HATE CRIMES AGAINST BLACK LESBIAN SOUTH AFRICANS: WHERE RACE, SEXUAL ORIENTATION AND GENDER COLLIDE (PART II)

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SUMMARY

This article, which is the second of a two-part submission, examines the South African legal position pertaining to sexual offences and murder as a continuation of the theme introduced in Part One. The authors then examine the concept of motive before providing a brief overview of hate crime legislation and/or policy in the United States of America and Germany. The core of the article examines three possible routes for South Africa to curb hate crime. Firstly, the creation of substantive hate crime law in the form of legislation, secondly, the amendment of current legislation to incorporate protection against this form of crime and thirdly, the retention of the current *status quo* coupled with the roll-out of civil society initiatives to curb hate-motivated crime. The conclusion of the article provides recommendations from a civil society and criminal justice perspective.

A INTRODUCTION

This article seeks to extend the foundational framework laid in Part I within the context of criminal legal doctrine generally and the potential for hate-crime legislation in South Africa specifically. At the time of writing, the Department of Justice and Constitutional Development had appointed a task team to investigate hate-crime legislation and to submit proposals with regard to such legislation in South Africa.[1] The research is, however, still in

[1] Anonymous "Speech by Deputy Minister of Justice and Constitutional Development, Mr Andries Nel, MP, on the occasion of the official opening of the first networking session of the national task team on LGTBI Crime-related issues" October 2011 http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=22662&tid=47096 (accessed 2012-11-11). See also Nel and Breen "South Africa – A Home for All?"2011 38 *Crime Quarterly* 33-43.

the initial stages. While the authors are aware of the current furore surrounding the issue of hate speech in South Africa, this contribution will seek to isolate crimes committed with an "orientation motive" or bias.[2] While we are fully aware that rape is a reality for every person in South Africa regardless of gender, orientation or race, we submit that black lesbians are particularly vulnerable owing to their marginalization as women, lesbians and persons of African descent. These particular vulnerabilities are compounded by a heteropatriarchal/heterosexist society, as demonstrated in the first part of this article. Vulnerability factors relating to the "why" and "who" of corrective rape were discussed in detail in Part I, and will thus be highlighted only where necessary in this submission. We will later demonstrate that the corrective rape of lesbians, regardless of their colour, is a crime deserving of categorized protection under the law.

B METHOD(S)

As demonstrated in Part I of this submission, much of the abuse and sexual violation of black lesbians have been documented in narrative and anecdotal reports. In this submission, however, we turn our attention to the historical development of the common-law crime of rape and its subsequent codification into statute, and consider whether as a consequence any further protection has been extended to homosexual women who are subjected to corrective rape. For the sake of brevity, we shall thereafter discuss murder as a common-law crime in South Africa. The second focus of the paper will be comparative. We provide a concise overview of current hate-crime legislation relating specifically to orientation/homophobia in Germany and the United States of America. We shall suggest that the legal approach to corrective rape and murder based on sexual orientation ordinarily follows three possible courses in differing jurisdictions, and that South Africa may draw lessons from these approaches.

1 The first course may lie in the creation of specific hate-crime legislation;

2 the second course may entail extending and amending current legislation to include special protection for victims of hate crime;

3 the third course may involve retaining the legal *status quo*, but creating integrated gender and orientation awareness and education programmes for members of the public generally and members of the criminal justice system specifically (among the latter we include presiding officers, prosecutors, legal representatives, the legislature, members of the South African Police Service and administrative staff).

Each of the identified approaches has distinct disadvantages and advantages from both an administration of justice and procedural perspective and will be examined in this light.

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[2] A prime example in the South African media at the time of writing is the hate-speech trial of Julius Malema after his guilty finding in a trial in which he was called to answer a charge of singing "kill the boer [farmer]" at public gatherings. Another example, although the outcome is not without flaw, is the case of *Dey v Le Roux* CCT 45/10 [2011] ZACC 4; 2011 (3) SA 274 (CC).

In analysing the topic of study, we shall use the term "hate crime" specifically to refer to a broad category including xenophobia, homophobia, religious bias and race-related crimes. The terms "orientation bias" and "orientation-bias crime" will refer specifically to crimes committed against people based on the perpetrator's prejudice against the victim's sexual orientation or perceived sexual orientation. We reiterate that the term "black lesbian" is used to refer to a female person whose primary sexual orientation is to members of the same gender and who is African in descent. The use of the term "black lesbian" is not in any way intended to infer a sense of discrimination or victim categorization, but should be seen in the context of the submission as a linguistic identification of a certain group of victims of crime. Nonetheless, we submit that the averments hereunder may not reflect the experience of all lesbian women in South Africa, colour notwithstanding.

1 Criminal law approach to murder and sexual offences – *a luta continua*

Any act constituting a bias-motivated crime has two central elements. First, a crime recognized by the ordinary criminal law as such must be committed (a base crime if you will), and second, the crime must be motivated by prejudice against a protected group or protected characteristic. If no base crime occurs, then naturally a hate crime cannot result.[3]

This submission deals with rape and murder as base crimes against black lesbians in South Africa and will argue that the offence(s) is/are compounded by an orientation motive.

1 1 Rape: from common law to statutory codification – a limited synopsis

The overhauling of the South African approach to sexual violence has been well-documented and has received considerable press attention following the decision to codify common-law rape into statutory law. Prior to the enactment of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (hereinafter "the Sexual Offences Act") the crime of rape was narrowly defined as the unlawful and intentional engagement by a male person in sexual intercourse with a female person without her consent. This limited definition made sexual assault of males a crime of indecent assault, which by its very nature carried a much lighter sentence and placed males (especially children) and those subjected to sexual assault (including sodomy of a female by a male)[4] other than the commission of sexual intercourse in an unequal position before the law.

Section 3 of the Sexual Offences Act[5] defines rape as an act of sexual penetration of another person without the latter's consent. This definition is

[3] OSCE/ODIHR, 2009: 16.

[4] Snyman *Criminal Law* 5ed (2008) 356. See also Burchell *Principles of Criminal Law* (2005) 699 *et seq* for a discussion of the common-law definition of rape and the ramifications thereof.

[5] 32 of 2007.

gender-neutral and includes acts of sexual assault other than those committed in the narrow, anatomically specific sense.

The Sexual Offences Act[6] revolutionized the common-law definition of rape not only in the area of gender neutrality but also in terms of the number of acts that can now be defined as rape. As so pithily stated by Snyman:[7]

> "As far as the crime of rape is concerned, in terms of the Act it no longer matters whether it is the vagina or the anus which is penetrated, whether the perpetrator is male or female, whether the victim (complainant) is a female or a male (as where male X inserts his penis into another male Y's anus), or whether the penetration is by penis or by finger, some other part of X's body or even some object or part of an animal's body."

At the risk of sounding insensitive, we submit that the Sexual Offences Act[8] has created a situation in which many a form of sexual offence (some argue too many forms)[9] can be labelled as rape. Whether this actually assists in curbing sexual offences in South Africa or simply results in a proliferation of procedural and evidential issues which succeed in overburdening the system (not to mention labelling persons as rapists for acts which previously would have qualified as a lesser crime) is the topic for another study. However, if one considers the extent to which the legislature has gone in an attempt to punish sexual offenders it is glaringly obvious, in the case of orientation-bias crimes at least, that it is impossible to see the wood for the trees. If Plato were correct and democracy does "dispense a sort of equality to equals and un-equals alike,"[10] then the current legislation would appear to be successful in implementing the rule of law for the benefit of the "equals" – heterosexual victims of rape and/or sexual offences. Despite the Act's[11] creation of sexual-offence crimes committed by a male against a male or a female against a female, the general tenor of the statute is heterosexist in approach and fails to take into account that rape, and more especially corrective rape, can be used as a tool of discrimination and bigotry against members of minority groups.

Snyman[12] provides a thorough overview of what constitutes what sexual act in the case of a male acting against a female, a female acting against a male, a male acting against a male and a female acting against a female, and each of the acts described includes an element of intent. Intent, however, must be separated from motive in the case of any criminal conduct within South Africa. The importance of this distinction in the topic under discussion should be clear when one considers that any hate crime must include, as an increment of the second element described above, a motivational component. The commission of the crime must, in other words,

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6 *Ibid*.

