

**Authors: R Koraan and A Geduld**

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## **"CORRECTIVE RAPE" OF LESBIANS IN THE ERA OF TRANSFORMATIVE CONSTITUTIONALISM IN SOUTH AFRICA\***

**R Koraan\*\***

**A Geduld\*\*\***

### **1 Introduction**

"Corrective" rape refers to an instance when a woman is raped in order to "cure" her of her lesbianism.<sup>1</sup> In the last 15 years there have been at least 31 murders linked with lesbianism and an average of 10 lesbians are raped per week to "correct" their sexual preferences.<sup>2</sup> The phenomenon of "corrective" rape has become rife and has received significant media attention.<sup>3</sup> Although South Africa has some of the most progressive legislation pertaining to homosexuality, many still view homosexuality as unacceptable.<sup>4</sup>

South Africa is still in the grips of a transformative process, battling its way between the reality of poverty and economic inequality and the rights guaranteed by the *Constitution of the Republic of South Africa, 1996* (the *Constitution*).<sup>5</sup> Twenty years have elapsed since the enactment of the final *Constitution*. It was the first constitution worldwide to prohibit unfair discrimination on the basis of sexual orientation under the equality clause.<sup>6</sup> Since 1996, South Africa has had a number of progressive pieces of

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\*\* René Koraan. LLB, LLM (NWU). Lecturer, North-West University, Potchefstroom Campus. Email: rene.koraan@nwu.ac.za.

\*\*\* Allison Geduld. LLB, BA (Hons), LLM (NWU). Lecturer, North-West University, Potchefstroom Campus. Email: Allison.geduld@nwu.ac.za.

<sup>1</sup> Martin *et al Hate Crimes* 3.

<sup>2</sup> Strudwick 2014 <http://www.independent.co.uk/news/world/africa/crisis-in-south-africa-the-shocking-practice-of-corrective-rape--aimed-at-curing-lesbians-9033224.html>.

<sup>3</sup> Strudwick 2014 <http://www.independent.co.uk/news/world/africa/crisis-in-south-africa-the-shocking-practice-of-corrective-rape--aimed-at-curing-lesbians-9033224.html>; Smith 2015 <http://www.telegraph.co.uk/women/womens-life/11608361/Corrective-rape-The-homophobic-fallout-of-post-apartheid-South-Africa.html>; Carter 2013 [http://www.nytimes.com/interactive/2013/07/26/opinion/26corrective-rape.html?\\_r=0](http://www.nytimes.com/interactive/2013/07/26/opinion/26corrective-rape.html?_r=0).

<sup>4</sup> Anguita 2012 *Int'l J Hum Rts* 489; Roberts and Reddy 2008 *HSRC Rev* 1-3; Gontek *Sexual Violence* 10; SAHRC *Equality Report* 52-55.

<sup>5</sup> Albertyn 2011 *Stell LR* 591.

<sup>6</sup> Section 9(3) of the *Constitution of the Republic of South Africa, 1996*. Mubangizi and Twinomugisha 2011 *Stell LR* 331.

legislation and court judgments relating to the rights of sexual minorities and homosexuals in particular. Arguably the most important would be the *Civil Union Act*<sup>7</sup> which, *inter alia*, legalises civil unions between same sex couples.<sup>8</sup> Yet the numerous incidents of the "corrective" rape of lesbians are indicative of enduring homophobia.

It has been more than a decade since Karl Klare introduced the term "transformative constitutionalism" in his seminal article "Legal Culture and Transformative Constitutionalism" into the legal landscape of South Africa.<sup>9</sup> In this poignant article Klare explains that transformative constitutionalism connotes a transition from a racially segregated society to an equal, democratic and participatory society by means of the enactment, interpretation and enforcement of a constitution.<sup>10</sup> According to Klare the impetus for such a transformation is grounded in the law.<sup>11</sup> The law is used as an instrument to shape the norms of society. Against this background, it could be useful to examine the current legal position regarding corrective rape and how it shapes norms regarding sexual orientation.

