



Towards a policy on naming and shaming of sex offenders in Botswana: Lessons learnt from
South Africa and United States of America

By

KAONE SOLOMON

SUBMITTED TO THE UNIVERSITY OF CAPE TOWN

In partial fulfilment of the requirements for the degree

LLM (CONSTITUTIONAL AND ADMINISTRATIVE LAW)

(Word Count: 20025)

Supervisor: Professor Jameelah Omar

Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the Masters in Constitutional and Administrative Law in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

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DECLARATION

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ACKNOWLEDGEMENTS

This dissertation is a testimony of my academic sweat, toil, unflinching commitment, perseverance and attainment. The completion of this dissertation is a result of the contribution of many individuals whose names may not be enumerated, but they directly and indirectly shared with me their talents and wisdom. My heartiest gratitude goes to my supervisor, Professor Jameelah Omar for her guidance, support, patience, and continuous supervision.

I am forever grateful to Bojotlhe Butale, Bonno Theleso, Refilwe Nasha and Thato Outlule for showing the true measure of their friendship when I needed them the most. Without their ongoing support I could not have made it through this challenging time. I would also like to acknowledge the invaluable input of my lovely siblings, Patrick, Patricia, Keemenao and Moses for their prayers, support and encouragement. To everyone who has supported and prayed for me in the pursuit of my academic exercise, thank you. I appreciate every effort you have invested in me.

Special recognition is extended to the Government of Botswana who saw it befitting and necessary to invest in its human capital as stipulated in Pillar 1 of Vision 2036. May this dissertation be helpful in informing future policies and legislation for the Republic of Botswana.

Above all, I return all the glory to the Almighty God. His endless grace and mercy have seen me through this dissertation. I thank Him for the wisdom, knowledge and strength. May your works in my life continue to be glorified.

DEDICATION

I would like to dedicate this dissertation to my beloved parents; my late father, Gosetsemang Masome Solomon who has always visualised my success. Although you are not physically here to give me strength and support, your vision for my life has always been the driving force. You are forever present in my heart and I can hear you cheering me on every step of the way.

My mother, Mpontsheng Solomon who has always allowed me to carry on my aspirations, stood by my side and sacrificed her life for me to have a great life.

I hope I have made both of you proud!!!

To all the survivors of sexual violence, this dissertation is also dedicated to you. What has been done to you is despicable and you did not bring it upon yourself. My prayer for you is that you may discover and experience the God of all grace, that He may heal you, give you the strength to forgive and find a way for your pain to be turned into purpose.

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LIST OF ABBREVIATIONS

AWA	Adam Walsh Child Protection and Safety Act of 2006
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CRC	Convention on the Rights of the Child
HIV/AIDS	Human Immunodeficiency Virus/Acquired Immune Deficiency Syndrome
ICCPR	International Covenant on Civil and Political Rights
NRSO	National Register for Sex Offenders
SMART	Sex Offender Sentencing, Monitoring, Apprehending, Registering and Tracking
SORNA	Sex Offender Registration and Notification Act
UNAIDS	United Nations Programme on HIV/AIDS
USA	United States of America
WHO	World Health Organisation

CHAPTER 1: INTRODUCTION

On June 28, 2017, an alleged Physical Education teacher, after giving other learners their reports in a lesson, instructed a student to follow him to his office to collect hers. On arrival it was reported that he instructed the learner to close the office door and he went on to fondle and sexually assault the little girl. The suspect was also linked to a similar case in Francistown in which he raped a mentally disturbed 11-year-old girl.¹

Unbeknown to the school and the Gaborone community, the teacher was among the many sex offenders roaming the streets. This is one of the many sad stories in Botswana of dangerous sex offenders who have either escaped the reach of justice or having served their terms, are released from jail and continue to live among unsuspecting communities and resume their sexual attacks. The President of Botswana, Dr Mokgweetsi Eric Keabetswe Masisi in response to the public outcry for greater justice and in a bid to create safer communities, has called for the naming and shaming of sex offenders through the enactment of sex offender registration laws (hereinafter referred to as registration laws).² Whether registration laws can be a progressive and an effective solution to sexual violence in Botswana is the focus of this dissertation.

Sexual violence is one of the most prevalent human rights violations in the world. The WHO defines sexual violence as –

any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or 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.³

¹ Pini Bothoko 'Sex crimes against minor grave concern' Mmegionline, 4 Friday 04, August 2017 available at <https://www.mmegi.bw/index.php?aid=70734&dir=2017/august/04> , accessed on 16 January 2019.

² State of the Nation Address by His Excellency Dr Mokgweetsi E. K. Masisi President of the Republic of Botswana: To the First Meeting of the Fifth Session of the Eleventh Parliament, 5 November, 2018 at page 68 para 227, available at <https://www.parliament.gov.bw/index.php/files/37/New-category/1016/STATE-OF-THE-NATION-ADDRESS-2018.pdf>, accessed on 15 August 2019.

³ World Health Organisation. (2002). Sexual Violence. In Report on Health and Violence at 149, available at https://www.who.int/violence_injury_prevention/violence/global_campaign/en/chap6.pdf , accessed on 17 July 2018.

According to WHO, sexual violence encompasses –

rape by strangers, marital rape or rape in dating relationships, systematic rape during armed conflict, sexual harassment, sexual abuse of mentally or physically disabled people, sexual abuse of children, indecent assault, female genital mutilation and obligatory inspections for virginity, forced prostitution and trafficking of people for the purpose of sexual exploitation.⁴

In the past decade, sexual violence has been a significant problem in Botswana.⁵

According to statistics from the Botswana Police Service, every month approximately 173 people get raped across the country.⁶ On the other hand, Childline Botswana also revealed that, the current rates of sexual offences committed against children in the country are alarming.⁷ The Gender-Based Violence Indicator Study Botswana (hereinafter referred to as GBV Indicator Study), shows that gender-based violence which includes sexual violence⁸ “is the most flagrant violation of human rights in Botswana at the present time.”⁹

For a country of a population of approximately two million and with the second highest HIV/AIDS¹⁰ prevalence rate in the world, sexual violence according to the Botswana National Relationship Study (hereinafter referred to as the BNRS), is also a major health problem as it contributes to the prevalence of HIV/AIDS.¹¹ Although the WHO¹² has revealed that sexual violence against men and boys is a significant problem, sexual violence in Botswana is frequently directed towards women and girls and is perpetrated most often in the form of rape¹³ and

⁴ World Health Organisation op cit (n3) 149.

⁵ According to Botswana Police Service Statistics, between 23 December 2018 to 3 January 2019, 109 rape cases were reported.

⁶ The Gazette Reporter ‘Rape Nation, The Botswana Gazette’ Wednesday 12 July 2018 available at <https://www.thegazette.news/news/rape-nation/23316/> accessed on August 2018.

⁷ Thato Chwaane ‘Paedophiles Wreak Havoc Worldwide’ Mmegi 4 September 2007 available at <http://www.mmegi.bw/index.php?sid=1&aid=39&dir=2007/September/Tuesday4/> accessed on 14 July 2018.

⁸ According to WHO, gender-based violence takes many forms and includes sexual exploitation, rape, sexual assault and abuse, sexual harassment and discrimination, forced sex and other types of sexual violence, trafficking of women and girls, domestic violence, forced prostitution, and denial of rights.

⁹ Mercy Machisa and Roos van Dorp, *The Gender-Based Violence Indicator Study Botswana* (2012) at 11.

¹⁰ UNAIDS (2017), ‘Ending AIDS: Progress towards 90-90-90 targets reports that Botswana has the third highest HIV prevalence in the world at 21.9 per cent.

¹¹ The Botswana National Relationship Study (2018) at 31. The BNRS is a follow up to the Gender-Based Violence Indicators Study conducted in 2012.

¹² World Health Organisation op cit (n3) 154.

¹³ An analysis of data provided by the Botswana Police Service infers that in the year 2017 an average of 40 women were being raped in a week.

defilement.¹⁴ The Botswana Police Service statistics show that rape and defilement of young girls accounts for the greater percentage of sexual violence cases in the country.¹⁵

In his speech at the National Launch of the 2018 Commemoration of 16 days of Activism Against Violence on Women and Children, the President of Botswana, Dr Mokgweetsi Eric Keabetswe Masisi was disturbed by these findings on gender-based violence and vowed to fight against it when he stated as follows -

“I am deeply disturbed that there is no week that passes without the media reporting stories of gender- based violence around the country. These undesirable incidents should challenge us to come up with strategies to eliminate violence at all levels in our communities.”¹⁶

The Government of Botswana has put in place different policies, legislation and other prevention strategies to alleviate sexual violence, but the Botswana Police Service statistics show increasing cases of sexual violence. Towards the aim of addressing the problem of sexual violence in his State of the Nation Address Speech, the President Dr Mokgweetsi Eric Keabetswe Masisi stated as follows -

“In view of the increasing cases of rape, defilement, incest and other sexual offences, especially against children, I have directed that the drafting of the Sexual Offences Bill be given a priority. Among its provisions would be stiffer penalties against these crimes and the establishment of a Sex Offender Register, which will be a record of the names and particulars of all persons convicted of a sexual offence.”¹⁷

He stated further that sex offenders will also be prohibited from “working or interacting with children, vulnerable persons or institutions dealing with children or vulnerable persons.”¹⁸ The aim of this policy is to alleviate and ultimately end sexual violence so as to create safer communities.¹⁹

¹⁴ Recently the age of sexual consent was raised to 18. (Penal Code (Amendment) Act No. 21 of 2018.)

¹⁵ According to Pini Bothoko op cit (n1), statistics shows that from January to May 2017, the Botswana Police Service recorded 171 cases of defilement.

¹⁶ Remarks by his Excellency Dr Mokgweetsi E. K. Masisi on the occasion of the National Launch of the 2018 Commemoration of 16 days of Activism Against Violence on Women and Children, 25 November 2018, at para 10 available at <https://www.gabzfm.com/index.php/gabzfm-news/>, accessed on 15 August 2019. The Parliament of Botswana passed a motion to create a sex offender registry on the 1st December 2017.

¹⁷ State of the Nation Address op cit (n2) 68 para 227.

¹⁸ State of the Nation Address op cit (n2) 228.

¹⁹ Aubrey Lute ‘Sex Offenders to be named and shamed’ The WeekendPost, 16 January 2018 available at <https://weekendpost.co.bw/wp-news-details.php?nid=4475> accessed on 4 January 2019.

It is against this background that this dissertation discusses whether registration laws can be an effective solution to the sexual violence crisis in Botswana. This dissertation carries out a comparative analysis to establish whether registration laws have really worked in South Africa and the United States of America (USA) to address the sexual violence crisis in these countries and whether it will likely do the same for Botswana. To the best of my knowledge, there has been no research done on whether sex offender registration can assist with alleviating the problem of sexual violence in Botswana. This dissertation therefore seeks to address this gap in literature by commenting on whether the proposed law will work as anticipated by legislators.

1.1 The Concept of Sex Offender Register

Sex offender registers, as will be discussed in detail in Chapter 3, are tools that enable the public and law enforcement agencies to know about and monitor the identities, locations, and behaviours of convicted sex offenders in the community.²⁰ They provide a record of information of convicted sex offenders.²¹ The reason for the register is to provide the authorities with a database of information to help monitor convicted sex offenders, assist in the investigation of new allegations and to deter sex offenders from reoffending.²²

Over the past two decades, several countries that experienced high levels of sexual violence enacted registration laws.²³ According to Lara Geer Farley, the highly publicised and horrific crimes such as rape, abduction, abuse and murder committed against children have led countries like the USA to introduce stricter punishments like registration laws to create safer communities.²⁴ From the 1990s the USA has enacted a series of laws such as the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act²⁵, Sex Offender Registration and Notification Act²⁶ and the Adam Walsh Child Protection and Safety Act.²⁷ The enactments were

²⁰ Richard Tewksbury ‘Sex Offender Registries as a Tool for Public Safety: Views from Registered Offenders’ (2006) *Western Criminology Review* 7(1), 1–8 at 1.

²¹ A sex offender is a person who has been convicted of a sexual offence.

²² Elizabeth J. Letourneau et al (2006) Evaluating the Effectiveness of Sex Offender Registration and Notification Policies for Reducing Sexual Violence against Women, Final Report for National Institute of Justice Grant Award at 5.

²³ These countries include the United States of America, United Kingdom, South Africa and Canada.

²⁴ Lara Geer Farley ‘The Adam Walsh Act: The Scarlet Letter of the Twenty-First Century’ *Washroom Law Journal*: vol 47, no 2, at 472.

²⁵ 42 U.S.C. § 14071 (2006).

²⁶ 42 USC 151 16918.

²⁷ 42 USC 16901 (2006).

as a result of the public outrage urging the need to curb the rate of the sex crimes which were committed against children.²⁸ South Africa followed suit in 2007 by amending the Criminal Law (Sexual Offenders and Related Matters) Act to introduce the National Register for Sex Offenders.²⁹ The Government of Botswana is also desirous of taking the same route.

1.2 Background of the Study

The front page of the January 16, 2018, WeekendPost newspaper published an article entitled “Sex offenders to be named and shamed”.³⁰ According to the article, because of the sexual violence crisis in Botswana, the Gender Affairs Department, the Botswana Police Service and other relevant stakeholders were at the initial stages of consultations on enacting a law to have the names of sex offenders registered and published.³¹ The Assistant Minister of Local Government and Rural Development Ms Botlogile Tshireletso was quoted as saying, “I want this law to pass and be implemented like yesterday, we need to protect our elderly and young children and even the able-bodied women against sex offenders who have made it a habit these days to rape and assault women.”³²

The Assistant Minister stated further that Botswana has observed an increase in sex crimes where people between the ages of 3 years to 90 years are sexually assaulted and therefore the country must act against this cruelty by naming and shaming these sex offenders.³³ According to the Assistant Minister, “a sex offender register will allow the police to track down re-offenders faster thereby increasing the rate and speed at which they are brought to justice and also, act as a deterrent to potential sex offenders.”³⁴

1.3 Methodology of the Research

²⁸ Farley op cit (n19) 473.

²⁹ Act 32 of 2007.

³⁰ Aubrey Lute op cit (n19).

³¹ Ibid.

³² Ibid.

³³ Aubrey Lute op cit (n19).

³⁴ Aubrey Lute op cit (n19).

The methodology employed in this study is desktop research based on literature review of primary sources which includes case law on sexual violence. Secondary sources will be journal articles, statistics on sexual violence reports and books relevant to the topic. The study will also look at various pieces of legislation on sex offender registration. Both primary and secondary sources from Botswana, South African and the USA are relied on.

1.4 Dissertation Structure

The dissertation will take the following structure –

Chapter 2 focuses on the social and legal context of sexual violence in Botswana. It provides a comprehensive picture of the problem of sexual violence in Botswana by looking at its prevalence, its drivers and the reasons for underreporting and withdrawing of sex crimes. The Chapter will further look at the legal framework to establish what legislative steps Botswana has taken in terms of alleviating the problem of sexual violence. Chapter three looks at the history of sex offender registers, the rationale for sex offender registration and the implications of enacting such laws. This will be followed by a comparative study between the South African and USA registration laws to establish whether the introduction of these laws have been effective in alleviating sexual violence.

Chapter 4 looks at lessons learnt and best practice from a study undertaken in Chapter 3 on the South African and USA registration laws. Lessons learnt from the two countries are then used to make an analysis of whether the introduction of these laws could help address the problem of sexual violence in Botswana. Conclusions are drawn in Chapter 5 and recommendations are made in terms of whether Botswana should adopt such an approach as well as the model or peculiarities a Botswana model would need to focus on.

CHAPTER 2: SEXUAL VIOLENCE IN BOTSWANA: A BRIEF CONTEXT

2.1 Introduction

The purpose of this chapter is to paint a comprehensive picture of the problem of sexual violence in Botswana by looking at its prevalence, its drivers and the reasons for the underreporting and withdrawing of sex crimes. This discussion is carried out with a view to assess whether the proposed naming and shaming policy will achieve its intended purpose of alleviating the problem of sexual violence. The Chapter will further look at the legal framework to establish what legislative steps Botswana has taken in terms of curbing sexual violence and to further justify the findings made in this Chapter that despite numerous existing legislation, there is still a lot that needs to be done to address the problem of sexual violence in the country.

