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**A Brief Overview of Recent Developments in Sexual Offences Legislation in  
Southern Africa**

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*\* The views expressed in this paper are those of the author and do not necessarily represent those of the United Nations.*

## Introduction

The former Secretary General, Kofi Annan, identified several forms of violence against women in his recent in-depth study on all forms of violence against women.<sup>1</sup> These are: intimate partner violence, harmful traditional practices, femicide, sexual violence by non-partners, sexual harassment and violence in the workplace, educational institutions and in sport, trafficking in women, custodial violence against women, and forced sterilisation. While recognising that violence against women is manifested in various ways, this paper will focus on legislation relating to sexual violence in Southern Africa.<sup>2</sup> The reason for this limitation, other than the prescribed restriction on the length of the paper, is this area of the law has seen the most development in Southern Africa in recent years and is interesting in comparative terms, evidencing best practices and noteworthy shortcomings. Another reason for the choice of focus is that arguably, in Southern Africa, sexual violence is the most prevalent manifestation of gender based violence.

Amidst the prevalence of sexual gender based violence in Southern Africa there is increased momentum towards addressing it through specific sexual offences legislation since the turn of the century. A few factors could account for this. For example, human rights organisations, particularly those concerned with women's rights, are, with increasing success, raising awareness about violence against women and lobbying governments accordingly for legislation where it does not exist.

Another force promoting legislative reform is the devastating HIV pandemic, the epicentre of which is in Southern Africa where more women than men are infected. If there was ever a bright side to HIV, it is the opportunity it has presented for society to scrutinize the unequal relations between men and women and the way in which inequality, often manifested through violence, fuels the pandemic. The link between sexual violence and the spread of HIV is beyond debate and accordingly, legislation, with respect to sexual offences in particular, is being advocated as one tool to address HIV in Southern Africa as part of the human rights based approach to the crisis.

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<sup>1</sup> Report of the Secretary General *In-depth study on all forms of violence against women* (July 6, 2006) A/61/122/Add.1.

<sup>2</sup> For purposes of this paper, Southern Africa is defined according to membership to the Southern Africa Development Community (SADC): Angola, Botswana, the Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe. However, in order to highlight and devote substantial analysis to certain pieces of legislation and specific issues within, not all countries within the region will be covered.

Finally, attributing to the increased momentum in violence against women legislation in the region is the elaboration of the regional human rights framework for women's rights. In 2005, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Women's Protocol) was adopted and the adoption of a Protocol on Gender and Development (SADC Gender Protocol) for the Southern African Development Community (SADC) is imminent. The Women's Protocol, ratified by twenty-one African States to date, addresses violence against women comprehensively. It provides for legislative measures to prohibit violence against women in public or private, harmful traditional practices, trafficking in women, pornography, sexual harassment in schools and the workplace, and violence against widows, the elderly, and women with disabilities.

The SADC Gender Protocol, while less elaborate and prescriptive than the Women's Protocol, provides that State Parties shall enact and enforce legislation prohibiting all forms of gender based violence by 2015. In its current form however, the draft fails to include rape, marital rape and domestic violence, in the list of forms of gender based violence articulated in the same article. Despite such shortcomings, the development of the SADC Gender Protocol and the Women's Protocol, alongside advocacy, and the established link between gender based violence and the HIV pandemic, have led to the increased momentum towards violence against women legislation in the region.

### **Key features of sexual offences legislation in Southern Africa**

Key features of sexual offences legislation as it has developed in Southern Africa in recent years, in many cases, guided by international human rights standards, will be highlighted and illustrated comparatively although not exhaustively. These are: the definition of rape; the inclusion of rape within marriage as an offence; compulsory HIV testing of accused rapists; sentencing; and legislated care for survivors, namely the provision of post-exposure prophylaxis (PEP). In order to provide for a degree of analysis on these issues, other features such as those relating to investigations and prosecutions, evidence and procedure, training, dedicated courts, and rehabilitation are not covered within the scope of this paper.