This article specifically focuses on the "corrective" rape of a homosexual female, more generally known as a lesbian. The question that is posed is whether the South African legal framework adequately addresses the challenges of a heteronormative society in this era of transformative constitutionalism. It is furthermore questioned whether corrective rape needs to be classified as a hate crime. In order to answer this question the article will look at the following topics. The term transformative constitutionalism will be discussed, as will its interpretation by various authors, including Klare. Thereafter, heteronormativity and its implications for lesbian women in South Africa will be discussed. In the third section the notion of corrective rape and the legislation relevant thereto will be examined.

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<sup>7</sup> *Civil Union Act* 17 of 2006.

<sup>8</sup> Landmark cases regarding sexual orientation include *National Coalition for Gay and Lesbian Equality v Minister of Justice* 2000 1 BCLR 39 (CC); *Du Toit v Minister for Welfare and Population Development* 2002 10 BCLR 1006 (CC); *Satchwell v President of the RSA* 2002 6 SA 1 (CC); *Minister of Home Affairs v Fourie*; *Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 3 BCLR 355 (CC); *J v Director-General, Department of Home Affairs* 2003 5 BCLR 463 (CC); *Du Plessis v Road Accident Fund* 2003 11 BCLR 1220 (SCA).

<sup>9</sup> Klare 1998 *SAJHR* 146-188.

<sup>10</sup> Klare 1998 *SAJHR* 150.

<sup>11</sup> Klare 1998 *SAJHR* 150.

## 2 Transformative constitutionalism

There is no uniform definition of transformative constitutionalism.<sup>12</sup> Although the term is generally attributed to Klare, a variety of descriptions of transformative constitutionalism have seen the light.<sup>13</sup> Klare's definition recognises the process of transition from one situation to another. He explains as follows:<sup>14</sup>

By transformative constitutionalism I mean a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law.

Klare argues that the South African *Constitution* should be interpreted in a post-liberal manner.<sup>15</sup> His term post-liberal interpretation may be taken to suggest the need for adjudication that is politically and morally engaged.<sup>16</sup> Klare means to say that South African courts should no longer follow a strict traditionalist approach to interpretation,<sup>17</sup> but that the role of politics should be realised in the adjudication process. Although he does not specifically define politics he is of the opinion that gender and sexual identity need to be taken into account.<sup>18</sup> He also argues that a post-liberal interpretation of the *Constitution* would be appropriate to our situation as the *Constitution* is "social, redistributive, caring, positive, at least partly horizontal, participatory, multicultural and self-conscious about its historical setting and transformative mission".<sup>19</sup>

Since Klare's scholarly publication on transformative constitutionalism, the judiciary has embraced the concept wholeheartedly. Justice Langa, in a scholarly article,

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<sup>12</sup> Fuo *Local Government's Role* 26.

<sup>13</sup> Some of these contributions include: Langa 2006 *Stell LR* 351-360; Van Marle 2009 *Stell LR* 286-301; Rosa 2011 *Stell LR* 452-565; Moseneke 2009 *Stell LR* 3-13; Pieterse 2005 *SAPL* 155-166; Biltchitz 2010 *SAPL* 267-300; Sibanda 2011 *Stell LR* 482-500.

<sup>14</sup> Klare 1998 *SAJHR* 150.

<sup>15</sup> Klare 1998 *SAJHR* 151.

<sup>16</sup> Klare 1998 *SAJHR* 150.

<sup>17</sup> The strict traditionalist approach refers to a conservative legal culture and legal interpretation that is positivistic, technical and literal. Also see Langa 2006 *Stell LR* 356-358.

<sup>18</sup> Klare 1998 *SAJHR* 151.

<sup>19</sup> Klare 1998 *SAJHR* 153.

declares that there is no uniform definition of transformative constitutionalism, but that it is in keeping with the spirit of transformation that there is no single understanding of it.<sup>20</sup> Nevertheless, he attempts to provide a basis for the term. In doing so he refers to the postamble of the interim *Constitution*<sup>21</sup> which reads:

... a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.

