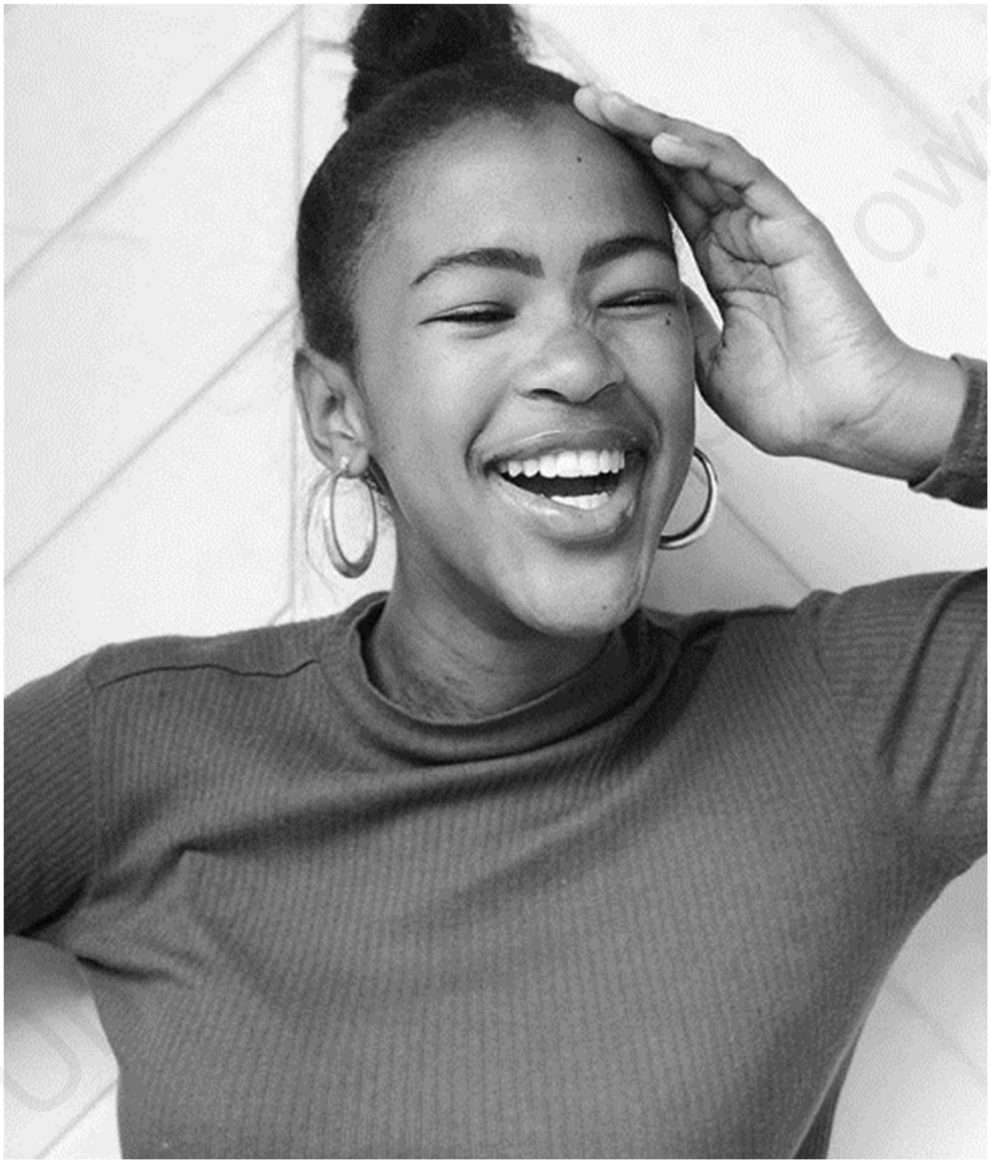
Addressing Sexual Offences in South Africa: Moving Past Rhetoric and Empty Gestures



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Abstract:

There is a plague of sexual violence in South Africa. As a country dedicated to the rights to life, dignity, bodily integrity, privacy and the right to be free from all forms of violence, it is the government's *duty* to adequately address the rate of sexual offences in the country. The government has not been silent on this issue, but its response beyond issuing strong statements accompanied by long sentences for the few offenders convicted, is lacking. Some important legislative changes have been brought about in the SORMA but without widespread change of social attitudes these improvements are going to have very limited impact. This paper explores why South Africa's current approach towards sexual offences is inadequate and how it should be improved. The first section lays out the background and development of South Africa's sexual offence laws (and laws relating thereto). The myths and stereotypes about sexual offences and their victims that prevailed in our legal system for decades, still persist in the minds of many police and judicial officers today. This has negatively affected how sexual offences are policed in the country. It begs the question of whether victims should be afforded specific rights in sexual offence cases. This section also discusses how mandatory minimum sentences came about as a response to rising crime rates. While the changes to the law have been praised for being more progressive for victims of sexual offences, its actual impact will remain insignificant until procedures for obtaining justice for victims are improved. The next section critiques the current legal framework relating to sexual offences, namely, the SORMA and the Criminal Law Amendment Act 105 of 1997. Legislative changes such as the new definition of rape and the formal acknowledgment of sexual offences courts are promising. However, the establishment of the National Register for Sexual Offenders and the mandatory minimum sentences for rape were poorly researched solutions. This paper argues that since SORMA's approach has not improved the experience of victims in the past 13 years, either duties for police officers in sexual offence cases should be legislated or victims should be afforded specific procedural rights. The final section of this paper discusses feasible options for South Africa to address sexual offences. The first is in the form of structured sentencing guidelines to steer the discretion given to judges in handing down sentences. The second is in the form of prevention strategies. This paper highlights how important it is for the government to start to implement policies that will address the societal norms that allow sexual violence to flourish. The government's only solution cannot be to keep clutching at popular mandatory sentencing. They owe it to the citizens of South Africa to commit to long-term social change initiatives.

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SECTION I:

INTRODUCTION

South Africa is 26 years into a constitutional democracy and its rate of sexual violence against women remains alarmingly high. In fact, it is estimated to be amongst the highest rates in the world.[1] This does not bode well for a democracy claiming to be based on many of the rights that sexual offences infringe, including the right to human dignity,[2] life,[3] privacy[4], the right to be free from all forms of violence[5] and the right to bodily integrity.[6] The best time for the South African government to have effectively addressed sexual offences was 26 years ago when their constitutional mandate began. The next best time is now.

It is widely understood that sexual offences are a particularly heinous category of crimes. They are intensely violent and often target the most vulnerable members of society in ways that strip them of their dignity, privacy and in many cases, their lives.[7] The highest court of the land observed that: 'Sexual violence and the threat of sexual violence goes to the core of women's subordination in society. It is the single greatest threat to the self-determination of South African women.'[8] After many misguided attempts at reform, it is time for South Africa to move beyond mere rhetoric and fulfil its constitutional mandate to protect its women.

Despite it being a daily occurrence in the country, every so often the country experiences what is known as a 'catalyst' sexual offence case that sparks public outcry.[9] Towards the end of 2019, this catalyst case was the rape and murder of Uyinene Mrwetyana, whose image appears on the cover of this dissertation. As with other catalyst cases, it was met with public protests and pleas for the government to make a positive change to address sexual

[1] World Population Review 'Rape Statistics by Country 2021' available at: https://worldpopulationreview.com/country-rankings/rape-statistics-by-country
[2] The Constitution of the Republic of South Africa, 1996 at s 10.
[3] Ibid at s 11.
[4] Ibid at s 14.
[5] Ibid at s 12(1)(c).
[6] Ibid at s 12(2).
[7] BBC News 'South African president's shame over surge in murders of women' available at: https://www.bbc.com/news/world-africa-53040513
[8] *Carmichele v Minister of Safety and Security* (CCT 48/00) [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) (16 August 2001) at para 62.
[9] Kristina Scurry Baehr 'Mandatory Minimums Making Minimal Difference: Ten Years of Sentencing Sex Offenders in South Africa', (2008) 20 Yale J.L. & Feminism 213 at 223.

offences.[10] Demands are made for more punitive measures to deal with sexual offenders.[11] Calls for a reinstatement of the death penalty or even castration of the perpetrators are not uncommon as a reaction to these cases.[12] Public outrage also often ends in the public taking the law into their own hands through 'mob justice' to ensure the offender suffers some form of sanction.[13] The frustration of the public is felt far and wide as citizens are unsatisfied with how sexual offences are handled in South Africa.[14] The government often responds to the cries from the public with rhetoric aimed to appease the public without adequately addressing the problem.[15]

There have also been several developments in South African law with regards to sexual offences. This has come in the forms of redefining rape, extending the category of sexual offences and creating a mandatory minimum sentence for rape.[16] These efforts made by the legislature to address the issue of sexual violence have not only been inadequate, but misguided.

This paper aims to start a conversation about the possible pathways South Africa could pursue to tackle sexual violence without overhauling the current criminal law system by departing from the generally accepted principles of criminal law. The solutions this paper will propose are largely based on amending the Criminal Law (Sexual Offences and Related Matters) Act (hereafter 'SORMA'),[17] as well as the Criminal Law Amendment Act 105 of 1997.[18]

Section II of this paper will lay out and discuss the history and development of sexual offence crimes and the laws relating to these crimes in South Africa. In order to make proposals for reform, it is important to understand the context in which our flawed laws arose. This history

[10] See ''Am I Next' protests: South Africans push to renew fight against rape' available at https://www.csmonitor.com/World/Africa/2019/0919/Am-I-Next-protests-South-Africans-push-to-renew-fight-against-rape and 'The Death of Uyinene Mrwetyana and the Rise of South Africa's "Am I Next?" Movement' at https://www.newyorker.com/news/news-desk/the-death-of-uyinene-mrwetyana-and-the-rise-of-south-africas-aminext-movement
[11] Op cit note 9 at 223.
[12] Phindile Ngubane & Robert Brand 'Mbeki Slams 'Speculative' Rape Stats' The Star Oct. 10, 1999.
[13] For example, when police released an alleged rapist in one community, local women castrated him with a broken bottle – Bronwyn Harris, '"As for Violent Crime that's our daily bread": Vigilante Violence During South Africa's period of transition' (2001) 1 Violence & Transition Series 25.
[14] Op cit note 10.
[15] See Ferial Haffajee 'Battered and bloodied by a week from Hell, Ramaphosa fails to match SA women's courage and determination' available at https://www.dailymaverick.co.za/article/2019-09-06-battered-and-bloodied-by-a-week-from-hell-ramaphosa-fails-to-match-sa-womens-courage-and-determination/.
[16] Criminal Law Amendment Act 105 of 1997.
[17] Act 32 of 2007.
[18] Supra note 16.

paints a picture of the myths and stereotypes about rape and victims that have persisted in our sexual offence laws for decades. The way that these myths and stereotypes plague our legal system and thus, our social discourse, is an important consideration for reforming sexual violence in the country.[19] Thus, the way the crime of rape and the evidentiary rules relating to rape have evolved over the decades in South Africa will be discussed.

This section will also explain the role of the victim and their experience in the criminal justice process with regards to sexual offence cases. South Africa has had a long history of failing its sexual offences victims. This section will highlight why sexual offences victims are to be treated and handled differently from victims of other crimes. Women who constitute the majority of victims in these cases, have traditionally been approached with scepticism and insensitivity. To undo the prejudices against sexual offence victims and their experience in the court process, South Africa still has a far way to go. Even though there were calls for the SORMA to create legislated police duties and afford victims of sexual offences specific rights in the criminal justice process, SORMA opted to adopt neither.

Lastly, Section II will discuss the context and background out of which mandatory minimum sentencing arose. Setting out the reasons for its initial adoption will reveal how it is just another empty gesture from the government to be perceived as doing something constructive about crime. In reality, mandatory sentences are an ineffective solution that encourage prejudices against women to continue in the judiciary, evident in the justifications provided when departing from the minimum sentence for rape.

Section III will proceed to critique the current laws relating to sexual offences set out in the SORMA and Criminal Law Amendment Act. Specifically, with regards to the definition of rape, the National Register for Sex Offenders, sexual offences courts, the treatment of victims by police officers and the mandatory minimum sentence for rape. While the latest definition of rape is a welcomed progression, its effects remain uninspiring without improvements to the rest of the justice system.

This paper will advise against the expansion of the National Register for Sex Offenders that is in the SORMA as well as the latest Bill.[20] If any advancements are to be made to the Register, they should be to improve it in its current form. However, expanding the Register and

[19] Amanda Spies 'Perpetuating Harm: The Sentencing of Rape Offenders under South African Law' (2016) 133 S. AFRICAN L.J. 389 at 391.
[20] Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill Government Gazette No. 43595 of 7 August 2020.

making it publicly available could have disastrous effects on vigilante justice and opening the floodgates to constitutional challenges. Furthermore, SORMA takes the unfortunate stance of avoiding legislated duties for police officers when it comes to sexual offence victims in favour of National Directives. Soft policy approaches have not worked in the past and now, 13 years after SORMA's enactment, it is clear they are still not having the desired effect. Lastly, the criticisms of mandatory minimum sentencing will be laid out. The inefficacy and inconsistency that arises out of these sentences begs for a more structured sentencing scheme in South Africa - one that helps steer a sentencing officer's discretion when handing down sentences.

Section IV will discuss potential options for South Africa to pursue at this stage. This includes reform to current legislation in the form of more structured sentencing. Sentencing has been described as a 'topic about which legal practitioners learn least and consequently with which they are least familiar.'[21] This paper recognises that each offence and offender are unique to their circumstances, however, more structured and consistent sentencing is needed from the courts with regards to sexual offences. Disparate sentencing has in fact increased in the name of mandatory minimum sentences.[22] Guidelines need to be put into place to ensure public confidence in the fact that the government takes sexual offences seriously and is on the side of the victim. Furthermore, sensitivity training for judicial officers in order to reduce the level of judicial discretion guided by rape myths and stereotypes should be employed.

As another avenue for South Africa to pursue, this paper discusses primary prevention strategies for rape and other sexual violence. These are strategies that aim to intervene in ideas and attitudes that commonly lead men to rape. While there is little evidence available to judge the effectiveness of various prevention methods and more research is thus required in this regard, there are numerous studies that show that misinformed ideas about gender and gender equality are at the heart of sexual violence.[23] This could be targeted at teenagers during a critical time in the development of gender attitudes and norms, thereby preventing the formation of future generations of sex offenders.[24]

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[21] Howard Zehr *Crime and Justice* 3 ed (2005) at 28-1.
[22] Ron Paschke & Heather Sherwin 'SA Law Commission, Quantitative Research Report on Sentencing' (2000) 10-11 at 55.
[23] See Rachel Jewkes 'Why, when and how men rape: Understanding rape perpetration in South Africa 2016 *South African Crime Quarterly* 34.
[24] It should be noted that this paper focuses on female victims and adult offenders. While not all victims of sexual violence are women, they do make up a large majority of the victims. See World Health Organisation 'Sexual violence: prevalence, dynamics and consequences' available at https://www.who.int/violence_injury_prevention/resources/publications/en/guidelines_chap2.pdf

Addressing sexual offences in South Africa requires the government to take positive steps to curb the high rates of sexual violence in the country. Their responses to the issue thus far have been disappointing. It is their *duty* to protect their people from sexual violence in the country. They cannot keep hiding behind mere rhetoric and empty gestures.