Reference will be made to the following specific sexual offences laws: The Criminal Law (Sexual Offences) Amendment Act of South Africa, the Combating of Rape Act of Namibia, the Sexual Offences Special Provision Act of Tanzania, the Sexual Offences Act of Lesotho, the

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Sexual Offences and Domestic Violence Bill of Swaziland, and the Criminal Law (Codification and Reform) Act of Zimbabwe which replaced its Sexual Offences Act in 2004.

*Definition of rape*

In sexual offences legislation, the definition of rape varies within the region but in almost all cases where legislation has recently been enacted it has been redefined from the limited common law definition whereby rape consists only of sexual intercourse with a women without her consent. The model statutory definition should rather be gender neutral, include a range of sexual acts, and remove the element of consent. The Namibian Combating of Rape Act, for example, includes such a definition. In terms of the Act,

Any person (in this Act referred to as a perpetrator) who intentionally under coercive circumstances (a) commits or continues to commit a sexual act with another person or; (b) causes another person to commit a sexual act with the perpetrator or with a third person, shall be guilty of the offence of rape.<sup>3</sup>

The definition of rape in Tanzania's Sexual Offences Special Provisions Act, for example, contrasts with the above characterisation whereby a male commits the offence of rape if he has sexual intercourse with a girl or woman under specified circumstance including without her consent qualified by certain coercive circumstances. Rape is thus limited to sexual intercourse and it allows only for females to be raped by males.

The limited common law definition of rape was criticised by a South African Court which found that 'it illogically and irrationally discriminates between male and female on the one hand, and on the other hand that it unfairly discriminates against a victim's right to decide where and by whom she wants to be sexually penetrated.'<sup>4</sup> It was ordered that 'the common law definition of rape be and is extended to include acts of non-consensual sexual penetration of the male sexual organ into the vagina or the anus of another person.'<sup>5</sup>

While the rationale behind the expansion of the definition to include both sexes and a broader range of sexual acts is to comply with the principle of non-discrimination and to more accurately reflect the nature of the crime, the motivation for removing the absence of the element of consent is worthy of examination as it is more subtle and contentious as evidenced by the inconsistent approach to it in the region. The exclusion of the element of consent in Namibia's

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<sup>3</sup> Sec 2(1) Combating of Rape Act 8 of 2000.

<sup>4</sup> *S v Masiya* 2005 SHG 94/04 (Regional Court for the Regional Division of Mpulanga).

<sup>5</sup> As above.

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Act is exemplary and in the region, this exclusion is found elsewhere only in Lesotho's sexual offences legislation, seemingly modelled in many respects on Namibia's law. The issue of removing consent is primarily concerned with the protection of the survivor in court from 'secondary victimisation'. As was aptly articulated by the Namibian Law Reform and Development Commission, requiring the absence of consent

puts the complainant "on trial", in effect, by requiring the prosecution to prove beyond a reasonable doubt that the complainant did not consent to the sexual act. As a result, the sexual behaviour or reputation of the complainant can become the focus of the trial rather than the conduct of the accused.<sup>6</sup>

While the South African Law Reform Commission conceded similar arguments the inclusion of the element of consent ultimately secured its way in the final South African Sexual Offences Act to the dismay of advocates for rape survivors. Future efforts towards sexual offences law reform in the region must give careful consideration to the various models in existence and continue to build on progress made towards a redefinition of rape which offers the widest protection to survivors.

### *Marital rape*

An important model element of sexual offences legislation is the removal of the exemption of rape as an offence if occurring within marriage. The former Secretary General noted in his in-depth study that marital rape is not a prosecutable offence in at least 53 States. Examples in Southern Africa of states which have not criminalised marital rape are Tanzania, Botswana, Zambia, and Malawi.

In the sexual offences legislation of Namibia, Lesotho, Swaziland, and South Africa, rape within marriage is illegal. In Zimbabwe marital rape is prohibited however, no prosecution may be instituted against any husband for raping or indecently assaulting his wife without the authorisation of the Attorney General.<sup>7</sup> In Tanzania, rape within a marriage is only illegal if the couple is separated.

International human rights law has long established that the private domain is not exempt from its norms. The UN Declaration on the Elimination of Violence against Women, for example, calls on states to 'exercise due diligence to investigate and punish acts of violence against

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<sup>6</sup> Legal Assistance Centre *Rape in Namibia* (2006) p 79.