7 *Criminal Law* 357.

8 32 of 2007.

9 See, *eg*, Snyman *Criminal Law* 356 *et seq* for a discussion of the acts constituting rape and whether such a wide scope should have been created or whether it amounts, as the author, suggests, to "putting God in the dock".

10 Plato [n.d.] http://www.brainyquote.com/quotes/quotes/p/plato135639.html (accessed 2012-11-22).

11 32 of 2007.

12 *Criminal Law* 358 and 362.

be driven by a prejudice on the part of the perpetrator against the actual or presumed "otherness" of the victim.

While the Sexual Offences Act[13] makes no mention of corrective rape, the intention of the legislature to protect all people from sexual assault is observable in the extension of the common-law definition. Despite this laudable intervention by the legislature, South Africa remains characterized by a culture in which sexual violence is on the increase. The 2010/2011 South African crime statistics reveal an incidence of 132.4 cases of sexual assault per 100 000 people for a total of 66 196 cases in the reporting period. Alarmingly, 51.9% of contact crimes committed against children are sexual offences. While the statistics reveal a decrease of 2136 cases from the 2009/2010 period it is worrying that rape and other forms of sexual offence are at such high levels.[14] Taking into account the trend of underreporting[15] and the fact that rape and sexual assault are not categorized by investigating officers as anything other than ordinary rape (dependent on the circumstances), it is impossible to determine how many of these assaults were against black lesbians or how many were committed with a bias motive.[16] The black lesbian agenda has been included in the 16 Days of Activism for No Violence against Women and Children Campaign, yet it would appear that there is no obligation on the police service to report separately on crimes against this segment of the community. Further, the duty of the legislature to protect their individual rights, at least as far as the issue of corrective rape is concerned, has not been given due recognition. In this regard, Anguita[17] suggests that the inability of the South African government to resolve the rape crisis facing the country does not bode well for additional protection against corrective rape.

While the Sexual Offences Act[18] fails to address the issues of corrective rape, sentencing legislation and the interpretation thereof by the courts it has acknowledged different "categories" of rape which will be discussed further in this submission as part of an alternative approach to curbing the phenomenon of corrective rape.

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[13] 32 of 2007.

[14] South African Police Service, 2011: 11.

[15] See Allen "The Reporting and Underreporting of Rape" 2007 73(3) *Southern Economics Journal* 623 641; and George and Martinez "Victim Blaming in Rape: Effects of Victim and Perpetrator Race, Type of Rape and Participant Victim" 2002 26(2) *Psychology and Women Quarterly* 110 119. See further Pomeroy, Joonee, Yoo and Rheinboldt "Attitudes towards Rape" 2005 11(2) *Violence Against Women* 177 196 for a discussion of the incidence of reporting and underreporting of rape.

[16] A similar situation exists in the crime-report statistics of South Africa with regard to the distinction between rape and other sexual offences. Rape and forms of sexual offence which, prior to the enactment of the Sexual Offences Act, would have qualified as indecent assault are not separated in reporting statistics. This gives a skewed picture of the actual number of rapes committed (or at least reported to the police) in South Africa.

[17] Anguita "Tackling Corrective Rape in South Africa: The Engagement between the LGBT CSOs and the NHRI's CGE and SAHRC and its role" 2011 *The International Journal of Human Rights* 1 28.

[18] 32 of 2007.

1 2 Murder under South African common law

The definition of murder under the South African common law is "the unlawful and intentional causing of death of another person".[19] Apart from the elemental unlawfulness, the method causing death and the human condition of the victim, intention must also be proved in order to secure a conviction for murder. Culpable homicide hinges by distinction on the negligence *probanda* as opposed to intention on the part of the offender. Part I introduced the topic of murder based on an orientation motive and demonstrated a number of reported deaths in which a suspected bias was involved. Motive is not a *facta probanda* of the crime of murder, or indeed of any crime, in South Africa. The current state of affairs therefore prevents murder committed with a prejudice motive to be heard in court as anything other than murder. The unique feature of murder committed against black lesbians is the potential for the offender to harbour an orientation motive against the victim's actual or perceived sexual orientation. If one keeps in mind this sense of "otherness" perceived by the offender one could speak of hosticide committed against black lesbians in South Africa. The killing of a perceived enemy springs from hostility towards a certain group or cultural display, in this case black lesbians. Despite the ease with which one can link hatred, albeit in a case of rape or murder, as a motivating factor for the action of the doer the South African court system refuses to recognize "motive" in its pure form. While any attempt to investigate motive may lead the court into a proliferation of subjectivity and evidential burdens, it is of the utmost importance in any crime that includes a suspected hate motive. In legislating hate crimes the importance and proof of motive may cause a measure of discomfort to prosecutors and victims. However, while the difficulty is acknowledged, it is not insurmountable. The query from the perspective of criminal law theory is therefore not simply "did the offender unlawfully and intentionally cause the death of the victim?", but becomes a two-pronged approach: "did the offender unlawfully and intentionally cause the death of the victim because the victim was a member or perceived member of a particular segment of society?" This approach ensures that the base crime of murder is prosecuted and that any prejudice in the mind of the accused as a cognitive catalyst for the murder is acknowledged as aggravating. While this enquiry leads to a number of procedural questions in connection with competent verdicts and burden of proof, the ultimate objective remains – the identification and proper prosecution of hate-motivated crimes.

1 3 Intention and motive – "would a rose by any other name ..."

It is trite law that intention and motive are two different concepts.[20] Where intention speaks to the knowledge of the perpetrator, motive, in simplistic form, can speak to the underlying construct leading to the formation of

[19] Snyman *Criminal Law* 447.

[20] Snyman *Criminal Law* 190. See also Wilkins "Motive and Intention"1971 31(4) *Analysis* 139 142. Hall *General Principles of Criminal Law* (1947) 153 goes so far as to state that "hardly any part of the penal law is more definitely settled than that motive is irrelevant".

intention.[21] Intent is included in the definition of a crime to assess culpability, whereas motive concerns the drive behind the act.[22] If one applies this to hate-crime legislation, as will be demonstrated in the comparative component of this submission, then South African criminal law must expand the focus of its lens to include objective intention and subjective motive. Where motive currently contributes to aggravation of sentence, if the legislature implements hate-crime legislation, motive will be brought to the forefront of a criminal system that is a rigid accusatorial system in which the court judges each case on the merits presented to it. The failure to examine or at the very least to recognize the motive of an offender in a crime of hatred leads to the invisibility of the crime, which complicates the victim's participation in and equal protection of the law. Burchell[23] suggests that motive is admissible when it is used to implicate the accused in the commission of a crime or to establish intention, but that intention may be proved without any reference to motive. Using Burchell's reasoning, the bias motive of the accused in a hate crime is or may be useful in proving intention, but is nonetheless superfluous to intention.

Motive must, however, be viewed through the lens of the model chosen by a specific jurisdiction to prosecute hate crime. The hostility model requires that the offender committed the offence because of his or her hostility towards or hatred of a member of a protected group.[24] Hatred is, however, a subjective feeling that is difficult to prove with any degree of certainty. A victim of rape is especially vulnerable in this model because of the usually private nature of the crime. The burden would fall to the prosecution to prove hatred and to the presiding officer to assess the evidence presented for reliability. Proving any subjective element "beyond a reasonable doubt" may be difficult, if not impossible, if hatred is indeed included as an element of a crime. Hatred cannot be defined categorically, and the hostility model therefore presents unique challenges to the prosecution, especially if one factors in that a subjective feeling of hatred is a "motive element" and is therefore at present disregarded by the South African criminal courts outside of the realm of sentencing.

In the discriminatory-selection model, by contrast, the victim is targeted purely for his or her membership of a specific group.[25] No hatred is

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[21] Burchell *Principles of Criminal Law* 463 states, "motive precedes the formation of the intention to engage in the action". Jenkins "Motive and Intention" 1965 15(59) *The Philosophical Quarterly* 155 164 states, "What I intend doing is not, as such, my reason for doing it", and in this separates the concept of motive and intention.