SECTION II:

THE DEVELOPMENT OF SEXUAL OFFENCE LAWS IN SOUTH AFRICA

South Africa's sexual offence laws have undergone extensive reform in recent years. This has been a necessary response to combat the discrimination and prejudices that have plagued this area of law for so many years. This section will track this development specifically in the context of rape. The evolution of how the crime is (and was) understood and how it has been treated in court will be discussed. It will begin with tracing how the definition of rape has evolved over the years. This will show how the current crime of rape as defined in SORMA came to be. This will be followed by a discussion on the changes to evidentiary rules relating to sexual offence cases. Next, the paper will discuss the background and context out of which mandatory minimum sentencing arose. Lastly, the role and experience of sexual offence victims in the criminal justice process will be discussed.

While progressive strides have been made for victims of sexual offences, archaic attitudes are still visible and pose a threat to obtaining a just system. Addressing sexual offences in South Africa is a process that requires addressing the root of the issue: societal attitudes that allow violence against women to persist as a norm.

2.1.1. Evolution of the Definition of Rape

The earliest form of rape that was recognised by the legal system viewed it as a proprietary crime between a male perpetrator and female victim. Women were viewed as legal objects and not legal subjects like their male counterparts.[25] This meant that in the eyes of the law women were considered property. If a woman was to be raped, this was a proprietary crime against the owner of that 'property' as opposed to a crime against the woman herself. Thus, rape was a

[25] Helen Suzman Foundation 'Sexual Offences in the Criminal Justice System' available at https://hsf.org.za/publications/hsf-briefs/sexual-assault-i-sexual-offences-in-the-criminal-justice-system

crime against the father or husband of the female victim. This was the view of the early English common law.[26]

The South African common law crime of rape was later developed to narrowly define it as 'unlawful sexual intercourse with a woman without her consent'.[27] In other words, rape could only occur between a male perpetrator and a female victim and only by inserting his penis into her vagina.

The 'unlawful' component of rape was particularly problematic since marital rape was not criminalised.[28] This was during a time where husbands were considered dominant and had extensive legal powers over their wives.[29] Marriage was considered blanket consent for intercourse.[30] Thus, even if a man forcefully had sex with a woman without her consent, being married to the victim would act as a complete defence for the man. Thus, the non-consensual intercourse between a husband and wife was not unlawful.

The Law Commission recommended that this archaic exemption be done away with in 1985[31] but parliament was only willing to give in to a compromise. Subsequently, legislation in 1989 stated that if a man *would have* been convicted of rape if he was not married to the victim, it would be considered an aggravating circumstance for his sentencing in the context of assault.[32] In other words, marital rape was not recognised as rape *per se*, but rather an aggravated form of assault. It was not until 1993 that the marital rape exemption was finally abolished by the Prevention of Family Violence Act.[33] The 'unlawful' requirement has survived in the latest statutory definition of rape, but some argue it is tautological since unlawfulness now only refers to a lack of consent which is an element of the crime in any case.[34] However, delineating instances of 'rape' with 'unlawful rape' finds relevance in the context of compulsion. Where one person compels another person to rape someone, the person

[26] Nikki Taylor, 'The Politics of a Definition' in L Artz and D Smythe, 'Should we consent: Rape Law Reform in South Africa' (2008) *Juta* at 25.
[27] C Van der Bijl *Defining the crime of rape under South African law: a reconsideration* (LLD Thesis, 2006, University of Pretoria) at 9.
[28] *Masiya v Director of Public Prosecutions Pretoria (The State) and Another* (CCT54/06) [2007] ZACC 9; 2007 (5) SA 30 (CC); 2007 (8) BCLR 827 (10 May 2007) at para 28.
[29] Felicity Kaganas 'Rape in Marriage - Law Reform in Scotland and South Africa' (1990) 4 Int'l J.L. & Fam. 318 at 318.
[30] Ibid.
[31] South African Law Commission, *Report on Women and Sexual Offences in South Africa* Project 45, April 1985, para 2.43.
[32] The Criminal Law and Criminal Procedure Act Amendment Act 1989 at s 1.
[33] Supra note 28 at para 28.
[34] Op Cit note 31.

who committed the rape will be able to rely on the defence of compulsion.[35] Thus, even though a rape has been committed, it was not unlawful. Instead, the person who compelled the other to commit the rape will be liable.[36]

The common law definition also strictly applied to penile-vaginal penetration. Any other form of penetration would be classified as indecent assault – a less serious crime. This meant that rape was exclusively gender specific and did not include the anal or oral penetration of a female or male victim. This narrow definition came to light in the case of *S v Masiya* which was handed down by the Constitutional Court in 2007.[37]

S v Masiya dealt with a male who had been charged with the rape of a nine-year-old girl. Medical evidence revealed that he had anally penetrated her. This meant that according to the common law at the time, the accused could only be convicted of assault. The court a quo and subsequent High court declared the common law definition of rape to be unconstitutional. The definition was developed to include the anal penetration of a female and to be gender neutral.

In the Constitutional Court, the majority decided that the definition was not unconstitutional, but it did fall short of section 39(2) of the Constitution. This section requires laws to promote the spirit, purport and objects of the Bill of Rights. They accordingly developed the definition to include the 'non-consensual penetration of a penis into the anus of a female'.[38] They did not agree to develop the definition to be gender neutral as they felt it was not the judiciary's place to do so.[39] Their justification was as follows:

> 'Invalidating the definition because it is under-inclusive is to throw the baby out with the bath water. What is required then is for the definition to be extended instead of being eliminated so as to promote the spirit, purport and objects of the Bill of Rights.'[40]

The court's decision not to develop the definition of rape along gender neutral lines was criticised by many and described as a 'lost opportunity'.[41] It was argued that since the Constitutional Court is required to uphold and protect Constitutional rights, they had a duty to eradicate the discrimination caused by a gender specific definition of rape.[42] It was particularly

[35] Supra note 17 at s 4.
[36] Ibid.
[37] Supra note 28.
[38] Ibid.
[39] Ibid.
[40] Ibid at para 27.
[41] Kelly Phelps and Sha'ista Kazee 'The Constitutional Court Gets Anal about Rape – Gender Neutrality and the Principle of Legality in Masiya v. DPP' (2007) 20 S. Afr. J. Crim. Just. 341.
[42] Ibid at 344.

controversial as the crime of rape was the only violent crime that was gender specific at the time.[43] The legislature soon responded by enacting the SORMA the same year as the *Masiya* judgment was handed down.[44]

SORMA has been in effect since December 2007 and affects the punishment of crimes after this date. It replaced some of the common law on sexual offences and some sections of the old Sexual Offences Act.[45] Rape is defined in the Act as follows: Any person ('A') who unlawfully and intentionally commits an act of sexual penetration with a complainant ('B'), without the consent of B, is guilty of the offence of rape.[46] The crime of rape is accordingly gender neutral and includes any form of penetration as well as penetration with any object. The Act also introduces a number of new sexual offences including compelled rape.[47] This definition will be further scrutinised under the next section of this paper.

2.1.2. Evolution of Evidentiary Rules Relating to Rape

The crime of rape has not only been problematic in its definition, but its corresponding evidentiary rules employed in courts as well. Most notably are the rules regarding previous consistent statements, the cautionary rule, and the prior history of the complainant. In determining the genuineness of the sexual complaint, the courts seemed to place primary focus on the character of the complainant rather than the accused.[48] As will be discussed below, these rules have had no rational basis in our courts and only serve to reveal the extent of misogyny that has plagued our criminal justice system for decades.

a) Previous Consistent Statements

A previous consistent statement is a statement made by a witness out of court that is substantially similar to her testimony given in court.[49] The general rule in the law of evidence is that previous consistent statements are inadmissible due to their lack of probative value.[50] In other words, a witness cannot testify that on a previous occasion she made a statement

[43] Ibid at 347.
[44] The Criminal Law (Sexual Offences and Related Matters) Act 32 of 2007.
[45] Sexual Offences Act 23 of 1957.
[46] Supra note 44 at s 3.
[47] Ibid at s 4.
[48] Karam Jeet Singh 'Evaluating the 'First Report': The Persistent Problem of Evidence and Distrust of the Complainant in the Adjudication of Sexual Offences' at 39.
[49] Ibid at 38.
[50] PJ Schwikkard 'Getting Somewhere Slowly – The Revision of a Few Evidence Rules' Op Cit note 26 at 87.

consistent with her current testimony in court. The more someone repeats or has repeated something in the past does not make it more true.

However, as with most general rules in the law of evidence, there are exceptions. Previous consistent statements may be admissible where there is an allegation of recent fabrication, where it is used as identification evidence, and in sexual offence cases. Under the common law, previous consistent statements are admissible in sexual offence cases when the statement is made voluntarily; the complainant testifies at trial; and the complaint is made at the first reasonable opportunity.[51] If these requirements are met, the previous consistent statement can be admitted as evidence.

The requirement that the complaint be made at the first reasonable opportunity has its origins in the Middle Ages. Complainants were required to raise a 'hue and cry' at the time of the offence for their experience to have a chance of credibility.[52] While this was a rule that applied to all crimes, by the end of the 19th century this requirement seemed to only apply in sexual offence cases.[53] Since the majority of complainants in sexual offence cases are overwhelmingly women, Singh suggests that the law of evidence seems to associate a delay in reporting with this inherent distrust of women as reliable witnesses.[54] This inherent distrust of women is seen in other rules as well which are discussed below.

With the enactment of SORMA, previous consistent statements are now admissible provided that the court may not draw any negative inference from the absence of such statements.[55] In addition, the court may not draw any inference from the length of delay between the commission of the offence and the reporting of that offence.[56] It seems that the only inference that could be drawn from a previous consistent statement in a sexual offence case is to show consistency in a witness' account. These provisions have rightly recognised that there are many psychological reasons why a complainant may not immediately report the incident.[57]

b) Cautionary Rules

[51] Op Cit note 48 at 38.
[52] Ibid.
[53] Op Cit note 50.
[54] Op cit note 48 at 40.
[55] Supra note 17 at s 58.
[56] Ibid at s 59.
[57] Op Cit note 50.

Another disturbing trend of the law of evidence was a special cautionary rule applied by courts to witnesses in sexual offence cases.[58] A cautionary rule is used by judicial officers in certain cases where witnesses are commonly unreliable and thus, their testimonies are approached with caution.[59] Women were considered by the legal system to be notoriously unreliable witnesses due to their propensity towards 'hysteria'[60] and 'lying about rape'.[61] There was no apparent logical basis for this rule and it only served to demean women and contribute to secondary victimisation and the non-reporting of sexual offences.[62] The misogynistic rationale behind this is illustrated in the following excerpt:

> 'It is not only the risk of conscious fabrication that must be guarded against. There is also the danger that a frightened woman, especially if inclined to hysteria, may imagine that things have happened which did not happen at all.'[63]

Schwikkard makes the point that even if the concern centres around the fact that sexual offences occur mostly in private and without 'outward traces' to affirm or deny whether there was consent, the court is no stranger to determining a case based on one witness.[64] In fact, for any crime with a single witness the court automatically applies a cautionary rule regarding this witness' testimony. Why then would sexual offences need to be singled out with a specific blanket cautionary rule? Additionally, presiding officers have their usual tools of cross-examination and evidence of surrounding circumstances to assist them in determining the credibility of the witness.[65] This is nothing unusual and there is no evidence to suggest that more false charges are laid in respect of sexual offences than any other crime.[66] The lack of logic behind the rule reveals that the heart of it was plain discrimination.

The Supreme Court of Appeal ruled in 1998 that the cautionary rule in sexual offence cases had no rational basis. It stated in *S v Jackson* that: 'The cautionary rule in sexual assault cases is based on irrational and outdated perceptions. It unjustly stereotypes complainants in sexual assault cases (overwhelmingly women) as particularly unreliable.'[67] Subsequent courts still managed to sidestep this case by interpreting it in a way that allowed them to retain the

[58] Op Cit note 50 at 73.
[59] Ibid.
[60] Op Cit note 50 at 75.
[61] *S v Jackson* (35/97) [1998] ZASCA 13 at pg 12.
[62] Op Cit note 50 at 74.
[63] *R v Rautenbach* 1949 (1) SA 135 (A) at 143.
[64] Op Cit note 50 at 74.
[65] Ibid.
[66] Ibid.
[67] *S v Jackson* 1998 (1) SACR 470 (SCA) at 476e.

rule in some cases.[68] The rule was only officially abolished by SORMA in 2007.[69] Thus, it is now statutorily recognised that there is no reason a complainant in a sexual offence case should be seen as any less credible than a victim of any other crime. The sexual nature of the crime in question is no longer a basis on which the court can treat the witness' testimony with caution.

c) Prior History of the Complainant

The last rule that will be discussed in this section is the prior history of the complainant. There is a general rule that states that the character or general disposition of the complainant is not relevant to determine their credibility as a witness.[70] Thus, evidence which is directed at establishing that the complainant is of good or bad character is inadmissible. However, a common law exception to this rule is in a case involving a charge of rape or indecent assault.[71]

Previously, section 227 of the Criminal Procedure Act provided that the admissibility of evidence as to the character of any female in a sexual offence case would be determined by the common law.[72] Accordingly, the complainant could be questioned in court about her sexual history with the accused. The complainant could also be questioned on her sexual relations with other men during cross examination as it was relevant to her credibility. Section 227 was later amended to say that evidence of prior sexual history would only be admitted after leave of the court was sought to lead such evidence. The court would only grant this if the evidence were relevant. This includes the complainant's prior sexual history with the accused.

The amendment was criticised for conferring very wide discretion on judicial officers to grant such applications.[73] The same judicial officers who had previously allowed irrelevant previous sexual history evidence to be led were now responsible for granting or denying these applications. The section was amended again. Section 227 of the Criminal Procedure Act states that prior sexual history evidence 'other than evidence relating to sexual experience or conduct in respect of the offence which is being tried' may not be led or raised in cross-examination except with the leave of the court or unless prior sexual history evidence has been introduced by the prosecution. Notably, the amendment specifies certain factors the court must consider when deciding whether to grant an application to lead such evidence.[74] The section requires

[68] Op Cit note 50 at 76.
[69] Supra note 17.
[70] Op Cit note 50 at 94.
[71] Ibid at 94.
[72] Act 52 of 1977.
[73] The Criminal Law and Criminal Procedure Act Amendment Act 39 of 1989.
[74] Supra note 72 at s 227(5).

the court to provide reasons for granting or refusing an application to lead prior sexual history evidence.[75]

The radical change of this area of law reflects how we, as a society, understand and view rape. The patriarchal and discriminatory views that underpinned rape for so many years have finally shifted. Our Constitution formally recognises the values of dignity, equality and freedom.[76] It has become more widely accepted that rape uniquely affects the dignity and personal integrity of its victims.[77] While we accept that rape is ungendered, women are acknowledged as the primary victims of the crime as statistics continue to reveal the unequal power relations between men and women in South Africa.[78] The law has made many welcomed strides in obtaining justice for sexual offence victims, however, the job is not over yet.