2.2 Prevalence of sexual violence in Botswana

Sexual violence amongst societies in Botswana is an escalating social problem which impacts the victims and their family members in devastating ways.³⁵ As can be seen from figure 1.1 below, sexual violence in Botswana takes different forms such as indecent assault, incest and rape.³⁶ An analysis of data provided by the Botswana Police Service infers that in the year 2017, an average of 40 women were being raped in a week.³⁷ These findings from the Botswana Police Service corroborate the findings of the GBV Indicator Study, that sexual violence is one of the most pressing social and human rights issues Botswana is facing at the moment.³⁸

Sexual violence is a major concern to the Government, Non-Government Organisations, activists and the public as a whole. This is evidenced by the fact that the Botswana Vision 2016 under the pillar a Safe and a Secure Nation stated as follows –

³⁵ Figure 1.2 shows 11.1 per cent increase in the average number of rape cases and 9.5 increase of defilement cases between the years 2014 and 2017. Botswana Police Service also revealed that 109 rape cases recorded from 21 December last year to 3 January 2019, Wave of Rape case has Batswana Women's Knickers in a Twist, Sunday Standard, Tuesday 23, April 2019.

³⁶ Sexual harassment is regarded as misconduct and is provided for under the Public Service Act. Providing for sexual violence within different laws means that it is difficult to get a comprehensive overview of the nature and extent of the offence. Rape within marriage is also not criminalised.

³⁷ The Gazette Reporter op cit (n6).

³⁸ GBV Indicator Study op cit (n9)11. Sexual violence violates a person's human rights such as protection against inhuman treatment, the right to life, and liberty and security of person.

“By the year 2016, violation of the physical well-being and human rights of individuals will have been eliminated. The abuse of spouses and children will be completely eradicated. The public will have sufficient confidence in law enforcement agencies and in public protective services to report crimes. Law enforcement procedures will have been strengthened, and the training of national and local police forces will have been integrated and developed.”³⁹

Following the end of Vision 2016 on the 30th September 2016, Botswana set for herself Vision 2036 which follows and builds on Vision 2016. Vision 2036, running under the theme “Achieving Prosperity for all”, states that-

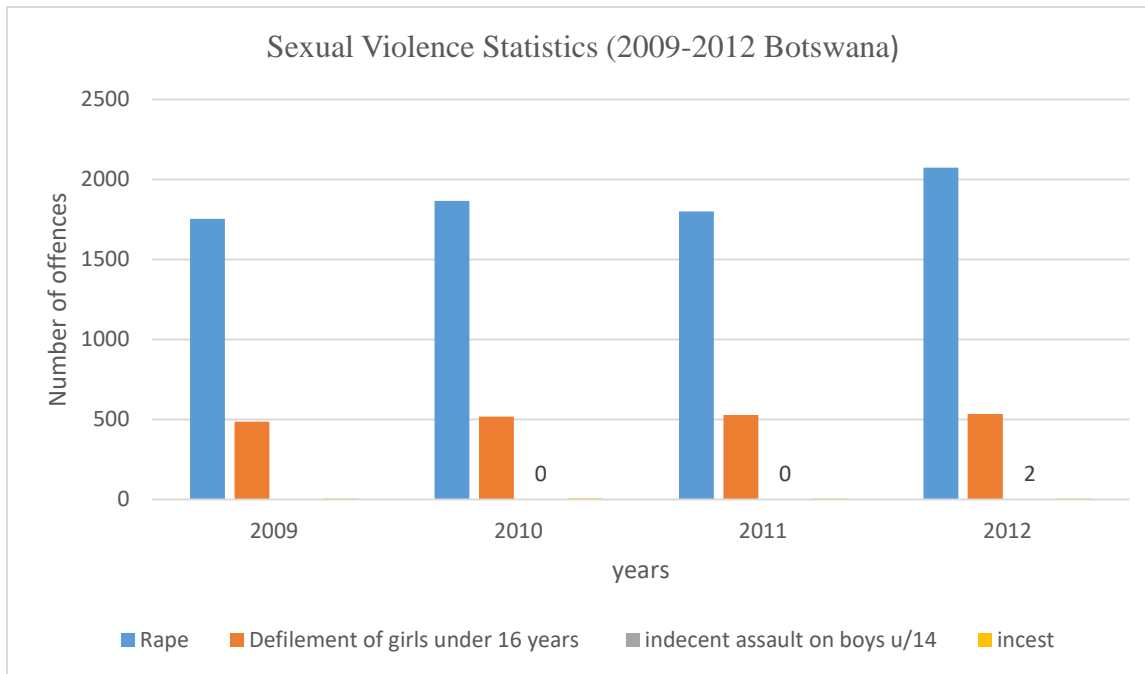
“Botswana will domesticate human rights treaties that aim to promote gender equality, empower women and make deliberate efforts to end gender discrimination and gender-based violence.”⁴⁰

Despite the Government’s efforts and goals as set out in these Visions, sexual violence remains a threat to the attainment of these Visions. The data below from the Botswana Police Service shows the magnitude of sexual violence in the past ten years.

Figure 1.1 Magnitude of sexual violence in Botswana 2009 -2012

³⁹ Vision 2016 is a document that defines the aspirations and goals of the people of Botswana and from which National Development Plan is derived from. available at <http://unpan1.un.org/intradoc/groups/public/documents/cpsi/unpan033260.pdf>, at 10 accessed on 10 June 2019.

⁴⁰ Vision 2036 is a transformational agenda that defines the aspirations and goals of Batswana, available at http://www.statsbots.org.bw/sites/default/files/special_documents/Vision%202036_0.pdf at 21 accessed on 10 June 2019.



Source: Botswana Police Service⁴¹

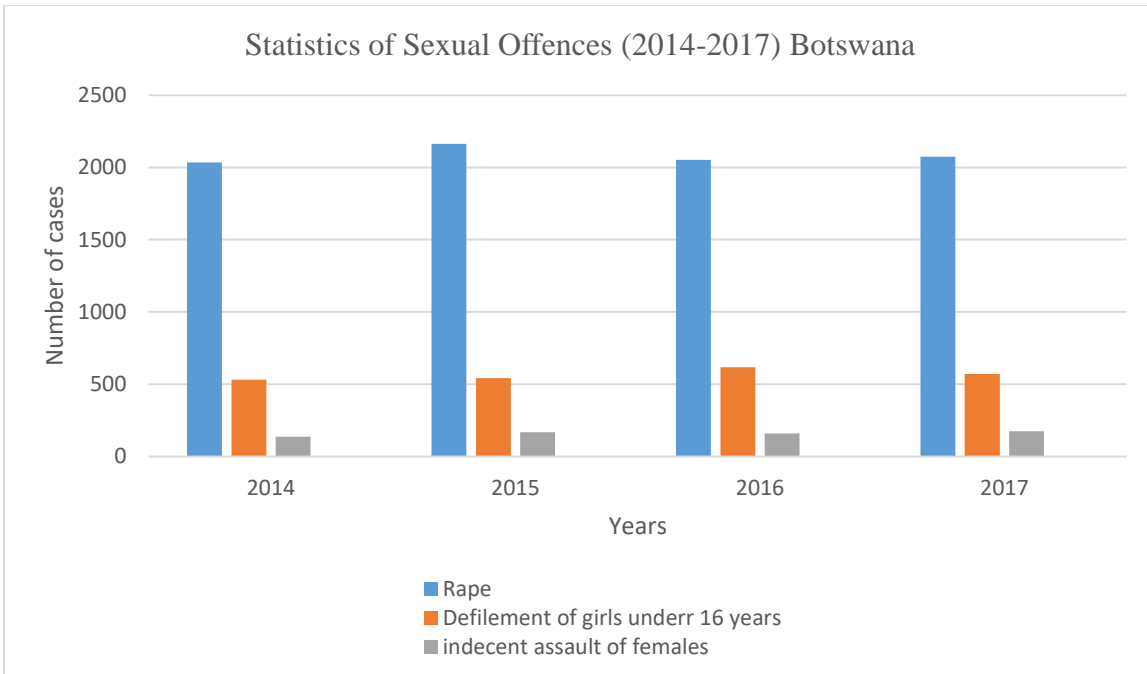
Figure 1.1 indicates the gradual and steady increase in number of cases between the years of 2009 and 2012. The Botswana Police Service reported an average of 1873 rape cases a year, with the lowest number of cases (1754) being reported in 2009, and the highest number of cases (2073) being reported in 2012.⁴² The average number of reported cases for defilement of girls below the age of 16 was 517 per year between the years 2009 and 2012 with the lowest number of cases (487) being reported in 2009 and the highest number of cases (534) being reported in 2012.

Figure 1.2

Magnitude of sexual violence in Botswana 2014-2017

⁴¹ The Baseline Assessment Report on Gender-Based Violence in (Sebina, Ghanzi, Kasane and Ramotswa) (2013) (hereinafter referred to as the Baseline Assessment Report) at 13 available at <http://www.kagisanowomenshelter.org.bw/phocadownload/BaselineAssessmentReportonGenderBasedViolence.compressed.pdf> accessed on September 2018.

⁴² Rape here does not include marital rape as the law of Botswana does not recognise marital rape.



Source: Botswana Police Service⁴³

Figure 1.2 shows that Botswana has recorded a significant number of rape cases in the year 2015 and of defilement in 2016. The rape statistics as compared with Figure 1.1 indicate a 11.1 per cent increase in the average number of rape cases reported a year, between the years of 2014 and 2017. The lowest number of cases (2034) were recorded in 2014 and the highest (2163) in 2015. The average number of defilement cases also increased by 9.5 per cent from 517 to 566 reported cases a year between the years 2014 and 2017 with the highest number (617) being reported in 2016.

Even though sexual abuse in Botswana is mostly directed at women and girls, it is worthy to note that boys and men also suffer sexual violence.⁴⁴ According to Socio-Economic Factors Contributing to Girl Child Abuse Report, there is a vast underreporting of sexual abuse against boys and men.⁴⁵ The report posits that this is attributable to the Tswana culture that does not see male children as abuse victims as traditionally men are seen as defenders and protectors.⁴⁶

⁴³ Graph drawn from statistics received from the Botswana Police Service, a copy which is kept by the author.

⁴⁴ Socio-Economic Factors Contributing to Girl Child Abuse in Botswana available at https://www.crin.org/en/docs/Botswana_CIDA_Full_Report.pdf, at 15, accessed on 10 September 2018.

⁴⁵ Ibid.

⁴⁶ Socio-Economic Factors Contributing to Girl Child Abuse in Botswana op cit (n44) 15.

2.3 Drivers of sexual violence in Botswana

For a naming and shaming policy to achieve its intended purpose, its framers should have a deep understanding of the root causes of sexual violence. A comprehensive policy aimed at preventing sexual violence, should focus on the root causes of sexual violence.⁴⁷ The purpose of looking at the drivers of sexual violence is therefore to shed light on social and cultural processes that contribute to its prevalence. This will inform my later discussion about whether naming and shaming policy will be effective in addressing the problem of sexual violence.

Sexual violence is driven by many factors operating in a range of cultural, social and economic contexts.⁴⁸ The WHO states that at the heart of sexual violence directed against women is gender inequality.⁴⁹ According to the GBV Indicator Study, patriarchal traditions and norms, education, unemployment, poverty, alcohol and drug abuse are the drivers of sexual violence in Botswana.⁵⁰ This paper will discuss the three drivers of sexual violence which are patriarchal traditions norms, poverty and alcohol abuse.⁵¹

2.3.1 Patriarchal traditions and norms

The Baseline Assessment Report identified Botswana as a patriarchal society.⁵² In terms of the Report, patriarchal norms and culture contributes significantly to sexual violence. The Report further defines cultural and societal norms as rules or expectations of behaviour within a specific cultural or social group.⁵³ Patriarchal societies distinguish women and men in role and status.⁵⁴ This distinction led to the unequal status between men and women with regard to legal capacity, property rights, inheritance rights including customary and guardianship rights to

⁴⁷ For example, by eliminating gender inequality at societal levels which perpetuates sexual violence.

⁴⁸ World Health Organisation op cit (n3) 174.

⁴⁹ Ibid

⁵⁰ GBV Indicator Study op cit (n9) 76.

⁵¹ Ibid.

⁵² The Baseline Assessment Report op cit (n41) 20.

⁵³ The Baseline Assessment Report op cit (n41) 29.

⁵⁴ The Baseline Assessment Report op cit (n41) 32.

children.⁵⁵ More also observed by the BNRS, sexual violence is prevalent in communities where men have more economic and decision making powers in the household than women.⁵⁶

Women in Botswana have been at the receiving end of sexual violence because of male dominance entrenched in societal attitudes and beliefs.⁵⁷ The BNRS also shows that acts of violence against women are perpetuated by culturally-based perceptions of resource provision and male authority.⁵⁸ Botswana has however made great strides in the fight against gender inequality. For instance, in 2004, the Government reviewed all laws that perpetuated gender inequality in order to empower women.⁵⁹ These laws will be discussed later in the Chapter.

The Tswana society and culture also supports and perpetuates beliefs that condone sexual violence.⁶⁰ According to the GBV Indicator Study, sexual violence committed by men is rooted in societal norms that promote male sexual entitlement and limit women's options to refuse sexual advances.⁶¹ Women in marriage are therefore expected to always be sexually available to their husbands.⁶² The BNRS reveals that 41 per cent of men and 43 per cent of women interviewed were of the view that a woman cannot refuse her husband's sexual advances.⁶³ This is so because they believe that if a man has paid bride price, he owns the wife and can have sex with her whenever he wants.⁶⁴ It therefore can be assumed that, if a wife was to attempt to report what she considers a sexual violation of her person this will not be met with kindness, as it is her cultural and matrimonial duty to cater to her husband sexually at his initiation or request.

2.3.2 Poverty

Poverty increases people's vulnerabilities to sexual violence.⁶⁵ According to Socio-Economic Factors Contributing to Girl Child Abuse in Botswana Report on Indices of Poverty, 22

⁵⁵The Botswana case of *Mmusi and Others v Ramantele and Others* MAHLB-000836-10 shows how custom and tradition may be deployed to undermine women's rights. In this case, custom was invoked to disinherit the applicants on the grounds of their gender. The High Court of Botswana ruled that a rule of customary law emanating from this custom was however unconstitutional.

⁵⁶ The BNRS op cit (n11) 75.

⁵⁷ The Baseline Assessment Report op cit (n41) 8.

⁵⁸ The BNRS op cit (n11) 75.

⁵⁹GBV Indicator Study op cit (n9) 11.

⁶⁰ The Baseline Assessment Report op cit (n41) 31.

⁶¹ GBV Indicator Study op cit (n9) 72.

⁶² Ibid.

⁶³ The BNRS op cit (n11) 11.

⁶⁴ The BNRS op cit (n11) 76.

⁶⁵ The Baseline Assessment Report op cit (n41) 29.

per cent of key informants identified factors such as low income and poor housing as factors associated with child sexual abuse.⁶⁶ This is because certain families who lack sufficient economic resources persuade their children to work as sex workers in order to meet daily basic commodities.⁶⁷ Further, the Baseline Assessment Report,⁶⁷ community conversations revealed that, parents, especially those living with their daughters, perpetuate sexual violence against them by encouraging their daughters, as well as female relatives, to engage in prostitution in order to earn income to support their family.⁶⁸ Women who are unable to meet their basic needs are also more at risk of sexual violence as they depend on their partners for financial support.

The Child Sexual Exploitation in Botswana Periodic Review Report, revealed that one of the main reasons for the increased incidence of child sexual exploitation in Botswana is poverty, unemployment and power dynamics.⁶⁹ Botswana has also been regarded as a source, transit and destination country for human trafficking.⁷⁰ The Report further notes that human trafficking appears to be the most significant manifestation of child sexual exploitation in Botswana affecting the poor, unemployed and children.⁷¹ Although boys are included, girls are highly vulnerable to being trafficked for prostitution.

Botswana has made significant strides in reducing poverty by introducing the National Strategy for Poverty Reduction.⁷² Since the inception of the Strategy in 2009, the proportion of people living below poverty datum line has reduced from 19.3 per cent between 2009 and 2010, to 16.3 per cent between 2015 and 2016.⁷³ Even though poverty is decreasing, its prevalence is still regarded as too high for a country with an upper middle-income status.⁷⁴ Poverty therefore

⁶⁶ Socio-Economic Factors Contributing to Girl Child Abuse in Botswana op cit (n44) 16.

