This indicates that the right to equality is not just a South African goal, but rather an international one. It is also known that South Africa is a member state in international conventions and declarations such as the *Universal Declaration of Human Rights*,

162 *Minister of Home Affairs and Another v Fourie and Another* 2006 (1) SA 524 (CC).
163 25 of 1961.
164 Isaack 2003 *Human Rights* 19.
165 Isaack 2003 *Human Rights* 19.
166 17 of 2006.
167 Isaack 2003 *Human Rights* 19.
168 Principles on the application of international human rights law in relation to sexual orientation and gender identity.
169 The Yogyakarta Principles 2007 www.yogyakartaprinciples.org/wp/wp-content/uploads/2016/08/principles_en.pdf.

the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*, which promote protection of human rights and the prevention of unfair discriminatory practices based on sexual orientation. It is indeed a victory to know that the South African Constitution has upheld the international duty to protect human rights and prevent unfair discriminatory practices based on sexual orientation.

The Bill of Rights is the foundation of equality in South Africa, which contains all human rights recognised by the law and encourages the democratic values of equality, human dignity and freedom.¹⁷⁰ This indicates that LGBTI people do not only have the right to be treated equally, but also have the rights discussed below, which also need to be protected.

3.3.1 *The right to human dignity*

Section 10 stipulates that everyone has inherent dignity and the right to have their dignity protected and respected. Unfair discrimination and hate crimes against LGBTI people violate their right to dignity, in that their dignity is often impaired by the homophobic slanders and attacks that they experience. Against that background, Mwambene and Wheal¹⁷¹ explain that:

It was held by the South African Constitutional Court that the heart of the equality test lies in whether or not there has been an impairment of the right to dignity as well as the extent to which such impairment has taken place. It has been held further by the Constitutional Court that discrimination means “treating people differently in a way which impairs their fundamental dignity as human beings.” It is clear that when considering the individual cases of the incidents of corrective rape, the inherent dignity of the victims was in fact impaired by the actions of the perpetrators... the Constitutional Court has held that the right to dignity is not subject to abrogation or subordination to other rights.

It is therefore submitted that the disregard for the importance of respecting other people’s dignity, regardless of their sexual orientation, should be regarded as a

170 S(7) of the *Constitution of the Republic of South Africa, 1996*:

- (1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.
- (2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.
- (3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.

171 Mwambene and Wheal 2015 *African Human Rights Law Journal* 70.

serious constitutional infringement, because this right is regarded as an important right, not only by the Constitution, but by international human rights law instruments which recognise the inherent worth of this right.¹⁷²

3.3.2 *The right to life*

Section 11 affords and protects everyone's right to life. This entails that the murdering of LGBTI people is against the values of the Constitution. Therefore, no person's life should be taken away for any reason, including their sexual orientation. Hate crimes against LGBTI people are a serious violation of LGBTI people's right to life. Mwambene and Wheal¹⁷³ elucidate this fact as follows:

According to O'Regan J, the right to life is antecedent to all other rights in the Constitution as one cannot exercise any of the rights enshrined in the Bill of Rights without life. It was further held that the right to life goes hand in hand with the right to dignity as, without dignity life is substantially diminished. Reflecting on the victims of corrective rape, many lost their lives, which is a direct violation of their right to life.

This right is unqualified and its infringement is a serious violation of one's constitutional rights, because every other human right emanates from this right.¹⁷⁴ Furthermore, the fourth Yogyakarta principle states that everyone has the right to life, and that no one should be arbitrarily deprived of their life, including by reference to their sexual orientation or gender identity.¹⁷⁵

3.3.3 *The right to freedom and security of the person*

Section 12 of the Constitution guarantees every person the right to freedom and security of the person, which includes the right not to be treated or punished in a cruel, inhumane or degrading manner.¹⁷⁶ This entitles everyone the right to be free from all forms of violence from third parties. However, this right is often infringed by the perpetrators of hate crimes.¹⁷⁷ For purposes of protecting this right, the Government has an obligation to protect people by enacting laws and when

172 Mwambene and Wheal 2015 *African Human Rights Law Journal* 71.

173 Mwambene and Wheal 2015 *African Human Rights Law Journal* 72.

174 Mwambene and Wheal 2015 *African Human Rights Law Journal* 72.

175 The Yogyakarta Principles 2007 www.yogyakartaprinciples.org/wp/wp-content/uploads/2016/08/principles_en.pdf.

176 S12(1)(e) of the *Constitution of the Republic of South Africa*, 1996.

177 Mwambene and Wheal 2015 *African Human Rights Law Journal* 71.

necessary, taking precautionary measures where the victim's life or person is at risk from the criminal conduct of another person.¹⁷⁸

Furthermore, it grants every person the right to bodily and psychological integrity, which includes the right to security in and control over their body.¹⁷⁹ Therefore, LGBTI people should not be persecuted for making decisions concerning their bodily and psychological integrity, because such persecution violates their right to have control over their bodies, more especially corrective rape, which affects all women's sense of security, psychological and bodily integrity and also affects their freedom of movement.¹⁸⁰

It is therefore imperative for the Government to protect this constitutional right against hate crime perpetrators. Moreover, the fifth Yogyakarta principle also stipulates that every person has the right to security of the person and to protection by the Government, irrespective of their sexual orientation or gender identity.¹⁸¹

3.3.4 *The right to freedom of expression and assembly*

Section 16 of the Constitution provide everyone with the right to freedom of expression, which includes expressing one's sexual orientation and the freedom to impart information or ideas,¹⁸² such as the awareness of LGBTI rights. As such, LGBTI people are allowed to express their sexuality. The nineteenth Yogyakarta principle elaborates on this right by stating that:

Everyone has the right to freedom of opinion and expression, regardless of sexual orientation or gender identity. This includes the expression of identity or personhood through speech, deportment, dress, bodily characteristics, choice of name, or any other means, as well as the freedom to seek, receive and impart information and ideas of all kinds, including with regard to human rights, sexual orientation and gender identity, through any medium and regardless of frontiers.¹⁸³

178 Mwambene and Wheal 2015 *African Human Rights Law Journal* 71.

179 S12(2)(b) of the *Constitution of the Republic of South Africa*, 1996.

180 Mwambene and Wheal 2015 *African Human Rights Law Journal* 71.

181 The Yogyakarta Principles 2007 www.yogyakartaprinciples.org/wp/wp-content/uploads/2016/08/principles_en.pdf.

182 Section 16(1)(b) which states that everyone has the right to freedom of expression including the freedom to receive or impart information or ideas.

183 The Yogyakarta Principles 2007 www.yogyakartaprinciples.org/wp/wp-content/uploads/2016/08/principles_en.pdf.

Furthermore, section 17 grants everyone the right to peacefully assemble for purposes of demonstrations, such as Gay Pride marches which are held annually, and the celebration of the International Day against Homophobia, Transphobia and Biphobia on the 17th of May.¹⁸⁴ This indicates that LGBTI people are able to hold their pride marches to raise awareness about non-heterosexuality, without any disturbance or harassment, which is also supported by PEPUDA, which prohibits harassment related to sexual orientation.¹⁸⁵

There are several LGBTI rights organisations In South Africa, whose aims are to continue the fight against LGBTI rights violations and to raise awareness about such rights.¹⁸⁶ This proves that to a certain extent, LGBTI people are able to walk free and proud in South African streets, proving that they deserve as much respect and protection as everyone else, and not just by the law, but by their heterosexual counterparts.

3.3.5 *The right to freedom of association*

Every human being has the right to freely associate themselves with whichever social, or any form of, group and/or category they want.¹⁸⁷ This allows LGBTI people to associate themselves with social groups such as LGBTI organisations. The twentieth Yogyakarta principle provides that:

...Persons may form and have recognised, without discrimination, associations based on sexual orientation or gender identity, and associations that distribute information to or about, facilitate communication among, or advocate for the rights of, persons of diverse sexual orientations and gender identities.¹⁸⁸

184 OutRight Action Research Report 11.

185 OutRight Action Research Report 11.

186 OutRight Action Research Report 11.

187 S18 of the *Constitution of the Republic of South Africa*, 1996 which states that everyone has the right to freedom of association.

188 The Yogyakarta Principles 2007 www.yogyakartaprinciples.org/wp/wp-content/uploads/2016/08/principles_en.pdf.

3.3.6 Language and culture

Section 30 of the Constitution¹⁸⁹ affords LGBTI people the right to partake in the cultural life of their choice, such as being part of the LGBTI culture. Furthermore, the twenty-sixth Yogyakarta principle elucidates that:

Everyone has the right to participate freely in cultural life, regardless of sexual orientation or gender identity, and to express, through cultural participation, the diversity of sexual orientation and gender identity.¹⁹⁰

3.3.7 The right of access to housing, healthcare and employment

In terms of sections 26 and 27 of the Constitution, every person has the right to have access to adequate housing, healthcare and social security; which promotes access to employment opportunities. For purposes of allowing LGBTI people to have equal access to such services and opportunities, various statutes have been enacted.¹⁹¹ Such statutes include the *Employment Equity Act*;¹⁹² *Rental Housing Act*;¹⁹³ *Medical Schemes Act*,¹⁹⁴ *Alteration of Sex Description and Sex Status Act*¹⁹⁵ and the *Labour Relations Act*,¹⁹⁶ which all prohibit unfair discrimination on the basis of sexual orientation.¹⁹⁷

From the above discussion, it is indicative that the rights of LGBTI people are often infringed by the perpetrators of hate crimes. In maintaining this view, Mwambene and Wheal¹⁹⁸ note that:

It was held by the Supreme Court of Appeal that judicial officers are aware of the extent to which sexual violence deprives women of their rights to dignity and bodily

189 Section 30 of the *Constitution of the Republic of South Africa*, 1996 states that everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.

190 The Yogyakarta Principles 2007 www.yogyakartaprinciples.org/wp/wp-content/uploads/2016/08/principles_en.pdf.

191 OutRight Action Research Report 7.

192 55 of 1998.

193 50 of 1999.

194 131 of 1998.

195 49 of 2003.

196 66 of 1995.

197 OutRight Action Research Report 7.

198 Mwambene and Wheal 2015 *African Human Rights Law Journal* 72.

integrity.¹⁹⁹ Further, in *S v Chapman*,²⁰⁰ it was held that rape in general constitutes a humiliating, degrading as well as brutal invasion of the privacy and dignity of the victim. The Court further held that rape infringes women's fundamental human rights.²⁰¹

The State should, therefore, comply with its constitutional obligation of protecting the equality, dignity and freedom of all hate crime victims, especially women affected by corrective rape, who suffer discrimination on the basis that they belong to a particular cultural community in addition to the discrimination they suffer as women and as lesbians.²⁰¹

The remarkable progress that the Constitution has brought about regarding unfair discrimination based on sexual orientation cannot be ignored. As such, Isaack²⁰² noted and summarised some of the most successful effects that the Constitution has had on LGBTI people's rights, specifically on combatting unfair discrimination as follows:

3.3.8 South African National Defence Force (SANDF)

LGBTI people are now permitted to work openly in the SANDF as a result of the Government's *White Paper on National Defence*,²⁰³ which was adopted in 1996. This White Paper prohibited the SANDF from discriminating against its members on the basis of their sexual orientation.²⁰⁴ The Department of Defence adopted its *Policy on Equal Opportunity and Affirmative Action* IN 1998, which prohibits the questioning of recruits' sexual orientation and explicitly. Furthermore, in 2002, the SANDF extended spousal pension and medical benefits to permanent life partners of its members which include LGBTI spouses.²⁰⁵

199 *DPP v Prins (Minister of Justice and Constitutional Development & two amici curiae intervening)* (369/12) [2012] 106 ZASCA para 1.

200 *S v Chapman* 1997 (3) SA 341 (A).

201 Mwambene and Wheal 2015 *African Human Rights Law Journal* 72.

202 Isaack 2003 *Human Rights* 20-22.

203 Clause 11.14 of the *White Paper on National Defence for the Republic of South Africa: Defence in a Democracy*, May 1996, available at <http://www.dod.mil.za/documents/WhitePaperonDef/whitepaper%20on%20defence1996.pdf>.

204 OutRight Action Research Report 15.

205 OutRight Action Research Report 15.

3.3.9 *The rights of immigrants*

The immigration case²⁰⁶ was about the exclusion and status of LGBTI couples with regards to immigration benefits, because the provisions of the *Aliens Control Act*²⁰⁷ granted non-South African spouses who are South African citizens, the right to an immigration permit based on their marital status.²⁰⁸ By granting benefits to married people, which were not granted to people who could not marry such as LGBTI life partners, the *Act* evidently discriminated against LGBTI people.²⁰⁹

The Constitutional Court held that the differentiation was based on two of the grounds enshrined in section 9(3) of the Constitution- sexual orientation and marital status.²¹⁰ The Court declared that the provisions of the *Aliens Control Act*²¹¹ amounted to unfair discrimination based on sexual orientation and marital status, and were therefore, unconstitutional. On behalf of the Court, Justice Ackerman held that:

The sting of past and continuing discrimination is that... lesbian and gay people do not have inherent dignity and are not worthy of human respect. Lesbian and gay people in same-sex life partnerships are as capable as heterosexual couples of expressing and sharing love in its manifold forms... they are capable of constituting a family including affection.²¹²

As a result of this judgment, immigrant same-sex partners can apply for permanent residence on the basis of a homosexual relationship with a South African partner. It is submitted that the judgment communicated a clear message that LGBTI partners also have the right to choose their relationships and to live together as a family while enjoying their right to equality.²¹³

3.3.10 *The rights of refugees*

The *Refugees Act*²¹⁴ affords certain rights to refugees and asylum seekers. This is as a consequence of many people escaping from their countries because they fear

206 *National Coalition for Gay and Lesbian Equality and Another v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC).

207 96 of 1991.

208 Isaack 2003 *Human Rights* 20.

209 Isaack 2003 *Human Rights* 20.

210 Isaack 2003 *Human Rights* 20.

211 96 of 1991.

212 Isaack 2003 *Human Rights* 20.

213 Isaack 2003 *Human Rights* 20.

214 130 of 1998.

and/or face persecution because of their sexual orientation.²¹⁵ The *Act* recognises membership of a specific social group as one of the grounds of persecution which makes people become qualified to apply for refugee status. The *Act* also allows for the inclusion of LGBTI people because the term "social group" is defined as "a group of persons of particular gender, sexual orientation, disability, class or caste."²¹⁶

3.3.11 *The right to be protected from domestic violence*

LGBTI victims of domestic violence were not protected by the *Prevention of Family Violence Act*,²¹⁷ because it did not explicitly provide for their protection. However, the *Domestic Violence Act*²¹⁸ was enacted to protect every person who lives in an abusive relationship, including LGBTI people.²¹⁹ It refers to people in domestic relationships as those who live together as if they were married and those in dating relationships even if they do not live together, whether heterosexual or LGBTI.²²⁰ The *Domestic Violence Act* also offers protection to LGBTI individuals who are being harassed by an immediate family member.²²¹

3.3.12 *The rights of LGBTI families*

Many LGBTI people are now able to have children, be it from adoptions, assisted reproductive technologies, or their previous relationships. This is because the South African legislative framework has become less discriminatory and more affirming regarding LGBTI families.²²² Consequently, more LGBTI people have often explored parenting options which they deem suitable for themselves.²²³ The twenty-fourth Yogyakarta principle enshrines the right to found a family. It explains that everyone has the right to found a family, irrespective of their sexual orientation or gender

215 Isaack 2003 *Human Rights* 20.

216 Isaack 2003 *Human Rights* 20.

217 133 of 1993

218 116 of 1998.

219 Section 1 of the *Domestic Violence Act* 116 of 1998; under the definition of "domestic relationship", subparagraph (b).

220 Section 1 of the *Domestic Violence Act* 116 of 1998; under the definition of "domestic relationship", subparagraph (b).

221 Section 1 of the *Domestic Violence Act* 116 of 1998; under the definition of "domestic relationship", subparagraph (d).

222 The *Human Tissue Amendment Act* 51 of 1989, *Child Care Act* 74 of 1983 and *Guardianship Act* 192 of 1993 are among the statutes whose provisions were amended for purposes of eliminating discrimination against LGBTI partners with regards to founding a family.

223 Isaack 2003 *Human Rights* 21.

identity; that families exist in diverse forms, and no family may be subjected to unfair discrimination because of their sexual orientation or gender identity.²²⁴

The following instances indicate how the Constitution has conferred the right to have families to LGBTI people:

3.3.12.1 Donor insemination process

Most lesbian couples favour the donor insemination process²²⁵ because it allows them to become pregnant without engaging in sexual intercourse with a man.²²⁶ This process is governed by the *Human Tissue Act*,²²⁷ which was amended by the 1984 *Human Tissue Amendment Act*²²⁸ and the 1989 *Human Tissue Amendment Act*.²²⁹ Before October 1997, the *Act* was restrictive because the donor insemination process was only permitted to married women, on condition that their husbands gave written consent for such a procedure to be undertaken.²³⁰ The amendments to the *Act* then allowed all unmarried, including lesbian and bisexual women, to make use of the donor insemination process.²³¹

3.3.12.2 Adoption

Prior to September 2002, no legal prohibition existed against individual LGBTI people adopting children; however, adoptions by LGBTI couples were strictly prohibited. This prohibition brought about the matter between *Du Toit and Another and Minister of Welfare and Population Development and Others*,²³² where the Constitutional Court held that LGBTI life partners are allowed to jointly adopt children.²³³

224 The Yogyakarta Principles 2007 www.yogyakartaprinciples.org/wp-content/uploads/2016/08/principles_en.pdf.

225 A procedure where a syringe is used to place semen into a woman's vagina to assist her in getting pregnant; wherein the semen is obtained from a donor other than the woman's partner.

226 Isaack 2003 *Human Rights* 21.

227 65 of 1983.

228 106 of 1984.

229 51 of 1989.

230 Isaack 2003 *Human Rights* 21.

231 Isaack 2003 *Human Rights* 21.

232 *Du Toit and Another v The Minister for Welfare and Population Development and Others* 2002 JDR 0934 (CC).

233 Isaack 2003 *Human Rights* 21.

In this case, the applicants were lesbian partners bringing an application for the adoption of two siblings; a brother and a sister, before the Pretoria Children's Court. However, because certain provisions of the *Child Care Act*²³⁴ restricted joint adoption to only married couples, the Children's Court only granted custody and guardianship to one of the applicants.²³⁵ They then applied to the Pretoria High Court, challenging the constitutionality of sections 17(a) and (c) and 20(1) of the *Child Care Act* and section 1(2) of the *Guardianship Act*.²³⁶

The applicants argued that the two *Acts* unfairly discriminated against them because of their sexual orientation and marital status. The two *Acts* also infringed upon the first Applicant's right to human dignity, and undermined the constitutional principle that provides that the child's best interests are paramount in matters relating to the child.²³⁷ The Court held that the two *Acts* certainly violated their constitutional rights and ordered that certain words be read into the two statutes to allow LGBTI partners to jointly adopt children. This order was later confirmed by the Constitutional Court, holding that the *Acts* must allow LGBTI life partners to jointly adopt children where they are considered to be suitable parents for the children.²³⁸

3.3.12.3 Custody of and access to minor children

Many court decisions²³⁹ have confirmed that the Court must always take the child's best interests into account when determining custody in divorce matters.²⁴⁰ The new constitutional framework brought about the implication that when coming to custody in divorce matters, the parent's sexual orientation is not a relevant issue.²⁴¹ This is a standard that was set by a number of cases.²⁴²

In *Van Rooyen v Van Rooyen*,²⁴³ a case which came about before the equality clause was passed, the Court held that a divorced mother should not be deprived of

234 74 of 1983.

235 Isaack 2003 *Human Rights* 21.

236 192 of 1993.

237 Isaack 2003 *Human Rights* 21.

238 Isaack 2003 *Human Rights* 21.

239 Court decisions in the cases of *Van Rooyen v Van Rooyen*, *Greyling v Minister of Welfare and Mohapi v Mohapi*; which are discussed hereunder.

240 Isaack 2003 *Human Rights* 21.

241 Isaack 2003 *Human Rights* 21.

242 Isaack 2003 *Human Rights* 21.

243 *Van Rooyen v Van Rooyen* 1994 (2) SA 325 (W).

access to her minor children solely because she was in a lesbian relationship.²⁴⁴ Furthermore, in the *Greyling v Minister of Welfare*²⁴⁵ case, the applicant was divorced and was granted custody of her daughter. After the divorce, they both went to live with her parents. She later moved out of the family home and fell in love with a lesbian co-worker who thereafter purchased a flat next to hers.²⁴⁶

The applicant's parents were opposed to the relationship and, without reference to the mother by either the parents or by the Department of Welfare and Population Development, obtained an order that removed the daughter from her mother on false bases that the daughter did not want to live with her mother; that the mother and her partner did things that the child was afraid to speak of and that the child suffered psychological damage as a result.²⁴⁷

After prolonged postponements, which were mostly caused by Government officials, the applicant approached the High Court requesting the order of removal to be set aside.²⁴⁸ The High Court then overturned the magistrate's decision of removing the child from her mother and giving the child to the grandparents, solely due to the fear that the child would suffer psychological damage because of her mother's lesbian relationship.²⁴⁹ Furthermore, in *Mohapi v Mohapi*,²⁵⁰ the High Court granted full custody of a child to the mother, who was involved in a stable lesbian relationship after she had been divorced.²⁵¹

3.3.12.4 Parenting rights

In the case of *J & B v Director General of Home Affairs, Minister of Home Affairs, & President of the Republic of South Africa*,²⁵² there were two applicants who were permanent same-sex life partners since 1995, and in August 2001, the second

244 Section 28(2) of the *Constitution of the Republic of South Africa*, 1996 reads as follows: A child's best interests are of paramount importance in every matter concerning the child.