2.1.3. Sentencing Sexual Offences: How Mandatory Minimum Sentences Stuck

The South African judiciary has traditionally had wide discretion with regards to sentencing convicted persons. The introduction of mandatory minimum sentencing has, to some extent, hampered that discretion. While it was initially introduced as a temporary measure, it has since become permanent.[79] There is now a small range of serious offences that attract a mandatory minimum sentence of incarceration unless the sentencing officer finds 'substantial and compelling circumstances' to justify a lesser sentence.[80] Rape is one of these offences.

To place the Criminal Law Amendment Act 105 of 1997 ('CLAA') in context, South Africa's early years of democracy were predicted to have a rise in violent crime.[81] South Africa's perceived crime rates came alongside the fact that the Constitutional Court abolished the death penalty in 1995.[82] This contributed to the public's fear of crime rates only getting worse. In

[75] Ibid at s 227(7).
[76] Supra note 2 at s 1.
[77] Supra note 28 at 28.
[78] Supra note 28 at 28.
[79] Edward Cameron, 'Imprisoning the Nation: Minimum Sentences in South Africa' Dean's Distinguished Lecture at the University of the Western Cape (2017).
[80] Supra note 16.
[81] Op cit note 9.
[82] *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995).

reality, the crime rate actually decreased from 1994/1995 to 1997/1998.[83] However, a sharp increase was recorded after this.[84]

The number of rapes that were reported doubled from 1994 to 1998.[85] The sentences of imprisonment being handed down by judges were inconsistent and the parole policy was seen as too lenient.[86] It appeared that serious crimes were not being met with sufficiently serious punishment. To make matters worse, the government had initially denied rape as being a problem in the country.[87] The public was outraged.

This led the Minister of Justice and Constitutional Development to appoint a project committee to investigate sentencing – this included the desirability of legislation on minimum and maximum sentences.[88] The Commission agreed that there was indeed an unacceptable rate of disparity in the sentencing of offenders.[89] The Issue Paper released by the Commission provided a number of possible solutions for sentencing reform. While one of these proposals was in fact mandatory minimum sentences, the Paper recommended that the issues be debated and discussed at length before a decision was made on which path to take.[90] Contrary to this recommendation, parliament seemed to rush the process along as their decision was basically made before submissions for public comment had even closed.[91]

The CLAA was introduced as a response to public outcry.[92] In fact, it was the only legislative response from the government for ten years.[93] The mandatory minimum sentences that were introduced were initially intended as a temporary measure for a 'temporary' problem to reduce crime rates.[94] They were extended twice before becoming permanent in 2007. Under the Act, Schedule 2 divides rape into two categories: Part I rape and Part II rape.[95] Part I lists several aggravating factors that, if present, attract a life sentence for the offender.[96] This includes rape involving a minor, rape with several perpetrators or rape by an HIV positive

[83] J Sloth-Nielsen and Louise Ehlers 'Assessing the Impact: Mandatory Minimum Sentences in South Africa' (2015) *SA Crime Quarterly* No 14 at 16.
[84] Ibid.
[85] Op Cit note 9 at 214.
[86] Ibid.
[87] Ibid.
[88] Op Cit note 31.
[89] Ibid.
[90] Ibid.
[91] Julia Sloth-Nielsen & Louise Ehlers, 'A Pyrrhic victory? Mandatory and minimum sentences in South Africa' Paper 111 (2005) *Institute for Security Studies* at 4.
[92] Op Cit note 79 at para 22.
[93] Op cit note 9 at 214.
[94] Op Cit note 79.
[95] Supra note 16 at s 51 read with Schedule 2 of the Act.
[96] Ibid at Schedule 2, Part I.

person.[97] The presence of any one of these factors is enough to trigger a life sentence. Rape in Part III is considered rape without aggravating circumstances and requires a sentence of ten years.

Mandatory minimum sentencing has survived Constitutional scrutiny due to the point of departure that the sentences are not mandatory if 'substantial and compelling reasons' exist to justify departure.[98] This proviso has been highly criticised by both judges and the public.[99] The Act does not provide a list of what these circumstances should or could be. Thus, judges decide it for themselves and minimum sentences are often not as 'mandatory' as they may seem. In fact, judges deviate from the mandatory minimum sentences in most cases.[100]

S v Malgas was the first Constitutional Court case dealing with the 'substantial and compelling reasons' caveat.[101] While it provided some gloss on the provision, it did not specify the degree to which deviation was permitted. This led to mandatory minimums increasing sentence disparity.[102] Evidence has shown that judges actually use mandatory minimums as maximum sentences in most cases.[103]

In her article analysing the effectiveness of mandatory minimum sentences, Baehr discusses the extent of inappropriate 'substantial and compelling circumstances' judges would draw from in the early years of the Act in order to justify lesser sentences in sexual offence cases.[104] Examples she used to highlight the inappropriate substantial and compelling circumstances included: the fact that the victim was not a virgin,[105] that a father of a ten-year-old was 'gentle' when he molested her several times,[106] and that a husband was culturally chauvinist and thus was less culpable for kidnapping and brutally raping his wife.[107] Visser J, in justifying his substitution of the mandatory life sentence with an eight year sentence for the rape of a fourteen year old, stated the following in a 2005 judgment:

> 'The complainant being the pretty girl that she is might have brought out the animal in the accused spontaneously, and it would be wrong to deprive the accused of the opportunity of rehabilitation and being a useful citizen.

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[97] Ibid at Schedule 2, Part II.
[98] *S v Malgas* (117/2000) [2001] ZASCA 30; [2001] 3 All SA 220 (A) (19 March 2001).
[99] Supra note 16.
[100] Op cite note 9 at 228.
[101] Supra note 98.
[102] Op cit note 9 at 228.
[103] Ibid.
[104] Ibid.
[105] *S v Mahomotsa* 2002 (2) SACR 435 (SCA) at 441 (S.Afr.).
[106] See: Judge Frees 'Gentle' Child Rapist, SUN. Times, Nov. 17, 2002.
[107] *S v Mvamvu* case 350/2003 (SCA) at 12.

> I have to bear in mind the sentiments of society and of the community, which demand that crime should be punished severely. It is fortunate for the accused that the evidence in this case indicates that the complainant has suffered no emotional disturbances or ill-effects as a result of her experience, and that she suffered no serious injuries. There is also the fact that her HIV tests proved negative.'[108]

Fortunately, Parliament eventually amended the law to prohibit judges from finding substantial and compelling circumstances from the following factors: (i) sexual history of the victim; (ii) the apparent lack of physical harm to the victim; (iii) the defendant's cultural or religious beliefs about rape and; (iv) the previous relationship between the defendant and the complainant.[109] However, Baehr holds that the inappropriate response and attitude of judges and the government in those initial years of the Act helped shape the rape crisis we deal with today.

As explained below, due to the haste with which this legislation was brought in- mandatory minimum sentences have been characterised as a poorly thought-out strategy by parliament under the guise of actually doing something constructive about the rising crime rates. With the low conviction rates for rape in South Africa,[110] it seems that sentencing offenders should have been one of their final steps in addressing sexual offences instead of the first. This will be made clearer with the discussion below on how poorly officials in the system treat victims of sexual offences. How did we focus on what punishment offenders should receive without addressing the fact that most victims of sexual offences do not even report the sexual offence in the first place?

2.1.4. Victims' Experience in the Criminal Justice Process

Reforming the laws on rape was an important step for the legislature to take. However, changing the definition of rape and eliminating prejudicial evidentiary rules is not enough to adequately address sexual violence in its entirety. The definition of rape and the rules employed in the court room when assessing evidence are only relevant in the final stages of the criminal justice process. If the high rate of sexual offences is going to be addressed, the entire criminal justice system needs to work in harmony towards this goal. The first step is for victims to feel comfortable enough to report the sexual offences done to them. As Smythe commented: '… laws which looked good on paper have been thwarted in their implementation by recalcitrant criminal justice agents and agencies.'[111] Even after redefining rape in SORMA, it is estimated

[108] *S v Ntuli* [2005] JOL 12442 (ECLD) at 34.
[109] Criminal law (sentencing) Amendment Bill of 2007 at s1(3).
[110] See L Artz & D Smythe (2007) 'Case Attrition in Rape Cases: A Comparative Analysis' *SACJ* 20(2) 158–181; L Artz & D Smythe (2007) 'Losing Ground: Attrition in Rape Cases' *SA Crime Quarterly*.
[111] Op Cit note 26 at 171.

that only one in nine women who have been raped, actually report their rape to the police.[112] A large contributor to this fact is the way victims are treated in the criminal justice process.[113]

a) Policing Sexual Offences

The legacy of not taking victims of sexual offences seriously in our legal system has impacted how sexual offences are policed in South Africa. Studies with victims have shown that rape myths and stereotypes still persist in the minds of many police officers today.[114] As the police are the entry point into the criminal justice system in most cases, addressing how sexual offences are policed is a large part of addressing sexual offences in general.

A big contributor to the lack of reporting rape and other sexual offences is due to the secondary victimisation that victims experience in the justice process. Aside from the traumatic experience of undergoing a form of sexual assault, victims who do decide to report their experience are often met with indifference, insensitivity and even hostility from police officers and the court.[115]

Police officers generally do not understand the trauma that victims go through and it shows through their treatment of the victims who do come forward. As part of a study, several interviews were conducted with female victims in South Africa who have reported their rape to the police.[116] Most of these victims perceived the police officers as unable to provide the respect, care, support and ongoing information that they needed.[117] This affects the whole investigation as a relationship of trust is needed between the officer and the victim for the victim to feel comfortable enough to share intimate details.[118]

When extensive rape law reform was first initiated in 1998, there were differing views on how the reform should take place.[119] Some viewed reform as creating an environment where victims of sexual offences would be treated with greater dignity and care. Others viewed it as enforcing more punitive measures for sexual offenders.[120] While the focus shifted over time,

[112] Vinesh Basdeo, 'Policing Sexual Violence in South Africa: Problems and Challenges' (2018) *International Journal of Criminal Justice Sciences* Vol 13 Issue 1 at 113.
[113] Op Cit note 1.
[114] Op Cit note 26 at 199.
[115] Ibid at 198.
[116] Op Cit note 26 at chp 9.
[117] J Jordan *Rape, Reform and Resistance* (2005, Victoria University of Wellington, New Zealand) at 5.
[118] Op cit note 26.
[119] Ibid at 1.
[120] Ibid.

the end product of this reform was largely the creation of new sexual offences. Artz and Smythe noted the following about the reform:

> 'In the end, the reforms enacted focused more on the creation of new sexual offences, rather than on the improvement of specific procedural mechanisms to reduce secondary victimisation and address the arbitrary application of measures designed to protect victims.'[121]

Despite calls for legislation to impose positive duties on police officers with regards to how they should handle sexual offence cases, SORMA opted for the establishment of National Directives instead.[122] This was done in spite of the lack of success from previous policies created for SAPS to prioritise violence against women.[123] Where legislation or policy prioritises certain crimes, the National Police Commissioner creates national instructions/directives to give effect to this goal.[124]

When SORMA was enacted, it provided for the establishment of a committee responsible for developing and monitoring a National Policy Framework.[125] The Framework is to set performance standards for the police with regards to sexual offences. The National Instructions are required to be developed on 'all matters which are reasonably necessary or expedient to be provided for and which must be followed by all police officials who are tasked with receiving reports of and the investigation of sexual offence cases.'[126] SORMA also mandates training courses for these National Instructions and social context training regarding sexual offences.[127] This is in order to make sure officers are capable of managing sexual offence cases in the appropriate manner that does not contribute to re-traumatising the victim.

While there has been nothing overtly controversial about the national directives themselves, to be effective they require enforcement by the leadership of SAPS. Over the past two decades, the lack of leadership in enforcing these national directives has been evident. Aside from the lack of enforcement, not many victims would even know the directives exist or how to rely on them. Without legislated police duties to rely on, a debate emerged as to whether victims should have specific rights when it came to sexual offence cases. These rights would

[121] Ibid at 3.
[122] Supra note 17 at s 66.
[123] The National Crime Prevention Strategy of 1996, The National Crime Combatting Strategy of 2000 and The Department of Safety and Security's Strategic Plan for 2005 to 2010 all attempted to prioritise violence against women with little to no improvement – see Should we consent 202.
[124] The South African Police Service Act 68 of 1995 at s 25(1)(b).
[125] Op Cit note 26.
[126] Supra note 17 at s 66.
[127] Ibid at s 66(1)(b).

go beyond the general rights afforded to every person in South Africa in terms of the Bill of Rights.

b) A Place for Victims' Rights?

Victims of sexual offences play a very limited role (if any) in the South African criminal justice process. As a result of our adversarial system, their role is limited to that of a state witness. There are no specific procedural rights available to victims.[128] What this means in reality is that sexual offence victims are not entitled to representation, may not challenge bail decisions, adduce any evidence, or appeal an acquittal or sentence.[129]

The South African Law Reform Commission came out with a discussion paper on Process and Procedure where they considered the system of criminal procedure that should govern sexual offence cases.[130] Its aim was not to reinvent the entire current criminal justice system, but rather find ways to make it work better. They put forward options to strengthen the procedural position of sexual offence victims. Their proposals came in the form of introducing victims' rights through, for example, an amended section of the Constitution or in legislation.

The idea of allowing victims representation rights was also submitted. The idea was that victims would have the right to legal representation in the trials of their offenders.[131] The legal representative would represent the victim in their dealings with the police, the National Directorate of Public Prosecutions, bail hearings, when the victim is testifying and at the time of sentencing.[132] Aside from the right to receive Post Exposure Prophylaxis in certain circumstances, the idea for a charter of victims' rights did not materialise in the SORMA.[133]

A process that is more inclusive of victims would tie in with African customary law. The Constitution itself highlights the importance of African customary law in our legal system by *requiring* courts to consider it when developing the law.[134] Thus, there is good reason to allow it to influence our legal processes. African cultures are well-known to be centred around communitarian values. This approach is also evident in customary criminal justice systems.[135]

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[128] Op Cit note 26 at 266.
[129] Ibid.
[130] South African Law Reform Commission (SALRC) Project 107 (2001) *Discussion Paper 102.*
[131] Op Cit note 26.
[132] Ibid.
[133] Supra note 17 at s 28.
[134] Supra note 1 at s 39(2).
[135] D Louw and L van Wyk 'The Perspectives of South African Legal Professionals on Restorative Justice: An Explorative Qualitative Study' at 491.

African scholars have asserted that traditional African customary law approaches to justice are very similar to the commonly known restorative justice model.[136]

The concept of restorative justice is not solely focused on the offender. For the restorative justice model, what really makes a crime harmful is that it is a violation of one person by another.[137] Crimes are viewed primarily as an offence against human relationships, and secondly as a violation of law.[138] Restorative justice focuses on repairing the harm that was done against the victim and restoring the damaged relationships.[139] Thus, the victim of a crime has a role to play in the criminal justice process as well as the community members that are affected. Since the Constitution claims to place such great emphasis on the recognition of customary law, it is strange that this fact is hardly revisited.

This section has discussed how we got to the laws relating to sexual offences that we have today. What follows is a critique these laws before the final section of the paper discusses proposals for addressing sexual offences in South Africa.

