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Sexual Violence and the Limits of Laws' Powers to Alter Behaviour: The Case of South Africa

By Tameshnie Deane¹

Abstract

Despite having one of the most inclusive and progressive constitutions in the world, South Africa (SA) has one of the highest rates of sexual offences globally. This article measures the extent of sexual violence, causes, developments and challenges in research, policy and practice in relation to sexual violence against women. It analyses the causes and responses to sexual violence in a largely South African context. Through different reports and literature reviews this paper will analyze the role that social traditions and norms play in the commission of sexual violence. By analyzing a prominent rape case, the author will deliberate on why law reform alone can be limiting in comprehensively dealing with sexual offences. It will also discuss how weaknesses in the governments' responses to sexual violence have led to it being perpetrated with relative impunity. This paper will further emphasize the need for an integrated response to eradicating sexual violence. In addition to presenting a brief explanation of legislative developments relating to sexual offences, the extent to which the South African judiciary has enforced the constitutional right to freedom from violence through relevant case law is also briefly discussed. In reinforcing violence against women as a human rights violation, it will be attempted to underscore the critical links between the law, public policy and service provision to victims of gender-based violence. Finally, this article will provide recommendations in changing attitudes, beliefs and to improve services to victims of sexual violence.

Keywords: gender-based violence, cultural norms, responses to sexual violence, sexual violence, South Africa, women's rights

Introduction

Sexual violence is an epidemic that is commonly viewed as a violation of basic human rights (Shepard 8), but persists through time, changes in economies and changes in governments (United Nations General Assembly 2). It is a global problem that is considered intolerable yet such violence, whether perpetrated by the State, its agents, by family members or strangers, whether in the public or private eye, in times of peace or in times of conflict, (Dartnall and Jewkes 10) continues to be effected on a large scale (United Nations General Assembly 14). Globally, the prevalence of sexual violence shows that 35.6 percent of women have experienced some form of sexual violence, whilst regional estimates show prevalence rates ranging from 27.2 percent to 45.6 percent (WHO, *Global and Regional Estimates of Violence against Women* 20). Violence on such a large scale leads to inequalities and discrimination of its victims and has dire consequences (Holmes et al 321). It is the obligation of States to protect women from violence, to hold

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perpetrators accountable and to provide justice and remedies to victims (Legal Action Worldwide 1).

Since the eradication of sexual violence continues to be one of the greatest challenges of today, updated and updating knowledge of this crime through research, records and literature reviews can be used as a tool to help place countries in a better position to eliminate this scourge (United Nations Population Fund 2). When violence against women and children is allowed to fester no real progress towards equality, development and peace can be achieved (United Nations General Assembly 15).

Differences in gender roles and behaviors give rise to inequalities and disadvantages, wherein these differences allow one gender to become more powerful than the other. Across cultures, attitudes toward gender affect perceptions of the male-female relationships (Gurvinder and Bhugra 244). This subsequently affects how the offenders of sexual violence and their victims are viewed. This is evident from societies that view women as subordinate to men; as having a lower social status with no decision-making powers and thereby giving men control over women (WHO *Promoting gender equality to prevent violence against women* 3). Sexual violence occurs in all cultures across the globe (Roze 499) with differing explanations of what exactly does constitute sexual violence (Heise, Moore and Toubia 12). The World Health Organization (WHO) defines sexual violence as:

“any sexual act or an attempt to obtain a sexual act, unwanted sexual comments, or advances, acts to traffic or otherwise directed, against a person's sexuality using coercion, by any person regardless of their relationship to the victim in any setting, including but not limited to home and work” (2).

South Africa (SA) has one of the highest rates of sexual offences globally (United States Government Report 3). It is a country that is currently struggling to balance one of the most inclusive and progressive Constitutions in the world (Kruger 1), with its largely patriarchal and culture driven society (Coetzee 300). Sexual violence against women and children within the South African context is occurring on such a large scale that it has been reported that it appears to be “socially normalized, legitimized and accompanied by a culture of acceptance” (Blanchfield 3). Its enormous scale is indicative that society’s beliefs of what does and does not constitute rape may be legitimizing acts of sexual violence or providing a space for these crimes to occur (Jewkes, Penn-Kekana and Rose-Junius 1810). The underlying challenges and its causes within this society must consequently be understood (United Nations, *Report of the committee on the elimination of discrimination against women*).

Purpose of this Article

Based on the principles in the *South African Constitution*, the government has enacted a fairly progressive legislative framework and has adopted policies, programme and plans of action aimed at ending sexual violence, including various sexual offences legislation, specialized sexual offences courts and a comprehensive *National Policy Guidelines for Victims of Sexual Offences* (Kruger 2). Regardless of the increased attention to women’s rights in SA, there has been little progress in reducing sexual violence against women. The question therefore remains that despite these gains, why is the rate of sexual violence so unacceptably high.

This paper will explore this question by deliberating on why laws and policies alone can be limiting in comprehensively dealing with sexual violence. Cultural and social norms have been

identified as being “highly influential in shaping individual behaviour, including the use of violence” (WHO, *Changing cultural and social norms supportive of violent behaviour* 3) and plays an important role in the way societies perceive sexual acts as well as sexual violence (Gurvinder and Bhugra 245). By looking at how culture and social norms have the effect of encouraging violence it is purported to find methods aimed at preventing and/or changing such perceptions and behavior.