Langa asserts that the postamble represents the core idea of transformative constitutionalism, namely that we must change.<sup>22</sup> He regards the object of transformative constitutionalism to be "a truly equal society".<sup>23</sup> He further contends that transformation is not only the responsibility of the courts but also the duty of other arms of government; that is to say, both the legislative and executive arms of government are responsible for effecting change.<sup>24</sup> A central part of Langa's understanding of transformative constitutionalism is social reconciliation.<sup>25</sup> Incidents of "corrective" rape are symptomatic of the need for reconciliation in society.

According to Pieterse, constitutional transformation includes *inter alia* the dismantling of the formal structures of apartheid, the eradication of social structures that reinforce inequality, and engagement with social vulnerability in all legislative, executive and judicial actions.<sup>26</sup> He notes that much of the inequality in society exists in private relationships, for example in racism by employers or sexual violence against women.<sup>27</sup> He further maintains that leaving such private relationships unchallenged would undermine our quest to create a substantively equal society.<sup>28</sup>

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<sup>20</sup> Langa 2006 *Stell LR* 351.

<sup>21</sup> *Constitution of the Republic of South Africa Act* 200 of 1993.

<sup>22</sup> Langa 2006 *Stell LR* 353-354.

<sup>23</sup> Langa 2006 *Stell LR* 353.

<sup>24</sup> Langa 2006 *Stell LR* 358.

<sup>25</sup> Langa 2006 *Stell LR* 358.

<sup>26</sup> Pieterse 2005 *SAPL* 159.

<sup>27</sup> Pieterse 2005 *SAPL* 160.

<sup>28</sup> Pieterse 2005 *SAPL* 161.

Another scholar, Karin van Marle, regards transformative constitutionalism as a critical project.<sup>29</sup> In this sense, she suggests that Klare's initial paper has opened up a space for dialogue.<sup>30</sup> She advances a possible criticism against the transformative constitutional project, namely that it lies outside the limits of the law, because legal rules function as "exclusionary reasons" and political considerations fall outside the limits of the law.<sup>31</sup> However, this is precisely why the post-liberal interpretation of the constitution would include political insights. All three arms of government, especially the judiciary, would need to take into account "extra-judicial" factors such as the history of the country, the background of the parties to the court case, and other relevant factors. This is by no means an impossible task.

From the above, it is evident that there is no uniform definition or understanding of the nature of transformative constitutionalism, yet there are common threads that run through the descriptions of the authors. Firstly, all three authors are in agreement that transformative constitutionalism envisions a change from the divided and discriminatory past of South Africa to a more equal society. Secondly, the transformation relates not only to the public sphere but to issues in the private sphere as well, including matters such as sexual orientation. Thirdly, the causes of inequality can be traced back to institutions, law and social norms. It is in this sense that we should look at the societal make-up of the country in a critical sense. With these three threads in mind, the next section gives a brief discussion of heteronormativity as the dominant model of the South African society. This will be done against the background of the objectives of transformative constitutionalism.

### **3 Heteronormativity**

Michael Warner coined the term heteronormativity.<sup>32</sup> It can be defined as "the institutions, structures of understanding, and practical orientations that make heterosexuality not only seem coherent – that is organised as a sexuality – but also

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<sup>29</sup> Van Marle 2009 *Stell LR* 300.

<sup>30</sup> Van Marle 2009 *Stell LR* 298.

<sup>31</sup> Van Marle 2009 *Stell LR* 293.

<sup>32</sup> Warner 1991 *Social Text* 3.

privileged".<sup>33</sup> Pierre De Vos refers to some arguments that citizens are discursively constructed as heterosexual in a heteronormative world.<sup>34</sup> Although people may obtain certain rights as gay men, lesbian women, bisexual people or other sexual minorities, they can claim protection from the law and society only insofar as they conform to the hierarchical assumptions of the heteronormative state.<sup>35</sup> The need to conform illustrates the tension between the promise of a prohibition of unfair discrimination based on sexual orientation and the reality of social isolation.