[22] A Href "Hate Crimes – Critique of Bias Crimes" http://law.jrank.org/pages/1316/Hate-Crimes-Critique-bias-crimes.html (accessed 2011-10-18).

[23] Burchell *Principles of Criminal Law* 464 and 465.

[24] OSCE/ODIHR, 2009: 46. Belgium (Article 377(bis) of the Penal Code), Canada (s 718.2(a) of the Criminal Code), and the United Kingdom (s 28 of the Crime and Disorder Act) require that a form of hatred be shown in a hate-crime case, for example. See also Nel and Breen 2011 38 *Crime Quarterly* 35 and 43.

[25] Perry *Hate and Bias Crimes: A Reader* (2003) 288. See also Gerstenfield and Grant *Examining the Boundaries of Hate* (2004) 285 for a discussion of the discriminatory-selection model. Bulgaria, Denmark and France are examples of jurisdictions that embrace the discriminatory-selection model and do not require that the emotionally loaded 'hatred' of the accused be proved. In this model, a link between the characteristic of the victim and the action of the accused is required – see also OSCE/ODIHR, 2009: 48 for a discussion of jurisdictional distinctions. See also Nel and Breen 2011 38 *Crime Quarterly* 35.

necessary. If, for example, a person murders a person belonging to a certain race group simply to gain entry into a gang or other such criminal syndicate, the crime is still a hate crime, but hatred need not be shown. A causal link will therefore be required between the conduct of the accused and a particular characteristic of the victim.[26] The discriminatory-selection model is broader in application and simply requires the establishment of a *nexus* between the characteristic(s) of the victim and the action of the accused. Actual hatred need not be shown; this lessens the burden on the state to establish with any degree of certainty whether a certain emotion existed within the mind of the accused at the time of the crime. An argument can be made that the discriminatory-selection model will lead to a dilution of the crime, but in a criminal justice system such as that of South Africa it may present a middle ground for the prosecution of a crime without the burden of motive.

Evidence of motive, whether under the hostility- or discriminatory-selection model, may be a difficult matter to show in court. The difficulty of the burden may be further complicated by a multiple-motivation crime, or one in which hatred does not appear directly, but rather indirectly. Here the actions of the police in investigating the crime are of importance. Investigative officers will require training as to the type of evidence to look for, including any associations the offender may have, admissions to friends and relatives and even the type of social connections the person may establish. The determination of whether a bias or hate motive existed is therefore holistic in interpretation and requires the presiding officer to weigh all the evidence placed before him or her to reach a final determination.

Lawrence[27] argues that "the decision as to what constitutes motive and what constitutes intention largely turns on what is being criminalized". He opines that criminal statutes (or common law in the case of South African criminal law) define the elements of a crime and a mental state applies to each element. The mental state that applies to the element is thus "intent", whereas the mental state that is extrinsic to the element is "motivation". Lawrence[28] in his critique of hate-crime law submits that there are two equally accurate descriptions of a bias-motivated assault:

> In the first, the offender possessed the intent (*mens rea*) to assault along with a motivation of bias. In the second, the accused has intent (*mens rea*) of purpose with respect to the parallel crime of assault and an intention (*mens rea*) of purpose to commit assault against a person because of the person's group identification.[29]

Using this reasoning there may be less weight to the formal distinction between intention and motive than what is currently thought. Regardless of

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[26] See, *eg*, *People v John Fox et al* 884 N.Y.C. 2N 627 (N.Y. Sup. 2007), where the court stated that the accused intentionally selected the victim because of a particular attribute.

[27] "Hate Crimes" 2002 http://www.encyclopedia.com/topic/Hate_Crime.aspx (accessed 2011-10-18).

[28] *Ibid.*

[29] In explaining the two Lawrence states that in the first example the accused "intends" to assault the victim and does so because the accused is a bigot. The accused in the second instance "intends" to commit an assault and does so with both an intent to assault and a discriminatory or animus-driven intent as to the selection of the victim.

how one views intention and motive it is trite that they are separate concepts in South African criminal law unless one accepts Burchell's argument that motive may be admitted to show intention or at the very least that it can be used to show unlawfulness. Nevertheless, motive cannot be used in isolation without an examination of intention in order to convict a person of a crime. A bias motive may at best aggravate the sentence given to an offender accused of a base crime such as rape or murder, regardless of his or her hate or bias motive.

2 Constitutional equality and sexual politics: appearance versus reality?

While constitutionalism guarantees equality before the law to all people of South Africa regardless of association or membership of certain categories, we submit that the equality principle works, especially for homosexual persons, on paper only.[30] While it is true that the constitution has opened the gateway for the implementation of many basic human rights previously denied to gay and lesbian persons in South Africa, the current reality of corrective rape and murder of segments of the lesbian/gay/bisexual/ transgender/inter-sexed community paints a less rosy picture. The constitution can guarantee rights and force the implementation of legislation and rulings designed to enforce those rights but it cannot change social perception, action and bias. In *Le Roux v Dey*,[31] heard before the Constitutional Court, Judges Cameron and Froneman gave a minority ruling that the act of calling someone a homosexual or associating a person with homosexuality, in the absence of derogatory conduct, is not in itself an infringement of dignity, even if the complainant is not gay.[32] We submit that the judges' conclusion in this above case has merit. If society is constantly reminded of the "otherness" of certain groups, prejudice remains in social consciousness. If the Constitution protects the rights of certain groups of persons, it would be anachronous to label as libellous any association with said group in the absence of an aggravating act. However, while we concur with the court on this point, it is clearly a utopian concept that is incongruent with the South African reality for black lesbians (or for that matter a homosexual person of any ethnicity). South Africa has not yet reached a stage in the development of its democratic constitutionalism where people are not labelled and categorized – despite the intentions of the Bill of Rights. Until we achieve social cohesion within our constitutional ideals, the law must protect those who are marginalized and punished for their "otherness".

Hate crimes are specific to their social context, which is important in any attempt to redress the issue. By categorizing corrective rape as a hate crime, or at least a crime that deserves special treatment, a separation or categorization of people will naturally occur. This is an unavoidable situation because South Africa is far removed from the constitutional ideal of equal

[30] See in this regard Nel and Breen 2011 38 *Crime Quarterly* 33 *et seq*; and Nel and Judge "Exploring Homophobic Victimisation in Gauteng, South Africa: Issues, Impacts and Responses" 2008 21(3) *Acta Criminologica* 19 36.

[31] CCT45/10 [2011] ZACC 4.

[32] CCT45/10 [2011] ZACC 4 182-185.

protection of and (more important) equal recognition by other citizens not only before the law but also as a human being. Hate-crime laws in the South African milieu will serve the purpose of deterrence and simultaneously send a message to the victim(s) that the criminal justice system serves to protect them. Hate-crime legislation in this manner recognizes the "human element" of law and seeks to cement the rule of law.[33]

3 Hate-crime legislation and legal recourse: a limited comparative overview

Hate-crime laws are intended to prevent bias-motivated crimes and, in the event of the failure of the preventive function, to punish crime committed with a bias motive. Hate-crime laws have come to be categorized along territorial jurisdiction as either (1) laws which specifically define an act committed with a bias motive as a distinct type of crime; or (2) laws which enhance the sentencing discretion of the court upon conviction for a bias-motivated crime; or (3) laws which have created a civil remedy for hate crimes; or (4) laws which mandate the collection of statistics of the commission of hate crimes or; (5) some combination of the above.[34]

Hate speech notwithstanding, South African criminal law does not criminalize hate crime as a substantive criminal offence, nor does it require enhanced penalties when the crime is motivated by hatred, despite calls for the amendment of existing legislation or implementation of specific hate-crime laws. The issue of hate speech has been the primary focus of anti-discrimination laws, followed closely by a focus on xenophobia. The South African Human Rights Commission and the Commission on Gender Equality, which use a process of mediation in equality disputes, have answered the question of equality to some degree. The equality courts provide a civil-avenue alternative to the work of the South African Human Rights Commission and the Commission on Gender Equality. Through the procedures provided, the equality courts may be seen as providing a civil remedy[35] for equality infringements, but it cannot be argued that they are able to present a remedy in the case of hate crimes such as corrective rape and murder motivated by prejudice to sexual orientation unless such jurisdiction is extended to them in terms of law. The position in South Africa is that the rape or murder of a homosexual person is prosecuted, and investigated, as rape or murder regardless of whether the crime was committed because of the bias of the accused. While we concur that many homosexual persons are raped and murdered without a hate motive being present, those who are targeted specifically because of their membership or

[33] OSCE/ODIHR, 2009: 7.