⁶⁷ Socio-Economic Factors Contributing to Girl Child Abuse in Botswana op cit (n44) 16.

⁶⁸ The Baseline Assessment Report op cit (n41) 31.

⁶⁹ Child Sexual Exploitation in Botswana Submission for the Universal Periodic Review of the human rights situation in Botswana to the Human Rights Council (2017) at 4 available at unpan1.un.org/intradoc/groups/public/documents/cpsi/unpan033260.pdf accessed on 25 September 2018.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Mercy T. Magombeyi, Nicholas M. Odhiambo & Jamie Halsall (2017) 'Poverty dynamics in Botswana: Policies, trends and challenges' *Cogent Social Sciences* at 4.

⁷³ Ditiro Motlhabane 'Poverty Declining in Botswana but.' *The Patriot* on Sunday, Monday 22 January 2018. available at <http://www.thepatriot.co.bw/news/item/5159-poverty-declining-in-botswana-but.html> accessed on 14 May 2018.

⁷⁴ The Mmegi reporter 'World Bank sees Botswana poverty levels dropping' *Mmegionline*, Friday 12 May 2017 available at <https://www.mmegi.bw/index.php?aid=68781&dir=2017/may/12> accessed on 16 January 2018.

remains a causal factor linked to sexual violence against women and girl children. More efforts are needed to fully address it because if, for instance, family members continue to be economically dependent on the perpetrators of sex crimes against their daughters they will not report the sex crimes.

2.3.3 Alcohol Abuse

Alcohol abuse is recognised as a major social and public health problem in Botswana.⁷⁵ Excessive alcohol consumption is also associated with sexual violence.⁷⁶ According to the BNRS, 45 per cent of women and men reported experiencing sexual abuse after their partners had taken alcohol.⁷⁷ In another study conducted by the Women's Affairs Department, a greater proportion of men who consumed alcohol in the 12 months leading to the survey were more likely to perpetrate gender-based violence.⁷⁸ A research carried out by Motlaleng also indicates that incidence of rape, domestic violence and HIV/AIDS infections are associated with alcohol abuse.⁷⁹

According to the Desk Review of the Botswana National Alcohol Policy Report, the reasons advanced by 38 informants interviewed on the reasons for excessive drinking were unemployment, lack of alternative entertainment and that drinking is a customary activity across the country amongst others.⁸⁰ The Government has adopted a multi-faceted approach to address the excessive consumption of alcohol.⁸¹ The components of this approach include a National Strategy on Alcohol⁸², public education campaigns on the dangers of underage excessive alcohol

⁷⁵ According to the 2014 Global Status Report on Alcohol and Health, beer accounts for most of the alcohol consumed in Botswana, contributing 56 per cent of total alcohol consumed, wine 12 per cent, spirits 11 per cent and other brews 21 per cent.

⁷⁶ Desk Review of the Botswana National Alcohol Policy, Final Report, Submitted to Ministry of Health and Wellness Botswana (2017) at 46, available at <https://info.undp.org/docs/pdc/documents/bwa/5383%20undp%20desk%20review%20of%20the%20botswana%20national%20alcohol%20policy%20text.pdf> accessed on 21 July 2019.

⁷⁷ The BNRS op cit (n11) 71.

⁷⁸ The GBV Indicator Study op cit (n9) 14.

⁷⁹ Callaghan Motlaleng *An investigation into factors contributing to the failure of the alcohol levy to reduce alcohol abuse in Botswana* (MBA) North-West University (Mafikeng Campus) (2013) at 8.

⁸⁰ Desk Review of the Botswana National Alcohol Policy op cit (n76) 38 and 39.

⁸¹ Remarks by his Excellency President Ian Khama Seretse Khama at the World Aids Day Commemoration day at para 15 available at <http://www.add-resources.org/botswanas-president-alcohol-a-great-obstacle-to-hiv-aids-prevention.4532054-315781.html> accessed on 16 January 2018.

⁸² Desk Review of the Botswana National Alcohol Policy op cit (n76) 25.

consumption and consumption of alcohol while on medication or during pregnancy.⁸³ Other components include enhanced law enforcement, reduction in the hours of sale of alcohol and the introduction of a levy on alcoholic beverages.⁸⁴

As a result of the National Policy or Strategy on Alcohol in 2005 the Ministry of Investment, Trade and Industry enacted the Liquor Regulations.⁸⁵ The Regulations sought to reduce trading hours to curb alcohol abuse. The Control of Goods (Intoxicating Liquor (Levy) (Amendment) Regulations were also enacted in 2008 to introduce the 70 per cent alcohol levy on intoxicating liquor.⁸⁶ The levy was later reduced to 30 per cent. The imposition of higher prices of alcohol was adopted to manage alcohol consumption and curb social ills, including sexual violence, associated with excessive intake of alcohol. The Road Traffic Act was also amended to introduce stiffer penalties on drinking and driving.⁸⁷

Despite the existing intervention strategies, alcohol abuse persists.⁸⁸ Motlaleng argues that from his investigation alcohol levy alone is not the perfect measure to curb alcohol abuse as this has always shown to have minimal impact on social ills. This dissertation therefore proposes that an Impact Assessment and Evaluation research be conducted to provide an in depth understanding of the extent of the effectiveness of the alcohol abuse intervention strategies that are already in place.

2.4 Reasons for underreporting and withdrawing of sex crimes in Botswana

It is noteworthy that a sex offender register requires that a sex crime be reported, and the offender convicted. If sex crimes are not reported and if a report is later withdrawn, the intention behind the naming and shaming policy will be defeated. Sex crimes are extremely prevalent among societies in Botswana yet are vastly underreported. The exact prevalence of these offences may be

⁸³ Remarks by his Excellency President Ian Khama Seretse Khama op cit (n81) 15.

⁸⁴ Ibid.

⁸⁵ Statutory Instrument No.26 of 2008.

⁸⁶ The 30 per cent alcohol levy goes towards public education and rehabilitation programmes and law enforcement measures to fight alcohol abuse.

⁸⁷ Chapter 69:01.

⁸⁸ Refilwe P. Sinkamba 'Alcohol abuse and interventions strategies in Botswana and China: A Preliminary Study' PULA: *Botswana Journal of African Studies* (2015) Vol. 29, No. 1, at 159

higher than reported. According to the BNRS, between 2015 and 2016, one in nine women who were raped reported the matter to the Botswana Police Service.⁸⁹ The study further revealed that sexual assault is the least reported form of gender-based violence.

Several factors influence the concealment of sexual violence and these includes -

Feelings of shame and self-blame, societal attitudes and discrimination against those who have been victims of sexual violence, community taboos around sexual violence, reluctance towards or threats against reporting a family member or intimate partner, discriminatory police attitudes and the secondary victimisation experienced by sexual assault victims in the criminal justice system.⁹⁰

The major barriers to reporting of sex crimes in Botswana according to Seloilwe, concerns the role the perpetrator plays in the victim's life and the unwillingness of the victim to turn against someone important to the family in cases, where the perpetrator is a family member.⁹¹ This is because most of sexual violence in Botswana is committed by family members or persons that the victims depend on for financial support.⁹²

The BNRS indicates that parents are also economically dependent on the perpetrators of sex crimes against their daughters.⁹³ This has thus resulted in parents not reporting sex crimes committed against their daughters. The other commonly cited reason for underreporting relates to the culture of silence within the Tswana Society.⁹⁴ This culture of silence discourages victims from reporting sex crimes.⁹⁵ According to a GBV Indicator Study, parents are reported to be at the forefront in concealing cases of child sexual abuse.⁹⁶ Some of the reasons victims do not report sexual violence include the fear of stigma, shame, to be blamed⁹⁷ due to myths and beliefs held in

⁸⁹The BNRS op cit (n11) 104.

⁹⁰Romi Sigsworth 'Anyone can be a Rapist, An overview of sexual violence in South Africa', Centre for the Study of Violence and Reconciliation (2009) at 8.

⁹¹ Esther Salang Seloilwe et al 'Sexual Abuse and Violence among Adolescent Girls in Botswana: A Mental Health Perspective' (2009) *Issues in Mental Health Nursing*.

⁹²Pini Bothoko op cit (n1).

⁹³ GBV Indicator Study op cit (n9) 31.

⁹⁴ The BNRS op cit (n11) 101.

⁹⁵ The BNRS op cit (n11) 5, focus group discussion with men revealed that men do not report cases of violence they may be experiencing for fear of being labelled as weak.

⁹⁶ The Baseline Assessment Report (n41) 26.

⁹⁷ According to GBV Indicator Study op cit (n9) 82, communities often blame survivors for being promiscuous and seducing perpetrators. 30 per cent of men and 18 per cent of women agreed that in any rape case the victim has to be questioned for promiscuity. 29 per cent of men and 12 percent of women agreed that in some rape cases women wanted it to happen.

the community about victims of sexual violence and lack of confidence in the criminal justice system.⁹⁸

The BNRS further revealed that similarly where the victim reports a sex crime, they, more often than not end up withdrawing the case.⁹⁹ The study indicates that between the years 2015 and 2016, 2092 men and 5446 women withdrew cases of gender-based violence that they had reported to the Botswana Police Service.¹⁰⁰ The report noted further that the majority of cases withdrawn were rape cases.¹⁰¹ The reasons cited for withdrawal include, long court processes and reconciliation between victims and perpetrators amongst others.¹⁰² President Mr Mokgweetsi Eric Keabetswe Masisi, concerned about withdrawal of cases in his speech at the National Launch of the 2018 Commemoration of 16 days of Activism Against Violence on Women and Children said-

“I therefore encourage the victims of gender-based violence to desist from withdrawing criminal charges against their perpetrators, because doing so is fighting a losing battle against gender-based violence by all concerned including the Government.”¹⁰³

2.5 Botswana’s Legal Framework

In this Chapter, the existing legislation is analysed with a view to establish as to what extent the laws have been effective in curbing sexual violence in Botswana. As observed by the GBV Indicator Study, an effective legal framework plays an important role in addressing and preventing sexual violence.¹⁰⁴ An effective legal framework is therefore critical in prohibiting sexual violence and also making sure that perpetrators are held accountable for their actions thereby enabling survivors access to justice. What then is an effective legal framework? In Xanthaki’s view, “effectiveness in legislation can be defined as the extent to which legislation influences in the desired manner the social phenomenon which it aims to address.”¹⁰⁵ It is my understanding

⁹⁸The Baseline Assessment Report op cit (n41) 33.

⁹⁹ The BNRS op cit (n11) 103.

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

¹⁰² The BNRS op cit (n11) 104.

¹⁰³ Remarks by his Excellency Dr Mokgweetsi E. K. Masisi op cit (n16) para 27.

¹⁰⁴ GBV Indicator Study op cit (n9) 87.

¹⁰⁵ Helen Xanthaki *Drafting Legislation: Art and Technology of Rules for Regulations* (2014) at 7.

therefore that one of the ways that can indicate that the legal framework is effective in curbing sexual violence is that the statistics should reflect a reduction in the prevalence of the crime.¹⁰⁶

Sexual violence takes different forms and ranges. This variety is reflected in different sexual violence legislation in Botswana. The laws prohibit sexual violence and provides for protection from sexual violence. The Constitution by entrenching the Bill of rights guarantees protection of basic human rights.¹⁰⁷ It enshrines the fundamental rights and freedoms of all people such as the right to security, liberty and the protection of the law and this includes the right to be free from all forms of violence and abuse.¹⁰⁸ Other legislation includes, the Criminal Procedure and Evidence Act,¹⁰⁹ Penal Code¹¹⁰, Domestic Violence Act¹¹¹, Children's Act¹¹², Public Service Act¹¹³ and the Abolition of the Marital Power Act.¹¹⁴ These laws will be discussed in detail below.

2.6 Sexual Violence in the private sphere

Sexual violence takes place in different circumstances and settings. The BNRS indicates that most sexual violence committed against women and girls occurs in a domestic setting.¹¹⁵ Sexual violence in the private sphere is recognised and prohibited under the Domestic Violence Act, the Abolition of Marital Power Act and the Children's Act.

2.6.1 Domestic Violence Act

NGO's coalition in Botswana recognising that a home is often the most violent place and that many victims of abuse are unable to leave abusive situations due to social and financial factors proposed the enactment of the Domestic Violence Act. The Act was enacted in 2008 to protect the family from violence and provide protection to survivors of domestic violence.¹¹⁶ Domestic violence is construed as any controlling or abusive behaviour that harms the health or safety of the

¹⁰⁶ This paper acknowledges that a reduction in crime may also be as a result of other factors such underreporting of sex crimes.

¹⁰⁷ Section 15 of the Constitution of Botswana.

¹⁰⁸ Section 3 of the Constitution of Botswana.

¹⁰⁹ Chapter. 08:02.

¹¹⁰ Chapter. 08:01.

¹¹¹ Chapter. 28:05.

¹¹² Chapter. 28:04.

¹¹³ Chapter. 26:01.

¹¹⁴ Chapter. 29:07.

¹¹⁵ The BNRS op cit (n11) 75.

¹¹⁶ Long title of the Domestic Violence Act (Chapter 28:05).

applicant and includes sexual abuse or threat thereof.¹¹⁷ The Act further defines sexual abuse as not being limited to any sexual conduct that humiliates, abuses, degrades or otherwise violates the sexual integrity of any person who alleges to have been subjected to an act of sexual violence.¹¹⁸

Even though the Domestic Violence Act recognises that sexual violence can take place between married persons by defining domestic relationship to include a relationship between persons who are married to each other, it does not however criminalise marital rape. This is because according to section 6 of the Act, the proceedings under the Act are heard as a civil case between the parties. The Act does not create criminal offences as these are provided for under the Penal Code which however does not criminalise marital rape. The effectiveness of the Act therefore goes only as far as acknowledging that married couples can violate each other.

2.6.2 The Abolition of Marital Power Act

From time immemorial the Tswana traditional law placed women in a position where they were accountable to men while men need not account to anyone. The power men yielded made women vulnerable as structures in place and only gave men recognition and a voice, hence opportunity for violation of women. Women in marriages were therefore subjected to the status of a minor with the implication that they could not exercise a number of juristic acts without the consent or permission of their husbands.¹¹⁹ It is against this background that the Abolition of the Marital Power Act was enacted in 2004 to abolish the marital power.

The Abolition of Marital Power Act recognised that factors that contribute to gender-based violence includes unequal status between men and women, unequal decision-making powers in the household and women's economic dependency. The Act therefore, removed restrictions¹²⁰ which the marital power placed on the legal capacity of a wife such as the inability to enter into contracts without the husband's consent, which consent the husband did not require to enter into any transaction and also abolished the common law position of the husband as head of the

¹¹⁷ Section 2 of the Domestic Violence Act (Chapter 28:05).

¹¹⁸ Section 2 of the Domestic Violence Act (Chapter 28:05).

¹¹⁹ E.K. Quansah 'Abolition of Marital Power in Botswana: A New Dimension in marital relationship?' *University of Botswana Law Journal*, Volume I June 2005, at 1.

¹²⁰ These restrictions include the inability to enter into contracts without the husband's consent.

family.¹²¹ The Act further sought to bring equality between men and women married in community of property¹²² and between spouses married out of community of property in respect to their joint estate.¹²³

The major challenge to the Abolition of the Marital Power Act is that customary and religious marriages were excluded from the application of the Act. What this exclusion means is that marital power will continue to exist in customary and religious marriages. According to E.K Quansah, as a result of the patriarchal nature of Tswana society, marriage under customary law is premised on the subjection of the wife to the overall authority of the husband.¹²⁴ In order for women to be protected from these patriarchal norms that perpetuate violence there is need to bring into consonance the various provisions in the customary and common laws so as to give effect to the abolition of marital power.¹²⁵

This harmonisation has however happened with respect to the common law with the amendment of Deeds Registry Act.¹²⁶ This Act was amended in 1996 in order to allow women whether married in community of property or not to execute deeds and other documents required to be registered in the deeds registry without their husband consent.¹²⁷ The Act further provides that a husband cannot solely sell immovable property registered in his name which is not excluded from community of property without the consent of the wife and conversely a wife cannot deal away with the same property without the consent of the husband.¹²⁸

¹²¹ Section 5, Abolition of the Marital Power Act. A woman was regarded as minor with the implication that she could not exercise a number of juristic acts without the consent or permission of her husband.

¹²² Section 7 Abolition of the Marital Power Act (Chapter. 29:07).