SECTION III:

CRITIQUE OF SOUTH AFRICA'S CURRENT LEGISLATIVE APPROACH TO RAPE

This section will critically discuss the SORMA and Criminal Law Amendment Act 105 of 1997 with regards to their effect on sexual offences and how they fall short of their goals. It is true that there has been important legislative reform in the past few years but without pursuing strategies that are backed up by appropriate research and resources, those reforms will be very limited in their impact. This section will specifically discuss the definition of rape, the National Register for Sex Offenders, sexual offences courts, the treatment of victims in the criminal justice process and the mandatory minimum sentence for rape. While the definition of rape and the establishment of sexual offences courts are useful tools in combatting the issue of sexual violence, the NRSO and mandatory minimum sentences are largely misguided avenues for reform. Furthermore, how the victims in the justice system need improvement if the reporting

[136] Devani Delomoney *Will a Restorative Justice Approach to Sentencing Improve the Efficacy and Functioning of The Criminal Justice System?* (College of Law and Management Studies, 2015).
[137] Op Cit note 21 at 182.
[138] South African Law Commission (Project 82), *Sentencing (A new Sentencing Framework)* 2000 at 217.
[139] The Department of Justice and Constitutional Development 'Restorative Justice: The Road to Healing' at 4.

of sexual violence and conviction of offenders is going to be improved. The paper will then move on to discuss the unimpressive effects of The Criminal Law Amendment Act 105 of 1997.

3.1.1. Definition of Rape: Consent

As mentioned above, rape is now described in SORMA as follows:

> 'Any person ('A') who unlawfully and intentionally commits an act of sexual penetration with a complainant ('B'), without the consent of B, is guilty of the offence of rape.'[140]

While consent may be one of the vital requirements that separates rape from consensual intercourse, the idea of consent is often misinformed and misinterpreted. Furthermore, it runs the risk of exposing the victim to secondary victimisation when they have to relive their trauma and have their testimony scrutinised in the court room. Notwithstanding the Law Commission's recommendation to forego the 'without consent' requirement, it is still a requirement for rape under SORMA.

The Law Commission opted for a replacement of 'consent' with 'coercive circumstances' in the definition of rape. This would shift the focus off the victim's behaviour and onto the surrounding circumstances. This would require the prosecution to prove that the sexual intercourse took place in 'coercive circumstances', rather than 'without consent'.[141] Their proposal redefined rape as follows:

> '(1) Any person who intentionally and unlawfully commits an act of sexual penetration with another person, or who intentionally and unlawfully causes another person to commit such an act, is guilty of an offence.
>
> (2) For the purposes of this Act, an act of sexual penetration is prima facie unlawful if it takes place in any coercive circumstances'.[142]

The report goes on to offer a non-exhaustive list of coercive circumstances.[143] Part of the argument against this definition seemed to be the fact that consent could still be a *defence* to a charge of rape.[144] Another argument has been that proving coercive circumstances is just another way of proving lack of consent.[145] However, the Law Commission urged the point that redefining rape in this way would shift the focus off the complainant's behaviour and back on

[140] Supra note 17 at s 3.
[141] Op Cite note 138 at 113.
[142] Ibid at 115.
[143] Ibid at 116.
[144] Op Cit note 26 at 7.
[145] Op Cit note 138 at 113.

the accused.[146] It will ensure the judgment is based on objective facts and not the view of the complainant.[147]

The lack of consent requirement for rape often leads to a reliance on stereotypical beliefs. For instance, the ability to simply say 'no' to sexual intercourse presupposes that both parties feel that they have a say in the matter. Consent has often been proved by the absence of the victim saying 'no' to the offender. This standard allows the silent or passive behaviour of a victim to pass for consent where fear may have stolen her words.[148] MacKinnon states that:

> 'No means 'no' is a big improvement over 'no' meaning 'yes,' but until equality exists not even 'yes' can reliably mean 'yes.' 'Yes' can be coerced. It can be the outcome of forced choices, precluded options, constrained alternatives, as well as adaptive preferences conditioned by inequalities.'[149]

SORMA did not adopt the Law Commission's recommendations to forego the consent requirement. For the purposes of rape, SORMA defines consent as 'voluntary or uncoerced agreement'.[150] SORMA's concept of coercive circumstances expands on the common law rules that negated consent for sexual intercourse. This is a more realistic recognition of the power dynamics around victims and perpetrators. Thus, while SORMA did not adopt the Law Commission's definition of rape, its inclusion of 'coercive circumstances' is intended to guide the court as to how they should assess the presence or absence of consent.

The idea of coercive circumstances recognises that sexual violence is derived from a fundamental right to individual autonomy over sexual decision making. Force, fear, and coercion all deny the sexual autonomy of the victim by denying them the right to say yes or no to sexual intercourse.[151] Ignoring this decision by the victim and resorting to violent, forceful, or deceptive means to overcome this decision is the ultimate violation of human rights.

While SORMA takes a leap in recognising that 'no' can look different in different situations, it does little to address the secondary victimisation of the victim during the trial. In practice, rape trials centre around the testimony of the victim to show that they did or did not consent. Secondary Victimisation occurs as a result of the victim's testimony being put in focus to determine the absence or presence of consent.[152] This requires the victim to relive their experience on trial with the intimidation of cross-examination. This has been heavily criticised

[146] Op Cit note 138 at 114.
[147] Ibid at 115.
[148] Op Cit note 26 at 27.
[149] C MacKinnon, 'Women's Lives, Men's Laws' (2005) *Harvard University Press* at 246.
[150] Supra note 17.
[151] Op Cit note 26.
[152] *Sexual Offences Commentary Act 32 of 2007* (2011) Juta.

as it focuses attention on the conduct of the victim rather than the accused. It has been said that the redefinition of consent re-orientates the enquiry towards the accused's actions:

> '[Coercive circumstances] emphasise that rape is not simply about whether the victim 'consented': it is about the reprehensible conduct of the perpetrator. It shifts the psychological nature of the enquiry away from what the victim did to what the accused did and puts him [or her] on terms to justify his [or her] conduct.'[153]

The fact that consent persists through SORMA as a requirement to prove rape places a disadvantage on the victim as they have to prove non-consent. Critics have argued that the enquiry into consent should begin by examining the conduct of the accused and the surrounding circumstances to determine whether consent was vitiated.[154] Retaining consent as a definitional element of the offence of rape means that instead of having to prove that coercive circumstances were present, the prosecution is responsible for proving that consent was lacking. This places a bigger burden on the prosecution. However, SORMA's recognition that coercive circumstances negate consent offers much more protection for victims of rape who did not feel like they could say 'no'.

The recognition that coercive circumstances do not equate to consent acknowledges that rape is not exclusively a sexual crime, but one that involves complex power dynamics. It involves the coercive exercise of power, including emotional, psychological, economic, social and institutional power.[155] By recognising the threat of harm alongside actual harm, SORMA does not expect the victims of sexual offences to put their own lives at risk to avoid these crimes. The shift to include the idea of submission as something that negates consent helps to understand rape in prisons as well. Gangs in prisons often control basic necessities that other prisoners require. In these circumstances the law recognises that a victim may consent to sexual intercourse in order to survive.[156]

According to SORMA's understanding of coercive circumstances, submission does not equate to consent. Valid consent is not submitting to sexual intercourse as a result of actual violence or fear of violence due to threats or intimidation.[157] All circumstances surrounding the rape must be considered to determine the presence or absence of consent.[158] These provisions of SORMA are construed in broad terms. For instance, it does not seem to matter whether the

[153] Ibid at 40.
[154] Op Cit note 130.
[155] Op Cit note 152 at 54.
[156] Ibid.
[157] Ibid.
[158] Ibid.

threats of force or harm need to be directed against the person or property of a third person as opposed to the victim herself. Furthermore, a threat of harm is sufficient and need not be actual harm or violence.

Fraud is also listed as one of the coercive circumstances in SORMA that serve to negate consent. SORMA codified the common law circumstances that excluded consent in cases of *error in negotio* and *error in persona*.[159] *Error in persona* refers to situations where a victim was misled regarding the *identity* of the accused involved in the sexual act.[160] *Error in negotio* refers to situations where the victim was misled as to the *nature* of the sexual act.[161] SORMA went beyond the common law exceptions of *error in persona* and *error in negotio* by avoiding a closed list of instances of fraud. It is argued that:

> '... fraud vitiates consent to an assault whenever it induces subjective consent and the fraud is material in the sense that the harm inflicted is substantially greater than the harm (if any) expected.'[162]

This is particularly important when it comes to the contraction of sexually transmitted diseases or infections. The argument here is that where a complainant would not consent to sexual intercourse with a person if they knew that the latter had a sexually transmitted disease or infection, consent should be vitiated.[163] This is because the complainant's consent extends to sexual intercourse but not necessarily to the unknown risks involved. A complainant cannot consent to a risk she is not aware of. SORMA's definition of fraud is broad enough to cover these instances.

SORMA also states that the complainant must have the requisite mental capacity to appreciate the nature of the sexual conduct in order to consent.[164] It then goes on to provide a list of instances where this capacity can be vitiated. This includes where the complainant is asleep,[165] unconscious,[166] intoxicated,[167] below the age of 12,[168] or has a mental disability.[169] The same logic applied to criminal capacity is applied to the circumstances of victims. For an accused to be convicted of rape, the prosecution needs to establish that they had capacity. Now,

[159] Supra note 17 at s 1(3)(c).
[160] R v Dee (1884) 15 cox cc 579.
[161] *R v Williams* 1923 1 KB 340.
[162] Op Cit note 162 at 83.
[163] Ibid at 86.
[164] Supra note 17 at s 1 (3)(d).
[165] Ibid at s 1 (3)(d)(i).
[166] Ibid at s 1 (3)(d)(ii).
[167] Ibid at s 1(3)(d)(iii).
[168] Ibid at s 1(3)(d)(iv).
[169] Ibid at s 1(3)(d)(v).

the victim's capacity is also considered to determine if they were actually able to consent to sexual intercourse in the first place. This is a welcomed rule to guard against taking advantage of persons in a vulnerable position or predisposition and it is largely a restatement of the position at common law.

The next aspect of the definition that will be discussed is the element of sexual penetration. As discussed in the previous section, this element has been significantly broadened by SORMA.

3.1.2. Definition of Rape: Penetration

The international law community has acknowledged that rape cannot be captured in an objective description of objects and body parts.[170] Serious violations are not restricted to penetration in the ordinary sense of the word. Insertion of objects, insertion of other parts of the body (such as fingers or tongues) and oral penetration are all extremely violating but are not traditionally classified under sexual penetration.

While SORMA retained penetration in its final definition of rape, it thoroughly expanded on its scope. SORMA recognised the need to move beyond the previous archaic understanding of what was recognised as 'penetration'. In section one, SORMA defines penetration as follows:

> **''sexual penetration'** includes any act which causes penetration to any extent whatsoever by-
> (a) the genital organs of one person into or beyond the genital organs, anus, or mouth of another person;
> (b) any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or
> (c) the genital organs of an animal, into or beyond the mouth of another person'[171]

As discussed previously, this is a welcomed progression from the early stance on rape as 'sexual intercourse' which was then changed to 'sexual penetration' of the vagina or anus.

Penetration by the accused's genital organs applied to the mouth, vagina, penis, or anus of a victim constitutes rape. The insertion of any part of an animal (in the case of oral penetration it requires the genital organs of the animal) or object into or beyond the genital organs or anus of the victim also constitutes rape. The scope of sexual penetration recognised by SORMA has significantly broadened. It includes any act that causes penetration to any extent by any part of the body of one person or an object, into or beyond the genital organs or

[170] See Amnesty International 'Rape and Sexual Violence Human Rights Law and Standards in The International Criminal Court' (2011).
[171] Supra note 17 at s 1.

anus of another person. What would previously have amounted to indecent assault (and thus, attracted a lighter sentence) may now fall within the definition of rape and attract the mandatory minimum sentence. The courts have confirmed that even 'slight' penetration is sufficient for a charge of rape.[172]

The dividing rationale between rape and sexual assault is penetrative and non-penetrative.[173] This is a welcomed progression as the violation that victims experience is no different for penetration of different orifices.[174] This is also true for the lack of object-specificity. Previously, penetrative conduct such as genital penetration of the mouth and penile penetration of the anus fell under indecent assault. Now, thanks to SORMA, it is included within the ambit of rape.

Another progression under SORMA is that a series of events can lead to multiple acts of sexual penetration.[175] This means that it could lead to multiple charges of rape. Thus, if an accused had to reposition the victim with the intention of raping the victim in a separate manner, multiple charges of rape could ensue.

The last element of rape that will be discussed in this paper pertains to intention. While seemingly standard for most crimes, there were debates as to whether negligence should be a form of fault for rape.

3.1.3. Definition of Rape: Intention

SORMA retained intention as the standard of fault required for rape.[176] It mirrors the common law in this standard. Punishing offenders who intentionally sexually penetrate a victim without consent has never been the subject of controversy. Instead, a point for debate has been whether negligence as a standard of fault should be included as an alternative to intention for rape.

Any crime that requires intention as its standard of fault divides intention into two components: a form of intention ('*dolus'*) and knowledge of unlawfulness. The latter component is notoriously problematic in the context of rape. This is due to the fact that the prosecution needs to show that the accused was aware that the victim was not consenting.[177]

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[172] *S v MM* 2012 (2) SACR 18 (SCA).
[173] Except in the case of self-sexual assault, which is the only kind of penetration of a genital organ that does not constitute rape; op cit note 152.
[174] M Reddi 'A feminist perspective of the substantive law of rape' in Saras Jagwanth et al (1994) *Women and the Law* 160–161.
[175] Supra note 17.
[176] Ibid.
[177] Op Cit note 152 at 127.

The accused has the possible defence of mistaken belief in consent. If they had a genuine, albeit mistaken, belief that the complainant was consenting, fault will be lacking.[178] This belief does not even need to be reasonable.

This defence is most likely to arise where the accused knew the victim prior to the alleged rape. In these cases:

> '... the complainant is less likely to offer significant resistance so that there will be more scope for the accused to argue that he honestly, albeit mistakenly, believed that the complainant consented to sexual intercourse.'[179]

This is particularly problematic as most rapes in South Africa are committed by offenders who know the victim.[180] It is also argued that this defence could result in the reintroduction of the resistance requirement under the guise of mistaken belief of consent. This is due to the fact that the lack of resistance provides an opportunity for the accused to argue that he mistakenly believed there was consent.[181] However, it has been pointed out that SORMA takes into account factors like coercive circumstances when determining a lack of consent.[182] This broad approach looks at all the circumstances surrounding the incident to conclude whether an honest, mistaken belief was held.

While it seems that this defence is an 'easy way out' for alleged offenders, the courts have not been lenient in its application. For instance, they have held the position that cultural beliefs in relation to sexual coercion are not afforded constitutional protection.[183] In other words, cultural norms do not play a part in mistaken belief of consent. Culture, custom and tradition do not remove the obligation of the accused to ascertain consent even within the scope of cultural generalisations.[184]

The definition of rape as per SORMA attracted initial concerns, but it seems these concerns have not come to fruition. Overall, it is largely progressive and a lot more inclusive of victims. Another innovation introduced by the SORMA is the National Register for Sexual Offenders. Similar to mandatory minimum sentencing, it seems that the Register was a poorly researched option by the government that wastes resources that could be far better spent in actually addressing sexual offences with positive results.