De Vos further notes that a manifestation of heteronormativity is "passing".<sup>36</sup> One example is where homosexuality will be accepted as long as homosexuals act in a certain way. For example, a homosexual couple should not publicly display affection.<sup>37</sup> An example that has received attention in the South African media is that of Ecclesia de Lange. She is a Methodist pastor who was in a relationship with another woman. The community where she was a pastor knew about their relationship and tolerated it. Once she announced publically to the congregation that they planned on formalising their relationship, however, the community indicated that they were not satisfied with the situation.<sup>38</sup> De Lange eventually took the matter to court,<sup>39</sup> but the court referred the case to arbitration.

In a heteronormative society lesbians face many challenges. In the South African context lesbianism is regarded as un-African by some.<sup>40</sup> A study done by the Human Science Research Council in 2004 found that 78% of the respondents regarded homosexuality as unacceptable. The majority of the respondents were African.<sup>41</sup> Gontek maintains that growing up in a context with deeply rooted patriarchal

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<sup>33</sup> Berlant and Warner 1998 *Critical Inquiry* 548. See also De Vos 2008 *Acta Juridica* 256; Barnard-Naudé and De Vos 2011 *SALJ* 408.

<sup>34</sup> De Vos 2008 *Acta Juridica* 257.

<sup>35</sup> De Vos 2008 *Acta Juridica* 257.

<sup>36</sup> De Vos 2008 *Acta Juridica* 258.

<sup>37</sup> De Vos 2008 *Acta Juridica* 258.

<sup>38</sup> Morgan 2013 [http://www.huffingtonpost.com/2013/05/22/south-africa-lesbian-minister-lawsuit-\\_n\\_3321309.html?utm\\_hp\\_ref=gay-voices](http://www.huffingtonpost.com/2013/05/22/south-africa-lesbian-minister-lawsuit-_n_3321309.html?utm_hp_ref=gay-voices).

<sup>39</sup> *Ecclesia De Lange v The Presiding Bishop of the Methodist Church of Southern Africa* 2014 ZASCA 151 (29 September 2014).

<sup>40</sup> Naidoo and Karels 2012 *Obiter* (Part I) 254-255. Van Vollenhoven and Els 2013 *De Jure* 269. Nel and Judge 2008 *Acta Criminologica* 22.

<sup>41</sup> Gontek *Sexual Violence* 13.

structures and heteronormativity makes living conditions for many lesbian women difficult.<sup>42</sup> Despite the legal rights for homosexuals in the South African *Constitution*, South African society and its institutions are still influenced by heteronormativity.

Realising that South Africa is a heteronormative society leaves one wondering whether the transformative constitutionalism project, which is grounded in the law, is capable of enabling South African society to transform to a truly equal society in all respects. With these few thoughts in mind, the question of whether or not the South African legal framework is adequate to counteract incidents of "corrective" rape receives some attention.

#### 4 "Corrective" rape

Some authors aver that many heterosexual men in South Africa regard lesbianism as an affront to their masculinity and a diminution of their power.<sup>43</sup> Corrective rape, which is also known as curative rape, is a brutal act of violence in which women and teenagers who are, or at least assumed to be, lesbians are raped to "cure" them of their homosexuality. It is believed by the perpetrators that having sex with a man will "correct" a homosexual woman's sexual orientation.<sup>44</sup>

In South Africa it is believed that lesbians from the African community are more prone to fall prey to this crime, due to their cultural environment. According to Morrissey<sup>45</sup> the black skin of lesbians is of particular concern, because much of the popular discourse in South Africa implies that lesbianism is taboo and that same-sex desire is not native to South African culture. It is a commonly held belief that homosexuality is "un-African".<sup>46</sup> Breen and Nel argue that African lesbians in townships are particularly vulnerable to rape and murder, as simply by being what they are they challenge traditional gender norms.<sup>47</sup>

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<sup>42</sup> Gontek *Sexual Violence* 18.

<sup>43</sup> Brown 2012 *Ann Surv Int'l & Comp L* 48-49.

<sup>44</sup> Brown 2012 *Ann Surv Int'l & Comp L* 45-46; Naidoo and Karels 2012 *Obiter* (Part I) 243.

<sup>45</sup> Morrissey 2013 *WSIC* 72-91.