¹²³ Section 15 Abolition of the Marital Power Act (Chapter. 29:07).

¹²⁴ E.K. Quansah op cit (n119) 12.

¹²⁵ United Nations 'Botswana Report on the Implementation of the Convention of the Elimination of All Forms of Discrimination Against Women' (2008) at 21.

¹²⁶ Chapter 33:02.

¹²⁷ Section 18 (3) of the Deeds Registry Act (Chapter 33:02.)

¹²⁸ Section 18 (5) of the Deeds Registry Act (Chapter 33:02.)

2.6.3 Children's Act

The Children's Act was enacted in 2009 and guarantees every child the right to protection against sexual abuse, exploitation, prostitution and pornography.¹²⁹ The Act makes it an offence for any parent, guardian, teacher or other person who without reasonable excuse fails to report a case of child abuse or exploitation of which he or she is aware.¹³⁰ A person who contravenes this provision is liable to a fine of not less than P10 000 but not more than P30 000, or to imprisonment for a term of not less than two years but not more than three years or to both.¹³¹

The Children's Act also makes it a crime to induce, coerce or encourage a child to engage in prostitution.¹³² As alluded to in the preceding paragraphs, in Botswana parents encourage their children to work as sex workers in order to meet their daily basic commodities. Further, despite Botswana ratifying the Convention on the Rights of the Child (hereinafter referred to as the CRC),¹³³ and enacting the Children's Act, Ditshwanelo-The Botswana Centre for Human Rights¹³⁴ has observed that children in Botswana are still not viewed as rights-holders.¹³⁵ This means that parents can do whatever they want with their children including forcing them to marry someone against their will. Ditshwanelo-The Botswana Centre for Human Rights was also concerned that, although the Children's Act prohibits marriages for persons under 18 years, under customary law a child below the age of 18 years can still be married off.¹³⁶

2.7 Sexual violence in the workplace

Sexual violence frequently occurs in institutions assumed to be safe such as places of work. Sexual violence at the workplace ranges from sexual harassment, sexual assault and indecent assault. The law does not compel the private sector to enact policies curbing such violations. However as recent as 2008 the Government, being the biggest employer in Botswana took steps

¹²⁹ Section 25(1) of the Children's Act (Chapter. 28:04).

¹³⁰ Section 25(2) of the Children's Act (Chapter. 28:04).

¹³¹ Section 25(2) of the Children's Act (Chapter. 28:04).

¹³² Section 57 of the Children's Act (Chapter. 28:04).

¹³³ The CRC was adopted by the UN on the 20th of November 1989 and came into force in 1990.

¹³⁴ Ditshwanelo – The Botswana Centre for Human is a locally based advocacy organisation, which was founded in 1993 and plays a key role in the protection and promotion of human rights in Botswana.

¹³⁵ Child Sexual Exploitation in Botswana (n69) 9.

¹³⁶ Ibid.

to lead by example in curbing sexual violation indiscriminately in the public service by enacting the Public Service Act.

2.7.1 Public Service Act

The Public Service Act was amended in 2008 to recognise sexual harassment committed by a public officer as a misconduct which attracts penalties under the Act.¹³⁷ The Act defines sexual harassment as –

any unwanted, unsolicited or repeated sexual advance, sexually derogatory statement or sexually discriminatory remark made by an employee to another, whether made in or outside the workplace, which is offensive, or objectionable to the recipient, which causes the recipient discomfort or humiliation, or which the recipient believes interferes with the performance of his or her job security or prospects, or creates a threatening or intimidating work environment.¹³⁸

The penalties for sexual harassment include suspension from duty without pay for a period not exceeding one month, demotion, deferment of increment that is a postponement of the date on which the next increment is due and dismissal.¹³⁹ The scope of sexual harassment under the Public Service Act is however limited to public servants. The Employment Act¹⁴⁰ which regulates employment relationships in the private sector is silent on sexual harassment and this creates a room for violence in the private sector work place.

2.8 Sexual violence in Acts of general application

These laws criminalise sexual violence and provides for protection from sexual violence that takes place both in the private and public sphere.

¹³⁷ Section 38(1) of the Public Service Act (Chapter. 26:01).

¹³⁸ Section 38(2) of the Public Service Act (Chapter. 26:01).

¹³⁹ Section 40 of the Public Service Act (Chapter. 26:01).

¹⁴⁰ Chapter 47:01.

2.8.1 Penal Code

As shown in figure 1,1 and 1.2 above, rape is the dominant form of sexual violence in Botswana. The Penal Code in section 141 prohibits rape. The definition of rape was amended in 1998 to make it gender neutral and also to broaden the scope of penetration which is an element of rape.¹⁴¹ The amendment of the Penal Code also introduced a minimum sentence of ten years imprisonment and a mandatory HIV testing for persons convicted of rape.¹⁴² Where rape was accompanied by violence or the rapist was unaware of their HIV status a minimum sentence of 15 years with corporal punishment was introduced.¹⁴³ In the event that a person was aware of their HIV status, the minimum sentence of 20 years imprisonment with corporal punishment applies.¹⁴⁴ These penalties were increased to address the general concerns of the public that the sexual offences laws were not deterrent enough. The amendment also provided that any person who is charged with the offence of rape shall not be entitled to be admitted to bail.¹⁴⁵ This provision was however declared ultra vires 5(3)(b) of the Constitution of Botswana and struck down.¹⁴⁶

The Penal Code distinguishes the offense of rape from the offense of defilement. The difference between rape and defilement is that defilement occurs where one has sexual intercourse with a child under the age of 18 years. Initially the age of consent was 16 years. The Penal Code was amended in 2018, to raise this age of consent from 16 years to 18 years.¹⁴⁷ The objective of the amendment was to address the incidences of defilement and indecent assault of children.¹⁴⁸

In the past years there has been a lot of amendments to the Penal Code to curb sexual violence. However, despite improvements in definitions, sentencing and procedures, the Penal Code is silent on the issue of marital rape. The Penal Code does not include marital rape from its

¹⁴¹ Section 141(1) (ii) of the Penal Code (Chapter 08:01).

¹⁴² Section 142(1) (ii) of the Penal Code (Chapter 08:01).

¹⁴³ Section 142(4) (a) of the Penal Code (Chapter 08:01).

¹⁴⁴ Section 142(4) (b) of the Penal Code (Chapter 08:01).

¹⁴⁵ Section 141 (1) (i) of the Penal Code (Chapter 08:01).

¹⁴⁶ In the case of *State v Marapo* 2001 (2) BLR 632 (HC), (Chapter. 01:00).

¹⁴⁷ Penal Code (Amendment) Act No. 21 of 2018.

¹⁴⁸ Penal Code (Amendment) Act No. 21 of 2018.

prohibition or definition of rape. I am of the view that there is therefore a need to amend the Penal Code to broaden the definition of rape so that it criminalizes marital rape. This is because, firstly, marital rape has a severe impact on the physical and psychological well-being of the victim. Secondly, according to international human rights conventions Botswana has ratified, marital rape violates the victim's human rights such as protection against inhuman treatment, the right to life, and liberty and security of person. Since marital rape has been recognised as a form of violence under the international instruments Botswana has ratified, Botswana is therefore under an obligation to condemn marital rape to ensure protection of women's human rights.

2.8.2 Criminal Procedure and Evidence Act

The Criminal Procedure and Evidence Act was amended in 1997 to provide for the mandatory hearing in camera of sexual offences such as rape, attempted rape, indecent assault on any woman or girl, defilement of a girl under the age of 18 years and indecent assault on a boy under the age of 14 years.¹⁴⁹ The amendment provided the victims with the privacy required and the opportunity to limit discrimination and stigmatisation following the incidence of sexual offences. The Act was further amended to prohibit newspaper report of the proceedings to reveal the name, address, or any particulars calculated to lead to the identification of the victim or complainant of the offence.¹⁵⁰ Newspapers are also prohibited from publishing the picture of the victim or complainant of the offence.¹⁵¹

2.9 International and regional instruments addressing sexual violence

Botswana is a party to numerous international and regional human rights treaties that are aimed at combating and ultimately eradicating sexual violence against all persons. Sexual violence is therefore not only recognised as a flagrant transgression of the principles enshrined in Botswana's national legislation but also of international human rights treaties to which Botswana is signatory to. Regionally Botswana has acceded to the revised Southern African Development

¹⁴⁹ Section 178(5) Criminal Procedure and Evidence Act (Chapter. 08:02).

¹⁵⁰ Section 178(7) Criminal Procedure and Evidence Act (Chapter. 08:02).

¹⁵¹ Section 178 (7) Criminal Procedure and Evidence Act (Chapter. 08:02).

Community Protocol on Gender and Development (hereinafter referred to as SADC Gender Protocol) on the 10th of May 2017.

As already alluded to in the preceding paragraphs, at the heart of sexual violence directed against women in Botswana is gender inequality. The Protocol addresses gender inequality by providing for the empowerment of women, elimination of discrimination, and the promotion of gender equality and equity through gender-responsive legislation, policies, programmes and projects.¹⁵² Although Botswana ratified the Protocol late, it was ahead in that, through the enactment of the Abolition of Marital Power Act it sought to achieve equality between men and women. However, even with the enactment of the Abolition of the Marital Power Act and the subsequent ratification of the SADC Gender Protocol, gender inequality is still pervasive.

In recognizing that women and girls have been at the receiving end of sexual violence and that sexual violence hampers the enjoyment of their human rights, Botswana also ratified the United Nations Convention for the Elimination of all Forms of Discrimination Against Women (hereinafter referred to as CEDAW).¹⁵³ The CEDAW is an international treaty adopted in 1979 by the United Nations General Assembly and focuses entirely on the protection of women.¹⁵⁴ It sets out the legal obligations to eliminate discrimination against women and to ensure that women enjoy their civil, political, economic, social and cultural rights without any discrimination in the public and private spheres.¹⁵⁵ CEDAW is the first of its kind to specifically recognise the vulnerabilities of women.

The United Nations Committee on the Elimination of Discrimination Against Women in its General Recommendation No.19 provides that “gender-based violence” such as family violence, forced marriage, sexual harassment, compulsory sterilisation or abortion, rape and other forms of sexual assault amongst others are forms of discrimination that gravely affect women’s enjoyment of their human rights.¹⁵⁶ State parties are to ensure that laws against such violence are

¹⁵² SADC Gender Protocol article 20(2).

¹⁵³ Botswana ratified the treaty on the 13th of August 1996.

¹⁵⁴ Preamble of CEDAW.

¹⁵⁵ Preamble of CEDAW.

¹⁵⁶ UN Committee on the Elimination of Discrimination Against Women, General Recommendation No. 19 Violence against women (11th Session, 1992) UN Doc, 1992, available at: <https://www.ohchr.org/EN/HRBodies/CEDAW/Pages/Recommendations.aspx> accessed on 14 February 2019.

enacted.¹⁵⁷ Even with this obligation under the Convention, Botswana laws are not comprehensive and do not criminalize all forms of violence against women such as marital rape and under customary law, child marriages.

CEDAW also imposes an obligation on State parties to correct cultural customs and practices which perpetuate discrimination of women.¹⁵⁸ As indicated in this Chapter, Tswana society and culture support and perpetuate beliefs that condone sexual violence. There is still a lot that Botswana needs to do in terms of modifying its social and cultural patterns that perpetuates sexual violence. Botswana legislation should be deliberate and clear such that no culture or societal norms may be invoked to justify sexual violence against women or children.

To ensure greater protection of children, Botswana ratified the CRC and its Optional Protocols on the Sale of Children, Child Prostitution and Child Pornography and on the involvement of Children in armed Conflict.¹⁵⁹ The CRC provides protection of children from violence and harm. Article 34 of the CRC enjoins State parties to take all appropriate measures, legislative and others, to protect children from all forms of violence and exploitation, including sexual abuse. State parties are further obligated to protect children from sexual exploitation and abuse including the inducement or coercion of a child to engage in unlawful sexual activity.¹⁶⁰ The unlawfulness, is however dependent or defined by what domestic legislation prescribes or condones.

As shown in the preceding paragraphs, the statistics of sexual abuse against children in Botswana are not painting a pretty picture. Child marriage still persists under customary law despite Botswana ratifying the CRC which prohibits marriages of children below the age of 18 and other instruments which calls for the abolition of harmful traditional practices specifically including child marriage. The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography places an obligation on State parties to criminalise the sale or purchase of children.¹⁶¹ Poverty in Botswana drives certain

¹⁵⁷ Article 2(b) CEDAW.

¹⁵⁸ Article 5 CEDAW.

¹⁵⁹ The United Nations Convention on the Rights of the Child (hereinafter referred to as the CRC) is a human rights treaty which sets out the economic, health, social, civil, political, economic, cultural and social rights of children. Botswana ratified the Convention on the 9th of December.

¹⁶⁰ Article 34 CRC.

¹⁶¹ Article 3 Optional Protocol to the CRC.

families to marry their daughters off at young age in exchange for bride price and other economic benefits the family hopes the groom can provide. Bride price as it relates to child marriage is therefore a contravention of this Protocol.

Lastly, the African Charter on the Rights and Welfare of the Child (hereinafter referred to as the ACRWC)¹⁶² is a regional convention providing for protection against sexual exploitation and sexual abuse.¹⁶³ State parties are enjoined in particular to take appropriate measures to prevent the abduction, the sale of or traffic of children for any purpose.¹⁶⁴ In light of the above, it is the considered view of this dissertation that children's rights in Botswana are not respected and protected in accordance with international laws on the rights of the child.

2.10 Conclusion

This Chapter has looked at the prevalence of sexual violence, the drivers of sexual violence and reasons for underreporting of sex crimes. The statistics has shown that rape is the most prevalent form of sexual violence and it is usually directed at women and girls. These statistics excludes marital rape as these cases are not recorded because marital rape is not criminalized under the Botswana laws. This dissertation has also revealed that sexual violence is driven by many factors operating in a range of social, cultural and economic contexts. Looking at these drivers, the position of this dissertation is that addressing sexual violence needs a multi-faceted approach as sexual violence is perpetrated by specific actors and in a specific context.

The discussion on the legal framework has also indicated that there is a lot of existing laws that deal with sexual violence in various ways. Several important amendments have also been made to these laws over the years. While this dissertation acknowledges that significant progress in the enactment of legislation has been made, numerous gaps and challenges remain as shown in the preceding paragraphs. Further, while ratifying international instruments shows Government's commitment to end sexual violence, this dissertation argues that paying simple lip-service to these international instruments is not enough. Appropriate measures such as systems and legal

¹⁶² Botswana ratified the Charter on the 10th of August 2001.

¹⁶³ Article 27 ACRWC.

¹⁶⁴ Article 29 ACRWC.

frameworks should be put in place for Botswana to meet its obligations under these international instruments.

In another effort to eradicate sexual violence the Government of Botswana has decided to enact registration laws. Whether registration laws can play any role in alleviating the problem of sexual violence looking at the social and legal context of sexual violence will be focus of this dissertation.

CHAPTER 3: THE CONCEPT OF REGISTRATION LAWS

3.1 Introduction

Sentences for sexual offences have been primarily based on retributive justice.¹⁶⁵ Retributive justice focuses on punishing an offender to repay his or her debt to society.¹⁶⁶ This is because of the belief that the harsher the punishment for sex offenders, the less likely they are to reoffend.¹⁶⁷ This Chapter provides an analysis of registration laws in USA and South Africa. In both countries the problem of sexual violence led to the enactment of registration laws.¹⁶⁸

The history of registration laws, the purpose of these laws and whether the introduction of these laws has been effective in alleviating the problem of sexual violence in the two countries will also be looked at in this Chapter. A comparative approach is employed to identify the best approach which Botswana can use as a benchmark in establishing registration laws. The recommendations in Chapter 6 of this dissertation will therefore provide the Government of Botswana with the opportunity to carefully consider the implications of enacting such a law by drawing on the experiences of the USA and South Africa.

3.2 The Concept of Registration Laws

Sexual violence has been an escalating problem for many countries over the past two decades and countries have implemented various strategies in a bid to curb the problem. Some countries attempted to target the problem of sexual violence through registration and notification laws.¹⁶⁹ Sex offender registration is a system where convicted sex offenders are mandated to register with the law enforcement agencies and to provide regular updates of their information in the register.¹⁷⁰ A sex offender is regarded as any person who is convicted of a sex crime. However,

¹⁶⁵ Coghlan, Michelle Anne. *Sex offenders and the Criminal Justice System: An Exploration of Public Opinion* University of Windsor, Canada (2003) at 4.

