Rape as a materially-defined crime: Could 'any act which causes sexual penetration' include omissions?

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ABSTRACT

This article examines the new statutory definition of rape as a materially-defined crime. It is hypothesised whether the phrase, 'any act which causes sexual penetration' in the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, could be broad enough to include omissions. The normative foundations of rape will be explored and the legal interests protected by a definition of rape will be identified. The terms 'conduct' and 'condition', which are central to a materially-defined definition, will be examined in juxtaposition to the phrase, 'any act which causes sexual penetration' to establish whether the deliberate infection of another with a life-threatening illness during consensual intercourse, or a failure to report specific cases of rape in prison, could possibly be considered to be forms of conduct which cause the condition of sexual penetration proscribed by the definition of rape.

1. Introduction

Crimes can be divided into two groups, known as formally and materially-defined crimes. In terms of formally-defined crimes, certain types of conduct are prohibited ('conduct crimes') irrespective of the result attained through such conduct. [1] On the other hand, materially-defined crimes do not prohibit specific types of conduct, but any conduct which causes a specific condition ('result crimes').[2]

Prior to the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (hereinafter the 'Act'), rape was a formally-defined crime in terms of the common law and consisted of a male having sexual intercourse with a female without her consent.[3] The crime of rape under South African law has since transmogrified itself

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1 CR Snyman *Criminal law* 5ed (2008) 79.

2 Ibid.

3 Snyman op cit (n1) 355-6. The definition of rape was narrow and only incorporated the penetration of a penis into a vagina.

from a formally-defined crime to a materially-defined crime. Rape is now defined in section 3 of the Act as: [4]

> '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.'

In section 1 of the Act, sexual penetration and consent are respectively defined as:

> '"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,
> "consent" means voluntary or un-coerced agreement.'

There has been a movement away from rape being defined as sexual intercourse *per se*, to that of a sexual act, i.e. penetration. The issue of consent however, is still present in the definition of rape. It is the definition of sexual penetration, and more specifically the term 'causes', which has the effect of converting the crime of rape from a formally, to a materially-defined crime.

This article explores and examines the definition of rape as a materially-defined crime and more specifically, the expression, 'any act which causes sexual penetration' in the Act, which transforms rape from a formally-defined crime to a materially defined crime.[5] Rape as a materially-defined crime will be examined in the context of the following interrelated issues: Firstly, the normative foundations of rape will be examined. The legal interests protected by a definition of rape will be identified. The terms 'conduct' and 'condition', which are central to a materially-defined definition, will then be examined in juxtaposition to the phrase, 'any act which causes penetration'. Secondly, the materially-defined expression, 'any act which causes penetration', will be examined to establish how far the ambit of this expression extends especially in the context of omissions. Thirdly, omissions will be examined in the

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4 Snyman op cit (n1) 358.

5 As set out in the definition of rape, read together with the definition of sexual penetration, in sections 1 and 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. The interpretation of this section could also be used for the expression, 'any act which causes direct or indirect contact' as defined in sexual assault (section 5) read with sexual violation (section 1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

context of the definitions of rape and sexual assault to establish under which crime the situations identified would best be covered.

2. The normative foundations of rape and a juxtaposition between the legal interests protected by the crime of rape and the different harms caused.

This section will firstly identify the legal interests which are protected in definitions of rape. It will consequently explore whether these interests are represented in the new statute of rape in South African law. The expression, 'any act which causes penetration', which is central to the definition of rape as a materially-defined crime, will also be examined against the elements of 'conduct' and 'condition' (i.e. the prohibited conduct which causes a condition), which form inherent parts of a materially-defined crime.

2.1 The legal interests protected by a definition of rape

Definitions of rape differ considerably under the domestic laws of various countries, but they usually involve sexual activity under conditions of force, violence, fraud, or where the victim is a person who is unable to consent because he or she is drugged, intoxicated, unconscious, mentally unsound or under the age of 12 years.[6] Under international criminal law, rape has been prosecuted before Tribunals as a form of torture or enslavement.[7]

The focus of a definition of rape may be placed on violence or coercion, or a lack of consent or agreement, or even both.[8] This is in

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6 CD Tollison & HE Adams *Sexual Disorders, Treatment, Theory, Research* (1979) 307.