<sup>46</sup> Brown 2012 *Ann Surv Int'l & Comp L* 51. In most of the reported cases of "corrective" rape, black African women are the victims. Also see Naidoo and Karels 2012 *Obiter* (Part I) 249.

<sup>47</sup> Breen and Nel 2011 *SA Crime Quarterly* 36.



Corrective rape is known for its unusual cruel execution, as shown in the following examples. One of the more brutal cases, which received extensive media coverage, is that of 24 year-old Noxolo Nogwaza, whose lifeless body was found in an ally in Kwa Thema, outside of Johannesburg on 24 April 2011.<sup>48</sup> She had been stoned, stabbed with broken glass and gang-raped: "She had been raped and her head and face were crushed".<sup>49</sup> To date the perpetrator or perpetrators have not been found.

On 28 March 2011 Nokuthula Rdebe's body was found by children playing in an abandoned building in Thokoza Township, east of Johannesburg. The 20-year-old was found strangled with her shoelaces, her face covered with a plastic bag and her pants pulled down.<sup>50</sup> To date her killer or killers have also not been apprehended.

A crucial element of "corrective" rape is the intention with which it is committed ie the intention to cure the victim. To correct someone implies that there is something wrong with a person which has the effect of pathologising a person.<sup>51</sup> The second element that is often present in "corrective" rape is the brutality with which it is executed. This intention, coupled with the violent behaviour of the rapist, may qualify the action as a hate crime. For the purposes of this contribution the authors define a hate crime as any crime committed with any bias on the grounds listed in section 9 of the *Constitution*. This will include a crime committed as a result of the criminal's bias against the victim's race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, or language.

There are numerous cases of hate crimes that can be mentioned, some reported and some not. The question that needs to be raised at this point is whether the South African legal framework adequately addresses the scourge of corrective rape in the light of the aims of transformative constitutionalism.

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<sup>48</sup> Rossier 2011 <http://www.health24.com/Sex/Sexual-diversity/Task-team-to-tackle-gay-hate-crimes-20120721>.

<sup>49</sup> Anon 2013 <http://www.mambaonline.com/article.asp?artid=8072>.

<sup>50</sup> Dumsa 2013 <http://inkanyiso.org/2013/03/29/2013-march-28-failed-justice/>.

<sup>51</sup> Hames 2011 *Agenda* 87-91.

## 5 Existing legal framework

The *Criminal Law (Sexual Offences and Related Matters) Amendment Act*<sup>52</sup> criminalises acts of rape and sexual violation. The statutory offence of rape<sup>53</sup> is broadly defined, but it does not specifically make mention of corrective rape or rape committed out of malice against the victim's identification.<sup>54</sup> According to Naidoo and Karels,<sup>55</sup> the crime of rape is legally condemned by minimum-sentence legislation.<sup>56</sup> The following minimum sentences apply in the case of rape committed under the following circumstances:<sup>57</sup>

- (1) Life imprisonment for the death of a victim caused as a result of, during or after an act of rape or compelled rape. Life imprisonment also applies where the victim was raped more than once, by more than one person acting in common purpose, by an unsentenced convict who has been convicted of two or more counts of rape or where the accused knows that he is infected with HIV/AIDS. Life sentences are applicable where the victim is under the age of 16 years, and/or is physically disabled and/or is mentally disabled. Life sentences are further applicable where the act involves the infliction of grievous bodily harm.
- (2) 10 years' imprisonment for a first offender, 15 years' imprisonment for a second offender and a period not less than 20 years for a third-time offender if the rape is committed in any circumstance not mentioned above. These sentences further apply to the sexual exploitation of a mentally disabled person

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<sup>52</sup> *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007 (hereinafter the *Sexual Offences Act*).

<sup>53</sup> According to s 3 of the *Sexual Offences Act* "Any person ('A') who unlawfully and intentionally commits an act of sexual penetration with a complainant ('B'), without the consent of B, is guilty of the offence of rape".

<sup>54</sup> Although s 28 of the *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000 provides that the commission of an offence where there was unfair discrimination based on race, disability or gender is an aggravating factor, the grounds for a finding of discrimination do not include discrimination based on sexual orientation.