<sup>7</sup> Sec 68(a) Zimbabwe Criminal Law (Codification and Reform) Act 23 of 2004.

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women, whether committed by the State or by private actors.<sup>8</sup> The African Women's Rights Protocol reiterates this,<sup>9</sup> leaving little room for cultural relativist arguments.

### *Compulsory HIV testing of offenders*

A trend in sexual offences legislation in Southern Africa is the provision for compulsory HIV, or blood (presumably for the presence of HIV) testing of the accused. The sexual offences legislation of Lesotho, and South Africa provides for compulsory HIV testing of charged offenders, Swaziland for convicted offenders and Zimbabwe, for charged and convicted offenders.

Mandatory HIV testing infringes on the human rights of alleged offenders. According to UNAIDS and WHO, testing of individuals must be confidential, be accompanied by counselling, and only be conducted with informed consent, meaning that it is both informed and voluntary.<sup>10</sup> During the public consultation process of the drafting of the South African Sexual Offences Bill, which provides that the survivor may apply to a magistrate within 60 days of the offence for an order that the alleged offender be tested for HIV, arguments were put forth by civil society organisations opposing the provision for compulsory testing of the accused. Aside from the need to protect the rights of the accused, the AIDS Law Project, concerned also with the implications for survivors, argued that,

without in-depth counselling to enable the survivor to understand the complexities of HIV transmission, including window periods and the risk associated with different types of exposure, it will be difficult for most survivors to make an informed choice about whether or not to apply for compulsory testing of the alleged offender, and to understand the implications of the test result, whether the alleged offender tests positive or negative for HIV.<sup>11</sup>

Also of concern is a subsequent section of the Act which sets out the penalties and offences for abusing this provision, or in other words, for maliciously using the application to ascertain an individual's HIV status. Rape has an extremely low conviction rate and it is therefore plausible that a perpetrator who was not successfully convicted could then lay a charge against the

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<sup>8</sup> Art 4 Declaration on the Elimination of Violence against Women UN Doc A/48/49 (1993).

<sup>9</sup> Art 4 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa CAB/LEG/66 6 Rev 1 (2003).

<sup>10</sup> UNAIDS/WHO Policy Statement on HIV Testing (June 2004) available at [http://data.unaids.org/una-docs/hivtestingpolicy\\_en.pdf](http://data.unaids.org/una-docs/hivtestingpolicy_en.pdf).

<sup>11</sup> AIDS Law Project *Submission on Criminal Law (Sexual Offences and Related Matters) Amendment Bill* (15 August 2006) available at <http://www.alp.org.za>.

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complainant for using the relevant provision of the law to ascertain his HIV status, thus further victimising a rape survivor.

The provisions regarding compulsory testing of alleged offenders vary within national laws but the common disconcerting thread is the deviance from internationally recognised human rights principles and, despite good intentions, the failure to place the best interests of the survivor at the forefront of the intervention.

### *Sentencing*

Prescribed minimum and maximum sentences vary between states in Southern Africa with respect to sexual offences and are dependant on the circumstances of the offence and whether or not the convicted was a first or repeat offender. Legislating minimum sentences is contentious with concerns ranging from, but not limited to, the integrity of judicial independence, difficulties in determining an appropriate minimum sentence for all offenders without consideration of each case, and contribution to the problem of overcrowding of prisons. Lesotho, Namibia, and South Africa addressed one of the main concerns, that it encroaches on judicial independence, by allowing for discretion by the courts to depart from the minimum sentences where there are 'substantial and compelling circumstances'.<sup>12</sup>

Arguments in favour of minimum sentences are also wide-ranging but at the forefront is the promotion of consistency in sentencing. This is especially important with sexual offences convictions, where certain factors based on prejudicial views about rape and women such as previous sexual history, for example, or a lack of apparent physical harm, are often considered in sentencing and the devastating nature of the crime is minimised. However, as illustrated by one South African example, prescribed minimum sentencing does not always alleviate the intrusion of such prejudices into sentencing whereby a presiding officer may refer to 'substantial and compelling circumstances'. According to the presiding officer in this case, 'the complainant did not sustain any serious injuries' and 'they [the victim and the accused] sat and drank together' and 'went together to the complainant's home.' The sentence therefore diverged from the prescribed minimum.<sup>13</sup>

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<sup>12</sup> Such circumstances are limited in the case of South Africa by the Criminal Law (Sentencing) Amendment Act (no 38 of 2007). Neither the previous sexual history of the complainant nor the lack of apparent physical injury to her constitute circumstances warranting departure from the minimum sentence.