245 Unreported case 8197/99 (WLD)

246 Isaack 2003 *Human Rights* 21.

247 Isaack 2003 *Human Rights* 21.

248 Louw 1997 *South African Human Rights Yearbook* 248-249.

249 Isaack 2003 *Human Rights* 21.

250 Unreported case, 1997 (WLD).

251 Isaack 2003 *Human Rights* 21.

252 *J & B v Director General of Home Affairs, Minister of Home Affairs, & President of the Republic of South Africa* 2003 (5) BCLR 463 (CC).

applicant gave birth to twins conceived through artificial insemination,²⁵³ where the sperm was from an anonymous donor, and the ova were from the first applicant.²⁵⁴

The applicants wanted to both register as parents of the twins, but because they were prohibited by Section 5²⁵⁵ of the *Children's Status Act*,²⁵⁶ they sought relief in the Durban High Court, arguing that section 5 was unconstitutional because it unfairly discriminated against LGBTI people on the basis of their sexual orientation, by only legitimising children conceived through artificial insemination to heterosexual married couples, but not those born to LGBTI permanent life partners, and the High Court agreed and held that the section was unconstitutional.²⁵⁷ On the 28th of March 2003, the Constitutional Court ruled that when a LGBTI couple conceives a child through artificial insemination, both individuals are automatically the legal parents of the child.²⁵⁸

253 Also referred to as Donor Insemination, as explained above.

254 Isaack 2003 *Human Rights* 21.

255 Section 5 of the *Act* reads as follows:

- (1) (a) Whenever the gamete or gametes of any person other than a married woman or her husband have been used with the consent of both that woman and her husband for the artificial insemination of that woman, any child born of that woman as a result of such artificial insemination shall for all purposes be deemed to be the legitimate child of that woman and her husband as if the gamete or gametes of that woman or husband were used for such artificial insemination.
(b) For the purposes of paragraph (a) it shall be presumed, until the contrary is proved, that both the married woman and her husband have granted the relevant consent.
- (2) No right, duty or obligation shall arise between any child born as a result of the artificial insemination of a woman and any person whose gamete or gametes have been used for such artificial insemination and the blood relations of that person, except where-
 - (a) that person is the woman who gave birth to that child; or
 - (b) that person is the husband of such a woman at the time of such artificial insemination.
- (3) For the purposes of this section-
"artificial insemination", in relation to a woman-
 - (a) means the introduction by other than natural means of a male gamete or gametes into the internal reproductive organs of that woman; or
 - (b) means the placing of the product of a union of a male and female gamete or gametes which have been brought together outside the human body in the womb of that woman,
for the purpose of human reproduction-
"gamete" means either of the two generative cells essential for human reproduction.

256 82 of 1987.

257 Isaack 2003 *Human Rights* 21.

258 Isaack 2003 *Human Rights* 21.

3.3.12.5 Marital rights

The marriage between same-sex people was legalised in South Africa after the *Fourie* case, where the Constitutional Court held that it was unconstitutional to prohibit LGBTI marriages. The Court gave Parliament one year to enact legislation that would allow LGBTI people to marry.²⁵⁹ In 2006 Parliament enacted the *Civil Union Act*, which permits same-sex civil marriages and unions for both LGBTI and heterosexual couples. Since the enactment of the *Act*, a lot of LGBTI civil marriages and/or unions have been observed.²⁶⁰

3.3.13 *The right to partnership benefits*

Awarding LGBTI people partnership benefits represented an important step towards equality for LGBTI people. This was as a result of the case of *Gory v Kolver*,²⁶¹ where the Court permitted homosexual partners to have a claim in the inheritance of the estate of their partner who died intestate.²⁶² Moreover, LGBTI rights activists worked hard to ensure that LGBTI partners of employees in both the public and private sectors were protected against unfair discrimination on the ground of sexual orientation in the workplace, by ensuring that they also have the equal right to benefit from their partnerships.²⁶³

3.3.13.1 Private pensions

The Pension Fund Adjudicator in the case between *Martin and Beka Provident Fund*²⁶⁴ ruled that the rules of the Beka Provident Fund were unconstitutional due to the fact that they excluded surviving homosexual partners from receiving spousal pension benefits.²⁶⁵ The adjudicator further ordered the fund to start making back payments and to also pay the spousal pension.²⁶⁶ Consequently, LGBTI surviving partners of a pension fund member are entitled to spousal pension benefits as well

259 OutRight Action Research Report 7.

260 OutRight Action Research Report 7.

261 *Gory v Kolver* 2007 (4) SA 97 (CC).

262 OutRight Action Research Report 7. Also see Isaack 2003 *Human Rights* 21.

263 Isaack 2003 *Human Rights* 21.

264 2000 (2) BPLR 196. (PFA).

265 Isaack 2003 *Human Rights* 21.

266 Isaack 2003 *Human Rights* 21.

as to the shares in the pension if their partner was in a relationship of mutual dependence in addition to partaking in a shared and common household.²⁶⁷

Furthermore, in the case of *Muir v Mutual and Federal Pension Fund*,²⁶⁸ the Adjudicator awarded full pension benefits to the surviving homosexual partner of a deceased mutual and federal employee.²⁶⁹ Moreover, in the case between *Du Plessis and Road Accident Fund*,²⁷⁰ the SCA determined that the heir in a homosexual life partnership has a right to recover funeral expenses incurred by him or her.²⁷¹

3.3.13.2 State pensions

The Lesbian and Gay Equality Project brought an application to the Pretoria High Court against the Minister of Finance, wherein they wanted to secure full pension benefits for surviving homosexual partners of state employees.²⁷² The argument arose because surviving heterosexual spouses of state employees qualified for "widows' pensions", however, LGBTI partners of state employees did not qualify for such benefits.²⁷³

The application also sought to proclaim some sections of the *Government Employees Pension Law*²⁷⁴ and other statutes unconstitutional, because they prevented LGBTI partners of state employees from receiving equal pension benefits.²⁷⁵ Private pension funds prohibited this form of unfair discrimination through the enforcement of the *Closed Pension Fund Amendment Act*.²⁷⁶

267 Isaack 2003 *Human Rights* 21.

268 *Muir v Mutual and Federal Pension Fund* 2002 (9) BPLR 3864 (PFA).

269 Reddy 2006 *Agenda* 147.

270 *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA).

271 Reddy 2006 *Agenda* 147.

272 Isaack 2003 *Human Rights* 21.

273 Isaack 2003 *Human Rights* 21.

274 Proclamation 21 of 1996.

275 Isaack 2003 *Human Rights* 22.

276 41 of 1999.

3.3.13.3 Medical aid benefits

In *Langemaat v Minister of Safety and Security and Others*,²⁷⁷ one of the members of the South African Police Service (SAPS) applied to have her lesbian partner registered as a dependant on the Police Medical Aid Scheme. However, her application was rejected due to the fact that the meaning of "dependant" in the Police Medical Aid Scheme's rules and regulations excluded LGBTI couples.²⁷⁸ The Court held that the rules and regulations constituted unfair discrimination against LGBTI people and therefore declared them unconstitutional.²⁷⁹ As such, a change in the definition of "dependant" in the *Medical Schemes Act*²⁸⁰ was effected to include LGBTI partners as well as unmarried heterosexual partners.²⁸¹

Furthermore, in the case of *Satchwell v President of South Africa and the Minister of Justice*,²⁸² the Pretoria High Court held that LGBTI partners should be included in receiving spousal benefits of judges under the *Judges' Remuneration and Conditions of Employment Act*.²⁸³ On review, the Constitutional Court confirmed the decision and ordered that the *Act* be amended to include the additional words "or partner, in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support" subsequent to the term "spouse", in the allocation of spousal benefits.²⁸⁴

3.3.14 Publicity

Most television (TV) programmes currently display an impressive number of LGBTI actors and personalities. This gives them the platform to show that homosexuality is existent and that it is normal being part of the LGBTI community. Almost all the South African Broadcasting Corporation (SABC) channels have TV and radio programmes that have employed a LGBTI person. This gives the idea that a lot of people are aware of homosexuality, because SABC is a public entity and commercial broadcaster that has millions of viewers.

277 *Langemaat v Minister of Safety and Security and Others* 1998 (3) SA 312 (T).

278 Isaack 2003 *Human Rights* 22.

279 Isaack 2003 *Human Rights* 22.

280 131 of 1998.

281 Isaack 2003 *Human Rights* 22.

282 *Satchwell v President of South Africa and the Minister of Justice* 2002 (6) SA 1 (CC).

283 88 of 1989.

284 Isaack 2003 *Human Rights* 22.

There are famous LGBTI people that have accomplished a lot in life such as Somizi Mhlongo,²⁸⁵ Sade Giliberti,²⁸⁶ Caster Semenya,²⁸⁷ the late Lara Kruger;²⁸⁸ all of which have indicated that their sexual orientation and gender identity is nothing that should stop anyone from achieving their dreams. They have made the LGBTI community proud by standing for what they believe in and disregarding the homophobic attitudes that come with being part of the sexual minority in the country.

Furthermore, it has been reported that the African National Congress Women's League (ANCWL) now allows transgender women into its ranks, a stride which challenges social norms and stigmas.²⁸⁹ ANCWL member, Khusela Sangoni stated that:

What is clear is that transgender people are discriminated against, subjected to violence and excluded from the economy. The League should be home for all women including transgender women.²⁹⁰

Another notable achievement is the gay rugby club, named Jozi Cats, which was founded in 2015 with the aim of building a competitive, social and diverse club which welcomes players from everyone having experience and who have the love for rugby.²⁹¹ The Club's objectives are set firmly on growing LGBTI rugby within the Club and the rest of the country, while ensuring that their members are safe and maintaining a harassment-free environment for everyone who shares the same values as the club,²⁹² which is a step in the right direction, because there are no LGBTI teams in South Africa.

285 Somizi is a very prominent gay person known for his vivacious personality. He is a choreographer, an actor and TV personality.

286 Sade is also a famous TV personality who has been public about being lesbian.

287 Caster is an athlete whose intersexuality has been questioned a number of times, but has not let it stop her from being the best athlete that she is.

288 She was a radio DJ, at Motsweding FM. Her real name is Thapelo Lehuleri, who was born in North West, Rustenburg as a boy but lived and identified as a woman.

289 Mamacos 2016 <http://www.careers24.com/career-advice/management-advice/transgender-trans-south-africa-workplace-advice-20160318>.

290 Mamacos 2016 <http://www.careers24.com/career-advice/management-advice/transgender-trans-south-africa-workplace-advice-20160318>.

291 Jozi Cats 2017 <http://www.jozicats.co.za/who-we-are/>.

292 Jozi Cats 2017 <http://www.jozicats.co.za/who-we-are/>.

3.3.15 The establishment of LGBTI support centres

There are a number of LGBTI organisations established for purposes of assisting and supporting LGBTI hate crimes victims.²⁹³ Some of those organisations include:

3.3.15.1 Legal support centres

- Tshwaranang Legal Advocacy Centre

It is a Johannesburg-based registered non-governmental organisation (NGO) that was established in 1996, for purposes of promoting and defending women's rights to be free from violence and to have access to quality effective services.²⁹⁴

- Women's Legal Centre (WLC)

The WLC is a non-profit law centre situated in Cape Town, aimed at achieving equality for black women through impact-based litigation. It provides free legal advice on violence, legal support to advocacy campaigns run by other organisations in the whole of Africa, and training that ensures that people understand the impact of court judgments on women's rights.²⁹⁵

3.3.15.2 Chapter 9 Institutions

- Commission for Gender Equality

It is an institution established in terms of section 9 of the Constitution, which has to investigate gender-related complaints, monitor compliance with gender policies and legislation, and run public information programmes.²⁹⁶

- South African Human Rights Commission (SAHRC)

The SAHRC is also an institution that has been established in terms of section 9 of the Constitution. Its duty is to promote, protect and monitor human rights in South Africa by investigating and reporting on the violation of such rights.²⁹⁷

293 DoJ&CD 2014 <http://www.justice.gov.za/vg/lgbti/2014-LGBTI-faq.pdf>.

294 The TLAC can be accessed on www.tlac.org.za.

295 The WLC can be accessed on www.wlce.co.za.

296 The CGE can be accessed on www.cge.org.za.

3.3.15.3 LGBTI resources, advocacy and support centres

- Gender DynamiX

It is a Cape Town NGO that undertakes to advance, promote and defend the rights of transgender non-conforming people in South Africa, Africa and globally through a human rights framework.²⁹⁸

- Luleki Sizwe

It is Cape Town-based organisation that was founded in 2007 by an LGBTI activist, Ndumie Funda. It provides shelter and support for lesbians in the Gugulethu township, which also rescues, feeds and nurses corrective rape survivors.²⁹⁹

- Transgender and Intersex Africa (TIA)

TIA is an organisation that was founded in 2010 by African transgender individuals with the aim of advocating for the rights of transgender and intersex constituents in rural settlements, and runs visibility and education initiatives.³⁰⁰

- Forum for the Empowerment of Women (FEW)

It is a Johannesburg-based non-governmental organisation that establishes programmes that empower and improve the political, socio-economic and psychological situations of black lesbians.³⁰¹

- Gay and Lesbian Memory in Action (GALA)

It is a centre for LGBTI culture and education in Africa based in Johannesburg, with the aim of acting as a catalyst for the production, preservation and

297 For more information, the SAHRC can be contacted on www.sahrc.org.za.

298 The organisation's information can be obtained via www.genderdynamix.org.za.

299 Mwambene and Wheal 2015 *African Human Rights Law Journal* 63.

300 More information on the organisation can be obtained via <http://transgenderintersexafrica.org.za>.

301 DoJ&CD 2014 <http://www.justice.gov.za/vg/lgbti/2014-LGBTI-faq.pdf>.

distribution of knowledge on the history, culture and experiences of LGBTI people.³⁰²

– Iranti-Org

It is a human rights visual media organisation located in Johannesburg, which was founded in 2012. It works within a human rights framework for raising awareness on sexuality.³⁰³ It was formed for purposes of forming partnerships and movements that use media as a platform for advocacy, lobbying, and educational interventions across Africa, through which it sets itself as an archive of LGBTI memory in a manner that destabilise numerous modes of discrimination based on gender, sexuality and sexual orientation.³⁰⁴

3.4 International human rights instruments

South Africa is a member state to some international human rights law declarations and conventions, which promote and protect human rights. Consequently, it has an international duty to prohibit discrimination.³⁰⁵ The core treaties of international human rights law, which are said to constitute the International Bill of Rights, are discussed hereunder.

3.4.1 Universal Declaration of Human Rights (UDHR), 1948

The UDHR is an international document which was adopted by the United Nations General Assembly on the 10th of November 1948.³⁰⁶ It was proclaimed as a result of

302 Information on the centre can be obtained from www.gala.co.za.

303 Iranti-Org <http://www.iranti-org.co.za/about.html>.

304 Iranti-Org <http://www.iranti-org.co.za/about.html>.

305 Mwambene and Wheal 2015 *African Human Rights Law Journal* 69.

306 The Preamble of the UDHR reads as follows:

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,
Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

Whereas it is essential to promote the development of friendly relations between nations,

Whereas the people of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal

the Second World War, as a common standard of achievement for all people and all nations. It sets out all the fundamental human rights that need to be universally protected, and is generally accepted to be the foundation of international human rights law.³⁰⁷

In terms of article 1, everyone is born free and equal in dignity and rights; and has been endowed with reason and conscience to act towards others in the spirit of brotherhood.³⁰⁸ In support of this, article 2 emphasises everyone's entitlement to all the rights and freedoms enshrined in the Declaration, without differentiation of any kind, such as sex,³⁰⁹ race or other status.³¹⁰ Furthermore, article 7 provides that every person is equal before the law and entitled to equal protection against any discrimination in violation of the Declaration and against any encouragement to such discrimination.³¹¹

3.4.2 *The International Covenant on Civil and Political Rights (ICCPR), 1966*

The ICCPR was adopted by the General Assembly of the United Nations on the 19th of December 1966,³¹² ratified by South Africa in 1998.³¹³ Article 2³¹⁴ of the Covenant provides that:

rights of men and women and have determined to promote social progress and better standards of life in larger freedom,
Whereas Member States have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,
Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realisation of this pledge,
Now, therefore,
The General Assembly,
Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all people and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the people of Member States themselves and among the people of territories under their jurisdiction.

307 United Nations www.un.org.

308 A 1 of the UDHR (1948).

309 In this context, sex should be interpreted to include gender identity and/or sexual orientation.

310 A 2 of the UDHR (1948).

311 A 7 of the UDHR (1948).

312 The preamble of the ICCPR reads:

Recognising that these rights derive from the inherent dignity of the human person,
Recognising that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can

1. 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 recognised 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.
2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the present Covenant.
3. Each State Party to the present Covenant undertakes:
 - (a) To ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
 - (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
 - (c) To ensure that the competent authorities shall enforce such remedies when granted.

This is indicative of the fact that the right to equality is a universally recognised right, which is stressed, so that people can uphold it. Other constitutional rights that were mentioned earlier such as the right to life³¹⁵ and security of the person³¹⁶ are also protected by the ICCPR.

only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,
 Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,
 Realising that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognised in the present Covenant,

313 NGO Pulse 2012 <http://www.ngopulse.org/press-release/south-africa-ratify-international-socio-economic-rights-covenant>.

314 A 2 of the ICCPR (1966).

315 A 6 of the ICCPR, which reads as follows:
 1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

316 A 9 of the ICCPR, which reads as follows:
 1. Everyone has the right to liberty and security of person...

3.4.3 *The International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966*

The ICESCR was adopted by the United Nations General Assembly on the 16th of December 1966, and enforced on the 3rd of January 1976.³¹⁷ The purpose of the ICESCR is to ensure the protection of economic, social and cultural rights, such as the right to non-discrimination on the basis of sex, religion or other status, which is enshrined in article 2;³¹⁸ and everyone's equal right to enjoy the rights in the ICESCR, in terms of article 3.³¹⁹

In light of the above, it is indicative that the objectives of the treaties that constitute the International Bill of Rights are to uphold and protect human rights, with equality being the core of them all. Furthermore, as already aforementioned, the Yogyakarta Principles, which are principles on the application of international human rights law on sexual orientation and gender identity. In addition, the United Nations Declaration on Sexual Orientation and Gender Identity also form part of the international human rights law instruments, which are also aimed at protecting human rights, and to particularly, protect LGBTI people against unfair discrimination based on their sexual orientation and gender identity.

3.5 Conclusion

In light of the above discussion, it is evident that the Constitution afforded LGBTI people with the necessary rights and protection as a means of promoting social justice³²⁰ as one of the cornerstones of the Constitution. The legislative reform brought about by the Constitution has enabled LGBTI people to claim their equality as citizens of South Africans.³²¹ The Constitution has therefore positively influenced the prohibition of unfair discriminatory practices based on sexual orientation, regardless of the fact that people choose not to uphold such rights.

317 United Nations www.un.org.

318 A 2 of the ICESCR (1966).

319 A 3 of the ICESCR (1966).

320 Social justice is a concept in which human rights are manifested in the everyday lives of people at every level of society. It advocates for the proper administration of laws conforming to the natural laws that all people are to be treated equally and without prejudice irrespective of their ethnicity, race, religion or sexual orientation.

321 Roberts and Reddy 2008 *HSRC Review* 9.

The following chapter will discuss the statutory and policy framework that prohibits unfair discrimination based on sexual orientation.

CHAPTER FOUR: THE STATUTORY AND POLICY FRAMEWORK ON UNFAIR DISCRIMINATION BASED ON SEXUAL ORIENTATION

4.1 Introduction

The objective of this chapter is to elaborate on the South African statutory and policy framework that prohibits unfair discriminatory practices based on sexual orientation. It focuses on a set of bills, government policies and statutes that were enacted and adopted to prevent and prohibit unfair discrimination based on sexual orientation.

4.2 Government Bills and Policies

4.2.1 Set of Bills

4.2.1.1 Women Empowerment and Gender Equality Draft Bill of 2012

This *Bill* was adopted to promote the values of non-racism and non-sexism, which gives effect to constitutional values and to acknowledge the fact that although universal recognition and constitutional guarantees are awarded to LGBTI people as all human beings, their rights continue to be infringed and they are often tortured, raped and murdered due to their sexual orientation.³²² The *Bill* is further aimed at recognising that all female persons are women, irrespective of their sexual orientation, their entitlement to equal protection and treatment, and their inherent dignity that they have by virtue of being human beings.³²³

4.2.1.2 Prevention and Combating of Hate Crimes and Hate Speech Bill of 2018

This *Bill* was tabled by Parliament in September 2016 for public comments.³²⁴ It has been drafted to address hate crimes and hate speech. It is reported that the *Bill* received about 75 854 comment submissions from both institutions and individuals even after the deadline for submissions had passed, which the Department of Justice and Constitutional Development maintains is what has caused the deferral of the *Bill* and also considering the complex and sensitive nature of the *Bill*, which required

322 See the preamble of the Bill.

323 One of the objectives of the Bill.

324 eNCA 2016 <http://www.enca.com/south-africa/new-law-to-deal-with-hate-crimes-in-sa>.

careful consideration, which resulted in the delay.³²⁵ The Department's response followed after a petition created by the Hates Crimes Working Group (HCWG)³²⁶ and All-out, with 21,519 signatures was submitted to the Department, calling for the *Bill* to be approved and enacted into legislation, because they believed that the *Bill* has been delayed for almost a decade now.³²⁷

Section 2 of the *Bill* provides for the objectives of the *Bill*, which are, *inter alia*, to:

- give effect to the country's constitutional and international human rights law obligations regarding racism, xenophobia and related intolerance;
- establish the offence of hate crime and hate speech, as well as the prosecution of the perpetrators of such crimes;
- provide for appropriate sentences that should be imposed on perpetrators of hate crime and hate speech offences;
- provide for the prevention of hate crimes and hate speech;
- provide for reports on its implementation, application and administration; and
- effect amendments to certain *Acts* and provide for matters connected therewith.

Furthermore, section 3 of the *Bill* creates and defines the offence of hate crime as follows:

- 3(1) A hate crime is an offence recognised under any law, the commission of which by a person is motivated by that person's prejudice or intolerance

325 eNCA 2018 <https://www.enca.com/south-africa/cabinet-approves-bill-criminalising-hate-speech-and-hate-crimes>.

326 The HCWG comprises of numerous civil society organisations, whose focus is the physical, emotional, and socio-economic well-being of their constituents. Its main function is to create awareness about hate crimes and develop the community's capacity towards the prevention of and response to hate crimes.

327 MambaOnline 2018 <http://www.mambaonline.com/2018/03/20/cabinet-finally-approves-historic-hate-crime-bill/>.

towards the victim of the crime in question because of one or more of the following characteristics or perceived characteristics of the victim or his or her family member or the victim's association with, or support for, a group of persons who share the said characteristics:

- ...
(h) gender or gender identity;
- ...
(p) sex, which includes intersex; or
- (q) sexual orientation.