7 *Prosecutor v. Semanza* Case No. ICTR-97-20-T (15/05/2003); *Prosecutor v. Akayesu* Case No. ICTR-96-4-T (02/09/1998); *Prosecutor v. Kunarac* Case No. IT-96-23-T (22/02/2001). It has been argued that the concept of consent is negated in armed conflict situations due to the coercive circumstances under which rape is committed. A Obote-Odora, 'Rape and sexual violence in international law: ICTR Contribution' 12 (2005) *New England Journal of International & Comparitive Law* 135 at 155. See also W Schomburg & I Peterson, 'Genuine consent to sexual violence under international criminal law' (2007) 101 *American Journal of International Law* 121, where it is stated at 123 that consent could be used as an affirmative defense. It has been suggested that rape could perhaps be treated in the same light as torture and enslavement, which are also violations of international criminal law, where non-consent need not be proved. One needs to bear in mind that as far as the issue of consent is concerned in international and domestic law, a distinction is usually drawn in international law on the basis that the latter generally focuses on the interests of a group, which means that the consent of one person, or lack thereof, cannot be taken to be the consent, or lack thereof, of the group as a whole.

8 CA MacKinnon 'Defining rape internationally: A comment on Akayesu' (2006) 44 *Columbia Journal of. Transnational Law* 940 at 941. See also CA MacKinnon *Toward a Feminist Theory of the State* (1989) 172.

line with the two predominant schools of thought, in defining rape, which delineate the legal interests protected in definitions of rape. The one school of thought is a proponent of rape being a crime of violence in the form of an assault, whereas the other school of thought views rape as an act which violates sexual autonomy or choice.[9] Cahill criticizes these two major schools of feminist thought on rape as failing to describe the phenomenon of rape sufficiently in terms of the interaction between power and the body. She states, in this regard, that the shortcomings of defining rape as primarily a crime of violence will fail to address rape as having a sexual meaning to the victim, and to define rape purely as sexual, will adopt a totalizing theory of power.[10] Mackinnon states that:[11]

> 'Where coercion definitions of rape see power-domination and violence, non-consent definitions envision love or passion gone wrong. Consent definitions accordingly have proof of rape turn on victim and perpetrator mental state: who wanted what, who knew what when. This crime basically occurs in individual psychic space. Coercion definitions by distinction turn on proof of physical acts, surrounding context, or exploitation of relative position: who did what to whom and sometimes why.'

Prior to the enactment of the new definition of rape, the South African definition of rape was therefore based on the school of thought, which advanced sexual autonomy and a lack of consent as key components. The inclusion of consent (i.e. the sexual autonomy model) and the use of the terms 'coercion' and 'sexual penetration' (i.e. the violence assault model), arguably combines both schools of thought. As Mackinnon states above, coercion definitions focus on physical acts. The South African definition of rape incorporates coercion as part of the definition and sexual penetration is defined in terms of specific types of conduct which is perhaps more in alignment with a formally-defined crime. But yet sexual penetration forms part of the 'condition' element of the materially-defined definition of rape, rather than the 'conduct' element. The elements of 'condition' versus 'conduct', which play a key role in materially-defined crimes, merit further investigation in this regard and will be examined in the next two sections.

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[9] AJ Cahill *Rethinking Rape* (2001) 14 – 5. Cahill is also of the view that rape is a violent sexual assault (at 207). Some of the views of other academic writers include Brownmiller's view that rape is not a sexual act but a violent act and is a, 'deliberate, hostile, violent act of degradation and possession on the part of a would-be conqueror, designed to intimidate and inspire fear.' (S Brownmiller *Against our Will: Men, Women, and Rape* (1975) 39); Groth identifies rape as a violent act rather than a sexual act (AN Groth *Men who Rape* (1979) 127-9). Schomburg & Peterson speak of acts of rape as being sexualized violence (Schomburg & Peterson op cit (n7) 126–7).

[10] Cahill op cit (n9) 12.

[11] *Ibid*. See also CA MacKinnon *Toward a Feminist Theory of the State* (1989) 172.