[34] *Ibid*. Although not specifically categorized by jurisdiction, in a literature overview of the various jurisdictional approaches to hate crime the categorization to which we allude becomes obvious.

[35] Although in the case of *Z Mpanza v S Cele* CGE (KZN) the respondents were later tried criminally for assault, MITP, intimidation and indecent assault after they refused to allow women in the village community to wear slacks and subsequently assaulted a woman who did. Here, however, the ruling by the equality court concerned the inequality of the decision by tribal men that women could not wear particular clothing and the criminal offence was a separate issue to the one heard before the equality court.

perceived membership of a certain group, or for the purpose of "curing" their "otherness" are being short-changed by the criminal justice system. As previously stated, a hate crime is an attack on identity and has the potential to interfere with the victim's life and further life choices because essentially the crime is committed and motivated by an inherent characteristic of the victim. The victim is then burdened by the knowledge that her democratic right to live openly as a homosexual woman is the very right that catalysed her rape. Freedom in this scenario is relative. South Africa now finds itself at a social *impasse* – questions of inequality based on discriminatory grounds still plague our interaction and the law has been found wanting in its approach, or rather lack thereof, to crimes committed against protected groups, catalysed by the malice of the perpetrator.

In an attempt to scrutinize the potential for progress in the identified area of law, we would do well to examine the approach of other jurisdictions.

3 1 The United States of America

As previously stated, the term "hate crime" was supposedly coined in the United States of America in the 1980s, and by all accounts was intended to describe a phenomenon of prejudicial violence occurring in most, if not all, societies globally.[36] In this manner the United States can be viewed as the authority on the prosecution of hate crime, albeit from a majority race-related perspective. The Hate Crime Statistics Act [37] mandates the collection of data by the Department of Justice concerning crimes committed with a hate motive so as to achieve a proper measure of the occurrence of hate crimes.[38]

The United States, thanks to its combined statistical-data collection, specific legislation- and penalty-enhancing legislation, has created a body of law for the protection of persons susceptible to hate crimes. The 1964 Federal Civil Rights Law[39] protects a person who is intimidated or injured because of his or her race, colour, religion or national origin during the pursuit of a federally protected activity. The federally protected activities are the attendance of school, patronization of a public place, application for employment, acting as a juror in a state court and voting. The Hate Crime Sentencing Act of 1994 further protects identified groups who are subjected to hate crimes based on the Federal Civil Rights Law by enhancing the penalty for a crime motivated by hatred. The Hate Crime Prevention Act[40] expanded existing federal laws to apply to a victim's sexual orientation (or perceived sexual orientation), gender, gender identity or disability and further did away with the requirement that the injury or intimidation should be

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[36] Glet "The German Hate Crime Concept: An Account of the Classification and Registration of Bias-motivated Offences and the Implementation of the Hate Crime Model into Germany's Law Enforcement System" 2009 *Internet Journal of Criminology* 1-45.

[37] 28. U.S.C. 534.

[38] Categories of protection include race, religion, disability, sexual orientation and ethnicity. The USA has since implemented further legislation, including the Hate Crimes Sentencing Enhancement Act of 1994, the Violent Crime and Law Enforcement Act of 1994, the Church Arson Prevention Act of 1996 and the Hate Crimes Prevention Act of 1999.

[39] 18. U.S.C. §245.

[40] Also known as the Matthew Shepard Act.

inflicted during the pursuit of a federally protected activity. At state level, 45 states and the District of Columbia criminalize various forms of hate crime (31 of these specifically protect sexual orientation).[41]

Turning specifically to hate crimes motivated by a victim's actual or perceived sexual orientation, the United States has enacted the Matthew Shepard and James Byrd Jr Hate Crimes Prevention Act,[42] which is an extension of the 1969 Federal Hate Crimes Laws. The Matthew Shepard Act removed the requirement that the victim must be acting in a federally protected capacity during the commission of the offence. Section 249(a)(2) of the Act stipulates that a violent or potentially violent act perpetrated with a dangerous weapon and motivated by the actual or perceived sexual orientation, gender, disability or gender identity of the victim constitutes a criminal offence. Section 249(a)(2)(A) of the Act, however, specifically states that the Act protects the victim of a hate crime specifically if the act caused bodily injury or through the use of fire, a firearm, dangerous weapon, explosive or incendiary device had the potential to cause bodily injury. If the crime was committed in any one of these circumstances the sentence is prescribed by section 249(a)(2)(A) of the Act. The sentence prescribed is a maximum of ten years' imprisonment or a fine or both for an offence which does not result in the death of the victim. If, however, the offence results in the death of the victim or the offence involves kidnapping, aggravated sexual abuse (or an attempt at either), the minimum sentence is life imprisonment or a fine or both.

While the Act provides for specific crimes and for prescribed sentences, it falls short in one important respect: it fails to legislate specifically threats of violence or conduct which do not inflict bodily harm or involve the use of a dangerous weapon. Presumably, these types of incidences are prosecutable under other criminal statutes, but would then not fall under the special protection of hate-crime law and eventual prescribed minimum sentences. The Act does not infringe on freedom of speech or religious freedom in any manner and specifically excludes the actions of religious leaders in expressing their opinions or instructing their congregation according to the specific tenets of religious practice. While it is laudable that the Act protects freedom of speech and association, it is silent on incitement of violence against people based on their actual or perceived sexual orientation. While we agree that religious freedom must be maintained in a democratic society, we submit that religious teachings (or any form of teaching) which incite others to commit a crime against members of a specific sexual minority (or any minority) should result in some degree of liability for the inciter. If a community or state leader incites racial hatred, his or her conduct is punishable under law; should the same not then apply to the incitement of homophobic hatred?

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[41] Anti-Defamation League "Anti-Defamation Leagues State Hate Crime Statutory Provisions" 2011 http://www.adl.org/99hatecrime/state_hate_crime_laws.pdf (accessed 2011-10-18).

[42] 18 USC 249. Matthew Shepard was a student who was tortured and murdered because of his perceived sexual orientation. James Byrd Jr was an African American who was tortured and murdered by white supremacists.

Despite its critics,[43] the Matthew Shepard Act makes inroads in protecting minority groups from hate crimes, and the results of the legislative approach remain to be seen in future hate-crime statistics.

3 2 Germany

In contrast to the United States, the German criminal code does not contain reference to hate crimes. The term "hate crime" does, however, appear as part of a reformed police-registration system in Germany's criminal policy.

Germany began to pay attention to the hate-crime agenda in 2001. Hate crimes are dealt with as "politically motivated offences" and acquire said label if,

> "in the assessment of the circumstances of the crime and/or attitude of the perpetrator, there is reason to suspect that the act was directed against a person because of his or her nationality, race, origin, ethnicity, skin color, physical appearance, sexual orientation, disability, religion or social status and the offence is thus in a causal relationship to this".[44]

The German approach, although aimed mainly at racial and ethnically motivated hate crimes, includes sexual orientation as a protected category under hate-crime registration procedures.[45] German police agencies keep statistics on the prevalence of "hate-motivated incidences".[46] The definition of a "hate crime" for these agencies is based largely on the American model, although the catalyst for hate-crime legislation in Germany lies more in the domain of anti-Semitism as opposed to racial hatred.