Sexual violence takes many different forms; (for example, male-male sexual violence, male-transgender sexual violence), the focus of this paper however, will be on the male-female sexual violence, since women and girls (WHO, *Facts and figures* 1) are disproportionately affected by such crimes (WHO, *Global and Regional Estimates of Violence against Women* 19). Statistics show that rape is the dominant form of sexual violence in SA (Sigsworth 14). This paper will provide an overview of the prevalence and perceptions around the many forms of rape in SA and it will illustrate how these perceptions contribute towards the high rates of sexual violence in the country.

Furthermore, seen as a key role player in the adoption and implementation of the laws of SA, the response of the criminal justice system (CJS) to such crimes and how weaknesses in their responses to sexual violence has led to it being perpetrated with relative impunity (Sigsworth 26-27), will be explored. This paper will conclude by providing recommendations on how more rigorous interventions that address culture, incorrect perceptions and social norms are needed (Legal Action Worldwide 5).

The importance of looking at these issues specifically is because of the often serious consequences of sexual violence.

Consequences of Violence against Women

The perceived consequences of sexual violence may vary depending on views about masculinity, gender roles, the attitudes of key role players in the CJS, social stigma (Pedersen and Strömwall 932) and the definition of sexual violence (Dartnall and Jewkes 9). In societies where victims feel ashamed or internalize feelings of blame for the incident, they may not open up about the violence that they have experienced and they may therefore not report it (Gurvinder and Bhugra 246). Where victims may feel victimized by a CJS as well, it might lead to an under reporting of such cases. This negatively affects an understanding of the true nature of these acts, thereby prompting inadequate policy-making for future actions against this scourge (Waetjen 64).

Based upon various literature studies it is evident that any form of violence against women is a violation of their human rights. It prevents them from enjoying their fundamental liberties and freedoms (WHO, *Global and Regional Estimates of Violence against Women* 23), like their right to life, security of their persons, the right to education and to freely participate in public life (United Nations General Assembly 16). It has severe consequences for women's health, their well-being and it hinders their development (Shepard 9). Such violence perpetuates the subordination of women and the unequal distribution of power between women and men (Kruger 1). Most importantly the continued violence against women is a direct violation of their rights enshrined in the *South African Constitution*, which is considered the highest law in the land.

Understanding Violence in SA

Credibility of crime statistics

Crime statistics by the South African Police Services (SAPS) must be approached with caution (De Kock, Kriegler and Shaw n. pag.). Various reasons account for this. One problem is directly related to the government's placing of a moratorium on crime statistics between 2000 to 2001, and as a result these figures cannot be taken as a true reflection on the extent of criminal activities reported (Brodie par 1). A further issue is that the SAPS crime statistics are not independently audited and therefore not quality assured. Outdated population data has also been reported to have been used in the calculation of statistical data (De Kock, Kriegler and Shaw n. pag.). This can give rise to the release of flawed comparative crime-to-population ratios in the SAPS's release of its statistics.

In addition, the 'total sexual crimes' as recorded by the police may include up to 59 separate crimes, ranging from different forms of sex work to rape (Institute for Security Studies par 8). The Institute for Security Studies (ISS) states that such a broad category of crime tells us very little about the trends or extent of any of the specific offences contained therein. According to an Eye Witness News report, it was stated that the data would prove to be more beneficial if the SAPS publicly made available the statistics for each of the crimes that fall under the broad category of sexual offences.

Regarding sexual violence specifically, since it is associated with shame and stigma, many such acts go unreported, not only to state or private institutions, but often even to the victim's family and friends (Sigsworth 4). For example, the Medical Research Council estimates that only 1 in 25 rapes are reported annually (Jewkes et al, *Preventing rape and violence in South Africa* 2). Apart from police records, sexual violence statistics data generally comes from clinical settings, non-governmental organizations and survey research (Vetten 3-4). The problem still remains that the exact prevalence of sexual violence in SA is unknown (De Kock, Kriegler and Shaw n. pag.). In response to the awareness of reported versus unreported crimes, Statistics South Africa (Stats SA) provides additional data on and measures public 'perceptions' of crime (*Victims of crimes survey: 2013-2014* n. pag.). This may also prove problematic as methodological shortcomings and 'perceptions' of crime may differ from legal definitions of crime, contributing to errors in the survey (Brodie 4).

Having said this, the understanding of what crime statistics can and can't reveal to us is a vital starting point for contributions towards the prevention of these crimes.

What We Do Know – The Extent of Sexual Violence in SA

Between the period of 2004 and 2012, 535 768 sexual offences were reported to the SAPS of which 55 000 rapes alone, of women and girls, were reported (Stats SA, *Crime research and statistics* n. pag.). Between 2008 and 2009 71 500 sexual offence cases were reported to the SAPS and in 2010/11 a total of 28 128 sexual offences of children under 18 years were reported to the police (Stats SA, *Crime research and statistics* n. pag.). Between April 2013 and March 2014, there were 4 720 reported cases of sexual offences identified by police officers and between the reporting period of April 2014 to March 2015, this escalated to 6 340 cases (Stats SA, *Victims of crimes survey: 2013-2014* n. pag.). The end result was that the biggest crime category, with an increase of 34.3 percent, was sexual offences.