Moreover, section 3(2) of the *Bill* states that anyone who commits a hate crime will be liable and found guilty of an offence on conviction to an appropriate sentence provided for in section 6(1). Section 6 of the *Bill* provides for penalties or orders that are applicable to hate crime perpetrator, which are outlined as follows:

- 6(1) Subject to subsection (2), any person who is convicted of an offence referred to in section 3 is liable, on conviction, to any of the following forms of penalties which the court sentencing the person considers appropriate and which is within that court's penal jurisdiction:
 - (a) Imprisonment, periodical imprisonment, declaration as a habitual criminal, committal to any institution established by law, a fine, correctional supervision or imprisonment from which a person may be placed under correction supervision, as contemplated in section 276 of the *Criminal Procedure Act*; or
 - (b) postponement or suspension of the sentence or a caution or reprimand, as contemplated in section 297 of the *Criminal Procedure Act*.

It cannot be argued that this *Bill* indicates the determination that the Government has in eradicating hate crimes and hate speech against LGBTI people. What makes the *Bill* even more unique and encouraging in eradicating the ongoing trends of hate crimes and hate speech is its prescription on how to prevent hate crimes and hate speech, as opposed to earlier statutes which lacked this most significant clause. Section 9 of the *Bill* sets out measures on how to prevent hate crimes. It prescribes such measures as follows:

- 9(1) The State, the SAHRC and the Commission for Gender Equality have a duty to promote awareness of the prohibition against hate crimes and hate speech, aimed at the prevention and combating of these offences.

- (2) Without derogating from the general nature of the duty referred to in subsection (1), one or more Cabinet members, designated by the President, must cause programmes to be developed in order to-
- (a) conduct education and information campaigns to inform the public about the prohibition against hate crimes and hate speech, aimed at the prevention and combating of these offences;
 - (b) ensure that all public officials who may be involved in the investigation and prosecution of hate crimes and hate speech are educated and informed of the prohibition against these offences;
 - (c) provide assistance and advice to any person who wants to lodge a complaint of a hate crime or hate speech; and
 - (d) train public officials on the prohibition, prevention and combating of hate crimes and hate speech, which training must include social context training.
- (3) The South African Judicial Education Institute established in terms of section 3 of the *South African Judicial Education Institute Act 14 of 2008* must develop and implement training courses, including social context training courses, for judicial officers for purposes of presiding in court proceedings, for the purposes of this Act.

Ndumie Funda, an LGBTI activist and founder of Luleki Sizwe, hopes that the *Bill* will completely put an end to hate crimes, especially corrective rape, because lesbians are often raped by men who believe that the rape will “cure” them of their lesbianism.³²⁸ On the same view, a member of the HCWG, Sanja Boenman stated that:³²⁹

It really will provide an opportunity for the criminal justice system to interrogate the underlying hate or underlying prejudice that results in something like corrective rape, which is of course that affects mostly black lesbians living in townships and currently if that is reported to the police it goes through the criminal justice system merely as a rape case as opposed to a rape case that happened because of hatred and prejudice against lesbians.

After the much anticipated outcome following the thousands of comments submitted on the bill and petitions advocating for the finalisation of the *Bill*, it is reported that the *Bill* was recently and finally approved by the Cabinet, and is now to be sent to Parliament to go through the legislative process.³³⁰ The Department of Justice

328 eNCA 2016 <http://www.enca.com/south-africa/new-law-to-deal-with-hate-crimes-in-sa>.

329 eNCA 2016 <http://www.enca.com/south-africa/new-law-to-deal-with-hate-crimes-in-sa>.

330 MambaOnline 2018 <http://www.mambaonline.com/2018/03/20/cabinet-finally-approves-historic-hate-crime-bill/>.

explained that as a result of the many submissions and debates that arose from the publication of the draft *Bill*, further research and engagements regarding the *Bill* were required, which resulted in the *Bill* being revised.³³¹

It is explained that the revised *Bill* that been approved by Cabinet differs substantially from the one that was published earlier on for public comments, in that the provisions dealing with, in particular hate speech, have been significantly changed.³³² The Department explains the change as follows:

The qualifying criteria for hate speech is a clear intention to be harmful or to incite harm or promote or propagate hatred on the basis of age, ..., gender identity, ... or sex, which includes intersex or sexual orientation.

Lastly, the revised *Bill* specifically excludes anything done in good faith in the course of engagement in any bona fide artistic creativity, performance or other form of expression, academic or scientific inquiry or fair and accurate reporting or commentary in the public interest, in so far as it does not advocate hatred that constitutes incitement to cause harm, from the ambit of hate speech.³³³

It further excludes the *bona fide* interpretation and proselytising or espousing of any religious tenet, belief, teaching, doctrine or writings, to the extent that such interpretation and proselytization does not advocate hatred that constitutes incitement to cause harm, from the ambit of hate speech.³³⁴

Having regarded the abovementioned clauses of the *Bill*, it is indicative that this *Bill* will mark the end of hate crimes and hate speech against vulnerable groups, such as LGBTI people. It is more encouraging to note the State's level of commitment in preventing and prohibiting hate crimes and hate speech through the training of criminal justice system officials in handling cases arising from such crimes, also noting the creation of public educational campaigns on the prohibition of hate crimes and the necessary support offered to victims of these crimes.

331 MambaOnline 2018 <http://www.mambaonline.com/2018/03/20/cabinet-finally-approves-historic-hate-crime-bill/>.

332 MambaOnline 2018 <http://www.mambaonline.com/2018/03/20/cabinet-finally-approves-historic-hate-crime-bill/>.

333 eNCA 2018 <https://www.enca.com/south-africa/cabinet-approves-bill-criminalising-hate-speech-and-hate-crimes>.

334 MambaOnline 2018 <http://www.mambaonline.com/2018/03/20/cabinet-finally-approves-historic-hate-crime-bill/>.

4.2.2 Government Policies

4.2.2.1 National Policy Guidelines for Victim Empowerment (2009)

This policy was proposed by the Department of Social Development in 2009 under the leadership of the former minister, Dr ZST Skweyiya, aimed at achieving a society where the rights and needs of victims³³⁵ of crime and violence are recognised and effectively addressed within a restorative justice framework.³³⁶ The policy identifies the targeted groups of victims among which victims of hate victimisation are included.³³⁷ The policy states that:

South Africa's past is characterised by a regime of categorisation, discrimination and prejudice. It is thus unsurprising that the production of 'otherness' and 'abnormality' became a virtually automatic and inherent practice of identity construction in this society. 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. These processes contribute to individuals becoming vulnerable to hate victimisation on the basis of their actual or perceived race, ethnicity, gender, nationality, social origin, sexual orientation, disability, health status, religious convictions, and on other grounds.

Violence directed at the identity of the victim and motivated by hatred not of the individual, but of the group to which he or she belongs (i.e. 'foreign nationals'; the

335 In terms of the policy, everyone; irrespective of race, gender, sex, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture and language is a victim.

336 The objectives of the National Policy Guidelines for Victim empowerment are to:

- 1) give strategic direction on the development of management structures for effective coordination of the programme at all government levels;
- 2) identify and clarify sector specific roles and responsibilities at all government levels of the management structures;
- 3) guide the process of monitoring, evaluation and reporting by the implementing structures;
- 4) serve as a framework for the development of sector specific policies and strategies;
- 5) identify roles and responsibilities of relevant government departments;
- 6) create a common understanding of victim empowerment amongst various State Departments, victims, perpetrators, non-profit organisations (NPOs), (including non-governmental organisations (NGOs) and community-based organisations (CBOs)), and individual members of the community.

337 The policy further sought to address the fact that with regard to hate crimes, international literature indicates higher levels of psychological distress of the victim as one of the reasons these sorts of crimes require unique services, legislative and policy responses, and prioritisation. Other reasons include evidence of decision-makers de-prioritising hate victimisation and service providers neglecting, and sometimes even overtly discriminating against, survivors of hate crimes within the criminal justice system and health system. This has the effect of exacerbating, rather than addressing, the vulnerability of survivors of hate victimisation. Further, limited policing and barriers to accessing the legal system exacerbate vulnerability. These social dynamics are compounded by self-stigmatisation and the hesitancy, as a result of fear, of survivors of hate victimisation to approach service providers for support or redress.

'lesbian and gay community'; or 'Muslims'), distinguishes hate victimisation from other crimes. The impact extends beyond the direct victim of the crime to other members of the victim's group in that such crimes instil fear and heightened vulnerability and convey the message that they are despised, unwelcome and/or under threat.

4.2.2.2 The National Policy Framework on Management of Sexual Offences³³⁸

The NPF provides an extensive framework for stakeholders within the sexual violence sector to jointly respond to and prevent the commission of sexual crimes through the application of a 5-year Inter-Departmental Plan and the development of Department-Specific Plans, which aim to eradicate sexual violence in the society. This policy also applies to LGBTI people; because of the discriminatory perceptions that they experience due to the belief that homosexuality is an unacceptable sexual conduct.

The primary objective of this policy is to prevent sexual crimes that are often experienced in different societies. Furthermore, it addresses the fact that LGBTI people are predominantly victims of sexual crimes, particularly corrective rape, because of their sexual orientation and gender identity.

4.2.2.3 The National Intervention Strategy for the LGBTI Sector (2011)

In 2014 former Minister of Justice, Jeff Radebe, launched the intervention strategy that was to be developed by the National Task Team. This team was established by the Department of Justice in 2011 for purposes of addressing hate crimes perpetrated against LGBTI people and to address sexual as well as gender-based violence against all community members.³³⁹ The Minister explained that the Department recognised the need to enact a specific legislation for hate crimes and that the issue would be addressed through a public debate.³⁴⁰

338 1st Edition June 2012. Section 62(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

339 *Nel South African Journal of Psychology* 146.

340 *Nel South African Journal of Psychology* 146.

4.2.2.4 The Draft South African National LGBTI HIV Framework 2017-2022 (2016)³⁴¹

This framework was established to provide guidance to all LGBTI stakeholders and implementers in South Africa. It includes all sexual minorities that live within the borders of South Africa, and recommends evidence-based and multi-sectoral Human Immunodeficiency Virus (HIV) interventions for addressing the HIV epidemic in the country. The framework is aimed at building consensus of LGBTI stakeholders from across South Africa on priorities, challenges, and goals related to providing appropriate, accessible and acceptable services to LGBTI people. The framework further recommends for the establishment of activities that will bring South Africa closer to addressing the vulnerabilities of LGBTI people and those living with HIV, Tuberculosis (TB) and Sexually Transmitted Illnesses (STIs) with evidence-based practices and within an environment that is affirming of their human rights.³⁴²

4.3 Scope of Legislation

To promote recognition and protection for the rights of LGBTI people, Parliament enacted anti-discriminatory statutes which contain provisions that aim to protect LGBTI people against unfair discriminatory practices on the basis of their sexual orientation and gender identity. The key statutory provisions are discussed hereunder.

4.3.1 Labour Relations Act³⁴³

This Act was enacted to advance social justice, economic development, labour peace and democracy in the workplace.³⁴⁴ In terms of section 187(1)(f) of this Act, discriminatory dismissals based on numerous grounds, as well as sexual orientation are prohibited; as such, an employer cannot dismiss employees based on their sexual orientation as that constitutes an unfair dismissal.

341 The Draft South African National LGBTI HIV Framework, 2017-2022 is a milestone in the country's response to HIV, AIDS, STIs, and TB for Lesbian, Gay, Bisexual, Transgender, Intersex People.

342 *The Draft South African National LGBTI HIV Framework 2017-2022 (2016)* 9.

343 66 of 1995.

344 Section 1 of the *Labour Relations Act* 66 of 1995.

4.3.2 *South African Schools Act*³⁴⁵

The Act was passed to transform schools through the establishment of uniform rules and standards for the funding, governance and organisation of public schools; to serve the interests and needs of all learners at schools and to uphold their constitutional rights. Section 5(1) of this Act provides admission requirements for public schools. It provides that public schools should not unfairly discriminate against learners on the basis of their sexual orientation or gender identity, among other grounds. This Act therefore prohibits unfair discriminatory practices against LGBTI learners who are eligible to be admitted in such public schools.

4.3.3 *Employment Equity Act*³⁴⁶

This Act was enacted for purposes of promoting equity in the workplace, through the promotion of equal opportunities and impartial treatment, which can be achieved through the elimination of unfair discriminatory practices and the implementation of affirmative action measures to redress the disadvantages experienced by vulnerable groups in the workplace, such as LGBTI people, so as to secure fair representation in all work categories and positions.³⁴⁷

Section 5 of this Act provides that an employer ought to take reasonable steps for purposes of promoting equality in the workplace through the elimination of unfair discriminatory practices and policies. Furthermore, in terms of section 6(1), direct or indirect unfair discrimination against employees on the basis of their sexual orientation is prohibited. This demonstrates that anyone who unfairly discriminates against an employee on the basis of their sexual orientation will be held accountable, because such discrimination is unconstitutional and intolerable.

4.3.4 *Promotion of Access to Information Act*³⁴⁸

This Act was enacted to give effect to the right of access to any information kept by the Government and any information in the possession of another person essential

345 84 of 1996.

346 55 of 1998.

347 As set out in section 2 of the Act.

348 2 of 2000.

for the application or protection of any other right. In terms of this Act, a person can choose not to disclose any information that may infringe upon their human rights and dignity. As such, no person can force another to disclose their sexual orientation without their consent.³⁴⁹

4.3.5 *Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA)*³⁵⁰

PEPUDA was passed for purposes of promoting equality, preventing and prohibiting unfair discrimination. It was also enacted to establish Special Equality Courts that address unfair discrimination by individuals. Its preamble explicates how although significant progress has been achieved in transforming South Africa and its institutions, unfair discriminatory practices based on sexual orientation still exist; because of their place in social structures, practices and attitudes, which undermines the aspirations of constitutional democracy. The *Act* also prevents harassment and hate speech based on the prohibited grounds of unfair discrimination. Furthermore, the *Act* states that all practices, including traditional or customary practices which impair the dignity of women, also constitute unfair discrimination.³⁵¹

It has been noted that sexual orientation is not specifically mentioned in the provisions of this *Act*, which is submitted to may have been a legislative omission when the *Act* was drafted.³⁵² However, section 3 provides that when interpreting the *Act*, the interpretation must be in a manner that gives effect to the Constitution and other measures employed to protect or advance the rights of people who have been unfairly discriminated against. As a result of such interpretation, sexual orientation is therefore included as a ground of unfair discrimination even in the absence of its mentioning in the *Act*.³⁵³

349 Opperman *An analysis of the sexual orientation discrimination* 26.

350 4 of 2000.

351 Mwambene and Wheal 2015 *African Human Rights Law Journal* 69.

352 Mwambene and Wheal 2015 *African Human Rights Law Journal* 81.

353 Mwambene and Wheal 2015 *African Human Rights Law Journal* 81.

4.3.6 *Alteration of Sex Description and Sex Status Act*³⁵⁴

This Act was enacted to provide for the alteration of the sex description of certain individuals in certain circumstances, and to consequently amend the *Births and Deaths Registration Act*.³⁵⁵ In terms of this Act, transgender people can apply for the alteration of their sex description in the birth register. Section 2(1) of this Act states:

Any person whose sexual characteristics have been altered by surgical or medical treatment or by evolvment through natural development resulting in gender reassignment, or any person who is intersexed may apply to the Director-General of the National Department of Home Affairs for the alteration of the sex description on his or her birth register.

Furthermore, section 2(2)(b) provides that an application for the sex change must include medical reports by the doctors who carried out the surgical treatment or the doctors who provided the medical treatment. It is however, not compulsory for the applicant to have undergone gender reassignment surgery as hormonal treatment is sufficient.³⁵⁶ When the application is approved, the Magistrate has to issue an order that directs the Director-General to change the sex description of the applicant in the birth register and the amended birth certificate will then be issued to the applicant in terms of section 27A of the *Births and Deaths Registration Act*. If the application is refused, the applicant must be given written reasons; and can thereby lodge an appeal to the Minister of Home Affairs within fourteen days of the decision.³⁵⁷

4.3.7 *Civil Union Act*³⁵⁸

This Act was as a result of the judgment in the case between the *Minister of Home Affairs* and *Fourie*, where the Court held that it was unconstitutional for the Government to prohibit LGBTI couples from getting married. The Court ordered that Parliament be given a year to rectify the status *quo*, which resulted in this *Act*. The *Act* was passed for purposes of solemnising and registering civil unions, by way of

354 49 of 2003.

355 51 of 1992.

356 Although this is the case, it is reported that officials at the Department of Home Affairs sometimes interpret and apply the *Act* incorrectly and turn away applicants who have not had surgery.

357 Southern Africa Litigation Centre 2016 *Research report* 39.

358 17 of 2006.

either a marriage or a civil partnership and for providing legal consequences of the solemnisation and registration of civil unions, provided for in section 2 of the *Act*.

4.3.8 *Criminal Law (Sexual Offences and Related Matters) Amendment Act*³⁵⁹

This statute was enacted for purposes of amending the application of laws all legal aspects that relate to sexual offences. The *Act* also amended the age of sexual consent that was set by the *Sexual Offences Act*, in which was 19 years was the age of consent for homosexual acts; however, 16 years was the age of consent for heterosexual acts. It therefore codified the law on sexual offences in gender and orientation-neutral terms and set 16 years as the uniform age of consent regardless of sexual orientation.

4.4 **Conclusion**

This chapter has indicated that South Africa contributed towards promoting equality and protecting its citizens irrespective of their sexual orientation, through the enactment of anti-discriminatory laws. Thus, it can be submitted that since 1994, South Africa has had a remarkable statutory and policy framework which was aimed at protecting LGBTI people. However, although such legal protection is offered, intolerance of LGBTI people is still prevalent and this proves that the statutes and policies put in place to curb unfair discrimination based on sexual orientation are not at all effective.³⁶⁰

The problem is that although the legislative framework exists, it does not prescribe how unfair discrimination on the basis of sexual orientation should be dealt with even though it emphasises its prohibition.³⁶¹ There is therefore a great need to enact and implement specialised hate crimes legislation that would strengthen enforcement and the prosecution of hate crimes perpetrators.³⁶²

The next chapter will identify and analyse selected incidents of hate crimes experienced by LGBTI people in the post-apartheid South Africa.

359 32 of 2007.

360 Opperman *An analysis of the sexual orientation discrimination* 22; 28.

361 Opperman *An analysis of the sexual orientation discrimination* 27.

362 Lynch and Van Zyl *Research Study by Triangle Project 2*.

CHAPTER FIVE: INCIDENTS OF VIOLENCE AGAINST LGBTI PEOPLE AND RELATED CAUSES

5.1 Introduction

The primary aim of this chapter is to identify and analyse selected incidents of hate crimes experienced by LGBTI people in the post-apartheid South Africa, where sexual orientation is a basic human right. It also aims to explore the possible causes of such hate crimes, specifically focussing on corrective rape which has become the most prevalent form of hate crime experienced particularly by black lesbians.

5.2 Hate crimes against LGBTI people

LGBTI people are among the most vulnerable groups to hate crimes in South Africa as indicated in a recently released report by the Hate Crimes Working Group (HCWG).³⁶³ Furthermore, hate crimes are believed to be message crimes that undermine social cohesion and have an especially traumatic impact on their victims.³⁶⁴ As alluded to in the preceding chapter, a hate crime is defined in section 3(1) of the *Prevention and Combating of Hate Crimes and Hate Speech Bill* as an offence that is recognised under any law, the commission of which is motivated by the perpetrator's bias, prejudice or intolerance towards the victim of the crime or because of characteristics of the victim, his or her family member, or his association with and/or support for a group of people who possess characteristics such as sexual orientation and gender identity.

Hate crimes are still a grave concern in South Africa despite the legislative reform put in place to prevent bias based on a person's sexuality, and although LGBTI people experience hate crimes on a daily basis, most of them do not report the crime.³⁶⁵ Qualitative studies indicate that about 88% of LGBTI hate crime victims do not report

363 MambaOnline 2018 <http://www.mambaonline.com/2018/03/20/cabinet-finally-approves-historic-hate-crime-bill/>.

364 Naidoo and Karels 2016 *Journal for Juridical Science* 72-73.

365 South African Hate Crime Working Group *Report 2*.

these incidents, because of fear of being further discriminated against by those they are reporting the crime to.³⁶⁶

5.2.1 Corrective rape incidents

Corrective rape has become the most concerning form of hate crime directed towards LGBTI people, particularly black lesbians living in townships, and it is still occurring at an alarming rate in South Africa.³⁶⁷ Hlongwane³⁶⁸ defines the term “corrective rape” as:

...a brutal act of violence in which African women and teenagers who are, or are at least assumed to be, lesbians are raped to “cure” them of their homosexuality.

Hlongwane³⁶⁹ further explains that corrective rape has also been defined as:

a hate crime exercised to convert lesbian women to heterosexuality which is an attempt to “cure” them of being gay.

It is unfortunate that this form of rape is not an isolated crime. This is because it is grouped under a broader category of the crime of rape.³⁷⁰ This entails that before corrective rape is considered, if such consideration is made at all, it is first considered as a general crime of rape. Moreover, corrective rape is cited in the broader framework of bias-motivated crimes, commonly termed as hate crimes, which do not yet form part of the South African legal framework. As a result, corrective rape is often treated as the general crime of rape, instead of a crime that was motivated by the perpetrator’s intolerance towards the victim’s sexual orientation.³⁷¹

Most black lesbians, particularly those who come from urban townships, are mostly affected by the brutal practice of “corrective” rape, in which they are raped with the belief that they will be convinced that their true orientation is in fact heterosexual and

366 Letsoalo *Challenges: faced by gay and lesbian students* 1. See also MambaOnline 2016 <http://www.mambaonline.com/2016/10/07/gauteng-police-stations-lgbt-friendly-within-3-years>.

367 Mwambene and Wheal 2015 *African Human Rights Law Journal* 60-61.

368 Hlongwane *Corrective rape* 21.

369 Hlongwane *Corrective rape* 22.

370 Hlongwane *Corrective rape* 9.

371 Hlongwane *Corrective rape* 9.

not homosexual.³⁷² Over the past decade, there have been extremely unspeakable hate crime incidents, particularly corrective rape incidents occurring. Some of them are discussed hereunder.