The German penal code provides sentencing guidelines for crimes committed with a race or other bias motivation. Section 46 of the German Criminal Code[47] states that the court, in considering sentence, may take the motives and aims of the offender into account. The court must during sentencing take a holistic approach to the crime, including the motive, aim and state of mind of the perpetrator. Further, the court must consider a host of other factors, including the offender's prior history of the displayed behaviour and his or her conduct after the act. The penal code further takes as mitigation any attempt by the offender to make restitution and achieve mediation with the victim.[48]

Germany's approach to hate-crime legislation had its origins in a registration system for politically motivated crimes. Essentially crimes are

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[43] Many have attacked the Act from a Christian or ultra-conservative basis. For examples, see Bassett "Conservative Christians Criticize Hate Crime Bill" 23 June 2009 http://www.news9.com/global/story.asp?s=10570314; and Duke "Controlling Thoughts, Words and Deeds: The Matthew Shepard Act" 8 June 2009 http://www.questia.com/PM.qst?a=o&d= 5031567039 (both accessed 2011-11-30).

[44] Bundeskriminalamt 2004 – http://www.bka.de/EN/Home/homepage__node.html?__nnn=true. See also Glet "The Social Construction and Prosecution of Hate Crime in Germany" 2010 http://www.mpicc.de/ww/en/pub/forschung/forschungsarbeit/kriminologie/sozialkonstruktion.htm (both accessed 2011-11-30).

[45] Glet 2009 *Internet Journal of Criminology* 1.

[46] Glet 2009 *Internet Journal of Criminology* 3.

[47] English translation www.juris.de (accessed 2011-11-28).

[48] Glet 2009 *Internet Journal of Criminology* 4.

categorized as propaganda offences, politically motivated offences, politically motivated violent offences or acts or terrorism. After the initial placement into one of the mentioned categories, the police then use surrounding circumstance to determine whether the crime is a hate crime. If determined to be a hate crime, the offence is then further categorized as left-wing, right wing, committed by an offender of foreign origin or as a non-definable crime.[49] This system of identification uses the police as a first point of determination. Once a crime is reported the police investigate it, and if a hate motive is suspected the case information is passed on to the local State Security Division of the Criminal Police for review. The State Security Division of the Criminal Police then takes the investigation further and registers the crime under a specific category along with the details of the place of the offence, the suspects in the matter and the circumstances of the crime.[50] All registered crimes are forwarded to the Federal Office of Criminal Investigation, which facilitates statistical data collection.

The German approach to hate crime is thus based on a policing and registration perspective. It is not, however, exclusively without judicial assistance, since any crime committed with a hate or bias motive can incur a higher penalty because the German criminal code mandates such to be considered in sentencing.

4 South Africa and hate crime

In June of 2011, South Africa tabled a resolution for the consideration of the United Nations Human Rights Council entitled "Human Rights, Sexual Orientation and Gender Identity".[51] The gist of the declaration is the call for an intergovernmental co-operative task-force responsible for defining sexual orientation and gender identity with a view to protecting victims of human-rights violation based on these identifiable features. Although certain African states, the Holy See and the Organisation of Islamic Cooperation States did

[49] Glet 2009 *Internet Journal of Criminology* 5.

[50] Glet 2009 *Internet Journal of Criminology* 7.

[51] Resolution 2504. See also http://mg.co.za/article/2011-09-09-africa-heads-gay-backlash (accessed 2011-09-13). The signatories of this declaration are: Albania, Andorra, Argentina, Armenia, Australia, Austria, Belgium, Bolivia, Bosnia and Herzegovina, Brazil, Bulgaria, Canada, Cape Verde, Central African Republic, Chile, Colombia, Costa Rica (which signed this declaration in March 2010), Croatia, Cuba, Cyprus, Czech Republic, Denmark, Ecuador, Estonia, Finland, France, Gabon, Georgia, Germany, Greece, Guinea-Bissau, Hungary, Iceland, Ireland, Israel, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Mauritius, Mexico, Montenegro, Nepal, Netherlands, New Zealand, Nicaragua, Norway, Paraguay, Poland, Portugal, Romania, San Marino, Sao Tome and Principe, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, Timor-Leste, United Kingdom of Great Britain and Northern Ireland, United States of America (which signed this declaration in January 2009), Uruguay and Venezuela. Notably most of the African group, led by Nigeria, did not sign the resolution. Recently the African states who continue to support state-sanctioned homophobia have come under attack from the international community. According to the *Daily Mail*, the United Kingdom, for example has pledged to slash aid to African countries with poor records on homosexual rights. The UK has already cut aid to Malawi by £19m after two gay men were sentenced to 14 years' hard labour. The southern African nation also plans to bring in tough anti-lesbian laws. See Martin "Foreign Aid for Countries with Anti-gay Rights Records to be Slashed, Pledges Cameron" 10 October 2011 http://www.dailymail.co.uk/news/article-2047254/David - Cameron-Foreign-aid-cut-anti-gay-countries.html (accessed 2011-11-18).

not support the resolution, South Africa confirmed its commitment to creating sustained dialogue on the issue of sexual orientation and gender identity. While the resolution is a far cry from the actual creation or affirmation of the creation of hate-crime legislation it is, along with the recent appointment of a task force to research the notion of hate crime in South Africa, a step in the direction of universal human rights. With regard to orientation-motivated crime, South Africa finds itself in a unique position on the African continent. South Africa is one of the few African countries[52] to decriminalize homosexuality, and the only African country to legalize gay marriages. South Africa thereby grants equal rights in all legal aspects to those people who identify with that community, and is the only African country to consider imposing legislation to curb orientation-motivated crime and to engage in dialogue with civil society on the topic of sexual orientation. Homosexuality is outlawed in 38 African countries,[53] with the situation further fuelled by homophobia and homophobic violence, often sanctioned by the state.[54] The notion that homosexuality is un-African and a colonial import is persistent despite a body of evidence to the contrary.[55] It is important, however, to recognize that the concept of homosexuality being un-African is culturally defined, but cannot be used as a blanket excuse for the national experiences of black lesbians in South Africa. In other words, majority morality cannot be used, without proper application of the limitation clause, as a convenient excuse to outweigh individual rights.

4 1 The argument for separate hate-crime legislation

Hate crimes threaten the fabric of social cohesion, as they affect the immediate existence of the victim of the crime as well as the community in which the victim identifies himself or herself as belonging.[56] Creating a separate substantive offence (in this context rape and murder with a bias motive) is relatively rare. The United States, Czech Republic and United Kingdom have created specific offences that include a bias motive as an element.[57] The crimes that are identified under the Czech Republic's Criminal Code and the United Kingdom's Crime and Disorder Act of 1998,

[52] Male homosexuality is illegal in 29 African countries and female homosexuality in 20 African countries according to http://www.afrol.com/html/Categories/Gay/backgr_legalstatus.htm (accessed 2011-11-28).

[53] Afrol News "Legal Status of Homosexuality" 22 May 2011 http://www.afrol.com/html/Categories/Gay/backgr_legalstatus.htm (accessed 2011-11-28).

[54] State legislation may not actively encourage homophobia, but the silence of the legislation as to the protection of homosexual persons within a specific territory and the actions of those in power (such as Robert Mugabe) are clearly indicative of intolerance and homophobia.

[55] Nord and Luckscheiter "Editorial Comments" 2010 4(10) *Perspectives* 3. See also Nel and Judge 2008 21(3) *Acta Criminologica* 22. See also the extensive works of Marc Epprecht of the Department of Development Studies at Queen's University, Canada on the history of gender and sexuality in Africa. See also Anderson "The Politics of Homosexuality in Africa" 2007 1(1) *Africana* 123136 for a critique of the political viewpoint of homosexuality in Africa.

[56] OSCE/ODIHR, 2009: 11. See also Crown Prosecution Service, 2007: 3 and Nel and Judge 2008 21(3) *Acta Criminologica* 20.

[57] OSCE/ODIHR, 2009: 33.

however, specifically relate to political conviction, nationality, race, creed and religion. No mention is to be found here of sexual orientation.[58]

Specific laws legislating orientation-motivated crimes send a direct and clear message not only to members of society but also to members of the legal fraternity and police bodies. If the law is clear in what it will and will not sanction, the actors in the legal field have no choice but to implement the will of the legislature if it is consistent with the supreme law of South Africa. The mandate is thus clear and personal bias or non-compliance is thereby reduced.