2.2 Rape as a materially-defined crime and the element of conduct

The definition of rape refers to, 'any act which causes sexual penetration'.[12] Although a number of situations are included in the definition of sexual penetration, it is mentioned nowhere that this phrase includes or excludes omissions. The use of the term 'any act' is arguably extremely wide, and in its broadest sense the use of the term 'act' could also be loosely used to refer to both an act and an omission. 'Act', could also be used as a synonym for conduct which would also possibly include an omission. In interpreting this term, the distinction is important as there is no general rule of liability for an omission, but there are exceptions which prescribe a duty to act, which list is not finite but dependent, 'for its delineation on the legal convictions of the community or legal policy makers.'[13] This is of special importance if one considers the following two scenarios:

- If a person intentionally fails to disclose his or her HIV status, or infection with another form of life-threatening illness during sexual penetration, such behaviour could arguably qualify as 'any act' which caused the sexual penetration.
- Another example where an act could be broadly interpreted to include an omission could be where a prison warden turns a blind eye to an act of rape committed in prison. Can it not perhaps be said that in such a situation the failure to act is 'any act' which causes the sexual penetration?

Should a failure to act, or omission, be read into the term 'any act'? From a cursory glance the answer would seem clear cut and simple, as it could be argued that an act and omission should be distinguished and that the legislature would make use of the terms act or omission if it intended to do so.[14] However, if the legal convictions of the community are taken into consideration, would it be reasonable for the term 'act' to include an omission so that in a situation where a person intentionally fails to disclose his or her HIV status, or infection with another form of life threatening illness, during sexual penetration, such person's omission could arguably qualify as an act which caused

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[12] Snyman op cit (n1) 358-62, discusses the acts falling within the definition of sexual penetration at length.

[13] J Burchell *Principles of Criminal Law* 3ed (revised 2008) 28, 140. CHW Gane & CN Stoddart *A Casebook on Scottish Criminal Law* 3ed (2001) 28 state that omissions can be divided into two categories i.e. pure omissions and crimes of commission by omission. Pure omissions consist in a failure to do something, and crimes of commission by omission consist not in the failure to act but in the consequences of that specific failure.

[14] Snyman op cit (n1) 52.

the sexual penetration. If such a person had informed their partner of their status, it is doubtful whether the former would have engaged in the act had he or she been aware of all the facts. The failure to disclose is the act which caused the penetration.

As far as the example of the prison warden turning a blind eye is concerned, a legal duty to act positively can arise from the holding of a certain office. One of the exceptions to the rule of immunity for failure to take action is where a legal duty is placed upon a person by virtue of his office, as in the case of a police official.[15] In *Minister van Polisie v Ewels* it has been held that a policeman on duty has to assist a person who is being assaulted, if the former is a witness to the assault.[16] Likewise, it could be argued that a legal duty exists on a warden to act positively to intervene in a case of prison rape. Whether such a duty is envisaged in the definitions of rape, and similarly in the case of sexual penetration, and sexual assault and sexual violation, is therefore not all that clear. If one examines section 51(1), which provides that a person who fails to report sexual offences against children and mentally disabled persons is guilty of an offence, it is clear that the legislature intended to protect vulnerable persons and make punishable instances of omission where a blind eye is turned by witnesses to such crimes.[17] Are prisoners not also vulnerable persons, as they may be subjected to continual acts of rape?[18]

Would the legal convictions of the community allow 'any act' to be read in such a way to include omissions in the above cases? The courts may develop a legal duty to act in accordance with the norms and

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15 Snyman op cit (n1) 60 and Burchell op cit (n13) 140.

16 *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) 590.

17 A prison warden who fails to act could also, in any event, perhaps be prosecuted as an accomplice, if his conduct furthers the commission of the crime, or as an accessory after the fact, if he does not further the crime but facilitates the perpetrator's evasion of liability or defeats or obstructs the course of justice. These crimes may be committed in the case of omissions if all the requirements of criminal liability are met. See Snyman op cit (n1) 273, 278, 340.