- On the 4th of February 2006, Zoliswa Nkonyana, who lived openly as a black lesbian from Khayelitsha, was brutally stabbed and stoned to death by about 20 men, after she and a group of men at a tavern had an argument on why lesbians use the ladies' toilet, when they pretend to be tomboys.³⁷³ After leaving the tavern and splitting with her friend, about 20 men caught up with Zoliswa and attacked her; the attackers were said to be clear that they wanted to kill her because she was lesbian,³⁷⁴ and of the reported 20 men, only 9 of them; who were mostly juveniles, were arrested. Zoliswa's mother; Monica Mandindi, approached the Treatment Action Campaign (TAC) to assist her in ensuring that her daughter's murderers were brought to justice.³⁷⁵

The matter proceeded for a very long period of time, wherein there were numerous postponements that were requested, and on the 5th of February 2008, the Magistrate who was presiding over the case criticised the State for its gross negligence because it failed to secure the presence of its witnesses.³⁷⁶ The TAC, together with other anti-homophobic organisations, such as the 07-07-07 End Hate Campaign³⁷⁷ and the Triangle Project mobilised their members throughout the trial for a number of reasons, including handing over a memorandum to the state prosecutor that demanded, *inter alia*, a speedy trial, access to information about the case; witness protection and the investigation of hate crimes.³⁷⁸

372 Mwambene and Wheal 2015 *African Human Rights Law Journal* 60-61.

373 Mwambene and Wheal 2015 *African Human Rights Law Journal* 66.

374 Mwambene and Wheal 2015 *African Human Rights Law Journal* 66.

375 Safe Communities Unknown date <http://safecommunities.sjc.org.za/affidavits/the-tragic-story-of-zoliswa-nkonyana/>.

376 Safe Communities Unknown date <http://safecommunities.sjc.org.za/affidavits/the-tragic-story-of-zoliswa-nkonyana/>.

377 A campaign that was initiated by the Joint Working Group, following the brutal killing of two lesbians; Sizakele Sigasa and Salome Massoa, in Soweto on the 7th of July 2007. The campaign was aimed at ensuring that the authorities aggressively work towards ending hate crimes against LGBTI people, as well as motivating the LGBTI community to claim its rights.

378 Safe Communities Unknown date <http://safecommunities.sjc.org.za/affidavits/the-tragic-story-of-zoliswa-nkonyana/>.

Zoliswa's tragic murder trial was filled with irregularities in that some of the evidence used was obtained unlawfully and defenses were raised regarding the admissibility of such unlawfully obtained evidence.³⁷⁹

During the trial, the Magistrate found it essential to consider the fact that all the accused were minors when they committed the crime, stating that it is difficult to sentence juvenile offenders because of the various factors that need to be considered.³⁸⁰ The Magistrate held that sentencing should be a deterrent to the accused and the community at large, by sending a message that hate crimes would not be tolerated and to further encourage rehabilitation.³⁸¹

Before passing the sentence, the Court took into account three factors surrounding the case. Firstly, it considered the seriousness and nature of the offence, which the Court noted as follows:

In considering this factor, due consideration was given to the case as proven by the state which dealt with the murder of a young woman whose life was taken away by virtue of her life choices and personal beliefs. She posed no threat to the accused but yet they acted in a brutal and violent manner which cannot be condoned by the community, nor the court.³⁸²

In addition, the Triangle Project's representative made recommendations that the sentencing should reflect the "extremely brutal nature" of the crime, while recognising and mentioning that discrimination on the basis of sexual orientation and gender identity must be considered as an aggravating factor in sentencing.³⁸³ In support of this view, Mwambene and Wheal³⁸⁴ explain that:

During the trial, no reference was made as to the motive for the killing of Zoliswa, but it was a necessary factor to consider in sentencing in the view of the Court. It was held that the "preceding events to the commission of the offence was a clear indicator as to what the motive was" which, according to the court, was held to be hatred. Such hatred stemmed from intolerance of her difference and thus the motive was considered as an aggravating factor

379 Safe Communities Unknown date <http://safecommunities.sjc.org.za/affidavits/the-tragic-story-of-zoliswa-nkonyana/>.

380 *S v Lubabalo Ntlabati and Others (the Zoliswa Nkonyana case)* Case RCB216/06 [2006].

381 *S v Lubabalo Ntlabati and Others (the Zoliswa Nkonyana case)* Case RCB216/06 [2006].

382 *S v Lubabalo Ntlabati and Others (the Zoliswa Nkonyana case)* Case RCB216/06 [2006].

383 Mwambene and Wheal 2015 *African Human Rights Law Journal* 77-78.

384 Mwambene and Wheal 2015 *African Human Rights Law Journal* 78.

in sentencing. The message that the murder of Zoliswa sent was one which blatantly communicated to lesbians that they are less than human and that their lives are expendable.

The second factor that the Court considered was the interests of the family of the victims and those of the community, wherein the Court noted the community' outrage by Zoliswa's murder,³⁸⁵ which resulted in the courtroom being over-crowded and extensive media coverage and attention given to the case by several interested groups who voiced their dissatisfaction.³⁸⁶ In addition to the outrage, the Department of Social Justice compiled a report detailing the circumstances of the victim's family. It stated that she was an only child, which resulted in an even greater loss to her family, and a further report was submitted by the Triangle Project, setting out the impact which Zoliswa's death had on her girlfriend who had witnessed her murder, and indicating to the Court the problems that LGBTI people experience within their communities and the degree of intolerance they consequently suffer.³⁸⁷

Lastly, the Court took the personal circumstances of the accused into account, concluding that all four accused were from good homes with loving and supportive families, who would also suffer a great loss once the accused were sentenced.³⁸⁸ The Court noted that families of the accused showed a great degree of empathy for Zoliswa's family, whereas all four accused displayed no remorse for their actions, which the court regarded as a key element in mitigation of the sentence.³⁸⁹

On the 1st of February 2012, after the case had been postponed more than 50 times and the Court having regarded the mitigating and aggravating factors, it held that imprisonment was the only appropriate sentence for the accused. All four were found guilty of Zoliswa's murder and sentenced to 18 years

385 *S v Lubabalo Ntlabati and Others (the Zoliswa Nkonyana case)* Case RCB216/06 [2006].

386 Mwambene and Wheal 2015 *African Human Rights Law Journal* 78.

387 Mwambene and Wheal 2015 *African Human Rights Law Journal* 78.

388 *S v Lubabalo Ntlabati and Others (the Zoliswa Nkonyana case)* Case RCB216/06 [2006].

389 *S v Lubabalo Ntlabati and Others (the Zoliswa Nkonyana case)* Case RCB216/06 [2006].

imprisonment, of which 4 years were suspended for a period of 5 years on the condition that they should not commit the same offence during suspension.³⁹⁰

It is submitted that Zoliswa's tragic death and delayed justice demonstrated the systematic problems that the SAPS and justice system have, which include the following as outlined in the Safe Communities website:³⁹¹

- Delayed witness protection and failure to secure the presence of witnesses at the trial;
- Failure to investigate, locate evidence and take statements lawfully from minors;
- Failure to communicate with the victim's family;
- A police officer's direct involvement in organising the escape of suspects from the court; and
- Incarceration of minors without bail for about 6 years including two whose statements to the SAPS were ruled as inadmissible because such statements were taken from the then minors in the absence of their legal representatives and/or parents; and such minors were then discharged after more than 5 years in jail.

Despite the several systematic problems, the SAPS Task Team unfortunately concluded that the investigation was properly conducted- a finding which was blatantly insupportable. Furthermore, astonishingly, neither the Task Team nor the Provincial Commissioner mentioned the fact that Zoliswa was lesbian and that she was murdered because of her sexual orientation.³⁹²

390 *S v Lubabalo Ntlabati and Others (the Zoliswa Nkonyana case)* Case RCB216/06 [2006]. See also Safe Communities Unknown date <http://safecommunities.sjc.org.za/affidavits/the-tragic-story-of-zoliswa-nkonyana/>, and Mwambene and Wheal 2015 *African Human Rights Law Journal* 80.

391 Safe Communities Unknown date <http://safecommunities.sjc.org.za/affidavits/the-tragic-story-of-zoliswa-nkonyana/>.

392 Safe Communities Unknown date <http://safecommunities.sjc.org.za/affidavits/the-tragic-story-of-zoliswa-nkonyana/>.

- On the 7th of July 2007, Sizakele Sigasa and Salome Masooa, a lesbian couple, were raped and murdered in Soweto, Johannesburg. Sizakele worked as an outreach official at Positive Women's Network and lived as an openly well-known lesbian and women's rights activist. It is reported that she was shot 6 times, with her underwear and shoelaces used to tie her hands and feet, and her partner, Salome, was also shot in the head.³⁹³

Before her death, Sizakele complained to her friends that she did not feel safe in her community because of the fact that she was a lesbian. A week later, the couple was found murdered next to a dumpsite.³⁹⁴ According to a witness, the couple suffered homophobic abuse by a group of people before they left a local bar that they had visited. Consequently, 3 men were arrested but later released and the charges against them were withdrawn.³⁹⁵ After the brutal murder of this couple, the 07-07-07 End Hate Campaign was established for purposes of ending corrective rape perpetrated against lesbians.³⁹⁶

- On the 28th of April 2008, a well-known lesbian activist and former soccer player for the South African women's national team, Banyana-Banyana, Eudy Simelane, was abducted, gang-raped and murdered in Kwa-Thema.³⁹⁷ She was stabbed more than 20 times in her face, chest and legs and her body was found mutilated in an open field.³⁹⁸ Five suspects were arrested and appeared before the Court, where all charges against Tsepo Pitja, were withdrawn because there existed no evidence linking him to the crime and he subsequently became a state witness.³⁹⁹

Four suspects were brought to trial at the Delmas High Court in 2009, where they were all facing charges of murder, two counts of robbery and "other"; possibly rape.⁴⁰⁰ On the second day of the trial, Thato Mphiti pleaded guilty to

393 Mwambene and Wheal 2015 *African Human Rights Law Journal* 62.

394 Mwambene and Wheal 2015 *African Human Rights Law Journal* 63.

395 Mwambene and Wheal 2015 *African Human Rights Law Journal* 63.

396 Mwambene and Wheal 2015 *African Human Rights Law Journal* 63.

397 Lee, Lynch and Clayton *Human Rights Report by Triangle Project* 11. See also Mwambene and Wheal 2015 *African Human Rights Law Journal* 65.

398 Lee, Lynch and Clayton *Human Rights Report by Triangle Project* 11. See also Mwambene and Wheal 2015 *African Human Rights Law Journal* 65.

399 Mwambene and Wheal 2015 *African Human Rights Law Journal* 74-75.

400 Mwambene and Wheal 2015 *African Human Rights Law Journal* 75.

the count of robbery with aggravating circumstances; however, he pleaded not guilty to the count of rape. He further pleaded guilty to assisting his co-accused in attempting to rape Eudy, in which the co-accused conversely pleaded not guilty to the charge of robbery with aggravating circumstances.⁴⁰¹

Mwambene and Wheal⁴⁰² note Mphiti's statement as follows:

...he and his friends passed Eudy in the early hours of the morning when they decided to rob her. When discovering that she did not carry any money, it was suggested that she be raped and all of them agreed. At that point, Eudy had recognised one of them and in fear of being identified, he insisted that she be silenced and passed his knife to Mphiti who panicked and started stabbing her after which she was kicked into a stream.

It is explained that Mphiti's plea was accepted and the prosecutor applied to have his trial separated from that of the other accused, an application which was granted, and their trial was to commence on the 29th of July 2009.⁴⁰³ However, it was noted that the prosecutor failed to raise the possibility that the perpetrator's prejudice on Eudy's sexual orientation was the motivation for the attack.⁴⁰⁴

On the 13th of February 2009, Mavundla J sentenced Mphiti to 18 years of imprisonment on the count of murder, and 15 years on the count of robbery with aggravating circumstances, of which 10 years were to run concurrently with the first sentence and a further 9 years for assisting his co-accused with the attempted rape, in which it was held that the time already spent in custody should be deducted from the said 9 years, totalling Mphiti's sentence to 32 years of imprisonment.⁴⁰⁵ The Judge explained that the considered factors in reaching a decision that deviated from the mandatory life sentence were the youthfulness of the accused, the fact that Mphiti was intoxicated at the commission of the crime, his level of education, and the fact that Mphiti suffered from "fright/fear syndrome."⁴⁰⁶

401 Mwambene and Wheal 2015 *African Human Rights Law Journal* 75.

402 Mwambene and Wheal 2015 *African Human Rights Law Journal* 75.

403 Mwambene and Wheal 2015 *African Human Rights Law Journal* 76.

404 Mwambene and Wheal 2015 *African Human Rights Law Journal* 76.

405 Mwambene and Wheal 2015 *African Human Rights Law Journal* 76.

406 Mwambene and Wheal 2015 *African Human Rights Law Journal* 76.

The trial of the three remaining accused who commenced in September 2009, where Mahlangu and Magagula were acquitted for lack of evidence and Mvuba was found guilty of murder, rape and being an accomplice to rape by Mokgothleng J. Mvuba subsequently received a life sentence; wherein he showed no remorse for his actions as he was quoted saying “Ach, I’m not sorry at all.”⁴⁰⁷

It is submitted that this case could have been a trail-blazer in deterring hate crimes directed towards lesbians because the perpetrators were convicted. However, during the trial, attempts to establish the relevance of her sexual orientation to her killers’ motives were unsuccessful. As such, Eudy’s sexuality was ruled out as a motive for the attack and the Judge stated that her sexual orientation was of no significance to her murder; therefore it had no bearing on the case.⁴⁰⁸

- On the 20th of June 2008, Sibongile Mphelo, a lesbian from Strand in the Western Cape was raped and murdered. She and her friend were crossing a field near her home when two men approached them. Mphelo’s friend managed to flee, while Mphelo was raped, shot, parts of her leg skinned and her genitals mutilated.⁴⁰⁹ No suspects were arrested in relation to her murder and the case was closed as no progress was being made in the investigation.⁴¹⁰
- In December 2009, Zukiswa Gaca was raped by a man she met at a local bar in Khayelitsha. The man pretended to have accepted her sexual orientation. However, as soon as they departed from the bar, the man attacked and raped her. He further informed her that he hated lesbians and that he wanted to show her that she was not a man, that he was the real man who had all the power over her.⁴¹¹

407 Lee, Lynch and Clayton *Human Rights Report by Triangle Project* 11. See also Mwambene and Wheel 2015 *African Human Rights Law Journal* 65, 76.

408 Mwambene and Wheel 2015 *African Human Rights Law Journal* 65. See also Lee, Lynch and Clayton *Human Rights Report by Triangle Project* 11.

409 Lee, Lynch and Clayton *Human Rights Report by Triangle Project* 12.

410 Lee, Lynch and Clayton *Human Rights Report by Triangle Project* 12.

411 Mwambene and Wheel 2015 *African Human Rights Law Journal* 64.

Zukiswa explained that she was first raped when she was 15 years old in the Eastern Cape because of her sexual orientation, but did not report the attack because of fear.⁴¹² Consequently she moved to Khayelitsha, where the current incident occurred, which she reported to the police. She accompanied the policeman to identify her attacker, upon which he was questioned but subsequently released, which marked the end of the investigation of her case.⁴¹³

- In 2010 Millicent Gaika from the Western Cape, was walking home with her friends after a night out, where they were approached by a man, Andile Ngcoza, whom Millicent was familiar with, and she told her friends they could continue walking.⁴¹⁴ Andile pushed her into her shack, beat and raped her for 5 hours, while telling her that he was showing her that she is a woman, and not the man she thinks she is, and that he was going to make her pregnant and kill her.⁴¹⁵

Millicent reported the incident to the police, which was then taken to the Wynberg Sexual Offences Court, wherein Andile was released on R60 bail and fled while out on bail. The case was then postponed until he could be re-arrested, which to date has not happened. Millicent was taken in by Ndumie Funda, the founder of Luleki Sizwe, who helped her recover from the rape and advocated her case.⁴¹⁶

- In March 2011, Nokuthula Radebe's body was found in a playground in Soweto, wherein her face was found covered in plastic and she was strangled with shoelaces. Non-governmental groups believed that Radebe was a victim of "corrective" rape before she was murdered. A case was then opened at the Thokoza police station. However, no arrests were reportedly made.⁴¹⁷

412 Mwambene and Wheel 2015 *African Human Rights Law Journal* 64.

413 Mwambene and Wheel 2015 *African Human Rights Law Journal* 64.

414 Mwambene and Wheel 2015 *African Human Rights Law Journal* 64.

415 Mwambene and Wheel 2015 *African Human Rights Law Journal* 64.

416 Mwambene and Wheel 2015 *African Human Rights Law Journal* 64.

417 South African Hate Crime Working Group Report 4.

- On the 24th of April 2011, the body of Noxolo Nogwaza, a lesbian who lived in Kwa-Thema township in Gauteng, was found in an alley, where she was attacked by a group of men who left her there with her head deformed, eyes out of their sockets, her brain split and her teeth scattered around her face, and the brick that was used to smash her head was also found next to her body.⁴¹⁸ A beer bottle and used condoms were found shoved up her genitals and some parts of her body were stabbed with glass.⁴¹⁹ This occurred after she had an argument with a group of men at a tavern who had made advances on her friend earlier that evening.⁴²⁰

It is believed that Nogwaza's assault should serve as a reminder that these homophobic attacks are in fact not only premeditated, but that they are committed with impunity, as there exists no hate crime legislation for the prosecution of such attacks.⁴²¹ Nogwaza's case was investigated by the Tsakane police station, who denied that the attack on her was a hate crime and claimed that "murder is murder" regardless of possible prejudice based on sexual orientation; and unfortunately, no arrests were made in the matter.⁴²²

- On the 3rd of May 2011, Nqobile Khumalo was found dead in her township; Kwamashu. Her ex-boyfriend later confessed to attacking and murdering Nqobile, stating that he had killed her because he could not accept that she left him for another woman; upon which he was consequently arrested. It is reported that, in addition to being severely beaten, Nqobile was also raped before she died.⁴²³
- On the 9th of September 2011, the decomposing body of Nontsikelelo Tyatyeka was discovered in a neighbour's dustbin in Nyanga, Cape Town, in what was suspected to be a homophobic case.⁴²⁴ This occurred a year later

418 Mwambene and Wheal 2015 *African Human Rights Law Journal* 64-65.

419 Mwambene and Wheal 2015 *African Human Rights Law Journal* 65.

420 Lee, Lynch and Clayton *Human Rights Report by Triangle Project* 12.

421 Mwambene and Wheal 2015 *African Human Rights Law Journal* 65.

422 Lee, Lynch and Clayton *Human Rights Report by Triangle Project* 12. See also Mwambene and Wheal 2015 *African Human Rights Law Journal* 65.

423 South African Hate Crime Working Group *Report 4*.

424 South African Hate Crime Working Group *Report 4*.

after having being reported missing by her family in September 2010. It is reported that Nontsikelelo reportedly refused to sleep with the perpetrator, Vuyisile Madikane, whom she knew. Apparently, Madikane related to a witness in the case that he attacked Nontsikelelo because she was a “tomboy”, the case in which he was then found guilty of Nontsikelelo’s murder and sentenced to 10 years’ imprisonment.⁴²⁵

- On the 9th of June 2012, Thapelo Makhutle, a 23-year-old self-identified transgender and gay man from Kuruman, Northern Cape, was brutally mutilated and murdered after an argument between him and the perpetrator about his sexuality and gender had taken place at a local tavern. It is reported that Thapelo’s throat was slit to the point where he was nearly beheaded, his genitals were mutilated and his detached testicles were forced into his mouth.⁴²⁶ His murder was interpreted by many community members in the Kuruman as a message of intolerance towards LGBTI people. The perpetrator; Sizwe Jajini was arrested in relation to Thapelo’s murder.⁴²⁷ There were existing speculations around whether or not his murder was another incident of a hate crime.⁴²⁸

- On the 23rd of June 2012, Phumeza Nkolonzi, who lived as an openly lesbian was shot in front of her grandmother and 6-year old niece at their home in Nyanga, Western Cape. She was at home with her family when a man kicked down the door and shot her 3 times. No arrests have been reportedly made in this case.⁴²⁹

- On the 7th of July 2013, Duduzile Zozo, an openly lesbian who lived in Thokoza, Gauteng, was brutally attacked, raped and murdered; and her body was found in her next-door-neighbour’s yard, with a toilet brush inserted in her vagina.⁴³⁰ The perpetrator, Lesley Motleleng was arrested on the 18th of

425 Lee, Lynch and Clayton *Human Rights Report by Triangle Project* 12.

426 Lee, Lynch and Clayton *Human Rights Report by Triangle Project* 13.

427 Lee, Lynch and Clayton *Human Rights Report by Triangle Project* 13.

428 Marais and Stobie 2014 *Literatur* 2.

429 Lee, Lynch and Clayton *Human Rights Report by Triangle Project* 13.

430 Lee, Lynch and Clayton *Human Rights Report by Triangle Project* 13.

October 2013 and charged with her murder.⁴³¹ Her murder was believed to be linked to one of the many corrective rape incidents that have occurred in South Africa over the past years.⁴³²

The trial of Lesley Motleleng was set to begin in May 2014. However, it was postponed to October 2014, because it is reported that, according to the magistrate who was to preside over the case, there were other “more important cases at the moment.”⁴³³

- On the 4th of December in 2016, Noluvo Swelindawo was found murdered near a footbridge that connects Driftsands and Khayelitsha, east of Cape Town.⁴³⁴ It is reported that she had been kidnapped by a gang of men from her shack in Sophakama, Driftsands, in the early hours; where her girlfriend, Nqabisa Mkatali tried to hide in the space between the bed and the wall when the attackers stormed into the shack.⁴³⁵

The suspect, Sigcine Mdani was arrested the following day after being identified as one of the men who kidnapped Swelindawo by her girlfriend, wherein he was charged with housebreaking, kidnapping and murder; to which he pleaded not guilty.⁴³⁶ The court was informed that before Swelindawo was murdered, she and Mdani had gotten into a fight at a party following an argument that they had. Swelindawo had also shown her brother, Bonga, a picture of her swollen face, telling him Mdani was responsible.⁴³⁷

On the 5th of February 2018, Mdani was sentenced to 18 years of imprisonment by Judge Derek Wille in the Western Cape High Court, after finding that Mdani’s intolerance for Swelindawo’s sexual orientation is the one that fuelled his desire to harm her. He was sentenced to 3 years for assault

431 Lee, Lynch and Clayton *Human Rights Report by Triangle Project* 13.

432 Marais and Stobie 2014 *Literator* 2.

433 Mwambene and Wheel 2015 *African Human Rights Law Journal* 67.

434 Evans 2017 <https://www.news24.com/SouthAfrica/News/man-accused-of-lesbians-murder-loses-bid-to-have-charges-dropped-20171130>.