<sup>55</sup> Naidoo and Karels 2012 *Obiter* (Part II) 619.

<sup>56</sup> The *Criminal Law Amendment Act* 105 of 1997 (hereinafter the *Criminal Law Amendment Act*) provides for minimum sentences for certain serious crimes such as rape and murder.

<sup>57</sup> Section 51 and sch II of *Criminal Law Amendment Act*. Naidoo and Karels 2012 *Obiter* (Part II) 620.

and for activities related to the use of a child or mentally disabled person for pornographic purposes.

It is thus possible for the court to take grievous bodily harm into account when "corrective" rape has taken place with grievous bodily harm, which it does most of the time. The court may deviate from these sentences only if the accused can show substantial and compelling circumstances to justify such deviation.<sup>58</sup> The *Criminal Law Amendment Act* does not dictate what constitutes substantial and compelling circumstances.<sup>59</sup> It states *inter alia* that the complainant's previous sexual history, the lack of physical injury to the victim, the accused person's cultural or religious beliefs, and any relationship between the accused and the victim do not constitute substantial and compelling circumstances.<sup>60</sup>

"Corrective rape" has already been labelled as a hate crime by the media.<sup>61</sup> For example, on 28 April 2008 Eudy Simelani, a soccer player for the national women's team, was found dead. It was found that she had been gang raped, beaten and stabbed twenty-five times in the face, chest and legs.<sup>62</sup> ActionAid<sup>63</sup> and the South African Human Rights Commission labelled the murder as a hate crime.<sup>64</sup>

Despite the labelling by the media, South Africa does not have legislation specifically pertaining to hate crimes (hate speech notwithstanding), although the need for such legislation is well debated by authors.<sup>65</sup> According to Naidoo and Karels:

Hate-crime laws are intended to prevent bias-motivated crimes and, in the event of the failure of the preventative function, to punish crime committed with a bias motive.<sup>66</sup>

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<sup>58</sup> Naidoo and Karels 2012 *Obiter* (Part II) 620.

<sup>59</sup> Section 51(3)(aA) of the *Criminal Law Amendment Act*.

<sup>60</sup> Naidoo and Karels 2012 *Obiter* (Part II) 620; s 51(3)(aA) of the *Criminal Law Amendment Act*.

<sup>61</sup> Rossier 2011 <http://www.health24.com/Sex/Sexual-diversity/Task-team-to-tackle-gay-hate-crimes-20120721>.

<sup>62</sup> Brouard and Pieterse 2012 <http://www.info.gov.za/view/DownloadFileAction?id=178876>.

<sup>63</sup> ActionAid is a non-government organisation fighting for human rights. ActionAid Date Unknown <http://www.actionaid.org/south-africa/what-we-do>.

<sup>64</sup> Brouard and Pieterse 2012 <http://www.info.gov.za/view/DownloadFileAction?id=178876>.

<sup>65</sup> Breen and Nel 2011 *SA Crime Quarterly*; Dixon and Gadd 2012 *SA Crime Quarterly*.

<sup>66</sup> Naidoo and Karels 2012 *Obiter* (Part II) 609.

Despite the call for the amendment of current legislation or the implementation of specific hate-crime laws, South African criminal law still does not criminalise hate crime as a substantive criminal offence, nor does it require enhanced penalties when a crime is motivated by hatred.<sup>67</sup> This is not to say that crimes (specifically rape) against lesbians are not prosecuted. Corrective rapes of lesbians are investigated and prosecuted as ordinary rape cases, regardless of whether or not the crime was committed because of the bias of the accused.<sup>68</sup>

There are differences of opinion as to whether or not hate crimes should be created as a substantive criminal offence. Brown defines a hate crime as:<sup>69</sup>

... a criminal offence committed against a person, property or society because of his or her actual or perceived membership in any particular group or identifying class, such as race, religion, disability, sexual orientation, gender identity, ethnicity, national origin, social status or political opinion, because of perpetrator's bias, prejudice or hate.