Looking beyond police statistics, studies have found that more than a third of South African girls have experienced some form of sexual abuse before the age of 18 years (Jewkes et al,

Preventing rape and violence in South Africa 1). Looking at specific provinces, the Teddy Bear Clinic in Johannesburg dealt with 1 979 cases of sexual abuse in 2010 (Omar n. pag.). In a nationally representative sample of 11 735 South African women, 153 (2 percent) reported being raped before the age of 15, whilst 85 percent of victims had been raped between the ages of 10-14 years (Omar n. pag.). Younger children are not immune from this type of sexual violence. In a Gauteng study approximately 3 percent of the victims of reported rapes were aged between 1 and 3 years (Vetten et al, *Tracking Justice* 29). It was found that the majority (84 percent) of child rapes were perpetrated by someone known to the victim (Jewkes et al, *Understanding men's health and use of violence* 19-20). This is different from adult rapes of which nearly half (48 percent) are perpetrated by strangers.

It is documented that even though sexual violence is perpetrated mainly against women and girls and they are generally more at risk of being sexually victimized, men and boys are not exempt from sexual violence (White House Council on Women and Girls 16). A study has found that sexual abuse of young men ranged from 3 percent to 21 percent (Dartnell 10). Research carried out from the point of view of the offenders found that over a quarter (28 percent) of men reported that they had raped someone (Jewkes et al, *Understanding men's health and use of violence* 19), and furthermore, of those who had committed rape, 73 percent had done so prior to the age of 20 years.

Understanding the High Rates of Sexual Violence

The continued high prevalence of rape in SA is often seen as a reflection of the violent and dehumanizing culture that the apartheid era has left behind (Tamale 158). Apartheids' policy of rendering "adult Africans as designated boys and girls, legally and economically infantilized," (Davis *How Rape Became South Africa's Enduring Nightmare* para 2) was perceived as an attack on their masculinity and has left deep seated feelings of aggression (Holzaman 47). Today's culture of violence is seen as a way of reasserting their masculinity (Dunaiski n. pag.). Furthermore, the new democratic constitutional order of 1994 in SA acknowledged all women in society as equal citizens and their roles were legitimated. This effectively eroded traditional notions of masculinity. The problem is that women's rights developments under the new dispensation happened without an equivalent development of a programme to help men cope with these changes (Dunaiski n. pag.). Thus, sexual violence rape is understood as being an attempt by men to reassert their authority and "put women in their place" (Peterson, Bhana and McKay 1233).

Studies have indicated that at least 119 countries have passed laws on domestic violence, 125 have laws on sexual harassment and 52 have laws on marital rape (United Nations, *Women facts and figures* par 13). However, even when laws exist, this does not mean they will be implemented or reduce sexual violence (United Nations Economic and Social Affairs 160). An important element in the WHO definition of sexual violence mentioned above is the use of "coercion" or force. The problem with this definition is that there are cultural and social differences with respect to what is labelled as "forced" sexual intercourse and what is not (Gurvinder and Bhugra 244).

Social Norms and Perceptions

Perceptions around sexual violence show that 'forced sex' is not considered to be rape or a form of sexual violence. Studies around the prevalence of forced sex by boys in SA (Reddy et al par 2) reflect two social phenomena (Dartnell and Jewkes 8). One relates to the pressure of adolescent boys, from male peers or even their girlfriends, to experience sex in order for them to

show manliness. This pressure happens even if the adolescent boy may feel that they are not ready for it (De Vries et al 1087). The other relates to the coercion of boys into sexual acts with older women. In one South African study 3.4 percent of adolescent boys disclosed being forced into sex by a man, and 9.7 percent by a woman (Dartnall and Jewkes 8).

Forced sex beliefs and behavior are as a result of several factors (De Vries et al 1088). One such factor relates to the norm of emphasizing toughness and strength in a male (Jewkes and Morrell 6). There is an expectation for such men to be in control of women and the violence that is used as a concomitant result to prove their masculinity, is considered an acceptable method to establish this control (De Vries et al 1088).

In addition to notions of masculinity, other factors associated with the norm of forced sex include, but is not limited to, drug and alcohol use/abuse, previous experience with forced sex, gang membership and peer pressure to have sex (Jewkes and Morrell 6).

Rape

SA is reflected as perpetuating a “rape culture” because of its patriarchal society (Vogelman, *Violent crimes* 96). Where women are not forthcoming to sexual advances or, a sense of entitlement is the norm, rape is often considered as an act of punishment used to demonstrate power over women and girls and to manufacture control (Christofides et al, *Other Patients are really in need of Medical Attention*). Rape is therefore a mechanism of social control and reflects mens’ sense of entitlement that stems from the “forced sex” norm in societies (Anderson et al 3).

Multiple perpetrator rape or ‘gang rape’ is highly prevalent in SA (Dartnall and Jewkes 8). Also associated with masculine aggression (Vogelman, *The Sexual Face of Violence* 4), studies have shown that more than one third of the women who report being raped have been gang raped (Abrahams, Martin and Vetten 231). Other studies report a multiple perpetrator rape prevalence ranging between 7 and 9 percent, to as high as 14 percent (Dartnall and Jewkes 9). Reports have found that gang rapes occurred in response to women saying “no” to their sexual demands (WHO, *World Report on Violence and Health* n. pag.). Understanding the complexities of what motivates such behavior is difficult as each offender has their own “psychological makeup” and therefore has different motives for committing the offences (Lawrence and van Rensburg 15). Gang rapes can also take the form of “streamlining” or “*isitimela*”, which is a type of rape that is often perpetrated against the girlfriend of one of the men by a group of friends (Wood 303).