435 Fisher 2017 amp.ewn.co.za/2017/11/22/noluvu-swelindwo-murder-girlfriend-hid-behind-bed-during-kidnapping.

436 Fisher 2017 amp.ewn.co.za/2017/11/22/noluvu-swelindwo-murder-girlfriend-hid-behind-bed-during-kidnapping.

437 Evans 2017 <https://www.news24.com/SouthAfrica/News/man-accused-of-lesbians-murder-loses-bid-to-have-charges-dropped-20171130>.

with intent to do grievous bodily harm and 15 years for murdering Swelindawo. Furthermore, he was given an additional 5 years for kidnapping and 2 years for the possession of an illegal firearm and ammunition; sentences which will run concurrently.⁴³⁸

- On the 27th of December 2016, Phoebe Titus, a Western Cape transgender woman was brutally murdered. It is reported that she was stabbed to death by a 15-year-old boy in broad daylight due to her gender identity. According to Sharon Cox, who is a health and support service manager at Triangle Project, the 30-year-old Phoebe Titus was at a shop in Wolseley buying ice lollies when she allegedly stepped on the toes of a 15-year-old boy by accident.⁴³⁹ It is alleged that the furious youth responded with a homophobic slur and shouted “vuil moffie” (dirty faggot) to Titus.

It is further reported that the 15-year-old boy repeatedly verbally abused Titus, following which Titus told a friend’s mother across the road from the shop that she was sick of being called names.⁴⁴⁰ Titus then allegedly picked up a plastic crate and gestured with it to the 15-year-old, wherein a man in the shop reportedly handed a knife to the boy, who then plunged it into Titus’s neck, after which she bled profusely and staggered away, which then led to her collapsing and dying about 500 metres away from the shop in a pool of blood.⁴⁴¹

The teenager, who could not be named, was arrested and appeared in court shortly after the attack, where he was immediately released on bail into the custody of his grandmother, and to reappear in court the following week.⁴⁴² It is further reported that the teenager was sentenced to 5 years of imprisonment, which was wholly suspended, and with a condition that he should not repeat the same offence.⁴⁴³

438 Fisher 2018 <https://google.com/amp/amp.ewn.co.za/2018/02/12/sigche-mdani-gets-18-years-in-jail-for-killing-noluvo-swelindawo>.

439 Madisha 2016 <http://www.thenewage.co.za/trans-woman-murdered/>.

440 Madisha 2016 <http://www.thenewage.co.za/trans-woman-murdered/>.

441 Madisha 2016 <http://www.thenewage.co.za/trans-woman-murdered/>.

442 Madisha 2016 <http://www.thenewage.co.za/trans-woman-murdered/>.

443 MambaOnline 2017 <http://www.mambaonline.com/2017/09/01/lives-cheap-transgender-womans-killer-goes-free/> accessed 01/05/2018.

- On the 4th of April 2017, a burnt out body, presumed to be that Nonkie Smous, was found in Maokeng, in Kroonstad. The victim was burned beyond recognition and the body was only confirmed to be hers after DNA tests had been received weeks later.⁴⁴⁴

According to LGBTI activists, three men were arrested in connection with the murder of Smous, with two of them being subsequently released. It was believed that one man remained in custody. However, it shockingly appeared that the detained suspect had only been charged with robbery after being found in possession of items that belonged to Smous.⁴⁴⁵

One of the local LGBTI activists, Nthabiseng Mokanyane, who is also Nonkie's relative, told MambaOnline that one of the released suspects had allegedly threatened a member of the community claiming that they are going to kill all lesbians in the community and take off their heads.⁴⁴⁶ Mokanyane also claimed that there had been other incidents of intimidation of LGBTI activists by some members of the community because such activists were raising awareness and attending the court hearing following the incident, they were also wearing t-shirts that read "rest in peace Smous", as such, some community members bullied them.⁴⁴⁷ Mokanyane stated that they want Smous's murderers off the street because they do not know who will be next to be killed by these murderers.⁴⁴⁸

- In April 2017, Lerato Moloi, from Soweto became yet another victim of hate crimes.⁴⁴⁹ The deceased was identified by the police as Lerato Moloi, also

444 Wesi 2017 <https://citizen.co.za/news/south-africa/1514567/horrific-photo-circulates-after-murder-of-lesbian-in-soweto/>.

445 MambaOnline 2017 <http://www.mambaonline.com/2017/04/12/burnt-lesbian-murder-victim-pain-nonkis-family-suspects-released/> accessed 11/04/2018.

446 MambaOnline 2017 <http://www.mambaonline.com/2017/04/12/burnt-lesbian-murder-victim-pain-nonkis-family-suspects-released/> accessed 11/04/2018.

447 MambaOnline 2017 <http://www.mambaonline.com/2017/04/12/burnt-lesbian-murder-victim-pain-nonkis-family-suspects-released/> accessed 11/04/2018.

448 MambaOnline 2017 <http://www.mambaonline.com/2017/04/12/burnt-lesbian-murder-victim-pain-nonkis-family-suspects-released/> accessed 11/04/2018.

449 Wesi 2017 <https://citizen.co.za/news/south-africa/1514567/horrific-photo-circulates-after-murder-of-lesbian-in-soweto/>.

known by her friends as “Tambai”, after being found dead with stab wounds, big stones around her head and a knife next to her lifeless body.⁴⁵⁰

The following day at about 7am, community members held a meeting on Lekuru Street in Naledi, raising concerns and complaints about the long grass near the railway line. They then came to a conclusion that they should cut the said grass, and while they were busy cutting the grass, they came across the half-naked body of the deceased, and the police were immediately called to the scene, in which upon arrival, they found a half-naked woman lying in an open space next to a certain house at Lekuru Street.⁴⁵¹

The police suspected that Mloi had been raped before she was brutally murdered.⁴⁵² Further investigations also revealed that a male suspect was the last person who was seen with the victim before her death, and that they had had a quarrel about money, following which Naledi police members arrested the suspect who was said to be “not very convincing” when answering questions asked by the investigating officer, and samples were to be taken from both the victim and the suspect to positively link the suspect to the murder.⁴⁵³

The abovementioned corrective rape and murder incidents encouraged by the victims’ sexual orientation and/or gender identity indicate that lesbians and transgender women experience more of these extreme forms of hate crimes because of their visible appearances and what is socially and culturally expected of their genders. Of all the cases of hate crimes that occur on a daily basis, only a few arrests are made, which in most cases result in charges against the perpetrators being withdrawn.

450 Wesi 2017 <https://citizen.co.za/news/south-africa/1514567/horrific-photo-circulates-after-murder-of-lesbian-in-soweto/>.

451 Wesi 2017 <https://citizen.co.za/news/south-africa/1514567/horrific-photo-circulates-after-murder-of-lesbian-in-soweto/>.

452 Wesi 2017 <https://citizen.co.za/news/south-africa/1514567/horrific-photo-circulates-after-murder-of-lesbian-in-soweto/>.

453 Wesi 2017 <https://citizen.co.za/news/south-africa/1514567/horrific-photo-circulates-after-murder-of-lesbian-in-soweto/>.

Mwambene and Wheal⁴⁵⁴ argue that although equality is afforded to corrective rape victims, it is however, important to note the difference between formal equality as opposed to substantive equality, which they describe herein:

Formal equality refers to sameness of treatment whereby individuals in similar circumstances are treated alike. This is in contrast to substantive equality which requires equality of outcome by tolerating disparity of treatment to achieve the said goal. Therefore, it is clear that the victims of corrective rape need to be afforded substantive equality as opposed to formal equality.

It submitted that corrective rape victims should be afforded equal protection because they are black homosexual women, which ultimately increases their vulnerability.⁴⁵⁵ This leads to the assumption that further discrimination will contribute to the continuation of their unfair social characterisation and, consequently, will have a more severe impact on them as they already are vulnerable.⁴⁵⁶

Furthermore, although it can be ascertained that the perpetrators were arrested, a majority of these cases involve lengthy trials, which result in convictions that are not linked to hate crimes, because in the process of judgement and sentencing of perpetrators, the hate crime element is disregarded due to the lack of hate crimes legislation.⁴⁵⁷ It is reported that a number of corrective rape cases have not been documented due to the lack of separate avenues to address this alarming form of hate crime and it is also suggested that, however, in a country where rape has become an enormous crisis, enacting separate avenues for corrective rape as an anti-lesbian hate crime, may result in the overburdening of the institution with different kinds of rapes motivated by different kinds of prejudices.⁴⁵⁸

It has been noted that most hate crime victims do not report these incidents because fear that they may be subjected to secondary victimisation.⁴⁵⁹ It has also been indicated that although other incidents were reported, they were not properly investigated and could therefore not be brought before court or resulted in charges

454 Mwambene and Wheal 2015 *African Human Rights Law Journal* 68.

455 Mwambene and Wheal 2015 *African Human Rights Law Journal* 68.

456 Mwambene and Wheal 2015 *African Human Rights Law Journal* 68.

457 Mitchell and Nel *Hate and Bias Crimes Research Report* by The Hate Crimes Working Group 24.

458 Hlongwane *Corrective rape* 31.

459 Mwambene and Wheal 2015 *African Human Rights Law Journal* 81.

against perpetrators being withdrawn.⁴⁶⁰ This can be confirmed by the abovementioned incidents, such as in the case of Sizakele Sigasa and Salome Massooa, where the perpetrators were arrested but later released.⁴⁶¹ Similarly, Zukiswa Gaca was attacked twice, and on the second occasion, she escorted the investigating officer to identify the perpetrator, but he was released.⁴⁶² Furthermore, the man who raped Millicent Gaika received an absurdly low bail after which he fled and was never found again.⁴⁶³

It is argued that although a number of the abovementioned cases may have resulted in convictions, the prosecution of hate crimes has proven to not be a simple task to execute, nor is it reflective of the ordinary prosecutorial process, because it involves a heavier burden on prosecutors to prove that the crime was motivated by the perpetrator's prejudice towards the victim's sexual orientation or gender identity.⁴⁶⁴ Furthermore, that although the current South African legislative framework may appear *prima facie* comprehensive, it does not take into consideration the difficulty in securing a successful conviction for a crime that has been committed with a specific state of mind or *animus*, such as hate crimes.⁴⁶⁵ Naidoo and Karels⁴⁶⁶ describe the task of the NPA when dealing with corrective rape cases, as according to the terms of reference of the Rapid Response Team,⁴⁶⁷ as having to:

- Ensure the successful prosecutions of hate crimes against LGBTI persons;
- Ensure the systematic reduction of secondary victimisation within the criminal justice system as experienced by victims of hate crimes;
- Ensure speedy prosecutions of hate crime cases as per the prescribed turnaround times;

460 Mwambene and Wheal 2015 *African Human Rights Law Journal* 81.

461 Mwambene and Wheal 2015 *African Human Rights Law Journal* 81.

462 Mwambene and Wheal 2015 *African Human Rights Law Journal* 81.

463 Mwambene and Wheal 2015 *African Human Rights Law Journal* 81.

464 Naidoo and Karels 2016 *Journal for Juridical Science* 74.

465 Naidoo and Karels 2016 *Journal for Juridical Science* 74.

466 Naidoo and Karels 2016 *Journal for Juridical Science* 74.

467 Rapid Response Team's terms of reference for the fast-tracking of pending and reported LGBTI-related cases in the Criminal Justice System.

- Provide a victim-friendly environment;
- Empower witnesses to be more effective witnesses and to decrease the potential of them experiencing victimisation;
- Provide court preparation support to the victims in regional, district and high courts specialising in sexual offences.

However, they argue that the above guidelines are an appropriate response to LGBTI-related hate crimes only in theory, as they fail to consider the difficulties experienced in prosecuting crimes that involve bias motive; where there exist challenges in the absence of specific prosecutorial directives, such as the admissibility of the evidence involved in hate crimes.⁴⁶⁸ Naidoo and Karels⁴⁶⁹ also explain that another challenge in bias-motivated crime prosecution is the defence raised by the perpetrators as follows:

Another example of trial-related aspects is associated with the defence case. According to the OSCE manual for the prosecution of hate crime, the accused has multiple options on which to defend a charge relating to a hate-motivated incident. The same Guide supposes that an accused can rely on an averment that the matter was a simple fight with no bias motive, a defence that disputes the intention to be racist or homophobic, for example, or one in which the accused disputes the motive because s/he displays the same characteristic or group orientation as the victim. In the absence of specific legislation, any of these may present a version that is deemed reasonably possibly true especially where bias related to motive is not a specific element of the crime charged.

Naidoo and Karels⁴⁷⁰ further state that:

Hate crimes ultimately attack fundamental rights and thus deserve the protection of one of the guardians of the rule of law, viz. prosecutors. In short, prosecutors can contribute to a swift resolution of hate crime cases, but face challenges in addition to the factors of proof.

It is submitted that the available legislative provisions used for the prosecution of corrective rape perpetrators are only specifically intended for rape and to provide

468 Rapid Response Team's terms of reference for the fast-tracking of pending and reported LGBTI-related cases in the Criminal Justice System.

469 Naidoo and Karels 2016 *Journal for Juridical Science* 78.

470 Naidoo and Karels 2016 *Journal for Juridical Science* 74.

guidelines with mandatory sentencing periods thereof.⁴⁷¹ However, corrective rape is not similar to ordinary rape in that it is committed based on the perpetrator's intolerance and prejudice towards the victim's sexual orientation, which ultimately makes the prosecution and sentencing of corrective rape perpetrators through guidelines provided for ordinary rape unjust and ineffective.⁴⁷² It has been indicated that in corrective rape cases, motive only becomes relevant during sentencing. This is confirmed by the judgment in Zoliswa's murder case, in which the Court held that motive is not an element that has to be proven during criminal trials, which often leads to the conclusion of such trials without the perpetrator's motive ever being established.⁴⁷³

This is because motive never forms part of evidence in criminal trials and people are often left astonished as to why particular crimes are committed.⁴⁷⁴ Subsequently, it was held that motive is regarded as an aggravating factor only in as far as sentencing is concerned, which results in the motive not being a factor that carries any weight for purposes of conviction.⁴⁷⁵ This then indicates that had the accused been acquitted, the motive for killing Zoliswa would never have been established.⁴⁷⁶

There exists legislation which provides the definition of rape and further provisions on mandatory sentencing thereof, however, there is no statutory definition for corrective rape, nor is there mandatory sentencing guidelines; which serves no justice to corrective rape victims.⁴⁷⁷ Sections 3 and 28 of PEPUDA support the need to have corrective rape statutorily defined and mandatory sentencing guidelines, by providing that a harsher sentence should be imposed in cases where the commission of the crime constituted unfair discrimination.⁴⁷⁸

It is therefore submitted that South Africa's failure to fulfil its constitutional mandate for protecting corrective rape victims is due to the absence of any statutory definition for corrective rape and the applicable sentencing guidelines, for which if it were

471 Mwambene and Wheal 2015 *African Human Rights Law Journal* 81.

472 Mwambene and Wheal 2015 *African Human Rights Law Journal* 81.

473 Mwambene and Wheal 2015 *African Human Rights Law Journal* 81.

474 Mwambene and Wheal 2015 *African Human Rights Law Journal* 81.

475 Mwambene and Wheal 2015 *African Human Rights Law Journal* 81.

476 Mwambene and Wheal 2015 *African Human Rights Law Journal* 82.

477 Mwambene and Wheal 2015 *African Human Rights Law Journal* 82.

478 Mwambene and Wheal 2015 *African Human Rights Law Journal* 82.

defined and such sentencing guidelines provided for, it would be considered as a hate crime and lead to the successful prosecution and sentencing of the perpetrators of this offence.⁴⁷⁹

Having considered the definition of a hate crime, as provided for in the *Hate Crimes Bill*,⁴⁸⁰ it is submitted that corrective rape fall within the definition of a hate crime, because it is committed against black African lesbians on the basis of their sexual orientation, with the intention of harming them and directing a message to other lesbians that they must see the error in their behaviour and consequently turn heterosexual.⁴⁸¹ It is with no doubt that corrective rape is motivated by the perpetrator's prejudice. This was accurately pointed out in *Zoliswa's* case, where it was established that the perpetrator's motive was influenced by his intolerance towards her sexual orientation.⁴⁸² It has been noted that arguments arise as to when motive should be considered in hate crime cases. Mwambene and Wheal⁴⁸³ note that:

There are two conflicting schools of thought on how to deal with hate crimes in the criminal justice system, as some advocate for evidence of hate to be presented during the trial in order to prove it as a hate crime, whereas others contend that evidence relating to hate should only be led as an aggravating factor during sentencing. Hatred may, however, only be discussed during trial proceedings if and when it has been classified as a crime category. Consequently, in the South African justice system, it may only be brought up during sentencing to serve as an aggravating factor for sentencing.

Therefore, in accordance with this understanding, the second approach was followed in the *Zoliswa* case when the four men were convicted in 2012 by Magistrate Whatten, who concluded that she had been murdered because she exercised her right to live openly as a lesbian and that hatred and intolerance which drove the crime were aggravating sentencing factors.

Zoliswa's case set a precedent in South Africa for being the first case wherein evidence concerning the perpetrator's prejudice and hatred was introduced for purposes of arguing for the imposition of a harsher sentence on the accused.⁴⁸⁴ The judgment clearly indicated that motive is not an element of a crime, hence it was held

479 Mwambene and Wheal 2015 *African Human Rights Law Journal* 82.

480 *Prevention and Combating of Hate Crimes and Hate Speech Bill*, 2018.

481 Mwambene and Wheal 2015 *African Human Rights Law Journal* 84.

482 Mwambene and Wheal 2015 *African Human Rights Law Journal* 84.

483 Mwambene and Wheal 2015 *African Human Rights Law Journal* 84-85.

484 Mwambene and Wheal 2015 *African Human Rights Law Journal* 85.

that motive was an aggravating factor which was only considered during sentencing.⁴⁸⁵ However, it is submitted that the *Hate Crimes Bill* will rectify this finding, because it recognises hate and/or motive as an element of the concerned crime.

Although both Zoliswa and Eudy's cases resulted in progressive trials, it is submitted that the result in Eudy's case could have been the same as that in Zoliswa's case if it were not for the level of homophobia displayed in the courtroom by the Judge.⁴⁸⁶ It is reported that Mokgothleng J was opposed to the use of the word "lesbian" in his Court, which raised assumptions that he was homophobic, the result of which prevented him from admitting that Eudy's sexual orientation motivated the crime.⁴⁸⁷ It is submitted that the partial conviction in this case implied that corrective rape and murder incidents can continue with impunity. This is because had the motive for her murder been established, future perpetrators could have been deterred to some extent because it would have indicated that crimes committed based on hate and intolerance would not be condoned.⁴⁸⁸

In light of the abovementioned cases, it is evident that hate crimes, particularly corrective rape, remain a concerning issue in South Africa, more so because although the perpetrators of such crimes are eventually arrested, it is disheartening to realise that the hate crime element is almost entirely disregarded in Court proceedings due to the lack of guidelines that provide for the prosecution and sentencing of hate crime perpetrators.⁴⁸⁹ However, the ground-breaking cases of Zoliswa Nkonyana and Noluvo Swelindawo have set a precedent in finding sexual orientation as motive for the murder and rape of LGBTI people; particularly lesbians and transgender women.⁴⁹⁰

485 Mwambene and Wheal 2015 *African Human Rights Law Journal* 85.

486 Mwambene and Wheal 2015 *African Human Rights Law Journal* 85.

487 Mwambene and Wheal 2015 *African Human Rights Law Journal* 85.

488 Mwambene and Wheal 2015 *African Human Rights Law Journal* 85-86.

489 Mitchell and Nel *Hate and Bias Crimes Research Report* by The Hate Crimes Working Group 5-6.

490 Lynch and Van Zyl *Research Study* by Triangle Project 1.

5.3 Possible causes of hate crimes against LGBTI people

There are serious challenges associated with unfair discriminatory practices and violence against LGBTI people on the basis of their sexual orientation that are worth analysing, since they affect the integrity and effectiveness of the legislative framework adopted to prevent same. Although a notable progress has been made in terms of combating unfair discriminatory practices and violence on the basis of sexual orientation, at least theoretically, the same cannot be said to have been achieved practically or in reality, because LGBTI people still experience extreme forms of unfair discrimination and violence. This indicates that there is a vast gap between the legal provisions that prohibit unfair discrimination and what actually happens in reality.⁴⁹¹

The South African legislative framework is important in the fight to prohibit unfair discrimination and violence, but it has to be accepted that these legal provisions cannot, on their own overcome attitudes and behaviours that are deeply entrenched in cultural and religious practices.⁴⁹² There are a few challenges that make the realisation of a society free from unfair discrimination and violence based on sexual orientation to be impassable. Some of these challenges, which are submitted to be the cause of hate crimes experienced by LGBTI individuals are listed and discussed hereunder.

5.3.1 Morality

There has been an increased demonstration on sexual orientation and gender identity through various public events, such as LGBTI political activism, pride marches and publication in the media.⁴⁹³ However, despite such visible demonstrations, LGBTI people are still regarded as being “unAfrican”.⁴⁹⁴ The allegation that LGBTI people are “unAfrican” indicates the perception that African

491 Polity 2014 <http://www.polity.org.za/article/rainbow-nation-de-jure-versus-de-facto-lgbt-rights-in-south-africa-2014-03-11>.

492 Polity 2014 <http://www.polity.org.za/article/rainbow-nation-de-jure-versus-de-facto-lgbt-rights-in-south-africa-2014-03-11>.