18 Clinical studies have revealed that male rape is a reality both inside and outside of a prison environment, which victims may be repeatedly raped over an extended period of time. See Groth op cit (n9) 119. Groth undertook a study of male rape and used a sample of 27 males in his study. His findings were that men are assaulted where they live, work, travel and relax and that male victims are susceptible to the same techniques used on women. He also found that men who raped other men whilst in prison, actually raped women in the community. See also Mezey & King (ed) *Male Victims of Sexual Assault* (1992) 84 *et seq;* P Rumney & M Morgan-Taylor 'Recognizing the male victim: Gender neutrality and the law of rape: Part one' (1997) 6 *Anglo-American Law Review* 198 at 202.

values held in the Constitution.[19] The Constitution provides in section 39(2) that the courts must interpret any legislation to promote the spirit, purport and object of the Bill of Rights.[20]

The principle of legality also plays an important role in the interpretation of legislation. In interpreting the definition to include 'any act' it could be argued that such expression is excessively wide and violates the principle of *ius certum*.[21] The principle of *ius strictum* dictates that crimes should be interpreted strictly.[22] If a strict interpretation were to be followed it would appear that omissions would not be included in 'any act'. The problem then is that such a strict interpretation conflicts with the Bill of Rights and more specifically the provisions of section 12(1)(c), which is the right to be free from all forms of violence from either public or private sources.[23] The preamble of the Sexual Offences Act of 2007 also contains a reference to the Bill of Rights in the South African Constitution and the 'right to be free from all forms of violence'. Rape as one of the sexual offences mentioned in the Act, is a recognised form of violence. In this specific example it could therefore be argued that the courts are free to interpret the legislation in accordance with the Bill of Rights and that 'any act' includes omissions by incumbents who hold specific public office, as in the case of prison wardens. Courts are not however precluded from, 'adapting existing crimes to meet contemporary requirements', but such process can prove to be a fine line between the extension and adaptation of the definition.[24] The courts would therefore have to be careful to 'interpret'

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19 Burchell op cit (n13) 140 and Snyman op cit n4. *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC). Constitutional values that may need to be considered in this regard include the right to remain silent (section 35(1)(a) of the Constitution of the Republic of South Africa, 1996) and the right to be free of all forms of violence from public or private sources (section 12(1)(c) of the Constitution of the Republic of South Africa, 1996).

20 Constitution of the Republic of South Africa, 1996.

21 Snyman op cit (n1) 42-3.

22 Snyman op cit (n1) 44.

23 A duty to protect fundamental rights is recognized, which is linked to a principle of accountability. See *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA). Another interest that would have to be weighed up is the 'right to remain silent', also guarded in section 35(1)(a) of the Constitution of the Republic of South Africa, 1996. It is submitted however that the legally recognized exception to this right could possibly be the duty relating to omissions applicable to persons holding a public office.

24 Burchell op cit (n13) 97. But now, in terms of the *Masiya v Director of Public Prosecutions* 2007 (2) SACR 435 (CC) it has been held that the application of a crime may be extended.

and not 'invent' by analogy.[25] The widely-debated controversial case of *Masiya v Director of Public Prosecutions* is a case in point.[26]

The problem with imposing liability for omissions extends further to the problem of causation. In materially-defined crimes one has to establish whether there was a causal *nexus* between the conduct and the prohibited condition.[27] In order to determine whether the conduct has caused the prohibited condition, two requirements have to be met. There must firstly be factual causation and secondly, legal causation.[28] In terms of factual causation one will usually try and establish whether the act was the *conditio sine qua non* of the result.[29] However, this does not mean that in the case of omissions, that a causal analysis will pose more problems than in the case of acts.[30]

The second leg of legal causation must also be complied with. Legal causation is based on normative value judgments or policy considerations, on whether it is just or reasonable to regard the specific act as a cause of the specific condition.[31] The generalisation theory, or theory of adequate causation, is normally applied and according to this theory:[32]

> '[A]n act is a legal cause of a situation if, according to human experience, in the normal cause of events, the act has the tendency to bring about that type of situation.'