“Jackrolling”, a form of gang rape, is a South African term for leisure gang rape (Taunyane para 2). This gang rape is distinctive, because it is a situation “in which no brutality, no threat even, would be necessary to subdue the victim” (Medea and Thompson 36). A peculiar characteristic of “jackroll” is that it is seen as a sport and it has been reported that the common view of jackroll is that “it is not a crime it is just a game” (Mathiane 148). These views demonstrate that violence against women has become “normalized” in society (Pather par 11).

Another type of rape that is common is “corrective rape” which is “performed” (Vetten 4) to “cure” lesbians of their homosexuality (Strudwick par 3). In most cases, the victims are black lesbians (Okafor par 3). South African society is strongly influenced by traditional cultures and religious groups, therefore corrective rape is understood as a response to “protect the status quo of women who are forced to conform to gender stereotypes or suffer the consequences” (Smith par 5). There is a common argument from black Africans that the practice of homosexuality is “un-African” (Yoruba par 2), something invented during colonization and that which is “exclusive to the white man and his culture” (Okafor paras 7-8). By detaching black African culture from homosexuality, black gay Africans are marginalized from their own culture. Corrective rape is

seen as a “rite of passage” back into the African culture. Such a form of violence is considered acceptable because it is believed that this would then force “these women” to “submit”, become heterosexual, and assume their “proper” role in society (Okafor par 9).

Despite these various forms of rape, there is no single factor that can explain the high prevalence of sexual violence in the country (Smythe et al 150). However, taking into account that rape is the most dominant form of sexual violence these perceptions and/or attitudes towards sexual violence goes a long way toward increasing the statistics of this crime.

Looking at statistics and according to CietAfrica, when attitudes towards sexual violence was studied on a provincial level in SA, it was shown that 59 percent of women had indicated that a sexually violent man was considered a powerful man and 9 percent said they were more attracted to a sexually violent man (4). Approximately 22 percent of women reported that women themselves were the cause of the sexual violence inflicted upon them, whilst 27 percent of female youth said forcing sex with someone you know is never sexual violence (4-5). CietAfrica also undertook a further study on a national level to map the extent of sexual violence among youth. It was found that about 9 percent of all participants in the research reported to have been forced to have sex within the past year; the percentage of males who admitted forcing sex on someone ranged between 6 percent in the lower age groups and 25 percent in the older age groups; 66 percent of males and 71 percent of females who had abused someone else had themselves been forced to have sex; 60 percent of all learners, boys and girls alike, said that it is not sexual violence to force sex with someone you know (5).

Reportedly, when learners were interviewed 50 percent of them either believed that a girl means ‘yes’ when she says ‘no’, or they were not sure whether ‘no’ in fact means no (Vetten 5). In other statistics, 10 percent of learners were under the impression that girls who are raped were at fault; 26 percent did not think that women hated being raped; 30 percent of all students said that girls do not have the right to refuse sex with a boyfriend; 30 percent female pupils felt that sex was proof of love, with 60 percent of males holding this view (Sigsworth 10).

These studies reveal that taken together the statistics illustrate that the rate of sexual violence in SA is much higher than the reported SAPS statistics (De Kock, Kriegler and Shaw n. pag.). Clearly, the extent and scope of sexual violence is such that it needs to be addressed as a matter of urgency. What follows is a discussion of the framework within which actions must be taken to combat sexual violence in SA.

The Politics of Culture and Sexual Violence: The Intersections

Different cultures perceptions allow for the condemnation of certain forms of sexual violence whilst allowing the tolerance of other forms to continue to a degree (Gurvinder and Bhugra 245). The culturally acceptable forms of violence (Baron 210) give rise to a “continuum with transgressive coercion at one end to tolerated coercion at the other” (Heise, Moore and Toubia 12). For example, in apartheid SA only the rape of white women was considered a crime and prosecuted, while sexual violence against black women was considered an acceptable part of everyday life (Armstrong 36).

Traditional beliefs and values of a large portion of South Africans regulate their view of men and legitimize the right of men to exercise their power over women and children (Tamale 159). Included in this perception is that men are allowed to take sexual advantage of them (Chasteen 135). Cultural beliefs and the patriarchal system have acted as a detriment to the enjoyment of fundamental rights by people where traditional beliefs and customs are considered more important than the rule of law (Tamale 155). For example, issues like domestic violence and

child abuse are considered to be 'private issues' (Furusa and Limberg 2). Interventions aimed at such acts are therefore much more complicated than if it were a real threat to the entire public at large (Furusa and Limberg 2).

In 2006, African National Congress (ANC) president and then South African deputy president Jacob Zuma (now President) was charged with rape (*The State v Jacob Gedleyihlekisa Zuma*) and this case specifically dealt with traditions versus the law. This case was considered "a watershed moment" for South Africa's gender problems (Davis, *How Rape Became South Africa's Enduring Nightmare* par 6). Jacob Zuma, an African male, was not only considered a 'man of his people' but a man with strong traditional roots (Waetjen 64). At his court appearance he chose to give his testimony in his Zulu mother tongue. This was within his constitutional right as the *Constitution* grants an accused person the right to defend themselves in any one of SA's eleven official languages (Chapter 2). The option of choosing to give his testimony in his Zulu mother tongue was however very significant (Waetjen 64). His choice to speak *isiZulu* within a court that had thus far proceeded in English emphasized his association to a particular cultural group and invoked his well-established reputation as a 'man of tradition' (Clarke par 11).