A hate crime is unique because of its target. Hate crimes intend to send a message not only to the victim, but also to the group to which the victim belongs.[59] In this instance the rape and/or murder of black lesbians seeks not only to "teach the victim a lesson" but also to make a point within the lesbian community that members' actions/choices/identification are not tolerated by certain segments of society. A hate crime is a crime against identity.[60] Whether the identifying characteristic is immutable or fundamental, the consequences of a hate crime are far reaching, which may justify a separate legal approach consistent with separate hate-crime laws. Separate substantive laws governing hate crime not only send a clear message, but are symbolic in specifically condemning the bias motive.

Past laws complicate South African queer jurisprudence. Where pre-constitutional laws criminalized acts between homosexual partners, it never sought to criminalize sexual identity/orientation. The decriminalization of homosexuality has legalized and protected the lesbian/gay/bisexual/ transgender/inter-sexed identity, and not the acts between partners. The paradigm shift has brought with it certain legal realities that unfortunately have not always been placed in issue before courts. Decriminalizing homosexuality is not the same as granting equal rights to all – regardless of orientation. As Reddy puts it, "the current context has shifted from a model which conceives homosexuality as a behaviour to one in which identities can be produced".[61] The shift in perspective brings with it an obligation on policy and lawmakers to protect the rights and identities of the lesbian/gay/ bisexual/transgender/inter-sexed community in the same way as any other segment of a country which emphasizes human value as opposed to illegality/legality of deed. The Constitution may very well therefore present the best argument for the creation of separate hate-crime legislation; if characteristics and individual traits are protected under section 9 of the

[58] See s 196(2) of the Czech Republic's criminal code and s 29-32 of the United Kingdom's Crime and Disorder Act 1998.

[59] Glet 2009 *Internet Journal of Criminology* 2.

[60] Anguita 2011 *The International Journal of Human Rights* 2 suggests that "sexual orientation and race intersect [in corrective rape] making it a weapon of social control of the three-times 'other', the black-lesbian-woman".

[61] Reddy "Identity, Law, Justice. Thinking about Sexual Rights and Citizenship in Post-apartheid South Africa" 2010 4(10) *Perspectives* 18.

Constitution, then surely legislation protecting that right must be implemented?[62]

It was demonstrated in Part I that rape in general and corrective rape in particular are underreported, and while we do not wish to discuss further the reasons for this trend here, we nevertheless aver that separate hate-crime legislation may result in more reliable crime statistics and an increase in the number of women reporting the incidences. A hate crime affects both the victim and the community, and when adequate protection of the law is not guaranteed very few of these crimes are reported. Specific hate-crime legislation sends a message to both victims and perpetrators in this regard. Clearly, specific hate-crime legislation also hinges on training of police officials and members of the legal fraternity not only to recognize a hate crime, but also how to deal with the investigation and eventual prosecution thereof. In this regard the courts are, it would appear, willing to implement such action. Magistrate Raadiya Whaten, in the conviction in 2011 of four men accused of killing Zoliswa Nkonyane in 2006, confirmed in *obiter* that the sexual orientation and gender expression of the victim motivated the killing of the 19-year-old. While this decision has no binding effect, it is nevertheless important as an indicator of the attitude of the judiciary, and by implication the need for training and development in prosecuting hate crimes. The courts, since South Africa's dispensation shift, have been the forerunners in implementing equal rights for the lesbian/gay/bisexual/ transgender/inter-sexed community and have declared a number of laws as inconsistent with the Constitution.[63] The courts have, however, been silent on the issue of hate crimes directed at members of the same community. Perhaps Raadiya's judgment signals a change in the judicial milieu.[64]

One argument against the enactment of specific hate-crime legislation is the potential for the law itself to be discriminatory. The protection of certain groups may cause other groups to feel isolated or ignored, or even result in the majority claiming unequal protection of the law. This position is preventable by the wording of any potential legislation. In line with the Bill of Rights, hate-crime laws would extend to all people and not only, for example, to gay men. A hate-crime law that created further division within protected groups would result in discriminatory law, but could achieve its purpose relatively easily by broadly categorizing groups.

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[62] The Promotion of Equality and Prevention of Unfair Discrimination Act and the Equality Act are examples of legislation enacted to protect equality rights, but they have done little, if anything at all, for the protection of those discriminated against based on sexual orientation.

[63] See, *eg*, *Van Rooyen v Van Rooyen* 2001 JOL 7821 (C); *Capt. Langemaat v Department of Correctional Services Safety and Security* 1998 (4) BCLR 444 (T); *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC); *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA (1) (CC); *Muir v Mutual and Federal Pension Fund* 2002 9 BPLR 3864; *Satchwell v President of the Republic of Republic of South Africa* 2002 (6) SA (1); *J and B v Director General: Department of Home Affairs* SA 621 (CC); *Du Plessis v Road Accident Fund* (443)2002[2003] ZASCA 86; and *Fourie v Minister of Home Affairs* 2003 (5) SA 301 (CC).

[64] In the American case Wisconsin v Mitchell, 508 U.S. 476 (1993) Chief Justice Rehnquist states succinctly on the topic or hate crime, "this conduct is thought to inflict greater individual and societal harm ... bias-motivated crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest".

In addition to the argument that hate-crime laws may be discriminatory, the argument that such laws can also be criticized for their focus on motivation as opposed to *mens rea* can be put forward.[65] The focus on motive may present an indirect ground of discrimination in that the court is asked to discriminate against the accused owing simply to the expression of a conviction that defies majority opinion. Section 36 of the Constitution of the Republic of South Africa can, however, rightfully be used to limit the rights of the accused in certain circumstances which support an open and free democracy. The corrective rape of a lesbian woman is certainly not an "expression of opinion" but rather a base crime, which, we suggest, is made more heinous by its catalyst – dislike for black lesbians.

The current South African law of criminal procedure and evidence may present a unique challenge to hate-crime legislation. From a procedural perspective, there is a real possibility of prosecutors electing to accept plea bargains on the base crime as opposed to bearing the burden of proving a hate motive or *nexus* between the act of the offender and a characteristic of the victim dependent on the juristic model [66] in place.[67] Another procedural aspect that would require definite clarification, in the event of the creation of a substantive law crime, is competent verdicts, which would have to be inclusive of specific acts of rape and/or murder committed with a hate motive. Further, the previous sexual history of the complainant may become relevant in a proceeding alleging an orientation motive, especially since the concept of sexual orientation is not clearly defined or fixed. The notion of a complainant being required to divulge her previous sexual history in order for the prosecution to establish a bias motivation runs counter to universal human rights, and yet the notion may be relevant to the issue. Not all homosexual victims are open about their sexual identity and in an open justice system the protection of the victim's right to privacy may become a pertinent issue in the trial process. Current procedural mechanisms for the protection of a victim tend towards children and to those who would suffer emotional distress through testifying in an open court. Whether the provisions of the Criminal Procedure Act[68] can extend to protecting a victim from negative social and perhaps vocational consequences is debatable.

Another contentious issue regarding the creation of specific substantive hate crimes is the status of current crimes that traditionally receive very low sentences. Take, for example, malicious damage to property. Traditionally the sentences for this crime have been low, but if the crime was

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[65] A Href "Hate Crimes – Critique of Bias Crimes" http://law.jrank.org/pages/1316/Hate-Crimes-Critique-bias-crimes.html (accessed 2011-10-18).

[66] With reference to a hostility model or discriminatory selection model.

[67] In terms of s 105A of the Criminal Procedure Act (51 of 1977) a prosecutor can enter into a plea agreement with the accused in which he or she pleads to the crime charged or a lesser charge in return for a certain sentence. Although the presiding officer can veto the agreement, the prosecutor can also enter into a traditional plea agreement in which the accused pleads to a lesser charge but is not guaranteed a certain sentence. In this case the presiding officer is directed by the prosecutor. In a criminal-justice system in which case flow is often obstructed, resulting in backlogs, and taking into account a prosecutor's obligation to report and therefore reach certain prosecution targets, it is not unimaginable that an overworked criminal-justice system will result in deals being made which are not always in the best interest of the victim or indeed of the concept "open justice".