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[178] *S v Zuma and Others* (CC358/05) [2006] ZAKZHC 22 (20 September 2006).
[179] Op Cit note 152 at 129.
[180] Orkin, Dr. FM 'Qualitative research findings on Rape in South Africa' (2000) Statistics South Africa.
[181] Op Cit note 152 at 132.
[182] Ibid at 134.
[183] Supra note 178.
[184] Ibid.

3.1.4. National Register for Sexual Offenders (NRSO)

The National Register for Sexual Offenders (hereafter 'NRSO') was established for South Africa in terms of the SORMA.[185] Essentially, it is a record of the names of people who have been convicted of sexual offences against children and mentally disabled people. The purpose of this register is to give employers who work in the public or private sector the ability to check that their employees are fit to work safely with children and mentally disabled people. The NRSO is purely confidential at this stage. In fact, it is a criminal offence to have unauthorised disclosure of the contents of this register.[186]

On a more controversial note, SORMA makes provision for the removal of a person's details from the NRSO in certain circumstances. A person who has been sentenced to prison or correctional supervision as a result of a sexual offence against a child or mentally disabled person, without the option of a fine, for between six and 18 months, may apply to have their name removed from the NRSO after 10 years have lapsed since their imprisonment or suspension.[187] Where the imprisonment or correctional supervision is handed down as punishment without the option of a fine for a period of six months or less, that person may apply to have their name removed from the register after seven years have lapsed.[188] Where a lesser form of punishment resulted from the conviction, a person may apply to have their name removed after five years have lapsed.[189] If anyone has been convicted and sentenced to a period of more than 18 months, or has more than one conviction, they are not eligible to be removed from the register. Whether or not sexual offenders should be able to have their names removed at all from this register is contentious.[190]

In August 2020, the legislature produced the 'Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill.'[191] Among the stated aims of the Bill is to further regulate the inclusion of persons on the NRSO and to make the NRSO publicly available.[192] The Bill goes on to extend the NRSO to include the particulars of persons who have been convicted of *any* sexual offense.[193] The respective periods after which a person listed

[185] Supra note 17 at s 40.
[186] Ibid at s 52.
[187] Ibid at S 51(1)(a).
[188] Ibid at s 51(1)(a)(ii).
[189] Ibid at S 51(1)(b).
[190] See: N Mollema 'The Viability and Constitutionality of The South African National Register For Sex Offenders: A Comparative Study' PER/ PELJ 2015 (18) 17.
[191] Government Gazette No. 43595 of 7 August 2020
[192] Ibid.
[193] Ibid at s 1.

on the NRSO may apply to have their name removed have doubled.[194] As these proposals are still in Bill form,[195] it is necessary to consider their suitability for South Africa's legal climate. When looking at sexual offender registries, it is useful to discuss the United States' and United Kingdom's approaches. The former has a public record (that the Bill is opting for) and the latter is not open to the public but is more accessible than the current NRSO.

The United States' federal law requires each state to keep a record of all sex offenders in their relevant jurisdictions.[196] The registry in all states is publicly available. This approach was taken in response to public outcry over child abduction and murder cases.[197] This meant that any person could look up registered sex offenders in their state at any time to ease public tension. While the aim was to reduce sexual offenses (particularly against children), the registers have not achieved their desired effect. Administration with regards to the registers hinder their potential. Implementation and maintenance are problematic and have resulted in inaccurate and unreliable registers.[198] Furthermore, studies have shown that unrestricted access to sex offender registers attract harassment, ostracism and violence towards the listed sex offenders. There was also no notable proof of a public registry protecting the public from sexual violence.[199]

The United Kingdom on the other hand, only allows for limited community access to its registers. For instance, parents are allowed to request information about a suspicious person or someone who has frequent unsupervised contact with their children from the police.[200] However, only if it is concluded that the person is a high-risk offender will the concerned persons be informed.

The Law Commission has concluded that the register has no justification or rehabilitative effect in South Africa.[201] Furthermore, the registry could potentially infringe several rights that offenders hold in terms of the Constitution. These issues will need to be addressed before South Africa follows the United States' example of a public registry. Infringements on rights listed in the Constitution will open the Bill up to Constitutional

[194] Ibid at s 16.
[195] At the time of writing this paper, the Bill has been posted for public comment.
[196] *Violent Crime Control and Law Enforcement Act,* 1994 (42 USC 14071).
[197] The case of Jacob Wetterling who was abducted and murdered.
[198] Harris, Levenson and Ackerman *Crime & Delinquency* (2014) 25-30.
[199] Human Rights Watch *No Easy Answers: Sex Offender Laws in the US* (HRW Press New York 2007) at 4, 7.
[200] See: https://www.gov.uk/guidance/find-out-if-a-person-has-a-record-for-child-sexual-offences
[201] South African Law Commission *Sexual Offences: Process and Procedures* Project 107 (2002) at 269.

challenges. If the infringement of a right is not justified in terms of the limitations clause, the law will be declared invalid.[202]

On one hand, the public have the rights of freedom and security of person, the right to bodily and psychological integrity and the right to access to information.[203] These rights would weigh in favour of a public sex offenders registry, the justification being that the public would want to protect themselves from dangerous individuals. On the other hand, sex offenders have the right to dignity, equality, privacy and preferred employment, and not to be treated in a cruel and unusual manner.[204] Sex offenders would be singled out by having their details on public records while other classes of offenders would not. Their details would be public and they would have trouble securing employment. This means that whether the Bill is potentially unconstitutional or not, depends on whether its infringements on sex offenders' rights are justifiable or not.

Section 36 of the Constitution states that rights can be limited if it is reasonable and justifiable to do so in an open and democratic society based on the values of human dignity, freedom and equality.[205] The section goes on to list certain factors to guide this conclusion. They include the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and it purpose, and whether there are any less restrictive means to achieve this purpose.

The purpose of the NRSO is to protect vulnerable groups against sexual offenders.[206] Presumably the benefits of such a register would be to warn the public of such offenders, help the police with investigations and act as a deterrent for potential sex offenders.[207]

The lack of available resources to maintain and implement such a register would be a huge hurdle to realising these benefits. The government has struggled to maintain the register in its current form which only lists a fraction of sex offenders.[208] The United States struggles to keep up with its registers even while having a dedicated group of social workers, police,

[202] Supra note 1 at s 36.
[203] Supra note 1 at ss 12(1), 12(2) and 32.
[204] See N Mollema, 'The viability and constitutionality of the South African National Register for Sex Offenders: A comparative study' PER vol.18 n.7 Potchefstroom 2015.
[205] Supra note 1 at s 36.
[206] Supra note 17 at s 43.
[207] Op cit note 204.
[208] Despite the Act requiring the registration of offenders to be complete within six months after the Act's commencement date, the government only registered 340 sex offenders over three years.

probation officers and law professionals monitoring the register.[209] Thus, the relationship between the Bill and its purpose is not realistic. This is strengthened by the lack of evidence to show that a public register (or even the confidential register employed in South Africa at the moment) has any effect on reducing the number of sexual offences.[210]

Thus, making the NRSO available for public access would open its permitting legislation up to Constitutional challenges. In addition, the potential for a public Register is that it would very likely facilitate vigilante (or 'mob') justice in South Africa. Vigilante justice often occurs as a response to sexual offenders in a community.[211] Furthermore, the lack of resources to keep up with the NRSO in its current form make the success of this project improbable. Expanding the scope of the NRSO is not only risky, but it is a project that is expecting too much from a system that is struggling to keep up in its current form. Thus, not only is the NRSO a waste of resources, its impact on addressing sexual offences in South Africa has not shown to be promising.

Specialised Sexual Offences courts will be discussed next. While they were not created by the SORMA, the SORMA did officially legislate their existence and the power of the relevant Minister to establish them at any court.

3.1.5. Sexual Offences Courts

Sexual offences courts are specialised courts that deal exclusively with the bail applications, plea proceedings, trial or sentencing of persons in criminal cases arising out of a sexual offence.[212] The purpose of these courts is to decrease the secondary trauma to victims of sexual violence, to increase the reporting of sex crimes by providing a specialised service to victims of sex crimes and to increase the conviction rate and sentencing of perpetrators.[213] They have

[209] Op cit note 204.
[210] Prescott JJ and Rockoff JE 'Do Sex Offender Registration and Notification Laws Affect Criminal Behaviour?' 2011 *J Law Econ* 161.
[211] See 'Angry mob torches Uyinene Mrwetyana's alleged killer's house in Cape Town' (2019) accessed at https://www.sowetanlive.co.za/news/south-africa/2019-09-03-mob-torches-uyinene-mrwetyanas-alleged-killers-house-in-cape-town/
and ''Rape Suspect' Cornered, Stabbed and Burnt In Mob Justice Attack' (2020) accessed at https://www.timeslive.co.za/news/south-africa/2020-02-06-rape-suspect-cornered-stabbed-and-burnt-in-mob-justice-attack/
[212] Supra note 17 at s 1 read with the Judicial Matters Amendment Act 8 of 2017 at s 35.
[213] Mastoera Sadan, Lulama Dikweni & Shaamela Cassiem, 'Pilot Assessment: The Sexual Offences Court in Wynberg & Cape Town and related services' (2001) IDASA at 5.

been officially codified in the Judicial Matters Amendment Act which is to be read with the SORMA (as the former amends certain provisions of the latter).[214]

Sexual offences are particularly traumatising crimes to fall victim to. This can be exacerbated by a lack of sensitivity during the resultant criminal justice process. Already in 1993, women's rights activists lobbied for better court services for rape survivors.[215] There was a need to develop specialised courts where victims would feel that their privacy, dignity and safety were prioritised. The idea was to have a safe place where victims would not have to relive their trauma through, for example, insensitive judicial officers and settings or personally running into their attackers.

The activists were successful as the Wynberg Sexual Offences Court Project was established in 1993.[216] It was established on a different floor of the Magistrate's Court building to prevent the victim from coming into contact with the accused and possibly, the accused's family. It is equipped with two CCTV rooms and a separate waiting room for witnesses. Rooms were designed to be 'child-friendly' as opposed to the typical clinical nature of regular courts. Two prosecutors are assigned to each case. One prosecutor consults with the victim and the other works in court. Additionally, a social worker provided pre- and post-counselling to victims and children who had to testify. The project was considered a success by the Department as it secured a conviction rate of offenders of up to 80% over the year of 1993.[217]

The National Sexual Offences Court Task Team was established in 1998 to determine how to replicate the court across the country. A second court was established in Bloemfontein in 1999. By the year 2000, there were sexual offences courts in Durban, Parow, Grahamstown, Mdantsane and Soweto.[218] A blueprint for the courts was rolled out in 2002 to detail how the courts should be managed and oversight committees were established to ensure its compliance.

The statistics seen in the early 2000s were positive – conviction rates were higher than normal courts and cases went to court a lot faster. Surveys found that victims were generally

[214] Supra note 200 at the Preamble.
[215] 'History of Sexual Offences Court in South Africa' by Rape Crisis accessed at https://rapecrisis.org.za/part-1-the-history-of-sexual-offences-courts-in-south-africa/
[216] Department of Justice and Constitutional Development, 'Report on The Re-Establishment of Sexual Offences Courts Ministerial Advisory Task Team on The Adjudication Of Sexual Offence Matters' 2013 at 17.
[217] Ibid at 18.
[218] Op Cit note 215.

more satisfied with the infrastructure, personnel and services at Sexual Offences Courts than at regional courts.[219]

In the following years there were a number of evaluations done to assess the various new courts.[220] The conclusions drawn included that the courts were overloaded, half of the prosecutors had not received any specialised training, and there was a lack of coordination between state departments.[221] Furthermore, prosecutors indicated that:

> '…poor facilities, an unfriendly environment, inadequate time for case preparation, little or no experience, lack of training, lack of access to essential material, such as case law and the lack of emotional support prevented them from achieving the desired specialisation. They indicated that they needed effective management, training, emotional support and multi-disciplinary participation to overcome these obstacles.'[222]

These conclusions make it clear that the sexual offences courts had lost their 'specialised' nature. This goes against all the stated goals and purposes of their creation. From evaluations done of the courts, the most significant challenges have been identified as: a lack of legal framework for guidance; a lack of buy-in from other stakeholders; inadequate resources; less visibility of the courts in rural areas; inadequate capacity; restricted space; inadequate and inconsistent training of personnel; lack of monitoring and evaluation.[223]

By 2005 a moratorium was placed on the further expansion of sexual offences courts.[224] While statistics seemed to show a positive story about the courts, the problems mentioned above meant that they were not delivering on their promise. They had no dedicated budget and some courts were receiving more resources than others.

By 2009 there were around 50 sexual offences courts in total, however, by 2011 the NPA reported that sexual offences courts no longer existed. [225] It appeared that between 2007 and 2008, the sexual offences courts had slowly declined and eventually, ceased to exist at all.

However, the Minister of Justice established an Advisory Task Team on the Adjudication of Sexual Offences Matters (MATTSO) to investigate the need for sexual

[219] Op Cit note 213.
[220] Op Cit note 216 at 18 – this included investigations conducted by IDASA in 2001, the South African Human Rights Commission in 2002, and an audit on Sexual Offences Courts as called for by the then Minister of Justice and Constitutional Development in 2006.
[221] Ibid at 19.
[222] Ibid.
[223] Op Cit note 213 at 24.
[224] Op Cit note 215.
[225] The National Prosecuting Authority Annual Report for 2011/2012 at 22 (footnote 14).

offences courts.[226] MATTSO produced a report in 2013 that detailed the challenges in re-opening the courts and the costs involved. Most importantly, they recommended the re-establishment of the courts. Minimum requirements for the courts were recommended and methods to evaluate and monitor the courts were given.

SORMA came into effect in 2008 and initially, it did not include a provision for sexual offences courts. This changed with The Judicial Matters Amendment Act that came in effect in 2013 to amend certain sections of SORMA.[227] The amendment added a provision to SORMA that empowered the Minister to designate any division of a High Court or Magistrate's Court as a sexual offences court.[228]

The establishment of Sexual offences courts are not only envisaged by SORMA (as amended) but are in line with its ethos to afford victims maximum protection and the least traumatising experience.[229] The re-establishment of sexual offences courts in South Africa was desperately needed to improve the performance of courts in managing sexual offences and to attend to the needs of sexual offences victims. While the history of sexual offences courts has been erratic, experience and detailed investigations have revealed how they can be successful in South Africa. Due to the nature of these offences, sexual offences crimes deserve to be singled out and treated sensitively in the otherwise clinical court system.

Early in 2020, President Cyril Ramaphosa issued a proclamation on the announcement of legislation dedicated to sexual offences courts.[230] Section 4 of the Judicial Matters Second Amendment Act only came into effect in January 2020.[231] This new legislation sets out the requirements for the sexual offence courts facilities and the measures that need to be put into place 'to render services that will better protect complainants, enhance the quality of prosecutions and evidence to be given in sexual offence cases, minimise secondary trauma for complainants'.[232]

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[226] Department of Justice and Constitutional Development *Report on The Re-Establishment Of Sexual Offences Courts Ministerial Advisory Task Team On The Adjudication Of Sexual Offence Matters* August 2013.
[227] Judicial Matters Second Amendment Act 43 of 2013.
[228] Ibid. at s 55A (1).
[229] Supra note 17 at Preamble.
[230] 'President Cyril Ramaphosa issues proclamation on Sexual Offences Courts' accessed at https://www.gov.za/speeches/sexual-offences-courts-6-feb-2020-0000?gclid=Cj0KCQiAnKeCBhDPARIsAFDTLTIn5oOtqxRCmxcHMcd79k-Svo2YiGpPdIzuybAoMIpp4AD36sMYUfIaAvaAEALw_wcB
[231] Judicial Matters Second Amendment Act 43 of 2013; see Gazette 42987 of 31 January 2020.
[232] Op Cit note 232.