Legal causation is also important as far as the deliberate infection of another with a life-threatening illness is concerned, as it allows policy considerations to be taken into account as well. Snyman says the following about legal causation: [33]

> 'The legal criteria are narrower than those applied to determine factual causation; they are based upon normative value judgments or policy considera-

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[25] M Wesson & M du Plessis 'Hart, Dworkin and the nature of (South African) legal theory' (2006) 123 *SALJ* 700 at 707.

[26] *Masiya* supra (n24). Shortly before the enactment of the statutory definition, the Constitutional Court extended the common law definition of rape to include penetration of a woman's anus in *Masiya* supra (n24). This evoked debate from a number of academics. See in this regard S Hoctor 'Specific crimes' 20 (1) *SACJ* (2007) 78; A Dersso, 'The role of courts in the development of the common law under s39(2): *Masiya v Director of Public Prosecutions Pretoria (The State) and Another* CCT case 54/06 (10 May 2007)' 23 *SAJHR* (2007); CR Snyman, 'Extending the scope of rape – A dangerous precedent' 124 (4) *SALJ* (2007) 677.

[27] Snyman op cit (n1) 80.

[28] Ibid; Burchell op cit (n13) 209.

[29] Snyman op cit (n1) 81; Burchell op cit (n13) 211–3.

[30] A Ashworth *Principles of Criminal law* 5 ed (2006) 134.

[31] Snyman op cit (n1) 84; Burchell op cit (n13) 221ff – see also for a discussion of a *novus actus interveniens* (new supervening event)

[32] Snyman op cit (n1) 85.

[33] Snyman op cit (n1) 84.

tions, on questions such as whether it is reasonable or just to regard the act as a cause of the forbidden situation.'

If one has to apply the *conditio sine qua non* test it could be argued that 'but for' the prison warden's inaction the prisoner would not have been raped, or 'but for' the non-disclosure of the life-threatening illness, the one party would not have had consensual sexual intercourse with another. In the case of the prison warden example, it could be argued that the warden was present and could have done something based on the facts, and that his conduct therefore contributed causally to the *actus reus* of the crime of rape. An argument could be constructed that by inserting the word 'causes', a door is left open to the courts to interpret this provision as including liability for omissions in certain circumstances.[34] Nevertheless caution should be exercised in the broad interpretation of the term, 'any act which causes', and it is suggested that such interpretation be limited to cases where the courts or legislature are of the opinion that a duty exists based on the specific facts presented before the courts.

It is therefore not so inconceivable that the above forms of omissions could be read into the term 'any act.' This term could be judicially expanded to include these and other omissions where a legal duty may be placed on certain incumbents to act positively by virtue of the public office held, or in terms of other generally accepted similar legal duties.[35]

2.3 Rape as a materially-defined crime and the causing of certain conditions 'or results'

As a result of rape having been a formally-defined crime, the results of the act were irrelevant for definitional purposes and more focus was placed on the prohibition of a specific type of conduct, i.e. sexual intercourse without consent. As mentioned above, a materially-defined crime prohibits any conduct which causes a specific condition.

[34] Ashworth op cit (n30) 110 discusses homicide offences under English law and explains that the word "causing" is used instead of the word 'killing' in order to allow courts to construe the meaning of "causing" to include omissions.

[35] See Snyman op cit (n1) 60 and especially 275 and n72 regarding possible accomplice liability on the part of the prison warden. See also Burchell op cit (n13) 140 for further examples. Rape is also viewed by many academics as a sexual assault, as will be discussed later. The significance of this as far as omissions are concerned is that if rape had to be defined as a form of assault which crime includes acts and omissions, then rape could also include specific situations of omission. See paragraph 3 in this regard.

There is scholarly recognition for the fact that an act of rape results in a, 'differing set of harms' or, 'long-lasting physical and psychic harm'.[36] Victims do not necessarily experience rape merely as a sexual encounter involving sexual penetration or sexual intercourse, but may instead perceive it to be an act of violence in the form of a life-threatening attack.[37] In the United Nations Declaration on the Elimination of Violence Against Women, article 2(b) recognises rape as an act of violence. In article 1, violence is recognised as any act which results in 'physical, sexual or psychological harm or suffering.' As Cahill states: [38]

> 'The general ethical wrong of rape, then, is to be located in its particularly sexual nature and sexual assault on the personal, subjective and bodily integrity of the victim. It is a violent, sexual, bodily denial and destruction of a person's sexually specific intersubjective being. While there are other means, and even other physical means, of attack that undermine personal and bodily integrity, the sexual nature of rape can result in a differing set of harms.'