493 Roberts and Reddy 2008 *HSRC Review* 9.

494 Roberts and Reddy 2008 *HSRC Review* 9.

morals and cultures are unique and therefore resistant to those of Western and European import.⁴⁹⁵

It is true that there are norms and principles that guide African societies on what is morally acceptable and not. However, it cannot be determined as to who actually decides what is morally acceptable for all people, because for instance, South Africans have different traditions and beliefs, which predominantly determine what is morally acceptable that particular tradition, as such, South Africans cannot all have similar norms that conform to the standards of their different traditions and beliefs. In essence, South Africa encompasses diverse cultures, religions and traditions, which cannot be governed by similar norms. Although this is the case, there arises a question of whether South Africans are truly united in their diverse cultures, traditions and religions, because homophobic statements are still made, even by the very people who should be educating the nation on sexual orientation and gender identity. For instance, a school educator was quoted saying:

... it [homosexuality] is abnormal because we are living by norms ... deep down it is about our norms, that is why I classify it as abnormal. I can accept it. I can understand it, but I don't like it. I am ruled by my norms.⁴⁹⁶

It is these type of statements that raise concerns, because public role models who should be educating the nation on diversity, sexual orientation and gender identity, are the very people who are declaring the immorality of homosexuality and how such conduct does not conform to their norms. This “unAfrican” perception on morality, is a result of the religious debate that follow the idea that the laws of nature to which marriage is supposed to conform, were the laws of nature as generally recognised by Christian.⁴⁹⁷

The acknowledgement of LGBTI people's rights and the moral tone on everyone's right to equality has actually failed, resulting in a homophobic environment. For instance, in the last decade there have been over 31 reported murders of lesbians,

495 Roberts and Reddy 2008 *HSRC Review* 9.

496 Bhana 2014 *Journal of Moral Education* 362.

497 Robinson and Swanepoel 2004 *Potchefstroom Electronic Law Journal* 6.

and the predominance of hate crimes against LGBTI people still continues to rise as a result of moral prejudice.⁴⁹⁸

5.3.2 Religion

Religious denominations and regular attendance at religious institutions have proven to have a significant causal link on sexual prejudice, because research indicates that people who are strongly religious and come from denominations that are conservative, such as Christians and Muslims, have more homophobic attitudes towards LGBTI people, while less religious people such as Anglicans and Hindus have displayed less homophobic attitudes towards LGBTI people.⁴⁹⁹ Although this is the case, it is reported that not much differences exist among the above denominations, which reflects the narrow range in which the attitudes towards homosexuality differ.⁵⁰⁰

An indication that proves that religious people, such as some Christians, have more homophobic attitudes towards LGBTI people as opposed to those who are less religious, like some Anglicans, is Archbishop Desmond Tutu's view on homosexuality. He is of the view that just as much as people should not be discriminated against because of their gender or colour, they should also not be discriminated against because of their sexual orientation and gender identity.⁵⁰¹ He was further quoted saying that he refuses to enter a homophobic heaven or to serve a homophobic God, and that he would much rather go to hell.⁵⁰²

Conversely, Reverend Kenneth Meshoe of the African Christian Democratic Party who, at the time when the *Civil Union Act* was still in discussion, was of the view that Parliament was testing God's patience by decriminalising same-sex marriages; and he later addressed Archbishop Tutu on his remarks about a "homophobic God", holding that Archbishop Tutu was out of order.⁵⁰³ He told Archbishop Tutu that he

498 Bhana 2014 *Journal of Moral Education* 363.

499 Roberts and Reddy 2008 *HSRC Review* 11.

500 Roberts and Reddy 2008 *HSRC Review* 11.

501 Bhana 2014 *Journal of Moral Education* 363

502 Hawker 2015 <https://www.enca.com>.

503 Hawker 2015 <https://www.enca.com>.

should not confuse people who respect the Holy Bible, and that he should keep his unbelief to himself if he does not believe in the teachings of the Holy Bible.⁵⁰⁴

Robinson and Swanepoel⁵⁰⁵ argue that religious beliefs should not be used to determine how people should lead their lives, especially if they do not belong to a particular religious denomination that is opposed to their way of life. Thus, approving LGBTI relationships would not have an effect on anyone's religious freedom; essentially because one person's religious beliefs may not be the same as that of another person's religious beliefs. Ultimately, a particular religious denomination may accept LGBTI people while another denomination may not, as such, LGBTI people's lives should not be dictated by other people's religious beliefs. Be that as it may, at least prominent religious leaders such as Archbishop Desmond Tutu and Dr Allan Boesak have been vocal supporters of LGBTI rights and believe in equality for all irrespective of their sexual orientation or gender identity.⁵⁰⁶

In light of the above discussion, it can be deduced that Christians hold a more homophobic view. As such, a comprehensive analysis into the Holy Bible⁵⁰⁷ is essential and the biblical scriptures that forbid homosexuality are discussed below.

5.3.2.1 Genesis 19: 4-5

This scripture sets out the Sodom and Gomorrah story; which is the first story in the Bible that mentions practices of homosexuality. According to this scripture, the men of Sodom surrounded Lot's house, demanding to have sex with the two male guests who had visited him. The scripture reads as follows:

...Before the guests went to bed, the men of Sodom surrounded the house. All men of the city, both young and old, were there. They called out to Lot and asked, "Where are the men who came to stay with you tonight? Bring them out to us!" The men of Sodom wanted to have sex with them.

After this occurrence, the two men explained to Lot that they had come to Sodom because the Lord had sent them to destroy it due to such homosexual and other unnatural and immoral behaviours; after which they destroyed the city after having let

504 Hawker 2015 <https://www.enca.com>.

505 Robinson and Swanepoel 2004 *Potchefstroom Electronic Law Journal* 6.

506 OutRight Action Research Report 12.

507 *Good News Bible*.

Lot, his wife and daughters escape to safety. This indicates that homosexuality was forbidden to an extent that the whole city and everyone in it was burnt to ashes.

5.3.2.2 Leviticus 18: 22

This is the second scripture in the Bible that talks about homosexuality and further sets out all the forbidden sexual practices. It provides that “no man is to have sexual relations with another; God hates that.”⁵⁰⁸ Furthermore, another chapter provides that “if a man has sexual relations with another man, they have done a disgusting thing, and both shall be put to death. They are responsible for their own death.”⁵⁰⁹

The scripture explains that this sort of sexual behaviour is a perversion that makes one to become ritually unclean, which if committed, will make one to no longer be one of God’s people and therefore be rejected in God’s Kingdom and killed.

5.3.2.3 Romans 1: 26-27

This is another scripture that explains God’s wrath against the human race due to the fact that they indulge in sinful and evil acts. It explains how people do shameful things, such as homosexuality, and because of that, God punished them. The scripture reads as follows:

Because they do this, God has given them over to shameful passions. Even the women pervert the natural use of their sex by unnatural acts. In the same way the men give up natural sexual relations with women and burn with passion for each other. Men do shameful things with each other, and as a result, they bring upon themselves the punishment they deserve for their wrongdoing.

This indicates how homosexuality was considered as an unnatural and erroneous act that justified punishment for homosexuals, because the scripture further explains in verse 32, that people do not only commit such shameful acts, but they even approve of those who do them while they know that God’s laws declare that those who live in such sinful and evil ways deserve death.

508 Chapter 18 verse 22.

509 Chapter 20 verse 13.

5.3.2.4 1 Corinthians 6: 9

This is another scripture that justifies the abomination of homosexuality and declares that:

Surely you know that the wicked will not possess God's Kingdom. Do not fool yourselves; people who are immoral or who worship idols or are adulterous or homosexual perverts... will not possess the Kingdom of God.

This shows that God declared that homosexual people will not inherit his Kingdom, because homosexuality is perversion and a sin, which makes people unclean and therefore not worthy to enter God's Kingdom.

5.3.2.5 1 Timothy 1: 9-10

In this scripture, it is declared that the law is good if it is used as it should be used. However, it is argued that laws are not actually created for good people, but actually for those who commit sinful and evil acts. The scripture elaborates that:

It must be remembered, of course, that laws are made, not for good people, but for lawbreakers and criminals, for the Godless and sinful, for those who are not religious or spiritual, for those who kill their fathers or mothers, for murderers, for the immoral, for sexual perverts, for kidnappers, for those who lie and give false testimony or who do anything else contrary to sound doctrine.

This explains that God created laws primarily for the rebels and homosexuals because they were unrighteous and unreligious. This indicates a strong position against homosexuality.

The above biblical scriptures are indicative of the fact that Christianity is blatantly homophobic, because these scriptures express strong hatred towards homosexuality. This essentially indicates that Christianity considers homosexuality as a disgraceful and evil act that should be punished and all homosexuals will end everywhere else but definitely not in the kingdom of God.

It is submitted that societal values which are instilled by religion are significant factors that result in the formation of attitudes and stereotypes about LGBTI people. The discussion above has indicated that although it might be assumed that people who

are religious are more accepting and non-judgemental, research has indicated otherwise. It shows that homophobic perceptions actually occur as a result of religious beliefs, and that those who observe firm religious practices, are frequently more homophobic than those who are not religious.⁵¹⁰

5.3.3 Culture

There exists a common cultural perception that a man's duty is to provide for his family, while a woman's duty is to bear children for her man.⁵¹¹ As a result, homosexuality is perceived as unnatural and immoral because it interferes with the heteronormative pattern of life in terms of our cultures, because LGBTI people are usually in a position where they choose not to reproduce.

There are community members whose perception of social phenomenon are deeply rooted in cultural and traditional practices, some of which include the former President Jacob Zuma, who was quoted saying that he is personally opposed to LGBTI relationships and that while growing up, a homosexual, particularly a gay person would not have stood before him, because he would have knocked him out.⁵¹² Furthermore, King Goodwill Zwelithini was also quoted saying that customarily, no people engaged in LGBTI relationships, that nothing like that ever existed in African tradition and if one ever engaged in such relationships, they must know that they are rotten.⁵¹³

With such highly influential religious, political, and traditional leaders holding homophobic views about LGBTI relationships, ordinary community members cannot possibly be expected to change their homophobic attitudes, because their very own influential leaders are also homophobic. The only difference between these public figures and members of the community is that these leaders are to a certain degree forced to mask their homophobic attitudes and behaviours because they are supposed to "lead by example". However, they fail to hold back their homophobic remarks at certain times; hence such homophobic statements can be found reported.

510 Letsoalo *Challenges faced by gay and lesbian students 2.*

511 Lopang 2014 *International Journal of Humanities and Social Science 77.*

512 Hawker 2015 <https://www.enca.com>.

513 Hawker 2015 <https://www.enca.com>.

5.3.4 Stigmatisation

Because of the perceptions engraved in moral, religious and cultural norms, LGBTI people are prejudiced because of the stigma emanating from such norms. They often face unfair discrimination in different places where they should receive assistance and protection. The discrimination ranges from:

5.3.4.1 Criminal justice system

Police officials have been reported for victimising LGBTI victims who report discriminatory and violent incidents, which is a critical issue when it comes to tackling hate crimes.⁵¹⁴ However, a lot of these cases remain unreported,⁵¹⁵ because they often face abuse and humiliation by those who are meant to protect them; leading some to simply not report the crimes.

A recent report⁵¹⁶ has also revealed that approximately 66% of hate crime incidents do not get reported to the police. The report⁵¹⁷ explains that some of the reasons for such incidents not being reported to the police included:

- Incidents that were not classified as criminal cases, such as incidents of intentional unfair discrimination;
- Fear of retribution or of further victimisation;
- Fear of being arrested (undocumented non-nationals and sex workers);
- Lack of trust in the SAPS due to previous negative experiences;
- Perpetrators were or included SAPS officers;

514 MambaOnline 2016 <http://www.mambaonline.com/2016/10/07/gauteng-police-stations-lgbt-friendly-within-3-years>.

515 Letsoalo *Challenges faced by gay and lesbian students* 1.

516 Mitchell and Nel *Hate and Bias Crimes Research Report* by The Hate Crimes Working Group 16.

517 Mitchell and Nel *Hate and Bias Crimes Research Report* by The Hate Crimes Working Group 16.

- Being told that SAPS only serves South African citizens, or that a case cannot be reported if the perpetrator is unknown or that the reporting ought to be done in the jurisdiction where the crime was perpetrated.

It is also reported that about 51% of LGBTI victims who reported hate crime incidents to the police said that police officials were not helpful at all, and 90% of the victims in the Gauteng province, said they chose not to report these discriminatory and violent incidents to the police, because they feared that the police would do nothing or would themselves be homophobic.⁵¹⁸

The hate and bias crimes research report further explains that in about 66 cases of hate crimes, the police were reported as being accomplices to such crimes, and that the police witnessed the crime taking place in 20% of all the cases and did not provide any assistance.⁵¹⁹ With regards to the reactions that hate crime victims receive from the police when reporting such cases, it is explained that 36% of the victims that reported hate crimes felt that the police were helpful and supportive, while 18% perceived the police as being dismissive or disinterested in assisting them in their cases.

Furthermore, 8% of the victims thought that the police were hostile, insulting or prejudiced, and 10% of the victims explain that the police refused to assist them in their cases.⁵²⁰ This indicates that there is a great need to draft guidelines on how police officials should respond to hate crimes effectively and in treating hate crime victims adequately.⁵²¹

It is also submitted that to some extent, prosecutors and judicial officers also display some form of homophobic attitudes towards hate crime victims. It is suggested that some prosecutors decline to prosecute the perpetrators of such crimes⁵²² and some presiding officers display a level of homophobia in court, the result of which led to

518 MambaOnline 2016 <http://www.mambaonline.com/2016/10/07/gauteng-police-stations-lgbt-friendly-within-3-years>.

519 Mitchell and Nel *Hate and Bias Crimes Research Report* by The Hate Crimes Working Group 17.

520 Mitchell and Nel *Hate and Bias Crimes Research Report* by The Hate Crimes Working Group 17.

521 Lepodise 2018 <https://www.dailymaverick.co.za/article/2018-02-09-hate-crimes-new-report-cites-policing-lack-of-records-as-main-problems-to-addressing-the-issue/#.wt3g4sifpiu>.

522 SAHRC *Equality Report* 59. See also Koraan and Geduld 2015 *Potchefstroom Electronic Law Journal* 1942.

convictions which are not in the best interest of the victims, the community and that of justice.⁵²³

5.3.4.2 Health institutions

Most LGBTI people often receive inadequate or inappropriate healthcare services in South Africa.⁵²⁴ It is reported that healthcare workers are often prejudicial towards LGBTI people instead of helping them and ensuring that they receive the same quality of health care and treatment as heterosexual patients, which often leads to unhelpful interactions between healthcare workers and LGBTI patients.⁵²⁵ It is further reported that these healthcare workers show forms of discomfort around LGBTI individuals, some even refuse to assist LGBTI patients; which makes it difficult for LGBTI patients to receive appropriate health services.⁵²⁶

It is important for healthcare workers to be educated and trained on how to handle and assist LGBTI patients, because there is lack of knowledge regarding LGBTI patients. For instance, it is reported that some healthcare workers have the belief that lesbians do not need to undergo a Pap smear⁵²⁷ procedure.⁵²⁸ It is equally important to offer healthcare services embrace and are inclusive of LGBTI patients, for ensuring that the services offered to such patients are appropriate and their wellbeing is being catered for.⁵²⁹

5.3.4.3 Workplace

In 1998, the South African Parliament enacted the *Employment Equity Act*, to protect employees against unfair labour discriminatory practices on the basis of their sexual orientation and gender identity.⁵³⁰ Although this may be the case, LGBTI people still find themselves being denied job opportunities due to their sexual orientation. Those who are lucky enough to have jobs still face forms of unfair discrimination and some are even dismissed because of their sexuality.

523 Mwambene and Wheal 2015 *African Human Rights Law Journal* 85-86.

524 *Draft South African National LGBTI /HIV Framework*, 2017-2022 18.

525 *Draft South African National LGBTI /HIV Framework*, 2017-2022 18.

526 *Draft South African National LGBTI /HIV Framework*, 2017-2022 18.

527 A Pap smear, also called a Pap test, is a screening procedure for cervical cancer which tests for the presence of precancerous or cancerous cells in the cervix.

528 *Draft South African National LGBTI /HIV Framework*, 2017-2022 19.

529 *Draft South African National LGBTI /HIV Framework*, 2017-2022 19.

530 SAHRC *Equality Report* 49.

For instance, in *Atkins v Datacentrix Pty Ltd*,⁵³¹ the applicant was interviewed for a position as an Information Technology (IT) technician in which he was successful in the interview. After the conclusion of the contract, he informed the employer that he intended on undergoing a gender reassignment operation. The employer immediately dismissed him; who then approached the Labour Court claiming that his dismissal constituted a dismissal that was automatically unfair, as enshrined in section 187(1)(f) of the *Labour Relations Act* and the Court confirmed that his dismissal was on the basis of his gender identity, therefore awarding him compensation for four months.⁵³²

5.3.4.4 Institutions of learning

Insensitive attitudes regarding sexual orientation and gender identity are still prevalent in South African schools, including institutions of higher learning.⁵³³ Literature shows that LGBTI youth experience extreme forms of unfair discrimination in educational institutions, ranging from verbal harassment to physical assault; which results in high statistics of absenteeism from school and university drop outs.⁵³⁴ It has been reported that LGBTI youth experience deep-rooted homophobia in these institutions, with both the staff and students name calling, excluding, and physically and emotionally abusing them due to their sexual differences.⁵³⁵

The variety of challenges that LGBTI youth experience makes them very vulnerable and results in isolation which often leads to depression,⁵³⁶ an increased risk of health issues, suicidal thoughts, substance abuse, homelessness and poor academic performance, resulting from such a hostile environment.⁵³⁷ It is evident that LGBTI individuals experience stigma and unfair discrimination which occurs daily in all aspects of their life due to their sexual orientation and gender identity.⁵³⁸ It is therefore important for the relevant stakeholders to advocate for the promotion of

531 *Atkins v Datacentrix Pty Ltd* (2010) 4 BLLR 351 (LC).

532 Tebele *Analysis of discrimination in the workplace* 17-18.

533 Letsoalo *Challenges faced by gay and lesbian students* 1.

534 Letsoalo *Challenges faced by gay and lesbian students* 1.

535 Letsoalo *Challenges faced by gay and lesbian students* 3.

536 Letsoalo *Challenges faced by gay and lesbian students* 18.

537 Letsoalo *Challenges faced by gay and lesbian students* 1.

538 Letsoalo *Challenges faced by gay and lesbian students* 29.

safe school and campus environment for LGBTI scholars and students, because they also deserve an equal opportunity to study as their heterosexual counterparts.

5.3.4.5 The community

LGBTI people face unfair discrimination and violence from their homes. The discrimination often begins at home where their families resent them because they identify themselves differently from the gender that was assigned to them at birth and become attracted to people of the same sex as theirs, to the whole community that does nothing to protect them against those who violate their rights by raping, assaulting and murdering them. These homophobic attitudes are as a result of the following challenges that are faced by LGBTI people:

- No access to information about LGBTI rights

This is often the case in rural areas in particular, where people have little to no access to any compulsory information such as information about LGBTI people and their rights. This then leads to the ill-informed atrocities of LGBTI people because people fail to accept what is different to them and that which they do not know or approve of.

- Ignorance

The problem is that, some people do know about sexual minorities and that they have the right to be treated equally in the society, but they choose to be ignorant because homosexuality does not conform to their beliefs, so what is contrary to their beliefs remains completely wrong, and this does not help in combating homophobia; it in fact makes it worse.

- Lack of implementation of anti-discriminatory laws

The problem with the legislative framework put in place in South Africa to protect the sexual minorities is that although the framework emphasises prohibition and prevention of unfair discrimination the basis of sexual orientation, it does not prescribe information and methods as to how to

implement these anti-discriminatory laws.⁵³⁹ This then does not help in preventing unfair discrimination based on sexual orientation. This also, in a way, does not stop people from committing hate crimes against LGBTI people, because they know that even if they do such crimes, the victims are less likely to report the crime;⁵⁴⁰ If the crime is reported, the case is more likely to vanish into thin air because of the stigmatisation based on homosexuality even by the very people who are supposed to be law enforcers.

It has been reported that the intolerance of LGBTI people in their communities and homes ranges from being verbally and physically abused, to being harassed, as well as having their personal property and possessions being damaged or destroyed, and being sexually abused, raped and/or murdered.⁵⁴¹

In response to eradicating the stigma towards LGBTI people, and in exterminating hate crimes, the hate and bias crimes research report⁵⁴² recommends for:

- The monitoring and recording of hate crimes

It is submitted that monitoring hate crimes and relative response thereto will remain ineffective unless it is prioritised by organisations that provide services to hate crime victims.⁵⁴³ Such prioritisation entails allocating people who will be responsible to establish whether their clients are victims of hate crimes; assess the needs of such victims and refer them for counselling; develop an inter-organisational communication network for providing services to victims of hate crimes; and record incidents in a timely manner and ensure that they are reported to relevant officials.⁵⁴⁴

539 Opperman *An analysis of the sexual orientation discrimination* 27.

540 Letsoalo *Challenges faced by gay and lesbian students* 1.

541 Morris 2017 <https://www.news24.com/Analysis/lgbt-community-still-faces-high-levels-of-violence-report-20171204>.

542 Mitchell and Nel *Hate and Bias Crimes Research Report* by The Hate Crimes Working Group 25.

543 Mitchell and Nel *Hate and Bias Crimes Research Report* by The Hate Crimes Working Group 25.

544 Mitchell and Nel *Hate and Bias Crimes Research Report* by The Hate Crimes Working Group 25.

- The development of guidelines for responding to hate crimes

The report further submits that it is imperative to identify areas where hate crimes have occurred in the past and are likely to recur, as well as to work with hate crime perpetrators to prevent them from becoming repeat offenders and developing non-punitive forms of retribution for dealing with youth and first time offenders in cases where no physical harm was suffered by the victim.⁵⁴⁵ Furthermore, developing guidelines for responding to hate crimes will benefit the community and individual organisations. Furthermore, such guidelines may assist civil society to advise and assist the criminal justice system in effectively managing communities during outbreaks of hate crimes.⁵⁴⁶

5.3.5 Shortcomings in the criminal justice system

It can be ascertained that measures to prevent hate crimes were proposed by especially the civil society in previous years. For instance, in 2011, the HCWG recommended the following in their report:⁵⁴⁷

- That senior government officials must speak out against hate crimes against LGBTI people and ensure that effort is put into thoroughly investigating the crime and the perpetrators are held accountable.⁵⁴⁸
- That the President must establish an organisation in the Presidency to ensure effective coordination of the various government departments' programs on social cohesion and tackling hate crimes.⁵⁴⁹
- That Government must strengthen measures addressing hate crimes by introducing legislation that expressly criminalises hate crimes, and providing effective resources and training for public officials such as policemen and the judiciary, for purposes of ensuring the successful implementation of anti-hate

545 Mitchell and Nel *Hate and Bias Crimes Research Report* by The Hate Crimes Working Group 25.

546 Mitchell and Nel *Hate and Bias Crimes Research Report* by The Hate Crimes Working Group 25.

547 South African Hate Crime Working Group *Report* 8.

548 South African Hate Crime Working Group *Report* 8.

549 South African Hate Crime Working Group *Report* 8.

crime legislation, as well as detecting, recording, and prosecuting hate crimes, and monitoring trends of hate crimes.⁵⁵⁰

- That law enforcement agencies must develop measures to monitor hate crime cases by using police and justice statistics for tracking trends of hate crimes and monitoring police and justice responses to such cases.⁵⁵¹
- That law enforcers must take steps that will intensify the confidence of hate crime victims to report such crimes to the police and to also ensure thorough investigations and prosecution of any reports of police misconduct or abuse regarding hate crime cases.⁵⁵²

Further recommendations were made by the Rape Crisis Cape Town Trust⁵⁵³ and the Triangle Project⁵⁵⁴ in a media statement for purposes of adopting temporary measures that could be employed for protecting LGBTI people's rights and interests, while still waiting for the enactment of hate crimes legislation.⁵⁵⁵ These recommendations were proposed after a meeting on hate crimes was held between the former Minister of Justice and Constitutional Development, Jeff Radebe, and the Rape Crisis Cape Town Trust as well as the Triangle Project, which acted on behalf of signatory LGBTI organisations.⁵⁵⁶ The parties recommended that:

- SAPS, the National Prosecuting Authority (NPA) and the Department of Justice and Constitutional Development must monitor hate crimes in the criminal justice system from when the case is reported to SAPS until sentencing, to ensure that criminal justice officials do not re-victimise or re-traumatise the victims; that investigating officers must investigate hate crime cases adequately; that prosecutors must successfully prosecute hate crime

550 South African Hate Crime Working Group Report 8.

551 South African Hate Crime Working Group Report 8.

552 South African Hate Crime Working Group Report 8.

553 The Rape Crisis Cape Town Trust is an organisation in South Africa that assists rape victims to recover their ordeal victimisation. Also see Rape Crisis <http://www.rapecrisis.org.za>.