There are many concerns that a victim may have with regards to going to court (for example, judicial officers without sensitivity training treating them harshly, the fear of running into the accused or his family or even the clinical nature of courts in general). Sexual offences courts send a positive message to the victim that encourages them to come forward in a safer space. The success of the courts in light of the new legislation remains to be seen. Their potential is undisputed – the only fear is that they once again fail due to a lack of resources.

The existence of specialised sexual offences courts lends to the experience of victims in the criminal justice process. If the court experience is improved, the government is one step closer to fulfilling its mandate of protecting sexual offence victims. The next section of the paper will discuss further avenues to meet this mandate.

3.1.6. The Treatment of Victims in the Criminal Justice Process

Two alterative solutions to improving a victim's experience in the criminal justice process will be discussed in this part of the paper: increasing the accountability of police officers handling their case and the possibility of victims' rights.

a) Police Officers and Their Treatment of Sexual Offence Victims

Now that South African legislation has addressed *what* should be policed, it needs to go further and address *how* it should be policed. The South African Police Service has a huge role to play when it comes to addressing sexual offences. SAPS officers are often a victim's first point of contact with the justice system. In addition, they are the ones who investigate the case, collect evidence, statements and make arrests.[233] Thus, the importance of ensuring that the policing of sexual offences is improved cannot be underestimated.

Not only are victims of sexual offences often met with insensitivity, scepticism towards them and their experiences is rife among police officers. The belief that women lie about being raped is still widely held.[234] These persistent stereotypes and nonchalant attitudes are largely a result of poor leadership in the police.[235] As stated above, this is why calls for legislation to impose positive duties on SAPS officers with regards to sexual offence cases have been made.[236] This would make their duties and the state's expectations of officers and sanctions for non-compliance, explicit and easily accessible for citizens and the police. Most importantly,

[233] Op Cit note 112 at 113.
[234] Op Cit note 26 at 210.
[235] Ibid.
[236] Ibid.

victims would have legislation to rely on to hold police officers accountable when they do not act in accordance with the legislated standards.

It was unfortunate that submissions made to have duties and sanctions regarding the disposal of cases codified in legislation were rejected in favour of national directives.[237] It has been agreed that directives are enforceable under the branch of administrative law.[238] This position hardly seems to recognise the fact that administrative law is both extremely technical and costly. It is asking a lot from rape victims to have access to these directives, have sufficient knowledge on administrative law rights, as well as the funds to take the case on review.[239] These would all be required if a victim wanted to successfully challenge a police officer's actions while handling their case.

If the duties of SAPS officers were contained in legislation, not only would they be much easier for laypersons to access, victims who are unsatisfied with how SAPS handle their case would have a far easier recourse to hold them accountable. It is simpler to challenge actions based on legislation as the question of what happens when police officers do not conform with national directives is unclear.

There was a sense of hope when the National Instructions as envisaged by SORMA were issued for members of SAPS with lengthy instruction documents on how to deal with sexual offence victims.[240] On paper, their commitment seemed promising. Unfortunately, SAPS personnel were either unaware of the National Instructions or reluctant to implement them.[241] Once again, a promising policy to failed at the hands of inconsistent and lax leadership by SAPS.

Arguing in favour of legislated duties for SAPS, Artz and Smythe said the following:

> 'By imposing positive duties on the SAPS through legislation, the State's expectations of the quality of service to be delivered by the SAPS is made explicit. Likewise the threat of sanction for non-compliance. Furthermore, legislation being far more accessible than an internal police document, citizens are better apprised of their rights in respect of police conduct.'[242]

It is unfortunate that SORMA chose the same 'soft' approach as they have in the past by continuing with National Instructions as opposed to legislated duties. The same issues will remain as with the old directives: ensuring they are communicated to all officers and actually

[237] Ibid.
[238] Ibid.
[239] Ibid.
[240] National Instructions 3/2008.
[241] Op Cit note 26.
[242] Available at www.pmg.org.za/minutes/20030916-criminal-law-sexual-offences-amendment-billhearings.

enforced. The requirement of training coupled with the mandated social training was a promising compromise in addressing the archaic institutionalised approach to sexual offence victims. However, SORMA has been in force for 14 years and this promising addition has been left wanting. The simple solution would be to ensure that all SAPS officers are aware and well versed on the latest National Instructions. However, since very little has changed from the year of its enactment, a stronger and stricter approach is advisable. An alternative to legislated duties would be for victims to have specific rights when it comes to sexual offence cases. This option will be discussed next.

b) Specific Victims' Rights

While the government has made numerous changes in legislation, SORMA missed many opportunities to improve the experiences of victims of sexual offences in the court process. This paper discussed previously that a conscious decision was made not to include specific victims' rights in SORMA. This means that if a victim does decide to report her case, she has very little involvement from that point on. It becomes a matter between the state and the accused.[243] The decision to pursue or not pursue a case belongs to the National Prosecuting Authority who do not need the consent of the victim either way.

Victims having the right to legal representation would be a considerably generous approach as it would give the victim a chance to have some form of say in the trial and its process. The reason the Law Reform Commission rejected this idea was because pragmatically, they felt it would not be practical in South Africa where there are already limited resources to provide accused persons with legal representatives.[244] Even if this were to be privately funded, this would mean only those victims with financial means would have this opportunity.[245]

Even though a victims' charter of rights is not set out by SORMA, its preamble references several rights in the bill of rights that refer to victims. The preambles of Acts in South African law are often used as interpretative tools for the body of the rest of the Act. Thus, there is some infusion of victims' rights in the SORMA. Smythe observed that the victims' rights jurisprudence will continue to develop in a piecemeal fashion without the codification of victims' rights.[246] While it is not the most inclusive approach for victims, at least there is

[243] Op Cit note 26 at 265.
[244] Ibid.
[245] Ibid.
[246] Ibid.

some recognition of their rights. This could form the basis to allow the potential development of restorative justice playing a larger role in the criminal justice system.

Some measures that SORMA did decide to take to protect victims were promising in theory but failed in execution. The right of victims to testify via CCTV, intermediaries and in camera hearings were rights designed to make the victim feel safer in the process.[247] However, these rights in SORMA were replaced with a provision that authorised the National Directorate of Public Prosecutions to issue directives about these rights to members of the National Prosecuting Authority. This is unfortunate as the discussion about rape myths and stereotypes persisting in the minds of many officials entrenches the need for legislation and not protocols.[248]

This part of the section critically analysed the SORMA and its proposals for addressing sexual offences. The following section discusses the Criminal Law Amendment Act 105 of 1997. Unfortunately, the pattern of adopting poorly researched strategies that hide behind the government's seemingly grand gestures only continues. In fact, simply handing out lengthier sentences for crimes that are increasing is not only poorly researched, but lazy as well.

3.2. THE CRIMINAL LAW AMENDMENT ACT: MANDATORY MINIMUM SENTENCING

The Criminal Law Amendment Act 105 of 1997 is the Act famous for anchoring mandatory minimum sentencing in South Africa.[249] This paper has previously discussed the evolution of laws around sexual offence crimes (specifically rape). When these crimes are committed and a person is successfully convicted for such a crime, the question of sentencing arises. Thanks to the Criminal Law Amendment Act (hereafter 'CLAA'), rape is a crime that attracts a mandatory minimum sentence, hence the Act's relevance in this paper.[250] It also carries a life sentence when certain aggravating factors are present.[251] As will be shown in this part of the paper, mandatory minimum sentences have not served much beyond a façade that the government is actually doing something to address sexual offences.

3.2.1. Problems with the CLAA

[247] Supra note 17 at Schedule I Item 9.
[248] Op Cit note 36 at 10.
[249] Supra note 16.
[250] Supra note 16
[251] Supra note 16 at Schedule 2, Part I.

The main issues with the Act identified in academic criticism are two-fold. First, the CLAA is a poorly drafted and ineffective method of dealing with crime. Secondly, the Act has done little to dispel inconsistencies in sentencing, in fact, it has contributed to it.

Under the guise of actually tackling the problem of the rising crime rates, the government eased the public's mind by simply increasing sentences for serious crimes such as sexual offences. This was arguably the easiest way to make the public believe that the government was taking the problem seriously. To any member of the public who is not familiar with research in this area, it would seem like an appropriate response. However, mandatory minimums have proved to be ineffective in the long-term. In fact, the Act's poor drafting has been pegged as an 'emergency political measure to assuage the public's fears, rather than a well-developed strategy to combat crime.'[252]

Justice Cameron described the mandatory minimum legislation as:

> '…a false promise – the belief that we are actually doing something about crime. We are not. And this false belief lets those who are responsible for effectively dealing with crime – our society's leaders – off the hook.'[253]

In its haste to respond, Parliament bypassed the South African Law Commission's issue paper which outlined possible approaches to sentencing.[254] Introducing mandatory minimum sentences was an idea that was poorly researched without taking into consideration the recommendations of the Law Commission. Baehr makes the point that since they were introduced as a temporary, emergency measure, this explains the Act's poor drafting.[255]

Research on mandatory minimum sentencing would have shown that it is the certainty, not the severity of punishment, that deters crime.[256] In fact, the approach had already been tried and tested just a quarter century before the legislation was introduced. In 1971, minimum sentences for certain drug-related offences were introduced.[257] These minimum sentences had not only failed to reduce the use and distribution of these drugs, but they had also been subject to public condemnation by the judiciary.[258]

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[252] Op Cit note 9 at 225.
[253] Op Cit note 79 at para 21.
[254] Issue Paper 11 (project 82)
[255] A.M. Omar 'Minister of Justice/ Commencement of Sections 51 to 53 of the Criminal Law Amendment Act, 1997' available at info.gov.za/speeches/1998/98505_0w0439810048.htm
[256] Op Cit Cameron note 9.
[257] Act 41 of 1971.
[258] *S v Gibson* 1974 (4) SA 478 (A) at 481H-482B mentioned in Judge Cameron's speech at para 37.

Studies show that most criminals committing crimes do so in the belief that they will not get caught, or if they are caught, they are unaware of what sentence to expect.[259] Even those who advocate for the deterrence theory of punishment acknowledge that effective deterrence requires swift and certain punishment.[260] Harsher sentences are not a quick fix for rising crime rates. They have in fact, made no notable impact on crime rates.[261] This brings us to question whether it would be better to scrap mandatory minimum sentences in their entirety.

3.2.2. Should Mandatory Minimum Sentences be Scrapped?

If one asked whether mandatory minimum sentences should be scrapped in their entirety, many academics in the criminal law field would agree that they should. Former Justice Cameron stated that 'minimum sentences are a poorly thought out, misdirected, hugely costly and above all ineffective way of punishing criminals.'[262]

This paper has reiterated the point that there is little evidence to suggest that harsher or lengthier prison sentences deter crime.[263] As is agreed by academics in the field, it is not the *severity* of punishment that deters crime, but the *certainty* of it.[264] Mandatory minimum sentences have done little (if anything) to deter crime and do not have any symbolic effect or reassure the public that the government is not soft on sexual offences.[265] As will be explained below, without mandatory minimum sentences in the country, resources could be freed up to deter crime where it matters: the certainty of punishment.

If mandatory minimum sentences could be justified under one of the four commonly understood rationales of punishment, their retention in our law could potentially be defended. However, this has been proven not to be the case in South Africa. It has not been shown to be a deterrent, to aid rehabilitation or have an 'incapacitating effect'. Even if it could be solely justified for retributive purposes, our criminal justice system cannot justify purely retributive sanctions in a constitutional dispensation.

Since mandatory minimum sentences were first instituted as a temporary measure, they seem to be premised on having a deterrent effect on society. The Constitutional Court has

[259] Op cit note at para 79.
[260] The deterrence theory believes that the point of punishment is to either deter others in society from committing the same crime or simply deterring the offender himself from committing the same crime again; Op cit note 9 at 230.
[261] Op Cit note 79.
[262] Ibid at para 19.
[263] Op Cit note 9 at 92.
[264] Op Cit note 79.
[265] Op Cit note 9.

agreed with this view.[266] Even if it was agreed by all that the purpose of punishment is to deter future offenders, advocates of this approach would all agree that deterrence only works if punishment is swift and certain.[267] Schdnteich explains that deterrence is based on the capability, credibility and communication of government.[268] For deterrence to work properly, a government needs the resources and capacity to identify, arrest, prosecute, convict and punish the majority of serious offenders *and* their threat of doing so must be credible.[269] In other words, the government needs to be capable of making threats that can be followed through and effectively communicated to the public.

According to statistics recorded in 2017, RAPSSA examined 3952 cases of rape that were reported to the police.[270] Of these reported cases, only 8.6% of them resulted in the offender being convicted.[271] It is estimated that less than half of sexual offences are actually reported, never mind resulting in imprisonment.[272] Thus, most crimes do not result in conviction and imprisonment, so the length of sentences is actually the least of our concerns. Since the government is not capable of making credible threats for the conviction of offenders, the length of prison sentences is not an effective deterrent.

Do mandatory minimum sentences perhaps aid in rehabilitating offenders? In other words, does a longer prison sentence change an offender into someone who would not rape again? This idea is unsupported by evidence. In fact, prisoners serving long sentences become less amenable to rehabilitation.[273] Even if this were not the case, the resources required for appropriate rehabilitative measures are simply not available in South Africa's overcrowded prisons.[274]

As there is no proof of a connection between lengthy sentences and crime rates in the country,[275] incapacitating criminals so that they do not commit further crimes does not seem to be helping. Perhaps this is because the recidivism rate in South Africa is unknown.[276] Thus, we

[266] Supra note 98.
[267] Op Cit note 9.
[268] Ibid at 93.
[269] Ibid.
[270] Machisa et al '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.
[271] Ibid.
[272] Op Cit note 26.
[273] Op Cit note 79.
[274] Ibid.
[275] Ibid.
[276] Recidivism refers to the tendency of a person who has been imprisoned to commit further crimes after their release.

do not actually know what portion of offenders we are locking up would be likely to commit the same crimes again.[277] If incapacitation was the goal of mandatory minimum sentences, it is not a goal that is backed up with any evidence to support its success.

Retribution justifies punishment as a deserved consequence of committing a crime.[278] This would be the easiest way of justifying mandatory minimum sentences. One could simply answer the question of why we have mandatory minimum sentences with 'because the offenders deserve it'. However, key to retributive theory is the idea of proportionality: the punishment must fit the crime. The values present in the Constitution indicate that in our constitutional dispensation, our criminal justice system cannot be based on retribution alone.[279] However, even if it were, the 'all or nothing' approach of mandatory minimum sentencing for Part I and III rapes does not leave much room for proportionality.