Furthermore, in the context of a nation with a deeply racist history, Zuma's "linguistic medium" was part of a message that this trial was also about the "politics of culture" (Waetjen 70). By doing so, Zuma was attempting to create a legal platform to legitimate what others considered sexual violence (Waetjen 70). The importance of this case lies in the view that was reiterated by the Judge who stated that "this trial is more about sexual politics and gender relations than it is about rape" (*The State v Jacob Gedleyihlekisa Zuma* 48). Moreover, the media overwhelmingly focused their attention on the accused over the experience of his accuser (Davis, *How Rape Became South Africa's Enduring Nightmare* par 4). The political question of women's status was continuously cast as a private matter and the debate about relations between men and women came to be focused on issues of propriety, behavior and etiquette rather than on questions about rights and power (Waetjen 71). Importantly, this privatization of gender was effected through the politics of culture.

Even though Zuma was acquitted of rape, the trial was important for several reasons. It was one of several important legal events that have affected the course of his leadership and which continue to shape and reflect the broader politics in SA (Clarke par 12). This is relating specifically to some comments made during his testimony. In the course of giving his explanation of why sexual intercourse had taken place without a condom, despite the risk of HIV transmission, Zuma told the court that the complainant was in a state of sexual arousal. He asserted that this placed him under an obligation by stating that "...and I said to myself, I know as we grew up in the Zulu culture you don't leave a woman in that situation because if you do then she will even have you arrested and say that you are a rapist" (*The State v Jacob Gedleyihlekisa Zuma* 49).

He claimed that he was acting "as a Zulu man" and what it meant to act as a Zulu man in such a context was to act "with an awareness that he was confronting a potential danger" (Waetjen 68). This danger was interpreted according to his Zulu customs and this spoke to the nature of women. Within the forum of a court of law, culture offered to Zuma a legitimate medium in which to express the normativity of gender inequality and patriarchal morality (Clarke par 14). The invocation of Zulu culture in this context is highly controversial and has invited numerous debates about what can and cannot be claimed as a cultural norm (De Vos par 3). The problem is that however much academic the debate becomes, this case has caused a lot of damage to the provisions of the *Constitution* relating to women because it has reinforced the notion that by invoking culture, the President of SA himself has suggested that the proper place in which gender power be

negotiated was in the private (De Vos par 4), customary sphere, rather than in the public sphere of civic rights. It further enhances confidence in a broad patriarchal morality (Clarke par 14).

The view articulated in this case is in direct conflict with those expressed in the *Constitution of SA*, where the *Constitution* makes it clear that gender equality trumps culture and tradition (Sections 1(c) and 2 of the *SA Constitution*).

The Legislative Responses to Violence against Women

It is beyond the scope of this article to discuss the comprehensive legislative framework dealing with sexual offences in SA. However; it will be mentioned, very briefly, for the sake of completeness. Furthermore, this article does not give a critical analysis of each piece of legislation but merely lists the various laws implemented to deal with violence.

In line with its national and international obligations, South African legislation regarding violence against women is extensive. It is important to note here that legislation is supported by supplementary legislation and policies, guidelines and frameworks (Thorpe 1). Very briefly, the laws dealing with violence against women include the *Domestic Violence Act*, which places positive duties on the police regarding the protection of women in domestic partnerships, and provides for women to apply for protection orders in order to force a separation between themselves and their abuser. *The Criminal Law (Sexual Offences and Related Matters) Amendment Act* expanded the definition of rape and created a number of new crimes in order to cover the extent of violence against women in SA. Importantly, this Act removed the cautionary rule, where a rape survivor's testimony was to be regarded with suspicion, and ensured that rape within marriage was classified as rape. In addition the Act prescribes certain minimum sentences for certain acts of sexual violence. The *Protection from Harassment Act* protects women from harassment and provides for allows them to apply for protection orders in this regard. The *Prevention and Combating of Trafficking in Persons Act* introduces trafficking as an offence and sets up mechanisms to offer support to victims of trafficking. Importantly, all these legislations give effect to the principles enshrined in the *Constitution of SA*.

The Constitutional Duty to Prevent Sexual Violence

The *Constitution* entrenches a number of rights that are directly relevant to the context of gender-based violence. A key section relates to the right to freedom from violence. Section 12(1)(c) of the *Constitution* of SA provides that "every person has the right to freedom from all forms of violence from either public or private sources". The insertion of the words "from either public and private sources" is especially significant when one considers that such acts like domestic violence or sexual assault "are predominantly committed in contexts, spaces, and relationships that are traditionally viewed as private" (Smythe et al 175-6).

To fully appreciate the practical implications of the constitutional entrenchment of these rights, the above provisions should be read in conjunction with section 7(2) of the *Constitution*, which requires the State to "respect, protect, promote and fulfil" the rights contained in the *Bill of Rights* (Smythe et al 176). This implies that there are certain positive duties resting on the State to ensure that these rights are fully realized. In relation to the right to freedom from violence, the State has a responsibility to take proactive steps (Kruger 2) to prevent gender-based violence as well as to respond to such violence (Thorpe 2). The *Bill of Rights* therefore, not only provides rights but also responsibilities that rest with the State to ensure the realization of these rights (Smythe et al 152). The State has the duty to respect, protect, promote and fulfil these rights. The

following cases are some examples of where the court has placed a legal duty on the state to act against matters of gender based violence.