<sup>13</sup> Vetton, L and van Jaarsveld F *The (mis)measure of harm: an analysis of rape sentences handed down in the regional high courts of Gauteng Province* (January 2008) p 13 available at [http://www.tlac.org.za/images/documents/mismeasure\\_of\\_harm.pdf](http://www.tlac.org.za/images/documents/mismeasure_of_harm.pdf).

Views around the appropriateness of sentencing are also varied. In Namibia, during the second reading of the Combating of Rape Act in the National Assembly, a range of punishments were suggested including flogging, branding, castration, hard labour and the death penalty.<sup>14</sup> While none of these suggestions found their way into the Namibian law, the death penalty is a possibility for sentencing in the sexual offences legislation of Lesotho and Swaziland and Namibia, South Africa, Tanzania and Zimbabwe have provisions for maximum sentences of life. Amnesty International has criticised Swaziland's draft Sexual Offences and Domestic Violence Bill for its sentencing provisions.<sup>15</sup> The Bill proposes mandatory minimum sentences of 15 years to the death sentence depending on the circumstances. Not least of its concerns is the inconsistency of a mandatory death sentence with international human rights norms. Furthermore, as noted by Amnesty International,

High minimum sentences...may constrain the ability of the judiciary to apply their minds to each case and to exercise their discretion in relation to what might be the appropriate sentence. This may arise in a reluctance to convict.<sup>16</sup>

They also note that in the case of a rape of a child, for example, where the perpetrator is the parent or a parental figure, broadly defined in the African context, the severity of the punishment may add to pressures not to pursue a complaint.<sup>17</sup>

In all countries herein, with the exception of Tanzania, HIV status is an aggravating factor in sentencing for rape. In Namibia and South Africa it is considered only if the perpetrator had prior knowledge of status and in Zimbabwe, Swaziland and Lesotho it is considered regardless of whether the perpetrator had prior knowledge. Consideration of one's HIV status in sentencing has human rights implications, including violating the right to non-discrimination enshrined in all the constitutions of the above-mentioned states.<sup>18</sup> It also has notable shortcomings including the difficulty in proving the convicted offender was HIV positive at the time the offence was committed and that the survivor contracted the virus from the offender or was not already infected. The human rights implications and the logistical complexities of increased sentences for HIV positive perpetrators of sexual offences, a discussion of which is

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<sup>14</sup> *Rape in Namibia* (n5 above) p 50.

<sup>15</sup> Amnesty International *Memorandum to the Government of Swaziland on the Sexual Offences and Domestic Violence Bill* (Feb 2006) available at <http://www.amnesty.org>.

<sup>16</sup> As above, p 8.

<sup>17</sup> As above.

<sup>18</sup> In the case of *Makuto v the State* in the Botswana Court of Appeal for example, the discriminatory nature of stiffer sentences for HIV positive perpetrators was found to be unconstitutional where the convicted offender was unaware of his status at the time of the offence.



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beyond the scope of this paper, should be explored and considered before sentence enhancement on the grounds of HIV status is replicated in other sexual offences legislation in the region.

#### *Care for survivors*

Victims of sexual assault require comprehensive health services which address the physical and mental health consequences of the assault.<sup>19</sup> The types of services required include pregnancy testing, emergency contraception, abortion services, treatment for sexually transmitted infections, prophylaxis, treatment for injuries and psychosocial counselling.<sup>20</sup> Such services are generally mandated at the level of policy and are often lacking in implementation for a number of reasons including insufficient capacity to provide the required services. Law reform in the realm of sexual offences in Southern Africa has disappointingly not legislated these services which, is not only required in order to comply with international human rights norms, but would strengthen the level of protection for the health of survivors not least through the creation of an avenue for state accountability.