554 The Triangle Project is a non-profit organisation for the realisation of the rights of LGBTI people. Also see Triangle Project <http://www.triangle.org.za>.

555 Koraan and Geduld 2015 *Potchefstroom Electronic Law Journal* 1942.

556 SAHRC *Equality Report* 58.

perpetrators and that hate crime trials be finalised without unnecessary postponements.⁵⁵⁷

- That corrective rape cases be heard in sexual offences courts that have jurisdiction over such matters.⁵⁵⁸
- That the NPA keep disaggregated statistics of hate crime cases that they decline to prosecute, the number of hate crime cases that are withdrawn by complainants and the number of convictions of hate crime perpetrators.⁵⁵⁹
- That the NPA develop guidelines for prosecutors to raise hate crime as an aggravating circumstance in opposing bail; further as an exacerbating factor for sentencing; and advise complainants of their right to apply to court to not have their trial conducted in an open court, as in terms of section 153(1) of the *Criminal Procedure Act 51 of 1977*.⁵⁶⁰
- That Parole Boards view the commission of hate crimes as an aggravating factor for the consideration of the perpetrator's parole application.⁵⁶¹

It is submitted that the media statement urged and motivated the Government to take special measures in dealing with these alarming hate crime cases,⁵⁶² which resulted in the establishment of a Task Team for purposes of addressing hate crimes against LGBTI people.⁵⁶³ The SAHRC *Equality Report*⁵⁶⁴ explains the commitment by the State to eradicate hate crimes as follows:

557 SAHRC *Equality Report* 58-59. See also Koraan and Geduld 2015 *Potchefstroom Electronic Law Journal* 1942.

558 SAHRC *Equality Report* 59. See also Koraan and Geduld 2015 *Potchefstroom Electronic Law Journal* 1942.

559 SAHRC *Equality Report* 59. See also Koraan and Geduld 2015 *Potchefstroom Electronic Law Journal* 1942.

560 SAHRC *Equality Report* 59. See also Koraan and Geduld 2015 *Potchefstroom Electronic Law Journal* 1943.

561 SAHRC *Equality Report* 59. See also Koraan and Geduld 2015 *Potchefstroom Electronic Law Journal* 1943.

562 SAHRC *Equality Report* 59.

563 Koraan and Geduld 2015 *Potchefstroom Electronic Law Journal* 1943. See also SAHRC *Equality Report* 59.

564 SAHRC *Equality Report* 59.

As a sign of its commitment to LGBTI rights domestically, on the 17th of June 2011, the South African government tabled a resolution at the United Nations calling for a global study outlining acts of violence and discrimination committed against LGBTI individuals, with recommendations on how to put an end to such abuses. The resolution was adopted by a vote of 23 countries in support, with 19 against and three abstentions. The then Health Minister Aaron Motsoaledi gave a keynote address at a conference focussing on sexual-health matters affecting MSM in the context of the HIV and AIDS epidemic, and following the murder of Noxolo Nogwaza, the Justice and Constitutional Development Ministry set up a task team to address hate crimes against LGBTI people.

According to the former ministerial spokesman, Tlali Tlali, it would be comprised of six representatives from the Judiciary, the Police and Social Development, and six from the LGBTI sector. To allow for broader representation, four seats were added to the six originally allotted to civil-society organisations. Government representation was also extended to include the departments of International Relations and Cooperation; Women, Children and Persons with Disabilities; the National Prosecuting Authority and; the Legal Aid Board. Two representatives from Chapter Nine institutions were also included. Deliberations began with a focus on “corrective” rape, but the scope was broadened to include other prejudice-based crimes, such as xenophobic attacks and race-based incidents.

Following the establishment of the Task Team and commitment to address hate crimes against LGBTI people, the Government then identified the following short, medium and long-term strategies that needed to be adopted:⁵⁶⁵

- Short-term strategies⁵⁶⁶
 - The development of a public awareness and communication strategy;
 - Training interventions;
 - Referrals to specific complaints to justice, crime prevention and security cluster partners, which include specific cases to be investigated by the police, specific cases to be prosecuted by the National Prosecuting Authority, and specific cases in courts;
 - The development of a situational analysis to determine victims’ needs, leading to the development of strategies;

565 SAHRC *Equality Report* 60. See also Koraan and Geduld 2015 *Potchefstroom Electronic Law Journal* 1943.

566 SAHRC *Equality Report* 60.

- Initiatives to develop a statistical understanding of cases;
 - The provision of shelters for victims;
 - The support of children, families of survivors and victims;
 - The development of a legislative intervention plan; and
 - The development of a multi-sectoral approach.
- Medium-term strategies⁵⁶⁷
 - Presentation of a developed intervention plan;
 - The development, implementation and monitoring of policy;
 - Promoting the use of Equality Courts;
 - Intensified implementation of the Victims Service Charter; and recommendations to the judiciary.
 - Long-term strategy⁵⁶⁸
 - To forward written submissions for possible amendment of legislation to the relevant departments.

Furthermore, the SAHRC through the *Equality Report*⁵⁶⁹ went on to recommend for goals that can be achieved through a multi-sectoral and multi-level approach. The recommendations are as follows:

- To establish a cadre of LGBTI activists who are confident, informed and politically engaged, especially in poorer and less-resourced communities, to

567 SAHRC *Equality Report* 60.

568 SAHRC *Equality Report* 60.

569 SAHRC *Equality Report* 60-61.

act as role models for other LGBTI people and challenge homophobic attitudes and perceptions. In addition, support be offered for individuals to report cases of hate speech and crimes.⁵⁷⁰

- To challenge stigma and discrimination in all institutions of influence, such as schools, churches and the media and to examine discourses around sexual orientation and gender identity, as well as to create opportunities for promoting a national discussion around rights, development and sexual and gender justice.⁵⁷¹
- To fund, support and create alliances between LGBTI organisations and all other human rights organisations and defenders and to hold the criminal justice system accountable in committing to processes and policies which uphold the laws of the country, especially those concerning the prevention of hate crimes.⁵⁷²
- To train public servants on issues of diversity, commitment to addressing LGBTI rights, and a meaningful commitment to an inclusive national identity, which can assist in making the equality clause a reality rather than a mere ideal.⁵⁷³

However, despite the numerous recommendations made and proposed strategies by different institutional reports, organisations and Government departments, a majority of LGBTI people still experience extreme forms of hate crimes due to their sexual orientation and gender identities. This is indicative of the fact that the government has somehow failed to realise such resolutions, which would have otherwise resulted in a LGBTI violence-free South Africa. It has been noted that failure to realise such recommendations and strategies is as a result of certain shortcomings in our legal system, which have been noted as follows:⁵⁷⁴

570 SAHRC *Equality Report* 60.

571 SAHRC *Equality Report* 60.

572 SAHRC *Equality Report* 60-61.

573 SAHRC *Equality Report* 61.

574 South African Hate Crime Working Group *Report* 7-8.

- Inadequate legal framework for hate crimes:

There are currently no legal provisions allowing the application of intensified penalties or progress in the prosecution of hate crimes. Hate crime victims often experience secondary victimisation from service providers, despite being listed as a priority group in the National Victim Empowerment Programme (VEP) Policy guidelines, which prevents them from having access to certain support services as well as reporting hate crimes.⁵⁷⁵ It is submitted that even without such provisions; hate crimes should be properly investigated and prosecuted, so as to enable hate crime victims to have access to justice and adequate services.⁵⁷⁶

- The lack of official monitoring and reporting:

There also exists no effective system for collecting data indicating LGBTI hate crimes or one that encourages the recording of potential bias by police; which in the absence of such an adequate system, hinders policy makers from realising the cause of the problem and developing adequate responses thereof.⁵⁷⁷

- Inadequate inter-departmental cooperation:

There are also no inter-departmental measures that address hate crimes, which impedes efforts to hold hate crime perpetrators accountable. A good demonstration of how effective good inter-departmental cooperation can be was the good coordination in the establishment of special courts in trying perpetrators of crimes relating to the FIFA World Cup in 2010.⁵⁷⁸ Furthermore, although victims of hate crimes are noted as a priority group in the VEP guidelines, there are no practical guidelines on how to ensure effective support for victims as a cooperative effort from the Department of Justice and Constitutional Development and the Department of Social Development.⁵⁷⁹

575 South African Hate Crime Working Group *Report 7*.

576 South African Hate Crime Working Group *Report 7*.

577 South African Hate Crime Working Group *Report 7*.

578 South African Hate Crime Working Group *Report 8*.

579 South African Hate Crime Working Group *Report 8*.

5.4 Conclusion

This chapter indicated that although there is a legislative framework put in place to protect LGBTI people, South Africa is still experiencing hate crimes and unfair discrimination against LGBTI people. This is because there still exists homophobic attitudes propelled by people's moral, cultural and religious beliefs.

Until such a time where the stigma is eradicated and people are able to protect their fellow brothers and sisters against the horrific experiences they are subjected to, South Africa is still far from being a rainbow nation, and such challenges overshadow the achievements that have been reached thus far. In essence, equality and legal protection for LGBTI people are just words in law, not in action.

The next chapter will provide concluding remarks, findings and recommendations based on findings regarding the effectiveness of anti-discriminatory legislation on the lives of LGBTI people.

CHAPTER SIX: CONCLUSIONS, FINDINGS AND RECOMMENDATIONS

6.1 *Concluding remarks*

This study commenced by analysing the historical background regarding homosexuality from the pre-colonial era, wherein South Africans did practice homosexuality and no form of hostility was attached to it, because it was just an occasional act that caused no commotion whatsoever. It further focused on the colonial era, where especially black people in general were oppressed, and the situation was worse for LGBTI people because they were subjected to more cruel punishment for their homosexuality, such as being put to death. Black South Africans were not afforded any rights during this era, and any homosexual conduct was forbidden, because it constituted an “unnatural” conduct that was punishable by law. The study also focused on the position of LGBTI people during apartheid, a system fundamentally similar to that of the colonial regime because the apartheid regime inherited and retained the colonial laws that criminalised homosexuality.

The study further analysed the new constitutional dispensation that resulted in South Africa’s legal transformation, where unconstitutional provisions were repealed and some amended; introducing a statutory and policy framework that offered protection to LGBTI people against unfair discrimination. Furthermore, the study demonstrated that even after a progressive legal transformation, LGBTI people still experience unfair discrimination and extreme forms of violence because of their sexual orientation and gender identity.

According to Botha,⁵⁸⁰ homosexuality, during ancient times, was considered as a criminal conduct; that it appeared distasteful and humiliating for a man to be penetrated by another man as if he was a woman. Centuries have passed; however, most South Africans still have the same perception about LGBTI people. This is indicative of the fact that the available legislative provisions do not sufficiently cater for the protection of LGBTI people, nor does it eliminate the ongoing unfair discrimination and hate crimes perpetrated against LGBTI people.

580 Botha 2006 *Word and Action* 7.

6.2 Findings

The aim of the study was to determine to what extent the South African legislative framework has assisted in preventing unfair discrimination and hate crimes against LGBTI people while identifying the successful achievements of the legislative reform and the challenges that are still experienced by LGBTI people. The first objective of the dissertation was to clearly identify the legal provisions that give recognition to and protection of LGBTI people and determine whether or not such provisions are sufficient and effectively implemented for purposes of combating unfair discrimination and violence on the ground of sexual orientation.

The study identified the key legislative provisions that prohibit discrimination on the basis of sexual orientation. The findings are that the legislative framework put in place is not effectively implemented because there are still extreme forms of unfair discrimination and violence committed against LGBTI people; which are as a result of the ignorance and stigmatisation brought about by people's moral, cultural and religious beliefs. This proves that not everyone recognises, respects and upholds the provisions provided by these legal instruments which seek to especially promote the right to equality.

Furthermore, the findings affirm the hypotheses of the dissertation that the stigma propagated by moral, religious and cultural beliefs, dictate the perception that LGBTI people are different and therefore unequal, which eventually gives rise to homophobia. It also affirms that the legislative framework put in place is not sufficient, and it is not effectively implemented for purposes of preventing the unfair discrimination and violence that LGBTI experience because of their sexual orientation.

This leads to the specific objective of the dissertation, which is to comprehensively discuss techniques that can possibly be employed to overcome the extreme forms of hate crimes perpetrated against LGBTI people. Hereunder is the discussion of such techniques that can be employed to assist in the battle against hate crimes in South Africa.

6.3 Recommendations

6.3.1 Different ways of implementing laws

Although the South African legislative framework has proven to have been progressively reformed so as to allow for the recognition and protection of LGBTI people, it is no secret that it has not been effective as it seems in theory. This is as a result of having a legal framework that only prohibits unfair discrimination based on sexual orientation, yet it does not prescribe ways which can be employed to prohibit such discrimination and violence.⁵⁸¹

Furthermore, the legal framework aimed at combating unfair discrimination against LGBTI people is not accessible to everyone, because not all people have access to the legal and/or governmental documents that contain such legal provisions that prohibit discrimination based on sexual orientation, for many different reasons. For those that eventually get access to such documents, they find it difficult to understand the information contained in such documents, because most of the information is written in a manner that is understood only by those who understand legal terminology, than those who do not. Proposed solutions to this problem could be:

6.3.1.1 To create and distribute brochures

It would be very effective to create brochures,⁵⁸² not just about homosexuality, but about LGBTI rights. Firstly, the brochures should be in a clear, simple and understandable manner that explains what homosexuality is and who LGBTI people are; clearly explaining the difference between LGBTI people. Secondly, the brochures should set out LGBTI people's rights, while especially emphasising the right to equality. Thirdly, the brochures should explain the consequences that will follow if and when a person infringes other people's rights, including LGBTI people. Lastly, the brochures should explain that no rape, therapy, ritual and/or prayer can "cure" homosexuality, because it is not a disease that can be treated and/or cured.

581 Opperman *An analysis of the sexual orientation discrimination* 27-28.

582 Brochures such as the one available at <http://www.justice.gov.za/vg/lgbti/2014-LGBTI-faq.pdf>.

For ensuring that these brochures are easily accessed by every member of the society, they should be distributed at the following areas:

- Libraries;
- Hospitals;
- Police stations;
- Schools;
- Universities;
- Community halls (especially during community meetings, events and collection of grants by elderly people);
- Churches;
- Local municipality offices;
- All other public governmental institutions; and
- Door to door delivery

By ensuring that these brochures are in every public area as possible, this could have a positive impact on LGBTI people and the legal system itself, because it might change people's mindsets about homosexuality and LGBTI people. This will ensure that people are aware of the fact that it is wrong and illegal to rape, murder, assault and unfairly discriminate against LGBTI people, as much it is wrong to do so on any other person.

6.3.1.2 To create LGBTI billboards

The Government should invest in the creation of highway billboards, which display information that clearly and briefly summarise what homosexuality is, who are LGBTI people and set out LGBTI people's rights on all local and national roads. This can be a means of raising awareness about such to people who would otherwise not have access to such information for different reasons, such as people who work as particularly truck drivers, who spend most of their time on the road travelling.

6.3.1.3 LGBTI TV and Radio adverts

Television (TV) and radio advertisements, especially in public broadcasting entities, would be an effective way of raising awareness about LGBTI people, their rights, and

the consequences that will follow if such rights are infringed. Peak hours can be identified, where most people would be watching television and listening to the radio, so as to send through the message using advertisements. This is because, not most people are likely to watch an entire TV show about homosexuality, but adverts between their favourite shows will help raise awareness about unfair discrimination and violence based on sexual orientation.

This is also to basically raise awareness about the harsh experiences that LGBTI people face and how such experiences need to urgently stop, because more and more LGBTI people are assaulted, raped and murdered; some of whom are mentioned in the preceding chapter, because of their sexual orientation and gender identity. This study proposes for the undivided effort and attention to communicate the message of prevention and prohibition of unfair discrimination on the basis of sexual orientation, in as much effort as the one that was put in ensuring the achievement of prevention of children and women abuse. It is now time to stop LGBTI people's abuse.

6.3.2 Education

It is submitted that educated people become more tolerant towards social issues such as homosexuality.⁵⁸³ This demonstrates that if the community can be educated, particularly about LGBTI people and their right to be treated equally, it is submitted that there is a likelihood that their perception on LGBTI people will vary. It has been proven that education has an effect on people's perceptions, as more informed and educated people have proven to be more tolerant on subjects such as homosexuality.⁵⁸⁴

Educating children at schools and youth at higher learning institutions about LGBTI people and human rights, especially the rights to equality, dignity as well as the right not to be treated in a cruel and inhumane manner could liberate them from the religious and cultural perception against LGBTI people. It is submitted that additional

583 Roberts and Reddy 2008 HSRC Review 11.

584 Roberts and Reddy 2008 HSRC Review 11.

education and advocacy on homosexuality can ensure that sexual minorities will not be subjected to insensitivity, harassment, and violence.⁵⁸⁵

Educating the older generation; our grandparents and parents, about what homosexuality is, who LGBTI people are, and their legal rights is also worth a try and could be effective. This is because they often resist change which may have an effect on the acceptance of such change by their children, in that they dictate as to what is wrong, right, what should be accepted and what should not. Therefore, education should not only be directed at the younger generation, but the older one as well.

Educating public service personnel, such as healthcare workers and law enforcement officials about homosexuality and LGBTI people's rights will certainly be in the interest of the victims and justice. For instance, if policemen are well equipped and informed about homosexuality, more LGBTI people will be able to report the attacks they experience on a daily basis without feeling some form of prejudice from the officials assisting them. Every police station in South Africa should at least have police officials who will have been trained to deal with hate crimes.

It has been reported that Yoliswa Makhasi, Head of the Gauteng Department of Community Safety, said that her department is working to ensure that Gauteng police stations become LGBTI-friendly, so that secondary discrimination is avoided. She revealed that the department aims to have sensitisation training to all police stations in the province within three years, and that it will furthermore introduce a monitoring tool that allows them to follow up and get feedback on how LGBTI victims have been treated when opening cases of victimisation.⁵⁸⁶

If this form of training can be provided in all South African police stations, including in the NPA and the judiciary, it will have a great impact on the prevention of unfair discrimination and violence based on sexual orientation. The victims of hate crimes would have confidence in reporting their victimisation to the police, also having hope that the perpetrators will be successfully prosecuted and that effective and appropriate sentences will be pronounced.

585 Letsoalo *Challenges faced by gay and lesbian students* 16.

586 MambaOnline 2016 <http://www.mambaonline.com/2016/10/07/gauteng-police-stations-lgbt-friendly-within-3-years>.

Holding public debates and engagements, such as the *Hate Crimes Bill* Public Engagement,⁵⁸⁷ about homosexuality and human rights, that can assist in raising awareness on LGBTI rights. It is therefore submitted that the cure to unfair discrimination and hate crimes is education, because the more education people get about LGBTI people and their rights, the less likely homophobia will occur.

6.3.3 *The institution of criminal charges against perpetrators*

It is imperative that hate crime perpetrators be criminally charged and tried for committing such crimes. If such a technique of arresting and sentencing perpetrators of these hate crimes is employed, this could eradicate the ongoing homophobic attacks that LGBTI people experience. The study therefore recommends for the immediate enforcement of the *Prevention and Combating of Hate Crimes and Hate Speech Bill*, because it creates the statutory offence of hate crime and enables the criminal justice system to charge and convict perpetrators of such crimes.⁵⁸⁸ The need to have this *Bill* immediately enacted is again emphasised, because the *Bill* promises the extermination of hate crimes, which have become a big problem in South Africa.

The *Bill* provides the criminal justice system with an opportunity to investigate the primary cause of such crimes, in that it allows reported hate crime cases, especially corrective rape and murder cases that occurred as a result of the victim's sexual orientation and gender identity to be treated as bias motivated crimes. It also advances the skills of criminal justice system officials through training courses on how to properly investigate, prosecute and sentence hate crime perpetrators. It further provides for the establishment of public educational campaigns on the prohibition and prevention of hate crimes, which will raise public awareness on hate crimes and the struggles experienced by LGBTI people.