Key Constitutional Court Judgments

South African courts have recognized that sexual violence is a violation of women's rights. For example, in *S v Chapman* the Supreme Court of Appeal emphasized the seriousness of the offence of rape, wherein it stated that it represents a "humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim" (par 344I-J). It was unequivocally stated that in order to protect the equality, dignity and freedom of all women, the courts will "show no mercy to those who seek to invade those rights" (par 344J-345B). It also acknowledged in a number of decided cases that the State bears an obligation to take positive steps to address gender-based violence, the most prominent of which was the case of *Carmichele v Minister of Safety and Security and Another*, where the court stated that the State and its organs (such as the police) had a legal duty, arising from the *Constitution*, to provide appropriate protection to everyone through laws and structures designed to afford such protection (par 62).

The emerging principle of the States' liability for failure to prevent acts of gender-based violence was taken one step further by the Constitutional Court (CC) in *K v Minister of Safety and Security*, where the CC ruled that in light of the statutory and constitutional duty resting on the police to prevent crime and protect members of the public, each of the three police officials had failed in their duty towards the victim by not intervening when she was raped by the other two co-rapists. For this reason, the court ruled that the Minister of Safety and Security was liable for the acts of the three SAPS members. Therefore, where proactive steps are not taken to protect potential victims of sexual violence then the State and its organs may be held liable. (Smythe et al 178).

These judgments are important because of the following; firstly, it places sexual violence issues within a human rights framework by emphatically proclaiming that such violence amounts to a serious violation of constitutionally protected rights; and secondly, it is clear that the State must take proactive steps to prevent acts of gender-based violence (Smythe et al 178).

Having stated this, there are obvious challenges to the implementation of these constitutionally protected rights, as can be seen from an increase in sexually violent crimes. The following paragraphs will discuss a few more of these challenges that directly impacts on the increase in the statistics.

Challenges in the Application and Implementation of Legislation

SA's transition to democracy and its constitutional and human rights framework is solid and provides a source of hope for all South Africans. However the high rates of sexual and gender based violence negates these protections when it fails the very people it is meant to protect (Smith par 5). Based on the increased prevalence of sexual violence it is apparent that detailed legislation has not resulted in a substantial reduction in incidences of sexual violence against women and children (Statistics SA *Victims of crimes survey: 2013-2014* n. pag). Apart from the various challenges and issues related to social and cultural norms, there are other factors that contribute towards the high rates of sexual violence. Perceptions and attitudes around how seriously sexual violence issues are treated play a vital role in how a country's citizens view the importance of these issues (Sigsworth 4).

A key role player in this is the criminal justice system. In the landmark decision of *S v Makwanyane*, and, in declaring the death penalty to be unconstitutional, the President of the CC

wrote that “the greatest deterrent to crime is the likelihood that offenders will be apprehended, convicted and punished. It is that which is presently lacking in our criminal justice system; and it is at this level and through addressing the causes of crime that the State must seek to combat lawlessness” (par 443H).

A major contributor in ensuring authority in the laws of the land and ensuring that there is a sense of perceived justice is the CJS. A poor system's response to sexual violence creates a culture of impunity (Sigsworth 24). One key issue identified in the CJS's response to sexual violence problems relates to the persistent hostility, insensitivity and incompetence of the major actors in the legal system (The White House Council on Women and Girls 16). It has been reported that many women and children are subjected to secondary victimization when they attempt to report a rape (United States Government Report 4). Some examples of secondary victimization include victims being required to give their statements in front of other members of the public; the victims themselves may be disbelieved due to stereotypical attitudes and beliefs, like blaming the victim for acting in a manner or dressing in a manner that actually encouraged the rape; police officers refusal to take victims statements, and the worst case scenario's included police officers themselves have raped women reporting rape (United States Government Report 6).

This secondary victimization suffered at the hands of the CJS discourages the reporting and laying of charges for these crimes and depending on the challenges faced, it can even lead to the withdrawal of these charges at a later stage (Sigsworth 25). The apposite response of the CJS is therefore vital to ensure that it plays an effective part in reducing the sexual violence problem; to ensure that perpetrators of such crimes are punished and attitudes must encourage the victims to speak out and seek justice.

The conviction rate for perpetrators of sexual violence is generally an appropriate performance measure of the CJS (The White House Council on Women and Girls 5, 17). Despite having one of the highest rates of rape in the world, with an estimated 500 000 rapes occurring annually, only one in nine are reported and for every 25 men tried for rape, 24 will walk free – “a poignant reminder of the aggressive masculinity that colours the social and political landscape of South Africa” (Smith par 6).

Reportedly, the overall conviction rate for sexual offences is between 4 and 8 percent of all reported cases (Smythe par 1). These figures differ depending on each of the eleven provinces (SA Law Commission 10). A worrying factor is that it was reported by SA's National Victims of Crime Survey that the proportion of rape victims who report their victimization to the police decreased by 21percent between 2011 and 2014 (ISS par 10). Various research studies have reported that depending on the locality, “as few as one in thirteen rapes are reported to the police” (ISS 11). Between 58 and 68 percent of cases reported to the police did not even make it to court; whilst between 15 and 18 percent of those cases were withdrawn (SA Law Commission 18). These statistical data seem to provide proof that sexual violence is one of the easiest crimes to get away with in SA (Sigsworth 24).