[68] 51 of 1977.

compounded by a hate motive, the sentence should theoretically carry a heavier sentence. Specific substantive legislation would therefore be required to deal with many, if not all, crimes which could potentially be aggravated by a hate motive. This would essentially create a wide body of legislation that may not have the necessary specificity to grant protection to threatened groups and may become too unwieldy to enforce. A general provision concerning the sentencing aspects of any crime, or selective crimes, committed with a hate motive may be one method of containing the issue.

Deficiencies in the identification and interpretation of hate crimes may present an obstacle to the proper protection of those falling within identified protected groups. Any ambiguity in the wording and practical applicability of specific hate-crime legislation will lead to a body of law which does not serve its intended purpose.[69]

Separate substantive laws on bias crimes, specifically corrective rape and murder based on sexual identity, may make inroads into the tendency of states towards a heteronormative society, which encourages punitive rules for non-conformity to hegemonic norms. The creation of crimes for acts of hatred may, however, succeed in furthering a heteronormative society simply because they seek to protect a group which is seen as "weaker" and in need of special protection by a body of law which is only recently beginning to lose its heteronormative/heteropatriarchal/ ethnocentric flavour.[70]

4 2 The argument for the extension/amendment of current legislation

The extension or amendment of current legislation to include a category of hate crime or at the very least to delineate sentencing options for crimes motivated by prejudice sends a message that society is tolerant of diversity and invested in the democratic ideal of absolute equality and equal protection of the law.

If one considers an amendment of existing sentencing legislation, then the next enquiry is whether a bias motive should be met with a general penalty enhancement or specific penalty enhancements.[71] Some jurisdictions recognize a bias motive as a penalty-enhancing factor in general without taking the step of removing the court's discretion to implement sentence as it determines just. Andorra provides an example of a general penalty-

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[69] Glet 2009 *Internet Journal of Criminology* 1.

[70] Steyn and Van Zyl *The Prize and the Price: Shaping Sexualities in South Africa* (2009) 3 go as far as stating that "A key challenge has been presented to the edifice of heteronormativity through the 'queering' of the Constitution with the protection against discrimination of sexual orientation."

[71] The Russian criminal code, *eg*, contains general penalty-enhancement clauses for "the commission of crimes with a motive of ideological, political, national, racial, religious hate or enmity or hatred and enmity toward some social group." www2.ohchr.org/ english/bodies/hrc/.../HRF_RussianFederation97.do..., (accessed 2011-11-30). See also Abrahamson, Craighead and Abrahamson "Words and Sentences: Penalty Enhancements for Hate Crimes1994 16 *Arkansas at Little Rock Law Journal* 515 542.

enhancement clause in Article 30.6 of its criminal code, which states that a crime committed for "racist and xenophobic motives or reasons related to ideology, religion, nationality, ethnic origin, sexual orientation, disease or physical or mental disability of the victim" shall receive an enhanced penalty. The United Kingdom has a similar provision, but restricts itself to racially aggravated attacks, with no mention of sexual orientation.[72]

A specific penalty-enhancement scenario would require the legislature to specify the degree to which a sentence is enhanced if the crime was committed with a hate motive. The court in such situation would be required to stipulate its reasons for deviating from a mandated sentence. Articles 33 to 42 of the Belgian Anti-Discrimination Law of 10 May 2007, for example, provides for a specific penalty clause for hate crimes, including those committed with an orientation motive, and requires the penalty for certain base crimes to be doubled if the crime is committed with a hate motive.

The advantage of penalty enhancement for a hate-motivated crime is that the conviction is not jeopardized if the penalty requirements for enhancement are not proved. The bias motive would then still be part of the public record of the trial and thus comply with the principle of open justice. Conversely, the crime convicted would not reflect the fact that it is a hate-motivated substantive crime and therefore, from a statistical perspective, would not be recordable as such. Further, if the offender were later convicted of a similar crime, his or her previous record would not reflect a hate-motivated crime but rather the base crime, and therefore the tendency toward hate-based violence could be excluded from similar fact evidence or in aggravation of sentence in any subsequent charge on a similar crime.

Some jurisdictions rely on a combination of separate hate-crime legislation and penalty-enhancing legislation. Essentially, motivation translates to enhanced punishment. This option is not too far removed from the current functioning of the South African criminal-justice approach for specified offences, including rape and murder.

The Sexual Offences Act criminalizes acts of rape and sexual violation and has as its intention a reactionary approach to the scourge of sexual violence in South Africa. The Act specifically isolated children and disabled persons as deserving of special protection before the law as victims of sexual violence. While the Act is far ranging, it does not make mention of any form of corrective rape or rape committed out of malice for the victim's identification. The crime of rape is further legally condemned by minimum-sentencing legislation.

Although presiding officers enjoy judicial discretion in sentencing, the Criminal Law Amendment Act[73] (hereinafter "the Minimum Sentencing Act") seeks to provide minimum sentences for certain serious offences, including rape and murder. Judicial discretion is maintained by the provision that minimum sentences may be deviated from if the accused can show substantial and compelling circumstances to justify such deviation. In terms of the Act, the court is required in certain circumstances to apply a minimum

[72] See s 153 of the United Kingdom's Powers of Criminal Courts (Sentencing) Act 2000.
[73] 105 of 1997 as amended.

sentence. At present, the following minimum sentences apply in the case of rape committed under the following circumstances:

1 Life imprisonment for the death of a victim caused as a result of, during or after an act of rape or compelled rape.[74] 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 and for activities related to the use of a child or mentally disabled person for pornographic purposes.

The Sexual Offences Act together with the Minimum Sentencing Act work holistically to regulate a reactionary stance to sexual offences. The Minimum Sentencing Act contains further stipulations for cases of murder, and thus complements the common law. The court may deviate from these prescribed sentences and impose lower sentences, but only if substantial and compelling circumstances are shown. Section 51(3)(aA), however, dictates 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 victim do not constitute substantial and compelling circumstances.

Although neither Act specifically mentions corrective rape as a category of rape or the victim as deserving special protection, we submit that these Acts could be amended to include any act of corrective rape or indeed murder with an orientation motive (or, for that matter, any hate motive). The Sexual Offences Act could be amended either to include hate-motivated rape as a special category of protection or simply to include corrective rape under Part 1 of the Act. Correspondingly, the Minimum Sentencing Act could be amended to include corrective rape under section 51. With regard to murder, an amendment to the Minimum Sentencing Act to include a category of sentencing for murder committed with a hate motive would complement the function of the common-law definition of murder. In amending sentencing legislation, the court would be required to state on record any deviation from minimum sentencing, which would make the statistical analysis of hate crimes easier to report. The focus on enhanced sentencing serves the dual purpose of reassuring the victim and focusing the court on the hate motive of the crime. Amending sentencing legislation could further serve the purpose of outlining the sentencing process with regard to less serious offences, such as malicious injury to property committed with a hate motive, and thereby eliminate the creation of an entirely separate body of law previously alluded to.

[74] See s 3 and 4 of Act 32 of 2007 and s 51 and Schedule II of Act 105 of 1997.

4 3 The argument for retaining the legal status quo

Not all bias crimes prevent the victim from exercising a right under law in South Africa. Regardless of the subjective opinion of the accused, the victim is nonetheless still able to implement charges of rape and the murder of a person, regardless of sexual orientation, which is prosecutable by the state. Homosexual victims of rape and murder are not entirely unprotected in the current criminal justice system, however, the specificity of crimes targeting homosexuals is not recognized by the current system. In light of the arguments advanced above, a further suggestion, which particularly supports the idea of legal certainty, is to retain the current legal *status quo*. If the position remains unchanged from a legal perspective, then societal intervention and education will be required in order to change perceptions concerning the notion of homosexuality and hatred directed at certain groups. We discuss potential mechanisms for this in our conclusions below. If the *status quo* remains unchanged and attacks against persons based on their actual or perceived sexual orientation continue, then, we submit, the Constitutional protections and rights guaranteed by section 9 of the Bill of Rights become nothing more than convenient lip service to members of the homosexual community.

5 Conclusion and recommendations

In arguing for the creation of a truly democratic society in which all people are offered equal protection before the law one must take into account both social factors and legal protections. Our recommendations in paragraph 5 1 are made from a societal perspective, and those in paragraph 5 2 from a criminal justice perspective.