¹⁶⁶ Walen Alec, "Retributive Justice", *The Stanford Encyclopedia of Philosophy* (Winter 2016 Edition).

¹⁶⁷ Adrea Paige Salsman, *Police Perception of the Effectiveness of Megan 's Law Against Sex Offenders* Copyright by Andrea Paige Salsman 2014 at 2.

¹⁶⁸ The first Act to be enacted in USA is the Jacob Wetterling Crimes against Children and Sexually Violent Offender Registration Act (Wetterling Act) in 1994 while South Africa first adopted the sex offender registration with the Criminal Law (Sex Offenders Related Matters) Amendment Act in 2007.

¹⁶⁹ These countries include among others the Canada, South Africa, USA and United Kingdom.

¹⁷⁰ Elizabeth J. Letourneau et al op cit (n22) 5.

in other jurisdictions like the USA, a sex crime may include other crimes that do not involve the act of sex such as public urination or possessing child pornography.¹⁷¹

Registration laws provide a list of offences that require registration. These offences range from rape, sexual assault, incest, child pornography and prostitution.¹⁷² Sex offender registers (the words “registers” and “registries” shall be variously used to mean one and the same thing) contain personal information of the perpetrator.¹⁷³ The registrants are under a duty to ensure that the information in the register is updated whenever there is a change to the information.¹⁷⁴ There is no standard approach to registration, while some legal systems require that sex offenders be notified of the registration requirements before they are convicted others require that they be notified after the conviction.¹⁷⁵

As stated in Chapter 1, the objective of registration laws is to provide a database for monitoring and tracking sex offenders upon their release into the community after having served their terms.¹⁷⁶ In some jurisdictions, the public is also notified of such registered offenders and this is done through community notification laws (hereinafter referred to as notification laws). Community notification is the practice of releasing the information in the register to the public.¹⁷⁷ The purpose of notification laws is to provide the public with the information that will assist them to protect themselves from sex offenders by reporting any suspicious behaviour by sex offenders.¹⁷⁸ Some countries that have enacted registration laws do not make use of community notification for public access to the registration information, and only release such information to law enforcement officers.¹⁷⁹

¹⁷¹ In the USA for example, people who are convicted of public urination are also classified as sex offenders.

¹⁷² Abril R. Bedarf, *Examining Sex Offender Community Notification Laws*, 83 Cal. L. Rev. 885 (1995) at 888 available at: <http://scholarship.law.berkeley.edu/californialawreview/vol83/iss3/4>.

¹⁷³ AWA 42 USC 16914.

¹⁷⁴ Abril R. Bedarf op cit (n172) at 885.

¹⁷⁵ In the USA, Washington State the courts are required to provide written notification to any defendant charged with a registrable sex offence.

¹⁷⁶ Elizabeth J. Letourneau et al op cit (n22) 5.

¹⁷⁷ Elizabeth J. Letourneau et al op cit (n22) 5.

¹⁷⁸ Ibid.

¹⁷⁹ South Africa and United Kingdom are one of those countries that restricts access of the registry information to the public. Some countries does not make registration information to avoid potential constitutional challenges.

3.3 Registration Laws in the USA

Registration laws were first enacted in the USA in 1994.¹⁸⁰ Prior to that year, USA had no federal legislation providing for sex offender registration and notification.¹⁸¹ Highly publicised sex crimes committed especially against children created political pressure to introduce sex offender registers for all States.¹⁸² The rationale for enacting registration laws was to ensure that the public is safe from sex offenders and to assist law enforcement officials in keeping surveillance on sex offenders.¹⁸³

To address the increase in cases involving sexual violence against children and murder at federal level, numerous sex offender registration Acts were enacted. The first statute was the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (hereinafter referred to as the Wetterling Act) in 1994.¹⁸⁴ The Act was named in the honour of Jacob Wetterling, an 11-year-old boy who was abducted by an unknown gunman who was a sex offender.¹⁸⁵ The Act required the Attorney General to establish a national database at the Federal Bureau of Investigation to monitor and track the movement of convicted sex offenders.¹⁸⁶ Even though the Act required States to develop and maintain sex offender registers, it did not provide that the community be notified of the presence of sex offenders.¹⁸⁷

The Wetterling Act was amended in 1996 by the Sex Offender Registration and Notification Act (hereinafter referred to as SORNA), also known as the Megan's Law.¹⁸⁸ The amendment came about because in 1994, a neighbour who had prior convictions of sexual assault against children, sexually assaulted and murdered 7 years old Megan Nicole Kanka.¹⁸⁹ Megan's parents were not aware that the neighbour was a sex offender. Legislators felt that the Wetterling

¹⁸⁰ Joanna Davidson (2009) *Sex Offender Registration - A Review of Practice in the United Kingdom, Europe and North America*, Hallam Centre for Community Justice Briefing Paper at 1.

¹⁸¹ Legislative history of federal sex offender registration and notification, Office of sex offender sentencing, monitoring, apprehending, registering and tracking available at <https://www.smart.gov/legislation.htm>, para 1, accessed on 18 December 2018.

¹⁸² Lara Geer Farley op cit (n24) 472.

¹⁸³ Abril R. Bedarf op cit (n172) at 885.

¹⁸⁴ 42 U.S.C. § 14071 (2006).

¹⁸⁵ Lara Geer Farley op cit (n24) 473.

¹⁸⁶ 42 U.S.C. § 14072(b)(1) (2006)

¹⁸⁷ Kate Hynes, *The Cost of Fear: An Analysis of Sex Offender Registration, Community Notification, and Civil Commitment Laws in the United States and the United Kingdom*, 2 Penn. St. J.L. & Int'l Aff. 351 (2013), at

¹⁸⁸ 42 USC 151 16918.

¹⁸⁹ Lara Geer Farley op cit (n24) 475.

Act was inadequate in that it did not provide for community notification but only focussed on notifying law enforcement officials about sex offenders.¹⁹⁰ Legislators recognized the need to not only inform law enforcement officials about sex offenders but also the community.¹⁹¹ The Wetterling Act was therefore amended in order to require all States to come up with ways to release the information in the register to the public.

Several other pieces of legislation were later passed to improve sex offender registries. These included the Pam Lychner Sexual Offender Tracking and Identification Act, 1996.¹⁹² In order to prevent offenders from escaping registration requirements by moving from State to State, the Act mandated the development of a nationwide registry.¹⁹³ It was however repealed and replaced by the Adam Walsh Child Protection and Safety Act of 2006 (hereinafter referred to as the AWA).¹⁹⁴ The purpose of the AWA is to protect children from sexual exploitation and violent crimes, to prevent child abuse and child pornography, to promote internet safety, and to honour the memory of Adam Walsh and other child crime victims.¹⁹⁵ The Act ensures uniformity in sex offender registration and notification requirements thereby reducing State-to-State variations.¹⁹⁶ The Act also governs all notification and registration requirements for convicted sex offenders in the USA.

The AWA further establishes the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering and Tracking (SMART) within the Department of Justice, Office of Justice Programs.¹⁹⁷ The SMART office is responsible for guiding the States with regard to the implementation of the Act.¹⁹⁸ The Act further expanded and strengthened registration and notification requirements, increased the duration of registration and notification, and increased penalties for failure to register.¹⁹⁹

¹⁹⁰ Lara Geer Farley op cit (n24) 475.

¹⁹¹ Ibid.

¹⁹² Public Law 104-236.

¹⁹³ Elizabeth J. Letourneau et al op cit (n22) 6.

¹⁹⁴ 42 USC 16901 (2006).

¹⁹⁵ Purpose of the AWA

¹⁹⁶ Adam Walsh Child Protection and Safety Act 42 USC 16901 (2006) (AWA); enacted in recognition of Adam Walsh' parents. On July 27, 1981, in Hollywood, Florida, 6-year-old Adam Walsh was abducted at a mall. Two weeks later, some of Adam's remains were discovered in a canal more than 100 miles from his home.

¹⁹⁷ Section 146 AWA.

¹⁹⁸ Section 146(c) AWA.

¹⁹⁹ Elizabeth J. Letourneau et al op cit (n22) 6.

Section 111(1) of the AWA regards a sex offender as a person who has been convicted of a sex crime.²⁰⁰ As stated in the preceding paragraphs, sex crimes in the USA are not limited to crimes that involve the act of sex.²⁰¹ A sex offender is required to register in a jurisdiction where he or she resides, is employed or where he or she is a student.²⁰² The registration should be done before a sex offender completes a sentence of imprisonment with respect to the offense. Non-custodial offenders on the other hand are required to register not later than three business days after being sentenced.²⁰³ Failure to register or update information attracts a criminal penalty that includes a maximum term of imprisonment that exceeds one year.²⁰⁴

3.4 Contents of the register and duration of registration

Information to be recorded in the register includes –

the offender's name (including any alias used by the individual), a copy of the offender's identity card or driver's licence, social security number, place of employment or study, all addresses of residence, a physical description of the offender, a description of any vehicle operated, the licence plate number, previous convictions, the current status of the offender, a DNA sample and an existing photograph, finger and palm prints.²⁰⁵

The duration the offender is required to register depends on the tier classification in which the specific offence falls.²⁰⁶ The AWA creates a three-tiered system of classifying sex offenders.²⁰⁷ The registration period depends on the seriousness of the offence.²⁰⁸ The maximum registration

²⁰⁰ AWA 42 USC 16914.

²⁰¹N. Mollema 'The viability and constitutionality of the South African national register for sex offenders: A Comparative Study' (2015) Volume 18 No 7 at 2727.

²⁰² Section 113(a) AWA 4472—7

²⁰³ Section 113(b) AWA 4472—8

²⁰⁴ Section 113(e) AWA 4472—8

²⁰⁵ AWA 42 USC 16914 Section 114(e) 4472—8

²⁰⁶ Section 115 AWA 4472—9

²⁰⁷ Section 115 AWA 4472—9

²⁰⁸ According to section 111 of the AWA, A tier I offender means a sex offender other than a tier II or tier III sex offender.

A tier II sex offender means a sex offender other than a tier III sex offender whose offense is punishable by imprisonment for more than 1 year. The crime must also be comparable to, or more severe than, the following: aggravated sexual abuse; abusive sexual conduct with a minor under 13 years old; kidnapping by someone other than a guardian; or any sex crime occurring after the offender became a Tier I offender.

A Tier III sex offender means a sex offender whose offense is punishable by imprisonment for more than 1 year. The crime must also be comparable to, or more severe than, the following: sex trafficking; coercion and enticement; transportation with the intent to engage in criminal sexual activity; abusive sexual conduct; use of a minor in a

period for a tier I offender is 15 years. 25 years for a tier II offender and for life if the offender is a tier III offender.²⁰⁹ Sex offenders are also mandated to verify the information in the registry. The verification also depends on the tier classification. Tier I offenders must verify once every year, tier II offenders must verify once every six months, and tier III offenders must verify once every three months.²¹⁰

3.5 Community Notification

All 50 States in the USA have registry information available to the public.²¹¹ The manner in which communities are informed about sex offenders and what types of sex offenders requires notification vary from State to State.²¹² For example, communities can be notified through email, flyers and community meetings or in person or through written requests.²¹³ AWA requires each jurisdiction to make available on the internet all the information about each sex offender in the registry.²¹⁴ Each State is also required to maintain the internet site in a manner that will allow the public to access relevant information for each sex offender by a single query for any given zip code or geographic radius set by the user.²¹⁵

3.6 Efficacy of Registration and Notification Laws in the USA

As alluded to in Chapter 2, the “effectiveness in legislation is the extent to which the legislation influences in the desired manner the social phenomenon which it aims to address”.²¹⁶ According to Bandy, the effectiveness of sex offender registers is often measured by differences in the rates of recidivism.²¹⁷ Several studies report that registration laws have minimal effectiveness in reducing sex crimes and in deterring sex offenders from reoffending as different

sexual performance; solicitation to practice prostitution; production or distribution of child pornography; or any sex crime occurring after the offender became a Tier II offender.

²⁰⁹ Section 115 AWA 4472—9.

²¹⁰ Section 116 AWA 4472—9.

²¹¹ AWA 42 USC 16915(a) (1)-(3).

²¹² Beck, Victoria and Lawrence Travis ‘Sex Offender Notification: An Exploratory Assessment of State Variation in Notification Processes’ (2005) *Journal of Criminal Justice* 34: 51-55 at 52.

²¹³ Ibid.

²¹⁴ Section 118 AWA 4472—10.

²¹⁵ Section 115 4472—10

²¹⁶ Helen Xanthaki op cit (n105) 7.

²¹⁷ Rachel Bandy, ‘Measuring the Impact of Sex Offender Notification on Community Adoption of Protective Behaviours’ (2011) 10(2) *Criminology and Public Policy* 237.

States faced significant implementation obstacles.²¹⁸ As a result of these obstacles, the benefits of enacting registration laws have been said to be overshadowed by the economic, social and legal impacts they bring about.²¹⁹

The main reason for enacting registration laws was because it was believed that recidivism rate is high among sex offenders.²²⁰ A study on re-offense rates of sex offenders by the USA Department of Justice, that followed every sex offender released in almost 15 States for three years, found the recidivism rate to be low at 3.5 per cent.²²¹ Another study conducted by the Federal Bureau of Justice Statistics titled “Recidivism of Sex Offenders Released from State Prison: A 9-Year Follow-Up (2005-14)” also showed that sex offender recidivism is lower than for prisoners released for crimes such as robbery and assault.²²² The study further revealed that sex offenders were less likely than other released prisoners to be arrested during the 9 years following release.²²³ In yet another study conducted in Iowa, it was found that there is no statistically significant difference between recidivism rates for sex offenders subject to registration against those who were not subject to registration.²²⁴

Registration laws were also believed would in addition to reducing recidivism, deter new sexual offenses. However, according to Federal Bureau of Investigation, in Pennsylvania after the enactment of the SORNA between the years 1990 and 2015, the rate of rape remained relatively flat from 25.8 rapes per 100,000 people to 24.4 rapes per 100,000 people.²²⁵ This means that during

²¹⁸ Lauren Cui et al ‘The benefit and detriment of sex offender registers, A comprehensive, Qualitative Analysis’ 2018 at 6, John Jay ‘Assessment of Sex Offender Notification Policy in the United States: Has the Policy Been Working?’ (2016) *International Journal of Social Science Studies* Vol. 4, No. 1 at 102 and Andrew J. Harris, SORNA in the Post-Deadline Era: Whats The Next Move? (2011) at 1.

²¹⁹ Lauren Cui op cit (n218) 6.

²²⁰ Duncan, Jessica, *Public Perceptions Regarding Sex Offenders and Sex Offender Management* (2012). Electronic Theses and Dissertations Paper 1507 available at <http://dc.etsu.edu/etd/1507> at 45.

²²¹ Patrick A. Langan et al ‘Recidivism of Sex Offenders Released from Prison in 1994, U.S. Department of Justice Office of Justice Programs Bureau of Justice Statistics at 2.

²²² Mariel Alper and Matthew R. Durose ‘Recidivism of Sex Offenders Released from State Prison: A 9-Year Follow-Up (2005-14)’ (2019) U.S. Department of Justice Office of Justice Bureau of Justice Statics at 4.

²²³ Ibid.

²²⁴ Geneva Adkins, David Huff and Paul Stageberg, ‘The Iowa Sex Offender Registry and Recidivism’ Research Report, Iowa Department of Human Rights, at 9.

²²⁵ Joshua Vaughn ‘2016 Crime Review: A look at the effectiveness of sex offender registries’ *The Sentinel*, 13 February, 2017 available at https://cumberland.com/news/local/closer_look/digital_data/crime-review-a-look-at-the-effectiveness-of-sex-offender/article_a9923f58-9d65-5379-9670-eb08ad9d6620.html accessed on 20 January, 2020.

this 20 year period, the rate of rape did not show a significant change after the implementation of registration laws.²²⁶

As stated in the preceding paragraphs, notification laws were also enacted to enhance community awareness of sex offenders so that they are able to protect themselves against sex offenders. It was believed that they will protect the community better than registration laws. However, according to a study conducted on notification laws, it was found that there were no statistically significant differences between recidivism rates in Washington for sex offenders subject to notification laws against those who are subject to registration laws.²²⁷ It was actually found that notification laws may increase the opportunity for sex offenders to reoffend because they face reintegration obstacles.