One might argue that mandatory minimums at least have some symbolic effect in society. Maybe they give the public some sense of safety when it comes to violent crimes. However, this belief in the South African context has not proven to be true. In fact, mandatory minimum sentences have not eased public tension in any notable way. South Africans still fear crime and do not believe that offenders are punished severely enough.[280] This could have to do with the concerning crime statistics, or the disparity seen in sentencing sexual offenders. Either way, mandatory minimum sentences are not fulfilling this goal.

As a last resort, there is the argument that mandatory minimums make a statement that the South African government is not soft on rape, that they acknowledge it as a serious issue and will not tolerate it.[281] In reality, statistics reveal a different picture. They have shown that when it comes to sentencing in terms of the Criminal Law Amendment Act, judges comply mostly with Part III and least with Part I.[282] The latter lists circumstances of rape which attract a life sentence. Thus, while judges should, in theory, sentence all Part I offenders to life in prison, they seem to find ways to justify otherwise. Judges reserve life sentences only for the most horrific of cases. Since there is no legislative definition of the substantial and compelling circumstances that would allow departure from the mandatory minimum sentences, judges have vast discretion.

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[277] Ibid.
[278] Ibid.
[279] Ibid.
[280] Op Cit note 26.
[281] Ibid.
[282] Ibid. at 109.

Considering the fact that most of the public are unaware of the sentencing statistics, perhaps the presence of mandatory minimum sentences serves the purpose of placating the public? Perhaps, at the very least, the public feels safer with mandatory minimums in place? This argument has not seen to play out in the public's perception at all. The fact of the matter is that mandatory minimum sentences are only relevant for a tiny portion of offenders. Not even half of sexual offenders are even reported and thus, most sexual offences go completely unpunished. Even though the public may not be aware of the actual sentences being handed down, they are aware of the low portion of offenders that are even arrested.

The purpose of the mandatory minimum sentences as a temporary measure seemed to be premised on having a general deterrent effect on society. This is an intellectually appealing response to a surge in crime rates across the country. However, in 1997, the legislature did not foresee the mandatory minimums becoming permanent. At their best, mandatory minimum sentences are insufficient to deal with all violent crime, let alone sexual offences. At their worst, they increase disparity in sentencing, provide the opportunity to reinforce traditional sexist views and ineffectively drain government resources. Imposing harsher sentences is a cop-out. It is far easier than actually addressing the causes of crime. Upon analysis of the history of sexual offence laws in the country, it becomes clear that the attitudes of the government and judicial officers themselves pose a great threat to progressive policies on sexual offences.[283]

b) A World Without Mandatory Minimums

If an announcement were to be made tomorrow that mandatory minimum sentences were being abolished, it would almost certainly be met with public outrage. While researchers on the topic are aware of their ineffectiveness, it would sound absurd to members of the public. However, a world without mandatory minimum sentences would not immediately turn the country into the hostile environment rampant with criminals that a lay person might expect. In fact, there would be benefits to their absence.

The Institute for Security Studies conducted a victim survey in 2003 that revealed public feelings of safety have declined since 1998.[284] Thus, while the idea of mandatory minimum sentences may seem reassuring, they do not appear to have actually done anything positive to put the public at ease. Crime has not been reduced, public fear has not been assuaged and sentencing disparity has not adequately decreased.

[283] Ibid.
[284] Op Cit note 91 at 17.

Furthermore, mandatory minimum sentences take up a large number of governmental resources. The impact of the CLAA has left our prisons in a dire state.[285] The overuse and overreliance on lengthy prison sentences have ensured that our prisons are overcrowded to an extent that is arguably unconstitutional.[286] Even if one has little sympathy for the state of prisons, the amount of taxpayers' money spent on housing these prisoners is hard to refute. The truth is that the resources spent on minimum sentences could be far better placed in areas actually making an impact on crime statistics. A world without mandatory minimum sentences could allow space to improve other areas of the criminal justice system. To give an idea of the cost involved, the annual cost of to house a single prisoner for one year in South Africa was estimated to be R133 000 in 2015.[287]

There is also no guarantee that an abolishment of the mandatory minimum sentences would mean a substantial drop in sentencing tariffs.[288] Since sentencing officers are generally sensitive to public perception, Nielson and Ehlers argue that they are unlikely to suddenly start rapidly decreasing sentences. However, increasing the length of imprisonment for sexual offences does little to combat sexual violence in the country. After 23 years of mandatory minimum sentences, reported rape statistics remain relatively constant and fears from the public of being victim to sexual violence have not eased.[289] They have had the effect of lengthening sentences of incarceration *as well as* the level of inconsistencies in sentencing.[290] Furthermore, mandatory minimum sentences have proved to be yet another conduit for traditional sexist views to prevail in the courts.[291]

The main issues with the current legislative framework on sexual offences have been discussed in this section. The next section of the paper aims to provide solutions to these critiques and other possible alternatives. In particular relevance to this section, amendments to the current sentencing framework will be proposed that would help steer sentencing officers' discretion.

As has been reiterated throughout this paper, legislative changes *are* important, however, they cannot be the standalone solution to tackling sexual offences. The South African government needs to address other stages of the criminal justice process if any

[285] Op Cit note 79.
[286] Fagan 'Our bursting prisons' (2005) 18 *The Advocate* 1.
[287] Op Cit note 79.
[288] Op Cit note 91 at 17.
[289] Op Cit note 9 at 229.
[290] Ibid.
[291] Ibid.

progress is to be made. This paper has already proposed the implementation of legislated duties for police officers with regards to sexual offences. Further proposals are made in the next section as a means to address the issue of disparate sentencing and preventative measures.

SECTION IV:

A WAY FORWARD FOR SOUTH AFRICA

The fact that South Africa needs to restructure its sentencing legislation is no novel idea. What is largely needed is a more comprehensive sentencing regime, one that introduces more structure and consistency. It must be noted that sentencing alone is not sufficient to fully address sexual violence in South Africa. Other aspects of the criminal justice system would ideally be improved alongside our sentencing regime. Certainty of apprehension and conviction are areas that the government needs to work on as well. However, an improved sentencing policy and social policy would certainly be steps in the right direction.

As this paper pointed out, although the abandonment of mandatory minimum sentences is supported, it is an unlikely solution for South Africa any time soon. More viable options are discussed in this section. These include proposals in terms of introducing sentencing guidelines as well as further amendments to the CLAA to allow for more proportionate sentencing. Finally, more long-term solutions are discussed in terms of primary prevention strategies.

4.1. SENTENCING REFORM

Sentencing legislation in South Africa needs to be amended in such a way that it promotes more structured and consistent sentencing by the courts. Judges have typically resisted any interference with their broad discretion when it comes to sentencing convicted persons. It has traditionally been viewed as a fundamental aspect of their judicial independence.[292] While judges do need flexibility in choosing the appropriate sentence and length thereof, this paper has shown that more structure is needed. This could come in the form of replacing mandatory minimum sentences with sentencing guidelines.

a) The Law Commission's Recommendations

[292] Viljoen JA, Commission of Inquiry into the Penal System of the Republic of South Africa, 1997.

It was mentioned previously that mandatory minimum sentences were a rushed response by the government that bypassed the Law Commission's proposals on sentencing. In their report, the Commission made a number of useful suggestions for sentencing reform.[293] The Commission stated that the best way of achieving the ideal sentencing system is to state basic sentencing principles in legislation and to set up a sentencing council to create sentencing guidelines.[294]

The Commission created the Sentencing Framework Bill which provided for the development of binding sentencing guidelines that would be established by a sentencing council, which in turn would be based on statutory sentencing principles.[295] Subject to the Bills requirement of proportionality between the seriousness of the offence and the sentence handed down, was the requirement of sentences to seek the optimal combination of restoration of rights to the victim, protection of society against the offender and rehabilitation options for the offender.[296] The absence or existence of previous convictions would modify the sentence.[297]

First, they suggested presumptive sentencing guidelines. This involved a sentencing commission that would create principles in respect of certain offences to determine a presumptive sentence. Only special circumstances would allow a court to depart from this presumptive sentence. This would create specific outlined considerations for judges to look at when it came to different offences.

Secondly, they suggested voluntary sentencing guidelines. These would be non-obligatory guidelines that were designed to simply guide a judges in their decision. Thirdly, they suggested legislative guidelines where the legislature would determine the type and length of punishment attached to a particular offence. Fourthly, they suggested principles that govern the determination of a sentence for the offence. Certain factors would be listed for the court to look at – for example, aggravating and mitigating circumstances, the need for consistency, degree of responsibility, the fact that imprisonment should not be imposed for purely rehabilitative purposes and the aims of punishment and presumptive sentencing guidelines for custodial and non-custodial sentences. Mandatory minimum sentences for certain classes of offences were also recommended.

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[293] South African Law Commission *Sentencing (A new Sentencing Framework)* Project 82 (2000).
[294] Ibid.
[295] Criminal law (sentencing) Amendment Bill of 2007.
[296] Ibid at S 3(3).
[297] Ibid at S 3(4).

While the Bill certainly made positive suggestions involving sentencing guidelines, it allowed a departure from a particular guideline upwards or downwards 'in circumstances that increase or decrease substantially the degree of harmfulness or risked harmfulness of the offence or the culpability of the offender'.[298] Furthermore, the relevant guideline could be departed from downwards if there were 'substantial and compelling circumstances,' beyond those that relate to harmfulness or culpability, that justify departure from the guideline. From the similar caveat we have in the CLAA, we know that an exemption that leaves such a large amount of discretion runs the risk of undermining the entire legislation.

Another issue with the Bill was its priorities when it came to the rationale behind sentencing. It stated that even before proportionality, elements of restorative justice and the possibility for rehabilitation should be favoured. This is also a potentially dangerous pathway for discriminatory attitudes to prevail in sentencing. For example, a rapist could have a respectable job and be a contributing member of society and thus, considered to be a good candidate for rehabilitation.[299] Courts should not be left to determine which punishment goals should be prioritised.

It is clear we cannot simply adopt the Law Commission's previous recommendations as a solution for our present issues. Instead of a simple mandatory minimum sentence for rape, South Africa needs to amend how the courts are required to approach sentencing in sexual offences cases.

b) Amending Our Sexual Offences Sentencing Scheme

At present, the sentences for rape in South Africa under mandatory minimum sentencing exist under an 'all or nothing' approach. The Criminal Law Amendment Act lists certain aggravating factors (for example, if the offender is HIV-positive or has two previous convictions of sexual offences) that take an offence of rape from ten years to a life sentence.[300] This sentencing regime should be amended to allow sentencing to take place in a matter of degrees.

Baehr creates the following example to highlight the effect of the 'all or nothing' approach:

> '…if a group of men, one of whom is HIV positive, gang-rape an eight-year-old girl who is both physically disabled and mentally ill, causing her severe bodily harm. Under the current Act, the offenders

[298] Ibid at s 6.
[299] Op Cit note 26.
[300] Supra note 16 at Schedule 2.

> would receive the same sentence as a single offender who raped a fifteen-year-old once without excessive force.'[301]

This approach has severe effects on disproportionate sentencing. Even though every case of rape is violent and needs to be punished severely, it is logical to distinguish between bad and worse cases as shown above.[302] The multiple rape of a nine-year-old girl by a 35-year-old man with a weapon is certainly deserving of a worse punishment than the single rape of a 15-year-old girl by an 18-year-old boy.[303] Both cases are bad, but the former has more aggravating circumstances.

As Baehr suggests, a legislative sentencing approach should be adopted that begins at a base level which increases in severity (an added year or two to the sentence) for each additional aggravating factor.[304] This would switch judicial attitudes from asking 'how can we find ways to mitigate the offence to justify a more lenient sentence?' to 'what aspects of this crime render it more blameworthy?'. This would take progressive strides towards an image of public officials acting in the best interests of victims. In addition, Baehr argues for an increase in the list of aggravating factors mentioned in the Act.[305]

She argues that factors such as abduction, the degree of injury and the presence of a custodial relationship between the offender and victim to be considered.[306] While abduction and a custodial relationship between the offender and victim would certainly be considered more morally blameworthy (the former being a separate offence on its own and the latter due to the fact that custodians are acting in a position of trust and care), the consideration of how injured the victim is runs the risk of old stereotypes creeping back into the system that believe if violence is not employed, the victim is more difficult to believe.[307]

Thus, mandatory minimum sentencing as we currently understand it should be amended. Judges should have a mandated minimum sentence to apply to persons convicted of rape. The next step should be determining if there are one or more aggravating factors to increase the sentence. The presence of one or more of these factors should increase the sentence by one or two years each. However, while we can refine the amount of discretion given to

[301] Op Cit note 9.
[302] Op Cit note 26 at 235.
[303] Ibid.
[304] Op Cit note 9.
[305] Ibid.
[306] Op Cit note 9 at 143.
[307] Op Cit note 19 at 391.

judges in sentencing, we cannot eliminate it completely. There needs to be measures in place to make sure judges are not employing archaic attitudes in sexual offence cases.

c) Judicial Sensitivity Training

While there can be a degree of legislative reform to steer judicial discretion in sexual offences cases, one cannot determine the sentences to be handed down in every subsequent sexual offence case. There is a need for at least some degree of flexibility to suit the particular crime and perpetrator. Thus, some level of judicial discretion is inevitable. Judicial officers need to be made aware of the rape myths and stereotypes that they are potentially perpetuating. This can be done through the Judicial Education Institute.[308]

The Judicial Education Institution was established in order to 'promote the independence, impartiality, dignity, accessibility and effectiveness of the courts through continuing judicial education'.[309] As an already established institution, Spies points out that it could be used to educate judges on how to deal with sexual offence matters.[310] The real dynamics at play in rape cases could be discussed to show why some victims behave differently from others. Furthermore, archaic reasoning and rape myths could be dispelled in favour of the Constitution's commitment to equality.

Looking back at the Sentencing Bill we know now that some of the recommendations were far too optimistic about the level of desirable sentencing discretion. The Bill did acknowledge in its time that the proposals still needed further discussion and exploration. Fortunately, we can return to examine these proposals with twenty years of experience at hand. This paper has highlighted that unattended judicial discretion can, and has been, disastrous in many cases.

This paper has made recommendations for amendments to the current sentencing practices of rape. However, the truth is that sexual violence is not an issue confined to the court rooms. In fact, sentencing only occurs at the final stages of the justice process. In reality, sexual violence is an issue that runs much deeper than the offenders that actually make it to the final stage of sentencing – which, as statistics point out, is a minority of sexual offenders in the country.[311] This is not to say that sentencing is not an important area to improve – it shows the

[308] Ibid at 406.
[309] South African Judicial Education Institute Act 14 of 2008.
[310] Op Cit note 19 at 406.
[311] Op Cit note 79.

state's attitude and stance on sexual violence. However, the work does not stop there. The government needs to go further than addressing crimes after they happen. The attitudes and societal norms of future generations need to be addressed as well in order to progress into a society where sexual violence is not a constant fear.