In as much as South Africa is the first country in the region to move from policy to law with respect to the provision of PEP at state expense to survivors of sexual violence, the Sexual Offences Act is good practice. However, as the provision is isolated from a comprehensive package of treatment and care and is subject to limitations, the law should not be modelled in the region but rather improved upon. Referring to PEP, the Act provides that,

only a victim who (a) lays a charge with the South African Police Service in respect of an alleged sexual offence; or (b) reports an incident in respect of an alleged sexual offence in the prescribed manner at a designated health establishment...within 72 hours after the alleged sexual offence took place, may receive the services...<sup>21</sup>

In so far as no one may be refused emergency medical treatment, limitations on the right to access PEP are unconstitutional and may compromise women's health. Many survivors of sexual offences choose not to lay charges or report the incident for a variety of reasons, including fear of further harm for example, or in the case of the perpetrator being an intimate partner, financial dependence. Furthermore, many will be unable to access 'designated health establishments' within the prescribed timeframe, particularly in rural areas. If the legislation was

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<sup>19</sup> World Health Organisation *Guidelines for Medico-Legal Care for Victims of Sexual Violence* (2003) available at <http://www.who.int>.

<sup>20</sup> As above.

<sup>21</sup> Sec 28(2) Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007.

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foremost concerned with the best interests of the survivor, there would be no reason to make the provision of PEP conditional.

The absence of a comprehensive package of health care is a key feature of sexual offences legislation in the region, and where it is included it is addressed inadequately as in the South African model.

## **Conclusion**

The majority of States in SADC do not have specific sexual offences legislation despite obligations in international law. This discords with the pervasiveness of sexual violence in the region. The Democratic Republic of Congo (DRC) is one such country about which Stephen Lewis recently said that, 'in the vast historical panorama of violence against women there is a level of demonic dementia plumbed in the Congo that has seldom, if ever, been reached before.'<sup>22</sup> While the limitations of the law, with respect to violence against women in particular, are recognised, the enactment of respective legislation is not least an international human rights obligation of States and moreover, a necessary step towards the creation of an enabling framework for the promotion and protection of women's rights. States must move beyond inaction and tolerance for sexual violence especially in the face of the HIV pandemic in Southern Africa. The struggle against gender inequality, and all its manifestations, of which sexual violence is one, must move from the rhetoric of policy and into law, providing not only for punitive measures for perpetrators but for protections and remedies for survivors. The laws should be guided by international human rights norms including General Recommendation 19 of the CEDAW Committee, the Beijing Platform for Action and the African Women's Rights Protocol, all of which identify comprehensive measures, including legislation, to be taken by states with respect to violence against women. Campaigns for the universal ratification of the Women's Rights Protocol within SADC must continue with vigour.

While new legislation provides an opportunity to address HIV in relation to sexual violence, the implications of HIV related provisions in law must be well considered and also guided by international human rights norms, with the best interests of the survivor at the forefront of each intervention. Compulsory testing and consideration of HIV as an aggravating factor in sentencing should not be replicated as best practices. Provision of PEP, on the other hand, at

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<sup>22</sup> Speech presented at the 10th Annual V-Day Celebrations, New Orleans (12 April 2008) available at [www.pambazuka.org/en/categories/features/47347](http://www.pambazuka.org/en/categories/features/47347).

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state expense is promising in the South African model but needs to be amended to remove limitations and improved upon by those states yet to enact laws on sexual offences. It also needs to be accompanied by a comprehensive package of care.

The absence of a legislative framework that comprehensively addresses violence against women in Southern Africa sends a message of tolerance for crimes which perpetuate gender inequality. Legislation that has been enacted, yet fails to protect the survivor of the offence, reflects a lack of understanding of women's rights in the face of violence, including the right to the highest attainable standard of health. While the emergence of specific sexual offences legislation in Southern Africa may indicate a growing awareness of the scale of violence against women, future legislative drafting must look to best practices and improve upon existing models.