Harries and Lobanov-Rostovsky are of the view that the ineffectiveness of registration and notification laws are as a result of legal, operational and resource barriers.²²⁸ These barriers made it difficult for States to fully implement the provisions of the Acts. With regard to legal barriers, it has been contended that the provisions of the SORNA were complex and ambiguous.²²⁹ As a result, different stakeholders had limited understanding of the provisions of the Act and therefore it took time for stakeholders to fully understand and implement their obligations under the Act.²³⁰

Harries and Lobanov-Rostovsky further argue that, certain States failed to implement the law because of four statutory requirements under the SORNA.²³¹ These four requirements are classification of sex offenders, which information on sex offenders should be recorded and how often the register should be updated, new rules regarding juvenile registry and retroactive application of registration laws.²³² As a result of these requirements. States varied in the

²²⁶ Joshua Vaughn op cit (225).

²²⁷ Kristen M. Zgoba, and Karen Bachar, Sex Offender Registration and Notification: Limited Effects in New Jersey, U.S. Department of Justice Office of Justice Programs National Institute of Justice at 6.

²²⁸ Harris, A. J., Lobanov-Rostovsky, C., & Levenson, J. S. (2010). Widening the Net The Effects of Transitioning to the Adam Walsh Acts Federally Mandated Sex Offender Classification System. *Criminal justice and behaviour*, 37(5), 503-519 at 507.

²²⁹ Ibid.

²³⁰ Elizabeth J. Letourneau et all op cit (n22) 12.

²³¹ Harris, A. J., Lobanov-Rostovsky, C., & Levenson, J.S op cit (228) 507.

²³² John Jay op cit (n218) 102.

implementation of the Act. According to Davidson, due to these variations among State laws, increased mobility within society has led to sex offenders being lost off the system and those who fail to comply with registration duties remaining undetected.²³³

States implementing the SORNA also faced operational barriers with regard to implementing and maintaining the registers.²³⁴ According to Richard Tewksbury, the ability of sex offender registries to efficiently and effectively contribute to the safety of the community, depends largely on the registers containing accurate and up-to-date information.²³⁵ Where the registers contains incomplete, inaccurate and unreliable information, the goal of promoting public safety will not be achieved.²³⁶ In a review on the implementation of SORNA carried out by Department of Justice, the registers in USA were found to not contain accurate information as sex offenders provided false information.²³⁷ The registers were also found not to be up-to-date because of shortage of trained personnel to administer and implement registration laws effectively.²³⁸ The Department of Justice therefore concluded that registries are not reliable tools for both the public and law enforcement.²³⁹

In Kentucky it was found that a lot of information was missing from the register rendering the register ineffective to protect the public from sex offenders.²⁴⁰ California, lost track of more than 330,000 convicted sex offenders from their database.²⁴¹ The reason for having lost track of the sex offenders in California was that sex offenders were not updating their information with the law enforcement and the law enforcement on the other hand were not monitoring them because of their work load.²⁴² Further, in an interview with 183 sex offenders in the USA, more than half reported reading inaccurate and false information about themselves online.²⁴³

²³³ Joanna Davidson op cit (n180) 7.

²³⁴ N. Mollema op cit (n201)

²³⁵ Richard Tewksbury op cit (n20) 1.

²³⁶ Lauren Cui et al op cit (n218) 14.

²³⁷ US Department of Justice Review of the Sex Offender Registration and Notification Act at iii.

²³⁸ Ibid.

²³⁹ Ibid.

²⁴⁰ Richard Tewksbury op cit (n20) 6.

²⁴¹ Kim Curtis, 'California 'Loses' 33,000 Sex Offenders' Associated Press (San Jose, California) 8 January 2003 available at https://web.kitsapsun.com/archive/2003/01_08/44869_california_loses_track_of_more_t.html accessed on 19 May 2018.

²⁴² Ibid.

²⁴³ Lauren Cui op cit (n218) 11.

Financial barriers have also contributed to the ineffectiveness of the register. This is because tremendous expenditure are required to maintain and implement the registers.²⁴⁴ In Virginia, it was estimated that the first year of implementing the registry would cost more than \$12 million and the annual cost of SORNA would be \$8,887,000.²⁴⁵ It was also estimated that the cost of implementing the law by New Jersey in 1995 was \$555,565 and \$3.9 million in 2006.²⁴⁶ Further, as stated in the preceding paragraphs, the AWA Act does not distinguish between violent and non-violent sex offenders.²⁴⁷ This means that non-violent offenders who are not necessarily sex offenders in the strict sense and are unlikely to reoffend are being registered as sex offenders.²⁴⁸ The failure to distinguish between violent and non-violent sex offenders has been argued to have taken the time and the resources that could be used to deal with violent offenders.²⁴⁹

Finally, registration laws have also raised legal concerns regarding the constitutional rights of registered sex offenders.²⁵⁰ These laws have been said to be a violation of *ex post facto*,²⁵¹ due process and equal protection²⁵², cruel and unusual punishment²⁵³ and search and seizure.²⁵⁴ The courts have however maintained that these laws are constitutional because they “are regulatory and promote the State’s interest in preserving public safety.”²⁵⁵ Regarding due process, the Supreme Court in the case of *Connecticut Department of Public Safety V Doe*²⁵⁶ affirmed the constitutionality of registration and notification laws by holding that due process does not entitle the respondent to a hearing to establish a fact that is not material under the Connecticut statute.²⁵⁷

²⁴⁴ The deficiencies in the operation of registration statutes were most evident in California and Washington

²⁴⁵ Virginia Department of Planning and Budget 2008 Fiscal Impact Statement (Richmond, VA: Department of Planning and Budget, 2008).

²⁴⁶ These findings were based on data received from 15 of New Jersey’s 21 counties.

²⁴⁷ Lara Geer Farley op cit (n24) 502. Thirteen states have incorporated public urination into their list of sexual offenses; and twenty-nine states include consensual sex between teenagers.

²⁴⁸ Lara Geer Farley op cit (n24) 502.

²⁴⁹ Andrew J. Harris op cit (218) 4.

²⁵⁰ John Jay op cit (n218)103.

²⁵¹ *Ex post facto* is a latin word meaning “after the action”. Article I of the Constitution states in relevant part: "No State shall ... pass any... ex post facto Law." U.S. CONST. art. I, § 10, cl. 1.

²⁵² The Fourteenth Amendment protects an individual’s right to due process in that states cannot violate the individual’s life, liberty, or property without due process of law. The SORN policies are criticized due to a violation of two types of due process – substantive and procedural

²⁵³ Sex offenders find the aftermath registration and notification as cruel and unusual and as a result a violation of the Fifth and Eighth Amendment

²⁵⁴ John Jay op cit (m218)103.

²⁵⁵ Karen J. Terry, What is smart sex offender policy? *Criminology & Public Policy* Volume 10 Issue 2 (2011) 276.

²⁵⁶ 538 U.S. 1 (2003)

²⁵⁷ *Connecticut Department of Public Safety V Doe* supra (n226) at 7.

The respondent in this case argued that making his information available to the public violated his Fourteenth Amendments rights because he was not provided with a hearing to determine his current level of dangerousness.²⁵⁸

The retroactive application of registration laws has also come under scrutiny before. The Supreme Court settled this issue in the case of *Smith v. Doe*.²⁵⁹ In this case the court considered whether the Alaska Sex Offender Registration Act violated the Ex Post Facto Clause of Article I of the USA Constitution by retroactively imposing mandatory registration and notification provisions on sex offenders.²⁶⁰ The court held that registration and notification under the specific facts of that case were not punitive, and therefore could be retroactively imposed as regulatory actions.²⁶¹ Even though a lot of issues against registration laws have been settled by the court, opponents argue that the justifications, provided by the Government of USA, are not sufficient as too many rights such as privacy, liberty, and anonymity have been compromised.²⁶²

3.7 Registration Laws in South Africa

Sexual violence is a significant problem in South Africa.²⁶³ As stated in the preamble of the Criminal Law (Sexual Offenders and Related Matters) Amendment Act, 2007 (hereinafter referred to as the Sexual Offences Act), sexual violence in the country has been of grave concern, as it has a particularly disadvantageous impact on vulnerable persons and the society as a whole.²⁶⁴ In addressing this problem of sexual violence especially against children, South Africa first adopted the sex offender registration with the Sexual Offences Act in 2007.²⁶⁵

The main objective of the Sexual Offences Act was to help to combat sexual violence against all persons especially sexual offences being committed against vulnerable groups such as women, children and persons who are physically or mentally disabled.²⁶⁶ According to the Act, a sexual offence includes amongst others, any act of rape, compelled rape, sexual assault, self-sexual

²⁵⁸ *Connecticut Department of Public Safety V Doe* 538 U.S at 6.

²⁵⁹ 538 U.S. 84 (2003).

²⁶⁰ *Smith v. Doe* 538 U.S. 84 (2003) at 89.

²⁶¹ *Smith v. Doe supra* (n229) at 105.

²⁶² John Jay op cit (n218)103.

²⁶³ Romi Sigsworth op cit (n90) 12.

²⁶⁴ Preamble, Criminal Law (Sexual Offenders and Related Matters) Amendment Act.

²⁶⁵ Act 32 of 2007.

²⁶⁶ Vetten L 'New crimes and old procedures: Can the new Sexual Offences Bill deliver on its promises?' (2007) SA Crime Quarterly 21 at 22.

assault, compelled sexual assault, incest, bestiality, sexual acts with a corpse and exposing or compelling a person younger than 16 years to witness sexual offences, sexual acts or self-masturbation.²⁶⁷

Chapter 6 of the Sexual Offences Act establishes the National Register of Sex Offenders (hereinafter referred to as the NRSO).²⁶⁸ The object of the NRSO is to protect children and persons who are mentally disabled against sex offenders by establishing and maintaining a record of persons who have been convicted or are alleged to have committed a sexual offence against a child or a person who is mentally disabled.²⁶⁹ The NRSO was also established in order to inform an employer, licensing authority or other relevant authorities dealing with fostering, kinship, care, temporary safe-care, adoption or curatorship applying for a clearance certificate in respect of a particular employee or applicant whether that person's details appear on the NRSO.²⁷⁰

In terms of section 44 of the Sexual Offences Act, there are certain persons who are allowed to apply for a clearance certificate.²⁷¹ These include an employer in respect of an employee, a licencing authority in respect of an applicant, an employee in respect of their own particulars, a person applying for a licence or approval to manage or operate an entity, business concern or trade in relation to the supervision over or care of children or persons who are mentally disabled, a person applying to become a foster parent, kinship care-giver, temporary safe care-giver or adoptive parent in respect of their own particulars or any person whose particulars appear in the register in respect of their own particulars.²⁷²

3.8 Contents of the Register

According to section 49 of the Sexual Offences Act, details to be recorded in the register include –

the offender's full names and surname, any aliases or nick names, profession or trade of the person, identity number, passport number and driver's licence number

²⁶⁷ Chapter 2, 3 and 4 of the Criminal Law (Sexual Offenders and Related Matters) Amendment Act

²⁶⁸ Section 42 of Act 32 of 2007. The Children's Act (38 of 2005) also created the National Child Protection Register.

²⁶⁹ Section 43 of Act 32 of 2007.

²⁷⁰ Section 44 of Act 32 of 2007.

²⁷¹ A clearance certificate is a certificate issued to an applicant confirming whether or not his or her particulars are contained in the Register.

²⁷² Section 44 of Act 32 of 2007.

where applicable, a copy of the offender's identity card or driver's licence, last known physical address of the person and any other contact details including postal address.²⁷³

The offence committed, the sentence imposed, the date and place of conviction and sentence, as well as the relevant prisoner identification number are also to be recorded.²⁷⁴ The name of the medical institution or practitioner must also be noted if the person was dealt with in terms of section 77(6) or section 78(6) of the Criminal and Procedure Act, 1977.²⁷⁵ The register also includes people who have been accused of sexual offences against children but were incapable of standing trial due to mental illness or cognitive impairments.²⁷⁶

Unlike the USA legislation, the South African Act restricts access to the information contained in the register. The contents of the register are only available to those who are entitled to apply for a clearance certificate.²⁷⁷ The Act makes it a criminal offence for anyone to disclose or publish information contained in the register except for the purpose of giving effect to the provisions of the Act or when required to do so by a competent court.²⁷⁸

3.9 Obligations of the employer, employee and licensing authorities

Section 41 of the Sexual Offences Act prohibits persons who have been convicted or are alleged to have been convicted of sexual offense against children and physically or mentally disabled persons from employment that involves working with children or persons with disabilities. Licensing authorities or relevant authorities working with children and disabled persons are also required to take steps to prevent workers whose names are in the register from working with children or a persons with disabilities.²⁷⁹

An employer who at the date of the establishment of the register, has in his or her employment any employee or intends to employ an employee is required to apply to the registrar for a clearance certificate under section 44 to check whether the name of the person appears on the

²⁷³ Paragraph (b) (i-iii) of Act 32 of 2007.

²⁷⁴ Section 49(iv)-(v) of Act 32 of 2007.

²⁷⁵ Section 49(vi) of Act 32 of 2007.

²⁷⁶ Section 43(a)(ii) of Act 32 of 2007.

²⁷⁷ Section 44 of Act 32 of 2007.

²⁷⁸ Section 52 of Act 32 of 2007.

²⁷⁹ Section 41 of Act 32 of 2007.

register.²⁸⁰ If the name of the employee appears in the register, the employer is required to immediately terminate the employment of the worker, unless the person can be moved to another post which will not bring the worker into contact with a child or a person who is mentally disabled.²⁸¹

On the other hand, an employee who is in the employ of an employer and has been convicted of sexual violence against a child or a mentally disabled person is required without delay to disclose such conviction.²⁸² An employee who fails to disclose such conviction is guilty of an offence and is liable, on conviction, to a fine or to imprisonment not exceeding seven years or to both a fine and such imprisonment.²⁸³

In terms of section 47 of the Act, a licensing authority may grant a licence to a person to run a business or an organisation working with children or mentally disabled if the name of the person does not appear on the register. Sex offenders are also not allowed to apply for foster care or adoption of children, and any other processes related to the supervision of children and mentally disabled persons.²⁸⁴

3.10 Duration in the Register

The duration the offender is required to register depends on the length of the offender's sentence.²⁸⁵ If the offender receives a harsher sentence, the time they will appear on the register will be longer. In terms of section 51, the time which a person's name will appear on the register ranges from five years to ten years.²⁸⁶ The Act further provides for removal from the register. If a person is eligible to apply for removal from the register, he or she is required to make an application to the Registrar for such removal.

Certain sex offenders may however not be removed from the register. These include the following persons-

²⁸⁰ Section 45(1) of Act 32 of 2007.

²⁸¹ Section 45(1) of Act 32 of 2007.

²⁸² Section 46 of Act 32 of 2007.

²⁸³ Section 46(3) of Act 32 of 2007.

²⁸⁴ Section 41(1)(d) and section 48 Act 32 of 2007.

²⁸⁵ Section 51 of Act 32 of 2007.

²⁸⁶ Section 51 of Act 32 of 2007.

- (a) a person who has been sentenced for a conviction of a sexual offence against a child or a person who is mentally disabled to a term of imprisonment, periodical imprisonment, correctional supervision or to imprisonment as contemplated in section 276 (1) (i) of the Criminal Procedure Act (CPA) 1977, without the option of a fine for a period exceeding eighteen months, whether the sentence was suspended or not; or
- (b) a person who has two or more convictions of a sexual offence against a child or a person who is mentally disabled.²⁸⁷

3.11 Efficacy of Registration Laws in South Africa

With the continued rise of sexual violence in South Africa, registration laws have proven not to be very effective.²⁸⁸ The President of the Republic of South Africa, Cyril Ramaphosa, concerned about the escalating cases of sexual violence in the country stated, as follows-

“We are going to overhaul and modernise the national register of gender-based violence offenders provided for in the Sexual Offences Act to ensure it is effective in combating gender-based violence.”²⁸⁹

As noted by President Cyril Ramaphosa, the register has been ineffective in alleviating sexual violence in the country. According to a report by the Department of Justice & Constitutional Development, a number of challenges have been experienced with regard to the implementation of the register.²⁹⁰ Some of the identified challenges include factors such electronic system challenges, resource limitation and shortage of trained personnel for capturing data and maintaining and monitoring the register.²⁹¹ This has thus resulted in registers not containing accurate information to enable law enforcement to identify, track and monitor sex offenders. Sanja Bornman an attorney with the Lawyers for Human Rights had the following to say when

²⁸⁷ Section 51(2) of Act 32 of 2007.