Despite rape being reclassified as a materially-defined crime, the results of the unlawful sexual act are limited to specific aspects of bodily integrity only i.e. sexual penetration, and the issue of absence of consent, have been retained. The relationship between rape as a materially-defined 'result' crime and consent, becomes increasingly important if one considers that consent is deemed to be valid where the person is misled about the results of the sexual penetration.[39] It is evident that where harmful results ensue, i.e. when a party to consensual sexual penetration is deliberately infected with the HIV virus,[40] or a contagious life-threatening illness, such person would not

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[36] L Woolley 'Marital rape: A unique blend of domestic violence and non-marital rape issues' (2007) 18 *Hastings Women's Law Journal* 269 at 280; Cahill op cit (n11) 115, 133 and 194; *Holtzhauzen v Roodt* 1997 (4) SA 766 (W) at 778; *S v Van Wyk* 2000 (1) SACR 45 (C).

[37] C Hall 'Rape: The politics of definition' (1988) 105 S*ALJ* 67 at 73. In *R v C* 2004 2 Cr. App.R.15 253 at 259–260 the court refers to the position in the High Court of Justiciary in Scotland [S v H.M. Advocate, 1989 SLT 469] and states that it has been '… observed that rape always has been a crime of violence and aggravated assault, and doubted whether it was ever contemplated by the common law that a wife "consented to intercourse against her will and obtained by force".'

[38] Cahill op cit (n9) 194.

[39] Snyman op cit (n1) 365–6; *R v K* 1966 (1) SA 366 (RA) 368.

[40] HIV/ AIDS is the clinical definition given to persons whose immune systems have ceased to function properly. An infected person can transmit the virus via sexual intercourse. HIV is the acronym for 'Human Immunodeficiency Virus' whereas the term AIDS is descriptive of 'Acquired Immunodeficiency Syndrome.' AIDS, also described as a 'syndrome', is the final clinical stage of HIV and it can present itself as a number of diseases that arise as a result of the failing immune system. The AIDS sufferer will then be prone to illnesses such as certain cancers, tuberculosis or pneumonia, which will prove to be fatal to the AIDS victim which would generally not be the case for persons not suffering from AIDS. Consequently the person does not die of AIDS as such, but as a result of an illness to which the body cannot afford immunity. See A

be able to be classified as a rape victim. Furthermore psychological consequences, such as the causing of rape trauma syndrome or post-traumatic stress disorder ('PTSD'), are not included within the definition of rape, as the defined conditions are confined to physical acts of sexual penetration.[41]

It is not disputed that an act of rape can cause differing harms, yet these differing harms or results are not proscribed or reflected in the definition of rape. It is the physical component which is and has always formed part of the actual definition of rape and not the psychological component. The physical component is also specific and only refers to, 'acts of penetration' which are broadly described.[42] Why then focus on only one interest protected? One reason could be based on the concept of 'embodiment' as rape will always have bodily significance, whereas rapes can have different meanings or constitute different harms for victims.[43] It may be considered an impossibility to have an 'experiential unifying element' which requires victims to have a common experience.[44] Secondly, it can be argued that psychological harm, such as PTSD for instance, is not just applicable to victims of the crime of rape but is also valid for all other crimes of violence, for example, victims of assault, attempted murder or robbery. These crimes do not however include psychological harm within their definitions. Thirdly, the issue of deliberate infection of the HIV/ AIDS virus during consensual intercourse has been widely debated and is an extremely controversial one. This is evidenced by the fact that it was included as part of the definition of rape in the Draft Bill on Sexual Offences Act 50 of 2003,[45] and was consequently removed from the proposed definition and made a separate offence in the Working Paper of 2004.[46] An omission to disclose such information was made punishable under this Draft Bill.

The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 does not criminalise intentional infection of another with the HIV virus or other life-threatening illness, and the current

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Whiteside & C Sunter *AIDS: The Challenge for South Africa* (2000) 1–5; 10–6; See also SALC Discussion Paper 80 (1999) 14-5 n42.