Brown is strongly in favour of the passing of hate crime legislation.<sup>70</sup> His strong preference for hate crime legislation stems from the effects of hate crimes not only on the victim but on society as a whole.<sup>71</sup> An act such as "corrective" rape has an enormous effect on the people who are part of the group to which the victim belongs, namely homosexual women.<sup>72</sup>

An additional reason for the implementation of hate crime legislation is found in the status or ranking of the crime and the impact that will have on sentencing. According to Breen and Nel, one of the two reasons why hate crime legislation is introduced is the aggravating circumstances of the deed.<sup>73</sup> The other reason is the argument that hate crimes should be introduced as substantive new offences.<sup>74</sup> An additional reason for the creation of hate crimes is a possible change in social norms regarding the severity of the offence.

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<sup>67</sup> Naidoo and Karels 2012 *Obiter* (Part II) 609.

<sup>68</sup> Naidoo and Karels 2012 *Obiter* (Part II) 609.

<sup>69</sup> Brown 2012 *Ann Surv Int'l & Comp L* 63.

<sup>70</sup> Brown 2012 *Ann Surv Int'l & Comp L* 63.

<sup>71</sup> Brown 2012 *Ann Surv Int'l & Comp L* 63.

<sup>72</sup> Brown 2012 *Ann Surv Int'l & Comp L* 63.

<sup>73</sup> Breen and Nel 2011 *SA Crime Quarterly* 37.

<sup>74</sup> Breen and Nel 2011 *SA Crime Quarterly* 37.

Though some authors call for separate hate crime legislation, Naidoo and Karels are of the opinion that it would be sufficient to amend the *Sexual Offences Act* and the *Criminal Law Amendment Act* to include any act of corrective rape or murder with a sexual orientation or hate motive.<sup>75</sup> By enhancing sentences the courts will reassure the victim and focus on the hate motive of the crime.<sup>76</sup>

In the meantime, to provide for temporary measures to protect the rights and interests of lesbians, gay, bisexual, transgender and intersex persons (LGBTIs), the South African Human Rights Commission Equality Report,<sup>77</sup> the Rape Crisis Cape Town Trust<sup>78</sup> and the Triangle Project<sup>79</sup> made the following media statement:<sup>80</sup>

1. That the South African Police Service, Department of Justice and Constitutional Development and National Prosecuting Authority (NPA) monitor hate-crime cases in the criminal justice system from when the case is reported to the South African Police Service until sentence is handed down to ensure, inter alia, that the criminal justice system does not re-victimise or re-traumatise the complainant, that investigating officers properly investigate cases, that prosecutors fulfil their duties and execute their duties with a high level of skill and diligence and that criminal trials are finalised without unreasonable delays.
2. That rape cases based on race, gender, sex, sexual orientation and/or sexual identity be heard in the designated sexual offences courts.
3. That the NPA keeps disaggregated statistics of the number of alleged 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 perpetrators of hate crime.

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<sup>75</sup> Naidoo and Karels 2012 *Obiter* (Part II) 620.

<sup>76</sup> Naidoo and Karels 2012 *Obiter* (Part II) 620.

<sup>77</sup> SAHRC *Equality Report* 58-59.

<sup>78</sup> The Rape Crisis Cape Town Trust is an organisation in South Africa that supports the recovery of rape victims. Also see Rape Crisis 2015 <http://www.rapecrisis.org.za>.

<sup>79</sup> The Triangle Project is a non-profit organisation for the realisation for the rights of LGBTI persons. Also see Triangle Project 2015 <http://www.triangle.org.za>.

<sup>80</sup> SAHRC *Equality Report* 57-58.

4. That the NPA develops a directive for prosecutors to: raise hate crime as an aggravating circumstance to oppose bail; raise hate crime as an exacerbating factor for sentencing; and advise complainants of the right to apply to court to not have the trial conducted in open court, in terms of section 153(1) of the *Criminal Procedure Act* 51 of 1977.
5. That Parole Boards view the commission of a hate crime as an aggravating factor for the consideration of the perpetrator's parole application.<sup>81</sup>

One of the consequences of this initial meeting between the three actors was the setting up, by the state, of a task team to address hate crimes against LGBTIs.<sup>82</sup> As a sign of its commitment to the rights of LGBTIs, the South African government identified the following short-term strategies:

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; 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.<sup>83</sup>

Though it is clear that the government is taking note of the increase in and severity of violent crimes like corrective rape against LGBTIs, there is still a challenge hindering the protection of potential victims. The general prevalence in South Africa of social norms which declare same-sex proclivities and practices as unacceptable is a real challenge. The actions of various political figures and businessmen suggest that a "masculinist" culture is thriving.<sup>84</sup> This suggests a bigger challenge than the mere amending or drafting of new legislation.