²⁸⁸ The 2017/18 South African Police Services (SAPS) crime statistics shows an increase in sexual offences. Sexual assault and rape have increased in the past year with rape figures standing at 40 035 and sexual assault at 6 786.

²⁸⁹ Azarrah Karrim, ‘Lawyers for Human Rights: ‘Overhaul of sexual offences registry will not work’ News24 September 15 2019 available at <https://www.news24.com/SouthAfrica/News/lawyers-for-human-rights-overhaul-of-sexual-offences-registry-will-not-work-20190914>

²⁹⁰ Department of Justice & Constitutional Development, Annual Report, Implementation of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007), 1 April 2017 - 31 March 2018 available at http://pmg-assets.s3-website-eu-west-1.amazonaws.com/DOJ-departmental_Sexual_Offences_and_related_matters_Annual_Report_201718.pdf at 43 accessed on 10 December 2019.

²⁹¹ Azarrah Karrim op cit (n289).

commenting on President Cyril Ramaphosa’s speech on the proposed overhaul of the current NRSO –

“We do not believe that making the current register public would pass constitutional muster. In any event, the current register is woefully incomplete, and has been maintained and managed exceptionally poorly since day one, despite significant financial cost.”²⁹²

Sanja Bornman’s sentiments are corroborated by a report titled ‘Sexual Violence by Educators in South African Schools: Gaps in Accountability’, which revealed that as of 2014 there were approximately 39,000 cases that needed to be reviewed and information captured in order to bring the register up to date.²⁹³ The register was thus found to have incomplete, inaccurate and invalid information. As a result, the Deputy Justice Minister John Jeffery states that, the Ministry is currently doing a data verification process through the courts to obtain information that was not included in the register.²⁹⁴

Even though the NRSO was established in 2007, its implementation was delayed due to significant costs needed to implement and maintain the register.²⁹⁵ It started to fully operate with the Phase 1²⁹⁶ of the project at cost of R5 255 421.00.²⁹⁷ The Minister of Justice, Jeff Radebe in response to a July 2010 parliamentary question on the costs of implementing the register stated as follows -

“It is expected that during the 2011/12 financial year, further expenditure will be incurred, as approximately eleven posts will need to be created and filled (with the accompanying infrastructure for the Office of the National Registrar of Sexual Offences). The South African Police Service (SAPS) initially requested (as part of IJS Funding)

²⁹² Azarrah Karrim op cit (n289).

²⁹³ Rachel Brock, et al ‘Sexual Violence by Educators in South African Schools: Gaps in Accountability’ Centre for Applied Legal Studies, University of the Witwatersrand School of Law Cornell Law School’s, Avon Global Centre for Women and Justice and International Human Rights Clinic, 2014 at 35.

²⁹⁴ Andisiwe Makinana, Sex Offender Register to be expanded –but not necessarily made public, 20 November 2019 Sunday Times available at <https://www.timeslive.co.za/politics/2019-11-20-sex-offenders-register-to-be-expanded-but-not-necessarily-made-public/>.

²⁹⁵ Vetten L, Teresa Le, Alexandra Leisegang and Sarah Haken, The Right and the Real, A Shadow Report Analysing Selected Government Departments’ Implementation of the 1998 Domestic Violence Act and 2007 Sexual Offences Act, December 2010 at 3.

²⁹⁶ Phase 1 deals with the capturing of current convictions of all people who have committed sexual offences against children and mentally disabled persons

²⁹⁷ Reuters, Parliamentary Question: DODMV: National Sexual Offences Register, 15 December, 2010, Defence Web.

R200 million for the upgrading of the AFIS and the Criminal Record Centre. The SAPS has received R30 million and has commenced with a limited update linked to the resources received which will be finalised by April 2011.”²⁹⁸

Phase 1 of the project also required the development of the electronic system of the Register and was facilitated through the Integrated Case Management System (ICMS).²⁹⁹ According to a report by the Department of Justice & Constitutional Development, the ICMS experienced system challenges that resulted in the purity of the information in the register being contaminated.³⁰⁰

Phase 2 of the project which deals with issuing certificates and removal of the details from the register and the development of NRSO process maps was not implemented at the time Phase 1 was implemented.³⁰¹ This was because of financial constraints and lack of a current electronic interface between the information systems of the various stakeholder Departments.³⁰² Phase 2 of the project has also not been effective because some stakeholders did not to carry out their obligations under the Sexual Offences Act, for instance the judiciary failed to make orders after conviction as required under section 50 of the Act.³⁰³ Further, the challenges faced in Phase 2 include the failure to timeously complete the interfacing of electronic systems between stakeholder departments and the incorrect capturing of the information in the NRSO due to flaws in the system.³⁰⁴ According to the Department of Justice & Constitutional Development report, shortage of manpower in the office of the Registrar and across all the stakeholder departments to match the work volume has also contributed to the ineffectiveness of the register.³⁰⁵

According to Sanja Bornman, low conviction rates and underreporting of sex crimes have also greatly affected the implementation of the register.³⁰⁶ A 2017 report titled ‘Rape Justice in South Africa’, the National Prosecuting Authority revealed that only 8 per cent of reported rapes

²⁹⁸ Reuters, Parliamentary Question op cit (n297).

²⁹⁹ Department of Justice & Constitutional Development op cit (n290) 42.

³⁰⁰ Ibid.

³⁰¹ Ibid.

³⁰² Reuters op cit (n297).

³⁰³ Ibid.

³⁰⁴ Department of Justice & Constitutional Development op cit (n290) 43.

³⁰⁵ Ibid.

³⁰⁶ Azarrah Karrim op cit (n289).

result in conviction.³⁰⁷ Dee Smythe states that, out of the 1000 women raped, only close to 150 reported the crime to the police.³⁰⁸ From the 150 cases, 30 of the cases were prosecuted and less than 10 resulted in conviction.³⁰⁹ This means that very few sex offenders will be recorded in the register because an offender has to be convicted in order to be included in the register. Factors such as lack of resources to ensure effective investigations and prosecutions, untrained personnel and lack of collaboration among criminal justice officials were cited as preventing the system from effectively responding to sexual violence especially in schools.³¹⁰

The Sexual Offences Act has also raised constitutional concerns. Section 50(2) of the Act was declared unconstitutional in that it required that the names of child offenders be included in the register.³¹¹ The Constitutional Court in the case of *J v National Director of Public Prosecutions*³¹², declared section 50(2) (a) of the Act unconstitutional as it violated a child's rights to have their best interests taken into account as the paramount consideration as per section 28(2) of the Constitution.³¹³ In another case of *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* the court declared unconstitutional the criminalisation of consensual sexual acts of children between 12 years and 16 years old as per sections 15 and 16 of the Sexual Offences Act and these sections were amended.³¹⁴

3.12 USA sex offender legislation in comparison with the South African sex offender legislation

In an effort to alleviate the problem of sexual violence, USA and South Africa enacted sex offender legislation. The USA legislation provides for a more comprehensive national system for

³⁰⁷ Mercilene Machisa, Ruxana Jina, Gerard Labuschagne, Lisa Vetten, Lize Loots, Sheena Swemmer, Bonita Meyersfeld, Rachel Jewkes. (2017). Rape Justice in South Africa: A Retrospective Study of the Investigation, Prosecution and Adjudication of Reported Rape Cases From 2012. Pretoria, South Africa. Gender and Health Research Unit, South African Medical Research Council.

³⁰⁸ Smythe, Dee. Rape unresolved: Policing Sexual Offences in South Africa. Juta and Company Ltd, 2015.

³⁰⁹ Ibid.

³¹⁰ Sexual Violence by Educators in South African Schools op cit (n293) 28.

³¹¹ Zita Hansungule, *Testing the constitutionality of the National Register for sex offenders, Protecting child offenders' rights*, SA Crime Quarterly No. 50 December 2014

³¹² 2014 2 SACR 1 (CC).

³¹³ The Criminal Law (Sexual Offence and Related Matters) Amendment 5 of 2015 (Sexual Offences Amendment Act, 2015) amendment provides that the names of the juveniles should only appear in the register only after a state prosecutor has applied for such an order, and after careful consideration by the court of the child's probability of committing another sexual offence.

³¹⁴ 2014 2 SA 168 (CC).

the registration of sex offenders compared to South Africa. The USA has also over the years expanded the scope of crimes that qualify as sex offences, increased the number of people required to register as sex offenders and also provided stiffer penalties for sex offenders.³¹⁵ In expanding the scope of crimes, USA included the information of persons convicted of prostitution, possessing child pornography and statutory rape.³¹⁶

The South African Act does not require comprehensive information as the USA legislation does. The South African legislation is more focused on ensuring that registered sex offenders are not employed in positions where they may have access to children and the scope of registration is more restricted. The legislation does not impose a wider scope as people who commit crimes such as public urination and are not included in the register. In both countries the duration of the registration period depends on the offender's length of sentence although South Africa time-provisions are more lenient.³¹⁷

Both countries also provide for retrospective application in the register. The South African legislation in contrast to the USA legislation does not require that children be registered as a sex offender. The South African Act prohibits public access to the information in the register while in the USA they have notification laws. In both countries legal, operational, financial, and practical barriers have led to the ineffectiveness of the registers.

3.13 Conclusion

Registration laws have been enacted with the intention to promote community safety. As shown in the preceding paragraphs, these laws have been ineffective because of a number of factors such as the complexity of legislation, resource constraints, underreporting of sex crimes and shortage of trained personnel to maintain the register. As a result of these factors, registration laws provide minimal benefits while they bring about negative consequences such as the significant

³¹⁵ Velazquez, Tracy. (2008) *The Pursuit of Safety: Sex Offender Policy in the United States*. New York: Vera Institute of Justice at iii.

³¹⁶ The strict laws imposed against all sex offenders, including non-violent offenders.

³¹⁷ USA can even go up to life.

costs of implementing and maintaining the registers, increased workloads and the difficulty for sex offenders to reintegrate into the society resulting in them reoffending.

It is therefore concluded that even if the registers were accurate and up-to date, they are still not the most progressive and effective solution to the sexual violence scourge because they do not offer a comprehensive solution. By definition, registers are not proactive but rather reactive as they only come into play after a person has been convicted of a sex crime and thereafter listed on the register.³¹⁸ How these laws can inform legislative reform in Botswana is the subject of Chapter 4 below.

³¹⁸ Zubaida Jooma, *The National Register for Sex Offenders: The Solution to Protecting Children in South Africa?* LLM University of Pretoria (2010) at iii.

CHAPTER 4: LESSONS FROM USA AND SOUTH AFRICA

4.1 Introduction

This Chapter looks at lessons learnt from a comparative analysis undertaken in Chapter 3 on the South African and USA registration and notification laws. The Chapter analyses whether the benefits of these laws would justify introducing them in jurisdictions, such as Botswana, that have not yet introduced them or whether the associated detriments outweigh their benefits.³¹⁹ Lessons from South Africa and USA case studies will form the basis of recommendations to the Botswana Government on whether enacting registration laws will aid in curbing sexual violence and the implications of enacting such laws.

As indicated in Chapter 3, South Africa and USA have taken different approaches with regard to registration laws. In South Africa the register is used for narrowly defined purposes while the USA uses the register for more comprehensive and broad purposes. The following are lessons that could be drawn from the two countries and each are discussed in turn.

4.2 Implementation and maintenance of an accurate and up-to-date data register is difficult to achieve

Sex offender registers have been created in the two countries with the aim of creating a database for the monitoring of sex offenders and to facilitate investigations of new allegations.³²⁰ The information in the register should also be regularly verified and maintained because according to Richard Tewksbury, in order for the register to achieve its goal of promoting public safety and to deter convicted sex offenders, it is important that the information in the register is accurate and up-to-date.³²¹ Maintaining an accurate information in the register is however dependent on the cooperation of sex offenders, the personnel responsible for maintaining registers and also on different stakeholders to carry out their obligations under registration laws.³²²

The lesson learnt from the two countries is that maintaining an accurate and reliable register is a difficult task to achieve. This is due to several factors such as sex offenders providing

³¹⁹ Lauren Cui op cit (n218) 6.

³²⁰ Elizabeth J. Letourneau et al op cit (n22) 5.

³²¹ Richard Tewksbury op cit (n20) 1.

³²² Richard Tewksbury op cit (n20) 6.

incomplete, false and unreliable information, lack of resources by the Government and shortage of manpower to maintain the register.³²³

The other lesson derived from these two countries is that the effectiveness and overall value of registration laws largely depends on the accuracy of the information contained in the register.³²⁴ Where the registrants have entered false information and the information is not up-to-date, the register will not achieve its goal.³²⁵ The achievement of the accurate register also requires significant resources and manpower to collect the information and place it in the register.³²⁶ Close monitoring and effective management of sex offenders in the register is key so as to have an up-to-date register.³²⁷ With shortage of trained personnel, and lack of co-operation from sex offenders, this may be difficult to achieve. In order for the register to be effective in Botswana, measures should be taken to ensure that the information in the register is accurate, verified and reliable.

4.3 Effectiveness of the register is dependent on the reporting and conviction rates of sex crimes

Another lesson derived from USA and South Africa, is that the greatest challenge with regard to the effectiveness of registration laws is underreporting and poor conviction rates of sex crimes. These are significant limitations to the information in the register and with these limitations the register may not aid in curbing sex crimes. In order for the register to be able to serve its purpose, victims of sexual violence should be comfortable and able to report the crime. The law enforcement on the other hand should ensure that perpetrators are prosecuted and convicted. This however is not the case as many incidents of sexual violence go unreported, and some, if reported, may be withdrawn.

As discussed in Chapter 2, there are many factors that prevent victims from reporting sex crimes. The significance of underreporting and poor conviction rates of sex crimes is that sex offenders may not be convicted and therefore may never be registered in the sex offender register.

³²³ Richard Tewksbury op cit (n20) 6.

³²⁴ Ibid.

³²⁵ Ibid.

³²⁶ In South Africa in order to add the names of the convicted individuals to the NRSO, DOJ&CD hired data capturers to travel around the country searching for court records and checking the information against the case numbers submitted by SAPS.

³²⁷ Richard Tewksbury op cit (n20) 5.

It has been shown that in South Africa, many incidents of sexual violence go unreported and if reported only a few of these cases will result in conviction.³²⁸

In Botswana, the findings of the GBV Indicator Study shows that there is huge underreporting of rape to the Botswana Police Service as only one in nine women who were raped reported it to the police.³²⁹ Some victims report sex crimes and later withdraw the complaint. Even though the GBV Indicator Study indicates that 86 per cent of the sexual abuse cases resulted in conviction, it is noteworthy to state that the conviction rate only relates to reported cases and is a percentage of cases actually taken on prosecution.³³⁰

With underreporting of sex crimes, and if reported, the subsequent withdrawal, the register cannot be effective. This is because an offender has to be convicted in order for him or her to be placed in the register. Registration laws alone therefore cannot aid in alleviating the problem of sexual violence. In order for these laws to be effective in Botswana, the implementation of these laws should be complemented by other interventions.

For victims to trust the criminal justice system and be able to report sex crimes, the police, judges and other stakeholders must be sensitised, equipped and trained to deal with sexual violence cases. To ensure good conviction rates, the criminal justice system should ensure effective investigations and prosecutions. Without the Government ensuring that the systems and processes are improved for people to report sex crimes and ensure effective prosecutions and convictions of perpetrators, registration laws will not achieve their desired results in Botswana.

4.4 Economic implications of sex offender registration and notification laws are significant

The experiences of USA and South Africa on economic implications of registration laws serve as a very important lesson for Botswana. From the experiences of these two countries significant resources are required to implement and maintain the registers. According to the Justice Policy Institute in USA, the implementation costs include amongst others, personnel and training

³²⁸ According to Bureau of Justice Statistics National Crime Victimization Survey: criminal victimization in USA in 2007, an estimated 42 per cent of rapes or sexual assaults were never brought to the attention of authorities.

³²⁹ GBV Indicator Study op cit (n9) 97.