41 See AW Burgess & LL Holmstrom, 'Rape trauma syndrome' (1974) 131 *American Journal of Psychiatry* 981-4.

42 Snyman op cit (n1) 358–62.

43 Cahill (n9) 114-5.

44 Cahill op cit (n9) 110.

45 See clause 2(4)(c) in this regard. See also in general J Le Roux 'Die toepassing van strafbeginsels op HIV oordrag: 'n diagnose' (2000) 33 *De Jure* 293. See J Burchell op cit (n15) 138. J Burchell 'A saga of snitches and whistleblowers: the boundaries of criminal liability for breach of statutorily-imposed duties especially in the context of organised crime' in JJ Joubert (ed) *Essays in bonour of CR Snyman* (2008) 22.

46 See clauses 5 and 6 in the Working Draft Bill on Sexual Offences, 2004.

definition of rape contains no reference to the deliberate infection with the HIV virus or other life-threatening illnesses. [47] The reason cited for this is that it is believed that South African women have the highest prevalence rate for HIV and that a failure to disclose their HIV status would only increase discrimination against such women.[48] There is nevertheless authority for the view that the deliberate infection of another person with a life-threatening illness should be regarded as rape, as such infection is a material fact which should negate consent, [49] but the position has not been taken further as it has been felt that the common-law crimes are sufficient in this regard.[50] As has been explained earlier, this type of omission could possibly be interpreted as being included within the new definition of rape and will now also be examined in the context of the crime of sexual assault.

3. Sexual assault as a materially-defined crime and omissions

The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 has also introduced a definition of sexual assault (which replaces the common law crime of indecent assault) to cover unlawful non-penetrative sexual acts. The crime of sexual assault is also materially-defined, and is defined in section 5 as:[51]

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[47] Such conduct can however be prosecuted under the existing common-law crimes under South African law. In terms of the South African common law, for criminal liability to ensue, the state must prove beyond a reasonable doubt that an unlawful voluntary act or omission was committed, accompanied by fault and criminal capacity. If all the elements are present, a conviction can possibly be secured under the common-law crimes of murder, culpable homicide, assault with intent to cause grievous bodily harm and attempt to commit these offences. Burchell op cit (n13) 138, 724.

[48] See SALC Report on Sexual Offences Project 107 (2002) 34. See further Burchell op cit (n13) 711, 725. Burchell mentions that a fraudulent non-disclosure of one's HIV status should be sufficient to vitiate consent and that sexual intercourse under such conditions could in fact amount to rape. See also JMT Labuschagne, "Geslagsoordraagbare siektes en die geslagsdaad as geweldsinstrument" (2004) 25 *Obiter* 176 at 181. See *Regina v. B* [2007] 1 W.L.R. 1567 (Court of Appeal) for a contrary view in England.

[49] See Burchell op cit (n13) 711; Snyman op cit (n1) 366. See further Schomburg & Peterson op cit (n7) 126–7 where they state: 'In particular during the conflict in Rwanda, individuals were also subjected to conduct such as deliberate infection with the AIDS virus and the insertion of sharp objects into their genitals. The ICTR has correctly held that the latter may constitute rape. Acts of this kind have usually caused serious bodily injuries and even led to the death of the victim. They can hardly be conceived of 'merely as undesired sex.'

[50] Burchell op cit (n13) 342, 724. Snyman op cit (n1) 366.

[51] Sexual violation criminalises specific acts which cause sexual contact short of penetration. See section 1(1) of Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 in this regard.

(1) A person ('A') who unlawfully and intentionally sexually violates a complainant ('B'), without the consent of B, is guilty of the offence of sexual assault.
(2) A person ('A') who unlawfully and intentionally inspires the belief in a complainant ('B') that B will be sexually violated, is guilty of the offence of sexual assault.

The same principles which are applicable to common assault are also applicable to sexual assault.[52] Common assault is defined as:[53]

> 'Any unlawful and intentional act or omission
> (a) which results in another person's bodily integrity being directly or indirectly impaired, or
> (b) which inspires a belief in another person that such impairment of her bodily integrity is immediately to take place.'