## **6 Transformative constitutionalism and corrective rape as a hate crime**

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<sup>81</sup> SAHRC *Equality Report* 57-58.

<sup>82</sup> SAHRC *Equality Report* 57-58.

<sup>83</sup> SAHRC *Equality Report* 58.

<sup>84</sup> SAHRC *Equality Report* 53.

As alluded to above, transformative constitutionalism is a project directed towards the positive change of the norms of society by means of the law. Many South Africans are still stuck between the heteronormative and homophobic nature of South African society and the rights guaranteed in the *Constitution*. The drafting of hate crime legislation or the amending of existing legislation to include harsher sentences where the motive for the rape was hatred could make huge strides in pursuing transformative constitutionalism. The reasoning here is that the events that happen to a particular person from a vulnerable group affect the entire community. If legislation were to be drafted it would therefore also afford protection to that entire community. More significantly for the transformative constitutionalism project, it would send a message to society and assist in breaking down the existing traditional heteronormative stereotypes.

Charles Taylor<sup>85</sup> puts it as follows:

The thesis is that our identity is partly shaped by recognition or its absence, often by the misrecognition of others, and so a person or group of people can suffer real damage, real distortion, if the people or society around them mirror back to them a confining or demeaning or contemptible picture of themselves. Nonrecognition or misrecognition can inflict harm, can be a form of oppression, imprisoning someone in a false, distorted, and reduced mode of being.

## **7 Conclusion**

This article set out to determine whether the South African legal framework adequately addresses "corrective" rape against the background of transformative constitutionalism. The heteronormativity of South African society was discussed as a possible reason for the prevalence of "corrective" rape in South Africa. It was found that transformative constitutionalism aims to change the norms of South African society from those of a deeply segregated country to those of a more equal one. The appalling number of incidents of corrective rape that are perpetrated every day should shame South African society into realising that it desperately needs to change.

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<sup>85</sup> Taylor "Politics of Recognition" 25.

The article addressed the question whether it would be appropriate to draft hate crime legislation either as a substantive crime or as an amendment in existing legislation. It is submitted that either one of two options should be followed. Firstly, existing legislation could be amended to include harsher minimum sentences for "corrective" rape specifically, or crimes committed with hatred generally. This would need to be supplemented with appropriate sentences for perpetrators. The second option would be to create hate crime legislation which would create hate crimes as a substantive offence. There is concern that such legislation might create a hierarchy of prejudice by referring only to certain groups and thus discriminating against other vulnerable groups.<sup>86</sup> It is proposed that this need not be a problem if the legislation is drafted in manner that sets out the most important grounds of discrimination e.g. race, sexual orientation, and nationality, but does not refer to this as a closed list. It should still be possible for courts to determine whether a crime falls within the ambit of a hate crime, although the crime is not expressly mentioned in the legislation. A set of criteria should be used to determine whether or not a crime is a hate crime.

The project of transformative constitutionalism requires a change in the law, in society, in the norms that we uphold, and in the legal culture.

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<sup>86</sup> Dixon and Gadd 2012 *SA Crime Quarterly* 28.



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## LIST OF ABBREVIATIONS

Ann Surv Int'l & Comp L	Annual Survey of Comparative and International Law
HSRC Rev	Human Sciences Research Council Review
Int'l J Hum Rts	International Journal of Human Rights
LGBTIs	Lesbians, gay, bisexual, transgender and intersex persons
NPA	National Prosecution Authority
SAHRC	South African Human Rights Commission
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SAPL	Southern African Public Law
Stell LR	Stellenbosch Law Review
WSIC	Women's Studies in Communication