4.2. PREVENTATIVE MEASURES

Addressing sexual violence in South Africa needs to include more than a restructuring of the punishment for sexual offences. At the heart of sexual violence against women are issues relating to how gender and gender equality is viewed and understood.[312] If these issues were tackled at crucial developmental ages of South African boys, there is the possibility of intercepting these ideas and attitudes through prevention strategies. While each crime is unique, several studies have revealed trends in the logic behind them.[313]

Research on the area of sexual violence prevention is extremely limited, particularly in developing countries.[314] Assessing the effectiveness of these strategies is difficult and most of them are fairly new. The focus in this section is on what is known as 'primary prevention'. This refers to actual *prevention* strategies as opposed to 'secondary prevention strategies.' The latter refers to early strategies that reduce the effects of harm already done (as opposed to preventing them from occurring in the first place). Before discussing how to prevent sexual violence, it is important to get an understanding of *why* some men rape.

A study in 2010 interviewed a selection group of South African men across all races, several ethnicities and a range of socio-economic backgrounds. It made a number of interesting observations with regards to rape practices.[315] These men were asked questions relating to whether they had raped someone and why. Some of the observations amongst the men included the following:[316]

- Most of the men that admitted to having raped someone, had done so out of a sense of sexual entitlement.

[312] Rachel Jewkes 'Why, when and how men rape: Understanding rape perpetration in South Africa' (2016) *South African Crime Quarterly* 34 at 24.
[313] Ibid.
[314] Sexual Violence Research Initiative: Global Review of National Prevention Policies' South African Medical Research Council at 4.
[315] Op Cit note 314; The study was conducted with a randomly selected sample of men aged 18–49 years from the general population of the Eastern Cape and KwaZulu-Natal. These men were asked in an anonymous survey about rape and the motivations behind it. The study used the 2001 South African census as the framework for the sample group.
[316] Ibid.

- When rape was committed against a perpetrator's girlfriend, it was mostly committed out of anger or as punishment.
- One third of the men who had admitted to having raped someone, admitted it was out of boredom. This was most common when victims were young females.
- Half of the men who raped young girls admitted that they did so because they felt the young girl would not tell anyone.
- Most men had not been drinking when they committed rape.
- Less than half of the men who had raped someone were worried about being caught.
- 21.2% of the men who had raped were arrested.
- Most of the rapes were committed during the perpetrators' teenage years.

The fact that rape occurs (or at least, begins) mostly during the teenage years of a perpetrator's life indicates the importance of addressing rape prevention strategies from a young age.[317] The most common motivation for rape reveals that there are clear social norms that legitimise the exercise of gendered sexual power.[318] There is a large portion of men in society that feel entitled to sexual acts from women and/or feel that it is okay to punish women *and* to do so through sexual acts.

The results discussed above about the reasons behind rape accord with many studies done in other countries around the world.[319] Sexual violence is not unique to South Africa and it seems that the motivating factors behind these acts are largely universal. For research purposes, this means that there is value in examining policies from around the world as potential options for South Africa to pursue.

As part of a global policy review paper on rape prevention, several primary prevention strategies were identified across the world that tackled social norms that normalised gender inequality.[320] They included the use of campaigns to raise awareness of violence against women and promoting respectful relationships, targeting cultural and faith-based institutions to promote gender equality, media monitoring on how genders are presented to the public.[321]

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[317] Ibid at 29.
[318] Jewkes, Penn-Kekana and Rose-Junius, "If they rape me, I can't blame them": Reflections on the social context of child sexual abuse in South Africa and Namibia, *Social Science and Medicine* 61, 2005, 1809–1820; Bhana, "AIDS is rape!" gender and sexuality in children's responses to HIV and AIDS' (2009) *Social Science and Medicine* 69 596–603.
[319] World Health Organisation, 'Understanding and addressing violence against women' available at https://apps.who.int/iris/bitstream/handle/10665/77434/WHO_RHR_12.37_eng.pdf;jsessionid=C0E4230FC03486A7B07AE5E2A024E17B?sequence=1
[320] Op Cit note 314.
[321] Ibid at 13.

However, it was found that overall, countries placed little focus on primary prevention strategies. This is likely due to the fact that primary prevention strategies focus on the long term and are not short-term solution problems. This is not a politically attractive option for politicians who aim to get re-elected by a punitive public. The concern could be that if the public cannot see the results of their strategies, it will not lend well to the evaluation of their progress as a politician.

From the information that is available, researchers from around the world have highlighted factors that make successful sexual violence prevention programs. These are programs that:[322]

1. Are based on an ecological model and are multi-levelled (in other words, strategies based on intervention at an individual's own personal level, their level of relationships, contexts in which they live and the cultural and formal structures they live in)
2. Are theory-driven
3. Include research and evaluation
4. Foster networks and partnerships (e.g. are linked with other programs and community activities that support the development and achievement of common goals)
5. Have a community approach
6. Are well resourced
7. Are tailored to the specific audience
8. Are equipped to deal with disclosure
9. Promote healthy and positive behaviours
10. Are comprehensive
11. Challenge cultural norms

The trends that emerge are that the prevention strategies need to intervene at all levels of an individual's life. This includes their informal relationships with others as well as the formal, legal rules under which they live. They should partner with other programs that are aimed at promoting the development of that individual, for example, by uplifting the individual through economic activities.

Studies that have focused on school-going persons have revealed just how misunderstood rape and other forms of sexual violence are. For example, a South African

[322] Primary Prevention of Sexual Violence: Preliminary Research' The Brenda Strafford Chair in the Prevention of Domestic Violence; Shift: The Project to End Domestic Violence; and the Association of Alberta Sexual Assault Services 2013 at 42.

provincial study[323] showed that 22% of young females believed that they themselves were the cause of the sexual violence inflicted on them.[324] Furthermore, a national study revealed that 60% of the learners (females and males) said it is not sexual violence if the forced sex is with someone you know. Half of the learners were either not sure whether 'no' actually meant no.[325] When asked whether girls have the right to refuse sex with a boyfriend, 30% said no. The attitudes of the youth about sexual violence suggest that it will continue until the minds of a new generation are remoulded.

School-based prevention strategies have proven to be the most popular and effective at preventing sexual violence.[326] Importantly, they target potential offenders at the age group where they are most prone to committing sexual violence. This has proven to be the best option for addressing misguided gender ideas. Baehr points to the fact that responding to sexual violence should include a cultural, social and religious reimagination of women in South Africa.[327] Instead of only focusing on women empowerment, the government should consider developing programs for men that include economic development, substance and alcohol abuse treatment, education reform and corresponding media campaigns that advocate against sexual violence from men.[328]

There is an obvious absence of knowledge in large swathes of the population regarding what sexual violence is, what sexual offence crimes involve and what people's rights are when it comes to sexual violence.[329] Education would be a powerful tool to stop the cycle of sexual violence on women that has persisted for far too long in the country. Putting an end to the stereotyping of men and women and changing norms and beliefs around sex, relationships and gender roles have the power to influence individuals and future generations.[330]

[323] CIETafrica conducted a study in 1999-2000 with 16338 participants in South Johannesburg: 'Executive Report, Beyond Victims and Villains: South Johannesburg, 1997-2000' (2000).
[324] T Deane, 'Sexual Violence and the Limits of Laws' Powers to Alter Behaviour: The Case of South Africa' (2018) *Journal of International Women's Studies* 19 2 at 90.
[325] Op Cit note 325.
[326] Ibid.
[327] Op Cit note 9 at 246.
[328] Ibid.
[329] Op Cit note 312.
[330] Op Cit note 326 at 96.

SECTION V:

CONCLUSION

The rampage of sexual violence in South Africa is a constant threat to the lives and rights of many South African women. In a country where victims are not coming forward, either because sexual violence is normalised, or there is a misunderstanding of what sexual violence actually is, there is a fear of secondary victimisation or a lack of faith that police officers will take them seriously, reform is needed in numerous areas. This paper aimed to guide where that reform should be focused.

The second section of this paper set out the evolution of the laws relating to sexual offences in South Africa. The most notable progression we see today is that of the definition of rape. SORMA has finally offered the gender-neutral, inclusive definition that activists have been lobbying for over many years. Evidentiary rules regarding sexual offences victims have also developed immensely. In the past, previous consistent statements were admissible as evidence in sexual offence cases provided the victim, *inter alia*, made their complaint at the earliest opportunity. This rule has been pegged as an association of a delay in reporting a sexual offence with an inherent distrust of women victims. Thanks to SORMA, no negative inference may be drawn from a delay in reporting an offence or in the absence of previous consistent statements.

In addition, SORMA recognises that there is no reason complainants in sexual offence cases should be seen as any less credible than victims of any other crimes. This came as a welcomed response to previous attitudes of judicial officers that held women to be notoriously unreliable as witnesses. Furthermore, the Criminal Procedure Act has been amended to state that the prior sexual history other than evidence relating to the offence in question, may not be led or raised in cross-examination unless application has been made to the court or prior sexual history evidence was introduced by the prosecution. This means that complainants may not be arbitrarily questioned about their personal sexual history in an attempt to prove their likelihood of having consented to the sexual act.

The background and context out of which mandatory minimum sentencing arose was set out. As rape is recognised as one of the violent crimes that attract a mandatory minimum sentence, the Criminal Law Amendment Act 105 of 1997 was discussed in this paper. This

legislation was enacted in response to the rates of rape and other violent crimes surging in the country.

Lastly, the experience of victims of sexual offences in the criminal justice process was discussed. This discussion involved how sexual offences are policed in South Africa and whether victims should be afforded specific rights in the justice process. With regards to the former, South Africa has had disappointing results in trying to create a consistent and coherent system for SAPS to follow when dealing with sexual offences cases. It is clear that the problem is a lack of leadership and not a lack of policy initiatives. Legislated victims' rights would certainly be in line with restorative justice models but SORMA chose not to include them in its ambit.

In the third section, this paper critiqued provisions of the SORMA in relation to the definition of rape, its establishment of the NRSO and sexual offences courts. It also discussed SORMA's approach to victim-sensitivity by the police. As discussed above, SORMA's redefinition of rape has been received well. The broad understanding of 'sexual penetration' and 'coercive circumstances' which serve to negate consent, have been a refreshing progression from the previous archaic understandings of rape. The only concerns for retaining intention as the sole standard of fault for rape meant that a mistaken belief in consent could act as a defence for accused persons. In other words, if an accused genuinely believed there to be consent, he would not be guilty of rape. This mistaken belief need not be reasonable. However, the fear of this rule materialising into a loophole for careless behaviour without consequence has not proven to be true. The existence of *dolus eventualis* as a form of intention prevents any wilfully reckless behaviour from going unpunished.

The NRSO at present is a confidential register of the names of persons convicted of sexual offences against children and mentally disabled people. The public does not have access to the register and its purpose is only to ensure that these convicted persons do not work with children or mentally disabled people. A new Bill that was recently published for comment aims to not only make the register publicly available but also to include the details of persons convicted of any sexual offence. This paper strongly advised against this approach. First, the resources required to establish and maintain such a register are far too optimistic for the South African government. Secondly, a public register would be a constitutional challenge waiting to happen.

Sexual offences courts were established in South Africa even before the SORMA. They act as specialised courts designed to reduce the secondary trauma that many sexual offence victims experience in the normal court process. The establishment and rollout of these courts started off well but were soon halted due to lack of resources and structure. A few years later however, the courts again faded from their specialised nature. It was only in 2013 that a task team was appointed to investigate the viability of re-establishing the sexual offences courts. Thankfully, they found in favour of the sexual offences courts and set out problems that needed to be addressed. Sexual offences courts that were functioning properly were extremely valuable and efficient. SORMA (as amended in 2013) empowered the Minister to designate any division of any court to be a sexual offences court. The empowering provision only came into force in 2020 and the effects of the legislation on the courts remain to be seen.

This paper then discussed how SORMA went against submissions for statutory duties of police officers with regards to sexual offences cases. Instead, they paved the way for detailed National Directives to be set out for police officers coupled with forms of sensitivity training. It is unfortunate that victims will not be equipped with legislative duties to hold police officers accountable as SORMA clearly did not take any lessons from the past. This paper proposed the introduction of legislated duties for police officers in sexual offences cases.

Next, this paper discussed and criticised the notorious mandatory minimum sentences in terms of the CLAA. It discussed the context in which these sentences arose to explain how the legislation was a result of poor research and rushed drafting. They have not proven to have any beneficial place in our law. Furthermore, they appear to increase the level of sentencing disparity in South African courts. The caveat of prescribing mandatory minimum sentences unless 'substantial and compelling circumstances' exist to justify departure, and then not actually indicating what these circumstances could be, proved to be disastrous for the initial years of the Act.

Not only can mandatory minimums not be justified under any rationale of punishment, but they have also had no positive effect on crime rates or assuaging public fear. Their abolishment in our law would save the government a lot of resources that could be used where it matters: ensuring the *certainty* of punishment.

In the fourth section of this paper, two categories of proposals are set out: sentencing reform and preventative measures. First, the establishment of sentencing guidelines is proposed. This is not a novel idea as the Law Reform Commission had recommended this in

2000. Their suggestions can be used as a base, but they adopt the undefined caveat of 'substantial and compelling circumstances' to justify mandatory minimums which work against the objectives of their bill. In addition, their priorities when it comes to the purpose of sentencing is far too generous. It leaves room for judges to give an offender a lesser sentence because they are more 'amenable to rehabilitation'. Instead, this paper argued in favour of many of Baehr's suggestions to amend how sexual offences are sentenced in terms of the mandatory minimum laws. This would allow for more proportionate sentencing as opposed to the current 'all or nothing' approach. Baehr suggests that there be a mandatory minimum sentence for rape that can increase in the presence of one or more aggravating factors.

Furthermore, this paper argued that there needs to be some sort of sensitivity training for judicial officers with regards to sexual offences. The Judicial Education Institute exists in South Africa to educate and train the judiciary and thus could be used in furtherance of this goal.

While creating consistency and transparency in sentencing would be a huge improvement for South Africa's criminal justice system, it will not be enough to effectively address the issue of sexual violence in the country. Most occurrences of sexual violence have proven to be based on misconceptions of gender and gender equality. South Africa should aim to create a society where there is a positive change in social norms and attitudes about women and sex. Primary prevention strategies aim to address these ideas in the minds of young individuals (specifically, young boys). These strategies are relatively new across the world, but school-based intervention strategies have proved to be effective in reducing sexual violence and young males' attitudes towards women. These strategies are often not popular as they are focused on the long-term and thus, do not provide immediate results to reduce the rates of sexual violence.

While South Africa has not been blind to the fact that sexual violence is a serious issue in need of addressing, it needs to understand that making notable improvements means the criminal justice system as a whole needs to be improved. Unfortunately, reducing sexual violence is not as easy as increasing the jailtime for offenders. It can start by improving the sentencing of offenders by judicial officers in the country. This would show a united front by the government against sexual violence. Furthermore, sexual offences courts should continue to develop in light of MATTSO's recommendations to create a safer place for victims to testify and feel a sense of justice. Further victim-based surveys need to be conducted to get a sense of

whether police sensitivity has improved under the mandated social training for police officers under SORMA. These changes must be coupled with policy-based initiatives that focus on long-term change in the country.

While there have been a number of developments in the area of sexual offences laws and sentencing, can the South African government really say it is fulfilling its constitutional mandate to protect vulnerable citizens if its responses are not well-researched or thought out? It has been a long war against sexual violence in South Africa, yet sexual violence still plagues the country. It is time for the government to take its response beyond mere rhetoric and knee-jerk harsh sentencing and do the slow, hard work needed for widespread social change.

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