³³⁰ Ibid.

expenditure, law enforcement costs, software costs³³¹ such as licensing fees, installation, maintenance, administration and technician costs, administrative and legislative costs.³³²

In Botswana as stated in Chapter 3, poverty is one of the drivers of sexual violence. The costs of implementing and operating sex offender registries have been shown to be very significant. Botswana with problems of poverty is likely to face challenges in the implementation of these laws due to insufficient resources. Enacting these laws may further create large budgetary concerns for the Government. As it is, USA and South Africa are struggling to maintain and implement the registers because they lack resources. If Botswana will not be able to implement and maintain the registries because of resources, then the goal of protecting the public from sex offenders will not be achieved.

Another lesson which Botswana can learn from the USA is that, in order to reduce costs, the registry should differentiate between violent and non -violent sex offenders.³³³ This will ensure that the Government distributes resources towards registering and monitoring sex offenders that are violent.³³⁴ With registers providing minimal benefits this mitigates against the tremendous expenditure for enacting, implementing and maintaining them.

4.5 Sex offenders have low recidivism rates

As stated in Chapter 3, registration laws were enacted based on the misconception that sex offenders were more likely to reoffend compared to perpetrators of other crimes.³³⁵ Policy makers enacted registration laws under this false assumption and believed that the laws will assist in reducing recidivism.³³⁶ This has however resulted in sex offenders registries not achieving the results that was anticipated by the legislators. A profound view that cannot be ignored is the fact that, it has been shown that sex offender registers can be counterproductive due to the fact that sex offenders struggle with reintegrating into the society and hence may end up reoffending.³³⁷

³³¹ In Ohio it was estimated that the cost of implementing new software to create a registry would approach a half million dollars in the first year.

³³² Justice Policy Institute, What will it cost States to comply with the Sex Offender Registration and Notification Act? 2008, Justice Policy Institute, at 19.

³³³ Lara Geer Farley op cit (n24) 502.

³³⁴ Lauren Cui op cit (n218) 11.

³³⁵ Lauren Cui op cit (n218) 8.

³³⁶ Ibid.

³³⁷ Elizabeth J. Letourneau et al op cit (n22) 12.

The lesson that Botswana can therefore learn from the USA is that sex offenders have low recidivism rates and that for the legislation on sex offender registers to work effectively in Botswana sexual reoffending misconceptions and other myths on sexual violence should be properly addressed during the policy formulation stage.

4.6 Notification laws may increase the opportunity for reoffending than registration laws

Notification laws were enacted because of the assumption that they prevent recidivism better than registration laws.³³⁸ The lesson learnt from USA however is that notifying members of the public about sex offenders in their community does not take away the opportunity for them to reoffend.³³⁹ Community notification are however said to increase the risk of re-offense.³⁴⁰ This is because notification laws put registered sex offenders and their families in severe hardships as sex offenders struggle to reintegrate in the community.³⁴¹ Their status as former sex offenders has the effect of stigmatising them and rendering reformation and a dignified life after prison impossible.³⁴² Further, sex offenders often face threat, harassment and violence from other members of the community.³⁴³ Botswana will therefore have to decide whether to take the South African route of limiting access to the information in the register or go the USA route which provides open access to the registry.

4.7 Registration laws may violate registered sex offender's fundamental human and constitutional rights

In the two countries, registration laws have been challenged on constitutional basis. In drafting of the registration laws, the Government of Botswana should be careful to ensure that fundamental human and constitutional rights of registered sex offenders are not contravened. Botswana should ensure that these laws do not infringe on the rights of children like in USA where

³³⁸ Lauren Cui op cit (n218) 11.

³³⁹ Kristen M. Zgoba, and Karen Bachar op cit (n227) 2.

³⁴⁰ J.J. Prescott & Jonah E. Rockoff 'JJ Prescott and Jonah E. Rockoff, Do Sex Offender Registration and Notification Laws Affect Criminal Behaviour?' (2010) at 7.

³⁴¹ Bonnar-Kidd K. K. (2010). Sexual offender laws and prevention of sexual violence or recidivism. *American Journal of Public health*, 100(3), 412–419 at 417.

³⁴² Richard Tewksbury 'Collateral Consequences of Sex Offender Registration *Journal of Contemporary Criminal Justice* (2005) at 68.

³⁴³ Bonnar-Kidd K. K op cit (n341) 416.

juveniles could be registered for life as this goes against their best interest and against any commitment to rehabilitate them.³⁴⁴ Botswana should also not provide for the retrospective application of these laws as may also contravene section 10(4) of the Constitution of Botswana which provides that –

no person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence at the time when it was committed.³⁴⁵

4.8 Conclusion

This Chapter has explored the implications of enacting registration laws drawn from the experiences of South Africa and USA. What can be seen from the lessons learnt from these two countries is that they provide minimal benefits while there are significant economic costs for implementing them.³⁴⁶ Effective sex offender registration and notification laws are also dependent on the creation and maintenance of accurate, valid and reliable registers.³⁴⁷ This is difficult to achieve with sex offenders providing false information, underreporting and low conviction rates of sex crimes. Requiring that the information in the register be accessible to the public has negative consequences not only on sex offenders but also on their families. This creates an opportunity for sex offenders to reoffend which defeats the goal of enacting of these laws.

In order to effectively curb sexual violence, the Government of Botswana will have to do more than just enact registration laws. The implementation of these laws should be complemented with several other interventions. Effective programs and policies should be introduced and systems in handling cases of sexual violence should be reviewed and improved. If Botswana lacks the financial resources, it should be particularly circumspect in introducing these laws because the costs of implementing and maintaining the registers are significant. As stated in the preceding paragraphs sex offender registries do not prevent the commission of sex crimes and it would be

³⁴⁴ In some States in USA they have policies where juvenile sex offenders are can be registered for life.

³⁴⁵ Chapter. 01:00.

³⁴⁶ Lauren Cui op cit (n218) 50.

³⁴⁷ Pawson Ray (2002) 'Does Megan's law work? A theory driven systematic review' ESRC UK Centre for Evidence Based Policy and Practice: Working Paper 8. London: University of London at 6, available at <http://www.evidencenetwork.org/cgi-win/enet.exe/biblioview?780>.

worthwhile for the available resources to be focused on policies and systems that will prevent the commission of the offence in the first place.

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This dissertation has discussed how sexual violence is an escalating social and human rights problem in Botswana and the concept of registration laws as a proposed solution to the problem. Chapter one introduced this dissertation by giving a background and significance of the research. The reasons why Botswana wants to enact such a law were also discussed in this Chapter. Chapter two provided the social and legal context of sexual violence in Botswana by looking at the prevalence of sexual violence, drivers of sexual violence and the reasons for underreporting of sex crimes. The study of the legal framework was also undertaken in this Chapter to establish the legislative steps that Botswana has taken in addressing the problem of sexual violence and whether these laws have been effective in alleviating sexual violence.

Chapter three looked at the history of registration laws. This was followed by a comparative study between the South African and the USA registration laws to establish whether the introduction of these laws in these countries has been effective in alleviating the problem of sexual violence. Lessons learnt from a study undertaken in this Chapter 3 were discussed in Chapter 4. Chapter 4 further analysed whether the benefits of introducing registration laws would justify introducing them in Botswana or whether their detriments outweighs their benefits.

In this concluding Chapter, I give recommendations on whether registration laws are a progressive and an effective solution for curbing sexual violence. It is the prevailing position of this dissertation that registration laws alone cannot be effective in curbing sexual violence. For this policy to be able to adequately address the problem of sexual violence, the following actions are hereby recommended -

5.2 Public Education

Chapter 2 has shown how cultural and societal norms contribute significantly to sexual violence. It is submitted that the law alone cannot be effective in tackling sexual violence perpetuated by traditions and societal norms, as it cannot change attitudes and beliefs. Attitudes and beliefs can be changed by raising awareness and challenging the harmful traditions and beliefs

that perpetuate sexual violence.³⁴⁸ This can be achieved through public education. Public education therefore plays an important role not only in raising awareness of sexual violence but also in preventing sexual violence by changing traditions and norms, community attitudes and behaviours of potential offenders and the practises of organisations.³⁴⁹

It is recommended that Botswana should develop comprehensive strategies that will influence people to change their attitudes and core values that perpetuate sexual violence.³⁵⁰ This however cannot be done by the Government alone. A multi-sectoral approach should be adopted. The community, media and Non-Governmental Organisations can also play a crucial role in raising awareness and promoting behavioural change to eliminate sexual violence.

5.3 Initiatives to address the challenges of alcohol abuse and poverty

Other drivers of sexual violence as discussed in Chapter 2 includes poverty and alcohol abuse. It is therefore recommended that Botswana Government should develop initiatives geared towards tackling issues such as poverty and alcohol abuse. As highlighted in Chapter 2, poverty increases people's vulnerabilities to sexual violence. With problems of poverty, Botswana is likely to face challenges in the implementation of registration law due to community attitudes on how sexual favours can alleviate their economic status. The biggest challenge with a poverty-stricken community is that the victims or their families may allow sexual violence to keep happening for economic benefit. Governmental legal intervention may therefore be viewed as hindrances to any economic benefit.

The Government will have to work harder to empower communities so as to divorce sexual violence from economic gain. With an educated and informed nation as per Botswana's Visions, aggressive efforts in this regard will be complimentary to the legislative objectives of registration laws. More efforts and strategies are needed to reduce poverty such as empowering the poor, and marginalised people with the necessary skills needed for their survival. As sex offender registries do not prevent the commission of sex crimes and require significant resources to implement them,

³⁴⁸ The GBV Indicator Study op cit (n9) 57.

³⁴⁹ Haskell, L. (2011) 'Key Best Practices for Effective Sexual Violence Public Education Campaigns: A Summary' Ontario: Queen's Printer for Ontario at 3.

³⁵⁰ The Baseline Assessment Report op cit (n41) 38.

it is the position of this dissertation that the available resources should firstly be focused on policies and strategies that will prevent sexual violence before it occurs such as alleviating poverty.

With regard to alcohol abuse, unemployment especially among the youth was cited as one of the reasons for excessive drinking. According to Vision 2036, the high youth unemployment is partly due to the fact that the supply of skills from the education sector does not match the needs of the job market.³⁵¹ As proposed in Vision 2036, the education curriculum should be aligned to the needs of the economy.³⁵² While a few alcohol intervention strategies are in place, it is further recommended that more research be conducted to provide a deeper understanding of the extent of alcohol abuse, and the effectiveness of the intervention strategies that are in place.

5.4 Criminal Justice System should be strengthened

As observed by the GBV Indicator Study, sexual violence in Botswana is a serious yet underreported problem.³⁵³ Sex offender register will not be effective if victims do not report sex crimes and conviction not achieved. For victims of sexual violence to be able to report crimes they should have trust and confidence in the criminal justice system. The GBV Indicator Study has also shown that victims do not report crimes because of the general distrust in the criminal justice system.³⁵⁴ If the victims do report they end up withdrawing the case.³⁵⁵

The Police plays an important role in responding to sexual violence through investigations. According to the Baseline Assessment Report, most of the participants interviewed were doubtful about the police's capacity to handle cases of gender-based violence.³⁵⁶ The Study further showed gaps in handling of the cases by the police as survivors are said to fear re-abuse at the hands of the police at community service centres, especially men who fear to be mocked upon reporting.³⁵⁷

³⁵¹ Vision 2036 op cit (n40) 9.

³⁵² Ibid.

³⁵³ GBV Indicator Study op cit (n9) 97.

³⁵⁴ Ibid.

³⁵⁵ The BNRS op cit (n11) 104.

³⁵⁶ The Baseline Assessment Report op cit (n41) 34.

³⁵⁷ Ibid.

This dissertation recommends that, the Botswana Government should focus on ensuring that the public has enough confidence in the law enforcement agencies and in the public protective services in order for them to report sex crimes. There is a need for improvement in the way in which the Botswana criminal justice system responds to sexual violence. The police, judges and other custodians of sexual violence laws should be sensitised and trained on sexual violence laws and the implementation of these laws promoted.

5.5 Legal Reform

This dissertation acknowledges that legislative steps have been taken over the past two decades to address the problem of sexual violence. However, despite all these efforts, the existing laws needs to be improved, strengthened and expanded. The following amendments are therefore recommended –

- 6.51** the legal framework on marital rape should be reformed to specifically criminalise marital rape. The Penal Code in particular, should be amended to broaden the definition of rape so that it includes marital rape;
- 6.52** sexual harassment should not only be prohibited in the public sphere but also in the private sphere. This calls for the Employment Act to be amended to specifically prohibit sexual harassment in the private sector;³⁵⁸
- 6.53** Customary Act should also be amended to prohibit marriages for persons under 18 years because under customary law, a child below the age of 18 years can still be married off;
- 6.54** in order for women to be protected from patriarchal norms that perpetuate violence there is need to bring into consonance the various provisions in the customary and common laws in order to give effect to the abolition of the marital power,³⁵⁹ and
- 6.55** appropriate measures such as systems and legal framework should be put in place

³⁵⁸ Leah Hector, Women's Access to Justice in Botswana: Identifying the Obstacles & Need for Change, © Copyright International Commission of Jurists at 79.

³⁵⁹ United Nations op cit (n125) 21.

for Botswana to meet its obligations under the international instruments which is a signatory to.

5.6 Concluding Remarks

This dissertation has shown how Botswana has made concerted efforts to address and prevent sexual violence. While several pieces of legislation have been enacted and different policies and prevention strategies have been put in place to alleviate sexual violence, sexual violence remains a major challenge in the country. In another bid to strengthen the fight against sexual violence, naming and shaming of sex offenders through registration laws was considered as a solution. As highlighted in Chapter 4, effective registration laws are dependent on the creation and maintenance of accurate, valid and reliable registers.³⁶⁰ This dissertation submits that this will be difficult to achieve with underreporting of cases, withdrawal of cases and low conviction rates of sex crimes in Botswana.

Sex offender registers are not the most progressive, effective policies and do not offer a comprehensive solution to the sexual violence scourge. This is because registers are not proactive as they only come into play after a crime has been committed.³⁶¹ A sex offender must also be listed in the register before the register can be of any preventative value. Botswana should therefore adopt comprehensive policies that primarily focuses on preventing sexual violence before it occurs. This can be done by focusing on the root causes of sexual violence.

In order for registration laws to be effective in Botswana, they should be complemented with other interventions as recommended in the preceding paragraphs. This is because sex offender registers alone as an intervention strategy will not bear much fruit. Botswana will further have to make a difficult decision of whether to take the South African or the USA approach to registration laws. While the South African approach is less stringent and restricts access to the information contained in the register, the USA approach on the other hand is a more comprehensive and stringent approach to sex offenders.

Both approaches have their weaknesses. Allowing public access to the registration information has shown to make it difficult for sex offenders to reintegrate into the society and end

³⁶⁰ Pawson Ray op cit (n347) 6.

³⁶¹ Zubaida Jooma op cit (n318) iii.

up re-offending. Where registration information is not available to the public, the public may not be able to take protective measures against sex offenders. This dissertation, is however, drawn towards the South African approach as it better balances the interests of sex offenders as well as the interests of the public.³⁶²

Another lesson which Botswana can derive from the USA is that in order to reduce costs, the registry should differentiate between violent and non -violent sex offenders.³⁶³ This will ensure that the Government distributes resources towards registering and monitoring sex offenders that are violent.³⁶⁴ Further in the drafting of registration laws, the Government of Botswana should also be careful to ensure that fundamental human and constitutional rights of registered sex offenders are not contravened.

Finally, despite the widespread of sex offender registration, the minimal benefits they bring about are overshadowed by the negative consequences of implementing them. Their ineffectiveness is attributed to the fact that they were enacted based solely on false misconceptions on sex offenders and sexual violence. Public fear and outrage put pressure on legislators to come up with a solution to sexual violence and were therefore hastily implemented with no thorough research. As such, these misconceptions were not addressed at policy formulation stage and the operational and resource demands, the scope of potential barriers to sex offender registers, the collateral consequences related to registrants integration, the implementation and administrative concerns and legal implications were not taken into consideration.³⁶⁵ Without a thorough research on the above, Botswana is likely to face the same challenges as South Africa and USA.

³⁶² Richard Tewksbury op cit (n20) 6.

³⁶³ Lara Geer Farley op cit (n24) 503.

³⁶⁴ Lauren Cui op cit (n218) 11.

³⁶⁵ Harris, A. J. (2011). SORNA in the post-deadline era: What's the next move? Sex Offender Law Report, 12(6), 81-86 at 6.

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