At a provincial level, it was found that there was a significant attrition of rape cases in the Gauteng province alone (Vetten et al, *Tracking Justice* 43). Key findings from this research include, among others; that half the cases in the sample resulted in arrests; trials commenced in 17.3 percent of cases; a conviction for any crime resulted in just over 1 in 20 cases; and a conviction for rape was secured in just 4.1 percent of cases (51). Of those cases that resulted in convictions, 15.6 percent of perpetrators were sentenced to less than the mandated 10 years minimum sentence; 41 percent of perpetrators were eligible for a life sentence under South African law, a life sentence was handed down in only three cases (54).

This translates to a chronic failure by the CJS to properly investigate and prosecute sexual offences. A CJS that consistently fails to secure convictions has little credibility and “the failure to effectively hold perpetrators of crimes accountable for their actions fuels a perception by criminals of impunity from the law” and remains one of the primary reasons for the increase in this crime (SA Law Commission 27).

Conclusion and Recommendations

Sexual violence is a human rights violation that cannot be condoned for any reason. It must never be legitimated by a culture of silence and impunity, either by government or society (Kruger 2). It is the legal and social obligation of every person to prevent sexual violence whilst at the same time maintaining its’ wrongfulness and unacceptability in terms of traditional culture, social values and the law.

A discussion on the laws in SA above has shown that it has developed one of the most progressive legislative frameworks to protect women and children against sexual violence but in spite of this, they have one of the highest rates of sexual violence in the world (United States Government 2). Laws remain an essential component in addressing the various forms of sexual violence as it sends a message that certain acts are unacceptable (WHO *Promoting Gender Equality to Prevent Violence against Women* 4). As important as laws are other aspects of society need addressing to ensure that the high rates of sexual violence does not continue. It is also clear that sexually violent behavior is strongly influenced by cultural and social norms; so efforts to prevent sexual violence must take into account the effect that social pressures and expectations have on individual behavior. The goal of sexual violence prevention is simple enough, to stop it from happening in the first place, but the resolutions remain just as complex as the problem itself (Centers for Disease Control par 1).

Any factors, including but not limited to social and cultural norms, that encourage sexually violent acts are in violation of clearly established legal principles. An imbalance is consequently created between the legal sphere and the socio-cultural sphere. Interventions that challenge such social and cultural norms that are supportive of sexual violence, whilst bridging the gap between legally acceptable and unacceptable behavior, must be adopted (WHO *Changing Cultural and Social Norms Supportive of Violent Behavior* 6). This means that any attempts to ensure reform must therefore be adapted to local conditions or aimed at “internal cultural transformation” (Tamale 176). By changing convictions and adopting interventions aimed at integrating human rights and constitutional values into culture, social change can be achieved (UNFPA *Integrating Gender, Human Rights and Culture in UNFPA Programmes* 5). Cultural sensitivity towards gender is an essential component for an integrated human rights approach as “the objective of an integrated approach is to build ownership of the human rights agenda within communities....” (UNFPA *Integrating Gender, Human Rights and Culture in UNFPA Programmes* 3).

Such changes can only happen gradually. However solutions for these changes must be approached from the aspect of those issues that can be challenged almost immediately whilst giving rise to medium and long term goals. Each of these time periods is interrelated to the extent that the eventual goal of ending sexual violence must start with immediate strategies.

The first step towards this is taking note that there is an obvious absence of knowledge regarding what does constitute sexual violence, what is illegal and what people’s rights are (Jewkes et al, *Preventing rape and violence in South Africa* 1-2). Stereotypes of women and men’s behavior has found it’s sanctioning in noticeably established cultural traditions and this effectively

encourages more sexual violence (Gurvinder and Bhugra 248). Debates that challenge stereotypes that give men power over women must be encouraged.

Changing social norms and beliefs are a critical prevention strategy because of its power in influencing behavior (Davis, Parks and Cohen 15). Within a human rights based approach cultural sensitivity is required and this means that one has to “seek elements in the surrounding culture that support efforts to eliminate.....(sexual violence) while also seeking to transform norms that violate women’s and girls’ human rights” (Shepard 10). This approach recognizes that providers of knowledge and prevention programmes may themselves come from cultural settings that condone such behavior. Consequently, special training is required to transform these cultural norm ideologies in order to reinforce positive norms that will help eliminate sexual violence (Shepard 11).

To change cultural attitudes and beliefs around gender issues require both short and long-term interventions. As a matter of immediacy current norms must be replaced with standards that promote respect, safety, equality, healthy relationships and sexuality. To address the knowledge-disparity (Leoschut xv), attitudes and behaviors at the community level becomes important and this translates to a “primary prevention approach through a community-wide solution” (Davis, Parks and Cohen 5). The Centers for Disease Control and Prevention (CDC) defines primary prevention of sexual violence as:

“.....population-based and/or environmental and system-level strategies, policies, and actions that prevent sexual violence from initially occurring. Such prevention efforts work to modify and/or entirely eliminate the events, conditions, situations, or exposure to influences (risk factors) that result in the initiation of sexual violence and associated injuries, disabilities, and deaths.” (CDC, *Sexual violence prevention: beginning the dialogue* 1).

Primary prevention focuses not only on individuals but on the community and societal factors that increase the risk for sexual assault and therefore a holistic approach to preventing sexual violence is advocated (Curtis 5).