5 1 Conclusions and recommendations for civil society

5 1 1 Increased co-operation between civil-society organisations

Civil society organizations with an lesbian/gay/bisexual/transgender/inter-sexed agenda should co-operate more closely, formulate a common agenda and speak with one, unified voice on the issue of “corrective rape” and other crimes against lesbian women specifically and all lesbian/gay/ bisexual/transgender/inter-sexed persons generally. The joint working group of the 07-07-07 Campaign has illustrated that civil society organizations can be more effective if they collaborate on common issues. In this way civil society organizations could become a powerful force for change and engage more effectively with government. Anguita advocates engaging government, through both “co-operation” and “confrontation” *via* quasi-governmental bodies such as the Commission on Gender Equality and the South African Human Rights Commission,[75] since there is a perceptible distance between civil society organizations with a lesbian/gay/bisexual/transgender/inter-sexed agenda and the government. This could be an important first step for

[75] Anguita 2011 *The International Journal of Human Rights* 6.

the civil society organization sector to take in order to increase awareness of lesbian/gay/bisexual/transgender/inter-sexed issues at government level.

5 1 2 Community education

Despite a number of progressive court decisions, legislative reforms and Constitutional protections[76] which impact positively on lesbian/gay/bisexual/ transgender/inter-sexed issues, South African society, especially at community level in black townships, remains heteronormative and homophobic. One way of reducing prejudice and violence, especially towards lesbian/gay/bisexual/transgender/inter-sexed persons in communities, is by implementing community education programmes. Hitherto in South Africa, activists from civil-society organizations have undertaken all efforts at community education with a lesbian/gay/bisexual/transgender/ inter-sexed agenda. While these past efforts at community education are indeed commendable, they should not be the responsibility of the civil society organization sector alone. It is incumbent upon the South African government to adopt a "multi-level response"[77] to solve the problem of violence and intolerance towards lesbian women, and indeed towards all minorities. Government departments such as the departments of Justice, Education, and Women, Children and People with Disabilities should collaborate with the civil-society organization sector to develop and implement education programmes intended to eliminate violence and prejudice towards lesbian/gay/bisexual/transgender/inter-sexed persons and other minority groups. In the words of Berrill, these community education programmes should "create an atmosphere of tolerance that fosters an appreciation of diversity".[78] While any education programme in South Africa that espouses tolerance and an appreciation of diversity would focus on race, ethnicity and gender, given South Africa's patriarchal, racially-segregated past, it should also specifically encompass lesbian/gay/bisexual/ transgender/inter-sexed issues. A possible starting point would be for the recently announced government task team, as part of its public awareness strategy, to develop and implement these community education programmes. While it is essential that community-education programmes be implemented in black townships first, they should be extended to schools and other areas in which lesbian/gay/bisexual/transgender/inter-sexed persons generally, and lesbian women specifically, are most at risk.

5 1 3 Sensitizing the police and other criminal-justice officials

Research has revealed that the police in South Africa are homophobic and insensitive to lesbian women and all lesbian/gay/bisexual/transsexual/inter-sexed persons. As a victim's first point of access to the criminal justice

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[76] *Eg*, in *Satchwell v President of the Republic of South Africa* 2002 ZACC 18 the court extended financial benefits available to the opposite-sex partners of judges to same-sex partners; the Civil Union Act 17 of 2006 legalized same-sex marriages and s 9 of the South African Constitution, 1996 enshrines the right to equality and prohibits discrimination on the basis of, inter alia, sexual orientation.

[77] Nel and Judge 2008 21(3) *Acta Criminologica* 30.

[78] Berrill and Herek "Primary and Secondary Victimisation in Anti-Gay Crimes: Official Response and Public Policy 1990 5 *Journal of Interpersonal Violence* 401 408.

system, it is essential that members of the South African Police Service undergo sensitivity training "which should explicitly mention acts … committed against lesbian/gay/bisexual/transgender/inter-sexed persons."[79] Since the government task team will include representatives from the South African Police Service, the issue of sensitivity training for the police should be firmly placed on the agenda. Sensitivity training programmes should teach the police how to respond with the necessary sensitivity to lesbian/gay/bisexual/transgender/inter-sexed persons who are the victims of crime, how to interview lesbian women who have been raped and how to recognize and investigate crimes that have been committed with a hate/bias/orientation motive.[80] These programmes should also teach the police that violence against lesbian/gay/bisexual/transgender/inter-sexed persons, and indeed violence against all minority groups, cannot be condoned. Sensitivity training should also be included as a compulsory component of the curriculum for trainee-police officials. Such sensitivity training would help contribute to a reduction in the secondary victimization[81] frequently experienced by lesbian/gay/bisexual/transgender/inter-sexed persons within the criminal justice system. Since the criminal justice system includes the courts and the judiciary, sensitivity training should also be extended to include public prosecutors, magistrates and judges and administrative personnel.

5 2 Conclusions and recommendations: criminal-justice perspective

Having reviewed the prospective for and the potential systems of control of hate crimes, in this case the rape and murder of homosexual people motivated by their orientation, we conclude the following:

1 The current *status quo* cannot remain unchanged or without critical scrutiny. The targeting of homosexual people, as discussed in Part I of the submission, is unacceptable in a constitutional democracy. South Africa cannot continue to ignore or omit to act against persons who commit crimes against a group of persons protected by the Bill of Rights, especially when the base crime is aggravated by hatred of the perpetrator.

2 South African criminal law does not take cognisance of motive in its pure form as an element of crime. This may present a barrier to the enactment of substantive legislation for hate crimes, especially if one follows a hostility model of legal intervention. The discriminatory-selection model, which does not require proof of hatred *per se*, but rather the establishment of a *causal nexus* between the action of the perpetrator and a characteristic of the victim, may be better suited to South Africa in

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[79] Nel and Judge 2008 21(3) *Acta Criminologica* 30.

[80] There is evidence that the SAPS in the province of Gauteng did undergo diversity training in which more emphasis was placed on race and gender. See Newham, Masuku and Dlamini "Diversity and Transformation in the South African Police Service. Johannesburg: Centre for the Study of Violence and Reconciliation" 2006 http://www.isn.ethz.ch/isn/Digital-Library/Publications/Detail/?id=99525&lng=en (accessed 2011-11-18).

[81] Berrill and Herek 1990 5 *Journal of Interpersonal Violence* 401.

order to avoid the issue of motive being irrelevant unless it is used to show intention.

3 It would appear from the brief review of Germany and the United States of America that the collection of statistical data on the commission of hate crime is an important factor in a plausible system of legal control over hate crimes. Whether South Africa is equipped to separate hate crimes from base crimes with no-hate motive is an issue that will have to be dealt with by the legislature, whether it enacts substantive legislation or extends current legislation. Whether this is probable is debatable when one considers the current situation in which rape crimes are not separated from other sexual offences for statistical reporting purposes. Members of the police service will require proper training on the identification of hate crime in order to make any statistical analysis reliable and valid.

4 The establishment of substantive hate-crime legislation is not without issue from a criminal, procedural and evidentiary perspective. We submit that the means can be achieved by other methods and that substantive hate-crime laws may result in a situation where the victim is traumatized twice; once by the perpetrator and again by legislation that may require the victim's sexual identity to be placed before an open court.

5 Legislation already exists in the form of the Sexual Offences Act and the Minimum Sentencing Act, which, we submit, are better suited to the prosecution of homophobic hate crimes. The Sexual Offences Act already provides for different forms of sexual assault that are construed as rape and the Minimum Sentencing Act categorizes acts of rape and murder in terms of the sentence applicable in the absence of compelling circumstances to the contrary. An amendment to both pieces of legislation would, we submit, serve as a deterrent factor to perpetrators and a legislative mechanism for the prosecution of perpetrators of homophobic violence.

In conclusion, the protection of persons against hate crimes must be approached holistically and will require the effort of various role-players from civil society organizations and members of the criminal justice system. Hatred is a corruptive force in any society, and given South Africa's history of social exclusion and race discrimination, the country cannot afford to relapse into a situation in which hatred is at best ignored and at worst tolerated.