Therefore, the immediate enforcement of the *Bill* will assist in exterminating hate crimes in our communities, as well as in intensifying the training of service providers in reducing unfair discrimination and dealing with hate crime victims and cases; and it

587 Iranti Media 2017 <https://www.youtube.com/watch?v=Msq9y04ZJWo>.

will also serve as a foundation for holding such service providers accountable for their maltreatment towards LGBTI people.⁵⁸⁹

6.3.4 *Empowerment of LGBTI people through legal education*

Educating LGBTI people about their constitutional rights can prove to be an effective measure to be taken. This is because not all LGBTI people are familiar with their right to be treated equally and not to be unfairly discriminated against, in as much as not many people recognise the need to treat LGBTI people equally, and that they are also protected by the law as their heterosexual counterparts. They are made to believe that their sexual non-conformity is wrong and there is nothing to do about it but to change and be “normal”.

They need to be educated about and familiarise themselves with all the legal instruments that exist for purposes of prohibiting unfair discrimination and those that prohibit hate crimes such as the *Prevention and Combating of Hate Crimes and Hate Speech Bill*. They also need to be made aware of social media platforms that they can use to report homophobic slurs, which will then be dealt with. Some social media platforms, such as Facebook, have a policy against hate crimes.⁵⁹⁰

This can be achieved through the assistance of the Government through the establishment and implementation of specialised LGBTI legal educational programmes which can be held and offered at institutions of learning, community and youth centres for purposes of familiarising LGBTI people with all the legal instruments that are there to protect them.

6.4 *An afterword*

As alluded to throughout the whole study, it is imperative that people be educated and awareness be raised about LGBTI people and their rights to life, to be treated equally, with dignity and to not be treated in an inhumane and degrading manner. The alarming rate of hate crimes, specifically corrective rape incidents that are perpetrated against LGBTI people on a daily basis should shame South African

589 Mitchell and Nel *Hate and Bias Crimes Research Report* by The Hate Crimes Working Group 24.

590 STOP-Homophobia.com <http://www.stop-homophobia.com>.

communities into realising that South Africa desperately needs to change its heteronormativity.⁵⁹¹ It is therefore submitted that by effecting the proposed recommendations contained in this dissertation, homophobic attacks will less likely occur and the legislative framework will, through effective implementation, be helpful towards combating the extreme forms of hate crimes that are experienced by LGBTI people.

It is submitted that there exists is a great need to assert new techniques which can assist in the administration and implementation of those statutes and policies that aim to prevent unfair discrimination and hate crimes against LGBTI people. It is also submitted that there is also a great need to draft and/or implement hate crime legislation either as a substantive crime or as an amendment to existing legislation, so as to include harsher minimum sentences for hate crime perpetrators.⁵⁹² The final submissions of this dissertation are in conjunction with those alluded to in the *Hate and Bias Crime Research Report* by the HCWG; which emphasise that:

The member organisations of the HCWG must be commended for the incredible work that they do in their efforts to prevent hate crime and their support of victims of these crimes. But civil society alone cannot meet the growing demand for prevention, care, and prosecution. Now more than ever, our country's leaders must realise how crucial their voices are in taking a firm stance against all forms of intolerance, bigotry, and discrimination if hate crime is to be stemmed.⁵⁹³

In conclusion, it is submitted that this study is important to society as a whole, because it contributes towards the advancement of the body of knowledge, particularly qualitative insights on the challenges faced by LGBTI people and the effectiveness of the South African legislative framework regarding unfair discrimination and violence on the basis of sexual orientation.

It is also important because it contributes towards the betterment of the lives of LGBTI people, in that less homophobic attacks will occur if effective measures regarding the legislative framework are taken. It may also assist the government in what considerations need to be taken during the statutory and policy drafting and implementation process. Furthermore, it may assist in sexual orientation and gender

591 Koraan and Geduld 2015 *Potchefstroom Electronic Law Journal* 1944.

592 Koraan and Geduld 2015 *Potchefstroom Electronic Law Journal* 1945.

593 Mitchell and Nel *Hate and Bias Crimes Research Report* by The Hate Crimes Working Group 6.

identity-based unfair discrimination and violence-related research that is undertaken by LGBTI organisations, specifically, and other researchers in general, and may serve as a point of reference thereof.

BIBLIOGRAPHY

Literature

Books

Botha and Cameron "South Africa"

Botha K and Cameron E "South Africa" in West DJ and Green R (Eds) *Sociolegal control of Homosexuality: A Multi-Nation Comparison* (Kluwer Academic Publishers Netherlands 2002) 5-42

Butler and Astbury "South African LGBT youth"

Butler AH and Astbury G "South African LGBT youth" in Sears JT (Ed) *Youth, education, and sexualities: An International Encyclopedia* (Greenwood Publishing Group London 2005) 814-817

Dedaić *Singing, Speaking and Writing Politics*

Dedaić M.N *Singing, Speaking and Writing Politics: South African political discourses* (John Benjamins Publishing Co. Netherlands 2015)

Dunton and Palmberg *Human Rights and Homosexuality in Southern Africa*

Dunton C and Palmberg M *Human Rights and Homosexuality in Southern Africa* (Nordic Africa Institute Sweden 1996)

Good News Bible

Good News Bible: Today's English Version (Bible Society of South Africa Cape Town 1994)

Gomes da Costa "Decriminalising homosexuality in Africa: lessons from the South African experience"

Gomes da Costa G "Decriminalising homosexuality in Africa: lessons from the South African experience" in Lennox C and Waites M (eds) *Human Rights, Sexual Orientation and Gender Identity in the Commonwealth: Struggles for Decriminalisation and Change* (Institute of Commonwealth Studies London 2013) 314-337

Oxford Advanced Learner's Dictionary 8th edition

Hornby AS *Oxford Advanced Learner's Dictionary of current English 8thed* (Oxford University Press New York 2010)

Journal articles

Bhana 2014 *Journal of Moral Education*

Bhana D "Ruled by hetero-norms? Raising some moral questions for teachers in South Africa" 2014 *Journal of Moral Education* 362-376

Botha 2006 *Word and Action*

Botha PH "Christianity and homosexuals– homosexuals and Christianity" 2006 *Word and Action* 7-10

De Ru 2013 *Fundamina*

De Ru H "A Historical Perspective on the Recognition of Same-Sex Unions in South Africa" 2013 *Fundamina* 221-250

De Vos and Barnard 2007 *South African Law*

De Vos A and Barnard J "Same-sex marriage, civil unions and domestic partnerships in South Africa: Critical reflections on an ongoing saga" 2007 *South African Law* 175-826

Dlamini 2006 *Agenda*

Dlamini B "Homosexuality in the African context" 2006 *Agenda* 128-136

Han and O'Mahoney 2014 *Cambridge Review of International Affairs*

Han E and O'Mahoney J "British colonialism and the criminalization of homosexuality" 2014 *Cambridge Review of International Affairs* 268-288

Ibrahim 2015 *African Human Rights Law Journal*

Ibrahim AM "LGBT rights in Africa and the discursive role of international human rights law" 2015 *African Human Rights Law Journal* 263-281

Ilyayambwa 2012 *International Journal of Humanities and Social Science*

Ilyayambwa M "Homosexual Rights and the Law: A South African Constitutional Metamorphosis" 2012 *International Journal of Humanities and Social Science* 50-58

Isaack 2003 *Human Rights*

Isaack W "Equal in Word of Law: The Rights of Lesbian and Gay People in South Africa" 2003 *Human Rights* 19-22

Koraan and Geduld 2015 *Potchefstroom Electronic Law Journal*

Koraan R and Geduld A ““Corrective Rape” of Lesbians in the Era of Transformative Constitutionalism in South Africa” 2015 *Potchefstroom Electronic Law Journal* 1931-1952

Lopang 2014 *International Journal of Humanities and Social Science*

Lopang W “No place for Gays: Colonialism and the African Homosexual in African Literature” 2014 *International Journal of Humanities and Social Science* 77-83

Louw 1997 *South African Human Rights Yearbook*

Louw R “Sexual Orientation” “Sexual orientation” 1997 *South African Human Rights Yearbook* 245-266

Marais and Stobie 2014 *Literator*

Marais BM and Stobie C “Constructing the autobiographical self, collective identity and spiritual spaces in South African queer autobiography” 2014 *Literator* 1-9

Mwambene and Wheal 2015 *African Human Rights Law Journal*

Mwambene L and Wheal M “Realisation or oversight of a constitutional mandate? Corrective rape of black African lesbians in South Africa” 2015 *African Human Rights Law Journal* 58-88

Naidoo and Karels 2016 *Journal for Juridical Science*

Naidoo K and Karels MG “Prosecuting “hate”: An overview of problem areas relating to hate crimes and challenges to criminal litigation” 2016 *Journal for Juridical Science* 65-82

Nel 2014 *South African Journal of Psychology*

Nel JA “South African psychology can and should provide leadership in advancing understanding of sexual and gender diversity on the African continent” 2014 *South African Journal of Psychology* 145-148

Posel 2005 *Africa*

Posel D “Sex, death and the fate of the nation: Reflections on the politicization of sexuality in post-apartheid South Africa” 2005 *Africa* 125-153

Reddy 2006 *Agenda*

Reddy V "Decriminalisation of Homosexuality in Post-Apartheid South Africa: A Brief Legal Case History Review from Sodomy to Marriage" 2006 *Agenda* 146-157

Roberts and Reddy 2008 *HSRC Review*

Roberts B and Reddy V "Pride and Prejudice: Public attitudes towards homosexuality" 2008 *HSRC Review* 9-11

Robinson and Swanepoel 2004 *Potchefstroom Electronic Law Journal*

Robinson JA and Swanepoel J "Same-Sex Marriage in South Africa: The Road Ahead" 2004 *Potchefstroom Electronic Law Journal* 1-24

Sanders 1997 *Journal of African Law*

Sanders AJGM "Homosexuality and the Law: A Gay Revolution in South Africa?" 1997 *Journal of African Law* 100-108

Dissertations

Hlongwane *Corrective rape*

Hlongwane NT *Corrective rape as an anti-lesbian hate crime in South African law: A critique of the legal approach* (LLM-dissertation UKZN 2016)

Letsoalo *Challenges faced by gay and lesbian students*

Letsoalo DL *Challenges faced by gay and lesbian students at the University of Limpopo (Turfloop Campus)* (M.A-dissertation UL 2016)

Makhari *The South African Judiciary*

Makhari RM *Reflections on the Prospects and Challenges of the South African Judiciary in Achieving Its Constitutional Objective* (LLM-dissertation NWU-Mafikeng 2015)

Ntuli *Nguni urban-township homosexual subculture*

Ntuli PM *IsiNgqumo: Exploring origins, growth and sociolinguistics of an Nguni urban-township homosexual subculture* (MSSc-dissertation UKZN 2009)

Opperman *An analysis of the sexual orientation discrimination*

Opperman T *An analysis of the sexual orientation discrimination framework in the public sector: The case of Stellenbosch Municipality* (M.A-dissertation Stellenbosch University 2009)

Tebele *Analysis of discrimination in the workplace*

Tebele SM *Analysis of discrimination on the basis of sexual orientation in the workplace* (LLM-Mini-dissertation UL 2013)

Research reports

Lee, Lynch and Clayton *Human Rights Report by Triangle Project*

Lee PWY, Lynch I and Clayton M "Your hate won't change us" 2013 *Human Rights Report by Triangle Project*

Lynch and Van Zyl *Research Study by Triangle Project*

Lynch, I and Van Zyl, M "Justice delayed: Activist engagement in the Zoliswa Nkonyana trial" 2013 *Research Study by Triangle Project*

Mitchell and Nel *Hate and Bias Crimes Research Report by The Hate Crimes Working Group*

Mitchell Y and Nel JA "The Hate and Bias Crimes Monitoring Form Project: January 2013 to September 2017" 2017 *Hate and Bias Crimes Research Report by The Hate Crimes Working Group*

OutRight Action *Research Report*

OutRight Action International "A survey of laws impacting the human Rights of lesbian, gay, bisexual and transgender persons in selected Southern African countries" 2016 *Research Report*

SAHRC *Equality Report*

South African Human Rights Commission "Commentaries on Equality: Race, Gender, Disability and LGBTI Issues" 2012 *South African Human Rights Commission Equality Report*

South African Hate Crime Working Group *Report*

South African Hate Crime Working Group "Violent Hate Crime in South Africa" 2012 *Report*

Southern Africa Litigation Centre *Research Report*

Southern Africa Litigation Centre "Laws and Policies Affecting Transgender Persons in Southern Africa: *Transgender Rights in South Africa*" 2016 *Research Report*

Case Law

Atkins v Datacentrix Pty Ltd 2010 (4) BLLR 351 (LC)

DPP v Prins (Minister of Justice and Constitutional Development & two amici curiae intervening) (369/12) [2012] 106 ZASCA

Du Plessis v Road Accident Fund 2004 (1) SA 359 (SCA)

Du Toit and Another v The Minister for Welfare and Population Development and Others 2002 JDR 0934 (CC)

Greyling v Minister of Welfare (unreported case, 1998)

J & B v Director General of Home Affairs, Minister of Home Affairs, & President of the Republic of South Africa 2003 (5) BCLR 463 (CC)

Langemaat v Minister of Safety and Security and Others 1998 (3) SA 312 (T)

Martin v Beka Provident Fund 2000 (2) BPLR 196 (PFA)

Minister of Home Affairs and Another v Fourie and Another 2006 (1) SA 524 (CC)

Mohapi v Mohapi (unreported case, 1997 (WLD))

Muir v Mutual and Federal Pension Fund 2002 (9) BPLR 3864 (PFA)

National Coalition for Gay and Lesbian Equality and Another v Minister of Home Affairs and Others 2000 (2) SA 1 (CC)

National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others 1999 (1) SA 6 (CC)

S v Chapman 1997 (3) SA 341 (A)

S v Lubabalo Ntlabati and Others (the Zoliswa Nkonyana case) Case RCB216/06 [2006]

Satchwell v President of South Africa and the Minister of Justice 2002 (6) SA 1 (CC)

Van Rooyen v Van Rooyen 1994 (2) SA 325 (W)

Legislation

Aliens Control Act 96 of 1991

Alteration of Sex Description and Sex Status Act 49 of 2003

Births and Deaths Registration Act 51 of 1992

Civil Union Act 17 of 2006

Child Care Act 74 of 1983

Children's Status Act 82 of 1987

Closed Pension Fund Amendment Act 41 of 1999

Constitution of the Republic of South Africa, 1996

Constitution of the Republic of South Africa Act 200 of 1993

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

Draft South African National LGBTI /HIV Framework, 2017-2022

Domestic Violence Act 116 of 1998

Employment Equity Act 55 of 1998

Government Employees Pension Law, Proclamation 21 of 1996

Guardianship Act 192 of 1993

Human Tissue Act 65 of 1983

Human Tissue Amendment Act 106 of 1984

Human Tissue Amendment Act 51 of 1989

Immorality Act 5 of 1927

Immorality Amendment Act 21 of 1950

Immorality Amendment Act 57 of 1969

Immorality Amendment Act 2 of 1988

Judges' Remuneration and Conditions of Employment Act 88 of 1989

Labour Relations Act 66 of 1995

Marriage Act 25 of 1961

Medical Schemes Act 131 of 1998

Natal Criminal Act

National Intervention Strategy for the LGBTI Sector (2011)

National policy guidelines for victim empowerment by the Department of Social Development (2009)

Prevention and Combating of Hate Crimes and Hate Speech Bill of 2018

Prevention of Family Violence Act 133 of 1993

Promotion of Access to Information Act 2 of 2000

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

Refugees Act 130 of 1998

Rental Housing Act 50 of 1999

Sexual Offences Act 23 of 1957

South Africa Act, 1909

South African Judicial Education Institute Act 14 of 2008

South African Schools Act 84 of 1996

Trenskei Penal Code

White Paper on National Defence for the Republic of South Africa, 1996

International instruments

Universal Declaration of Human Rights (1948)

International Covenant on Civil and Political Rights (1966)

International Covenant on Economic, Social and Cultural Rights (1966)

Convention on the Elimination of All Forms of Discrimination Against Women (1981)

Internet sources

Department of Justice and Constitutional Development 2014 *Frequently asked questions on sexual orientation & gender identity for individuals, families and communities* <http://www.justice.gov.za/vg/lgbti/2014-LGBTI-faq.pdf> [Accessed 22 August 2017]

Evans J 2017 *Man accused of lesbian's murder loses bid to have charges dropped* <https://www.news24.com/SouthAfrica/News/man-accused-of-lesbians-murder-loses-bid-to-have-charges-dropped-20171130> [Accessed 10 April 2018]

eNCA 2016 *New law to deal with hate crimes in SA* <http://www.enca.com/south-africa/new-law-to-deal-with-hate-crimes-in-sa> [Accessed 15 June 2017]

eNCA 2018 *Cabinet approves bill criminalising hate speech and hate crimes* <https://www.enca.com/south-africa/cabinet-approves-bill-criminalising-hate-speech-and-hate-crimes> [Accessed 02 May 2018]

Fisher S 2017 *Noluvo Swelindawo murder: Girlfriend hid behind bed during kidnapping* amp.ewn.co.za/2017/11/22/noluvu-swelindawo-murder-girlfriend-hid-behind-bed-during-kidnapping [Accessed 10 April 2018]

Fisher S 2018 *Sigcine Mdani gets 18 years in jail for killing Noluvo Swelindawo* <https://google.com/amp/amp.ewn.co.za/2018/02/12/sigcine-mdani-gets-18-years-in-jail-for-killing-noluvo-swelindawo> [Accessed 10 April 2018]

Hawker D 2015 *Maimane, Zuma and other 'anti-gay' statements in SA politics* <https://www.enca.com/south-africa/maimane-zuma-and-other-anti-gay-statements-sa-politics> [Accessed 23 August 2017]

History.Com 2010 *Apartheid* <http://www.history.com/topics/apartheid> [Accessed 19 May 2017]

Iranti Media 2017 *Hate Crimes Bill public engagement* <https://www.youtube.com/watch?v=Msq9y04ZJWo> [Accessed 25 August 2017]

Iranti-Org Date unknown *About Iranti-org* <http://www.iranti-org.co.za/about.html> [Accessed 23 August 2017]

Jozi Cats 2017 *Humble beginnings* <http://www.jozicats.co.za/who-we-are> [Accessed 20 August 2017]

Kentworthynews media 2010 *Pre-colonial Africa* <https://stifkitten.wordpress.com/2010/08/13/pre-colonial-africa> [Accessed 13 May 2017]

Lepodise O 2018 *Hate Crimes: New report cites policing, lack of records as main problems to addressing the issue* <https://www.dailymaverick.co.za/article/2018-02->

09-hate-crimes-new-report-cites-policing-lack-of-records-as-main-problems-to-addressing-the-issue/#.wt3g4sifpiu [Accessed 23 April 2018]

Madisha K 2016 *Trans woman murdered* <http://www.thenewage.co.za/trans-woman-murdered/> [Accessed 10 April 2018]

Mamacos E 2016 *Transgender Troubles in the South African Workplace* <http://www.careers24.com/career-advice/management-advice/transgender-trans-south-africa-workplace-advice-20160318>[Accessed 15 August 2017]

MambaOnline 2016 *Plan for Gauteng police stations to be LGBTI-friendly within 3 years* <http://www.mambaonline.com/2016/10/07/gauteng-police-stations-lgbt-friendly-within-3-years> [Accessed 24 August 2017]

MambaOnline 2017 *Burnt lesbian murder victim: More pain for Nonkie's family as suspects released* <http://www.mambaonline.com/2017/04/12/burnt-lesbian-murder-victim-pain-nonkis-family-suspects-released/> [Accessed 11 April 2018]

MambaOnline 2017 *Our lives are cheap: Transgender woman's killer goes free* <http://www.mambaonline.com/2017/09/01/lives-cheap-transgender-womans-killer-goes-free/> [Accessed 01 May 2018]

MambaOnline 2018 *Cabinet finally approves historic Hate Crimes Bill* <http://www.mambaonline.com/2018/03/20/cabinet-finally-approves-historic-hate-crime-bill/> [Accessed 02 May 2018]

Morris M 2017 *LGBT community still faces high levels of violence- report* <https://www.news24.com/Analysis/lgbt-community-still-faces-high-levels-of-violence-report-20171204> [Accessed 23 April 2018]

NGO Pulse 2012 *South Africa to ratify International Socio-Economic Rights Covenant* <http://www.ngopulse.org/press-release/south-africa-ratify-international-socio-economic-rights-covenant> [Accessed 29 June 2017]

Polity 2014 *Rainbow Nation? De jure versus de facto LGBT rights in South Africa* <http://www.polity.org.za/article/rainbow-nation-de-jure-versus-de-facto-lgbt-rights-in-south-africa-2014-03-11> [Accessed 07 August 2017]

Safe Communities Unknown date <http://safecommunities.sjc.org.za/affidavits/the-tragic-story-of-zoliswa-nkonyana/> [Accessed date 18 December 2017]

South Africa Date unknown *Colonialism and Segregation: The Origins of Apartheid* <http://overcomingapartheid.msu.edu/unit.php?id=65-24E-2> [Accessed 10 May 2017]

South African History online 2014 *The Interim South African Constitution 1993* www.sahistory.org.za/article/interim-south-african-constitution-1993 [Accessed 15 May 2017]

South African History online 2015 *The History of LGBT legislation* <http://www.sahistory.org.za/article/history-lgbt-legislation> [Accessed 29 April 2017]

South African History online 2016 *Constructing the Union of South Africa; negotiations & contestations, 1902-10* <http://www.sahistory.org.za/article/constructing-union-south-africa-negotiations-contestations-1902-10> [Accessed 03 May 2017]

STOP-Homophobia.com Date unknown <http://www.stop-homophobia.com> [Accessed 24 August 2017]

The Yogyakarta Principles 2007 www.yogyakartaprinciples.org/wp/wp-content/uploads/2016/08/principles_en.pdf [Accessed 12 June 2017]

United Nations date unknown *Universal Declaration of Human Rights* www.un.org [Accessed 28 June 2017]

Wesi T 2017 *Horrific photo circulates after murder of lesbian in Soweto* <https://citizen.co.za/news/south-africa/1514567/horrific-photo-circulates-after-murder-of-lesbian-in-soweto/> [Accessed 10 April 2018]