These measures are directly linked to a long term strategy of creating and sustaining healthy norms in communities through on-going community engagement projects (Sigsworth 21). Comprehensive prevention strategies should address factors at each of the levels that influence sexual violence—individual, relationship, community and society—thereby addressing the root causes of this crime (Centers for Disease Control par 2).

Respect for ones-self and others is the foundation upon which intervention strategies can be successfully developed (Peterson, Bhana and McKay 1247). Therefore at an individual level, inculcating values of respect for oneself in both sexes is key. In order to develop effective strategies, intervention programmes must be aimed at both sexes whereby the community members themselves are engaged with (Who, *Promoting gender equality to prevent violence against women* 3). The attitudes that lead to violent behaviour towards women and girls are deeply ingrained in society therefore the education of young men, boys and girls (Leoschut 133) to change attitudes, is a crucial step to ending violence against women.

It is very important to change adolescent dating violence and gender-role norms. At the relationship level, intervention strategies must be designed to prevent the initiation of emotional, physical and sexual abuse in adolescent dating relationships (Centers for Disease Control and Prevention, *Sexual Violence: Prevention Strategies* par 5). Such interventions must be aimed at

dating conflict-resolution skills that also establishes values of respect and dignity (Centers for Disease Control and Prevention, *Sexual Violence Prevention: Beginning the Dialogue* 3).

The promotion and encouragement of victim and perpetrator beliefs in asking for help and seeking help through community resources must be encouraged. At a community level, collaborative work is crucial for entire families, as well as traditional authorities who are widely regarded and respected as the “custodians of culture and tradition” (United States Government 26). Intervention programs must include awareness-raising, encouraging people to report instances of abuse and very importantly, actively engaging people in relevant ways that encourage positive behavior and change (Sigsworth 29).

The promotion of gender equality is a key aspect in violence prevention (WHO *Promoting Gender Equality to Prevent Violence against Women* 13). Therefore, programs must be aimed at preventing sexually violent behavior. Such interventions must be designed to correct misunderstandings in normative beliefs about sex and rape and in changing these harmful attitudes toward rape. There is a desperate need to increase the knowledge elements of what constitutes sexual consent and the roles affecting notions of gender masculinity. Knowledge about forced sex and what constitutes forced sex, must be disseminated to the people affected and subsequent legal procedures explained and taught at schools and tertiary institutions (Centers for Disease Control and Prevention, *Sexual Violence: Prevention Strategies* par 8).

At a societal level this can come to mean a classroom-based approach where schools become a part of the solution for obviously confused youths (Espelage 52). A curriculum designed to promote positive social attitudes, a negative view of dating violence and the promotion of non-violent behaviors must be included in such classroom teachings. Strategies aimed at reducing favorable beliefs and behaviors with regard to forced sex must be identified in these offerings (Centers for Disease Control and Prevention, *Sexual Violence: Prevention Strategies* par 8). Both young boys and girls must be educated around these aspects and close attention must be paid to the lessons that they absorb about the meaning of masculinity. For boys and young men specifically this is an opportunity for them to be part of the change “in a society that needs to see a dramatic cultural shift in the very idea of what it means to be a man” (Bates par 12).

While it is difficult to effect changes in norms and culture as a matter of immediacy, legislation that is rigorously enforced can go a long way towards sending a send clear message to society that such violent behavior is not acceptable under any circumstances. A sustainable long-term strategy for the eradication of sexual violence will be feasible when both reactive and preventative measures are improved. The effective response of the CJS to sexual offences has been curtailed by inefficiencies and conservative attitudes. To change these perceptions a compassionate, open-minded response to victims of violence where there is a clear message that violence is never deserved must be adopted (Interagency Gender Working Group of USAID 26).

Measures must be taken to systematically transform the legal system in order to enable it to better deliver on the promises of equality enshrined in the *Constitution*. These types of measures can create a significant encouragement for the reporting of sexual violence offences and allow authority figures to be able to identify survivors of sexual violence and to provide appropriate referrals and deliver quality care (United States Government). The provision of uniformly high quality services relating to accessing facilities and services for victims of sexual violence will create the required reliability in the CJS.

Holding individual perpetrators accountable and providing quality services for victims of sexual violence will go a long way towards achieving faith in the CJS (SA Law Commission 6). Support must be provided to the justice sector institutions to strengthen the prosecution and

adjudication of sexual offences (United States Government 15). This can include efforts like capacity building and technical assistance for more effective management of cases of sexual violence; specific analysis of judicial decisions related to sexual violence and gender inequality; joint training workshops for prosecutors and justice sector actors and an initiative within the judiciary on changing male norms around these offences (United States Government 16). There should be mandatory training in, for example the South African Police College level, to integrate education on sexual violence and service delivery (United States Government 17). Without these basic educational and capacity building initiatives the secondary victimization of victims by poorly trained polices and other service providers in the CJS will continue.

In conclusion it must be iterated that the increase in sexual violence can be attributed to the fact that legislation alone cannot address the root causes of violence against women. A strong governmental stance and a more vigorous CJS response is needed to address these issues, since the ability of the law to eradicate sexual violence is restricted by the boundaries of cultural attitudes and biases (Smythe et al 162). What is required is a strong political will (Sigsworth 32), a steadfast commitment at all levels in the country and the determination, activism and practical action of individuals and communities (UN *Landmark' Promises, Political Will* paras 1-2) to reduce the rates of and prevent sexual violence against women.

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