If one analyses the definition of sexual assault it becomes clear that the crime is largely based on the common-law crime of assault, save for the addition of the terms 'without consent' and 'sexual violation'. The common-law crime of assault is also an example of a materially-defined crime and consists of an act or omission which causes a result, being the impairment of Y's bodily or psychological integrity (*corpus*).[54] An assault is thus an infringement of another person's bodily and psychological integrity whereby the potential victim's state of mind is also taken into account. [55] The right to bodily integrity (*corpus*) or physical-mental integrity is also recognised in the common law and the Bill of Rights.[56]

If a comparison is made with other jurisdictions, it appears that certain United States (US) states define rape as criminal sexual conduct

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[52] Snyman op cit (n1) 377 n 77.

[53] Snyman op cit (n1) 455. Note this definition differs from the previous edition's definition of assault which focused on the application of force, or the inspiring of a belief that force was to be applied. The new definition is preferred especially for purposes of defining rape as a form of sexual assault as one would want to guard against the use of force in the aforementioned definition, or else emphasis may be placed on the conduct of the victim and whether she resisted the force or not. See also Burchell op cit (n13) 161, 680.

[54] Snyman op cit (n1) 455-6, 460. See also CR Snyman, 'Die Geweldsbegrip by die Misdaad Aanranding' (2004) 3 *Tydskrif vir die Suid-Afrikaanse Reg* 448–63. See J Neethling, JM Potgieter & PJ Visser *Neethling's Law of Personality*, (2005) 83ff, 90ff for a discussion of the infringement of the psychological aspects of the body.

[55] Ibid; Burchell op cit (n13) 161, 680.

[56] See J Neethling, '*Delictual protection of the right to bodily integrity and security of the person against omissions by the state*' (2005) 22 *SALJ* (2005) 572; Neethling op cit (n54) 83, 90ff; Section 12(2) of the Constitution of the Republic of South Africa, 1996.

and sexual assault.[57] In New Zealand, rape is defined as a sexual violation.[58] If a comparison is drawn with South African law, sexual assault and not rape is defined in the South African Act as being a sexual violation and combines elements of the common-law crime of assault.[59] The South African definition of sexual violation covers all sexual acts of non-penetration, whereas the New Zealand definition covers sexual acts of penetration. Rape is widely acknowledged as a form of sexual assault as has been shown in the previous section on the two schools of thought.

One is left with the nagging feeling that there is perhaps a blurring of terminological boundaries between the crime of rape and sexual assault. It cannot be disputed that rape is a sexual assault, or that rape is a sexual violation. Yet in the South African definitions of sexual assault and sexual violation, such definitions are specifically limited to non-penetrative acts, whereas rape is a penetrative act. Furthermore, rape is defined as 'any act', whereas an assault incorporates an act or omission.

One thus sits with the anomaly that sexual assault, which criminalises only non-penetrative offences, is more encompassing as it encompasses both acts and omissions relating to bodily and psychological integrity, whereas rape is only limited to specific acts relating to bodily integrity.[60] It would appear that the deliberate infection of another with a life-threatening illness during consensual intercourse, or a failure to

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[57] Examples of differing definitions of rape to the South African definition are found in the Sexual Offences Act 2003 (UK); Crimes Act 1961 of New Zealand and the United States. Examples in the USA are the Michigan Criminal Sexual Conduct Statute 1975; the Model Penal Code; Revised Code Washington (ARCW) 1994.

[58] Section 128 of the Crimes Act 1961. Sexual violation is defined as:
(1) Sexual violation is the act of a person who–
(a) rapes another person; or
(b) has unlawful sexual connection with another person.

[59] See section 5 read with section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

[60] Furthermore if rape is a sexual assault and a sexual violation then it is a crime which is essentially viewed as an umbrella crime encompassing both penetrative and non-penetrative sexual acts, really the appropriate title for a crime which only covers non-penetrative offences? See MD Schwartz & WS DeKeseredy *Sexual Assault on the College Campus* (1997) 8 – 9. Definitions of sexual assault vary in the context of sociological and psychological literature but the term is mostly used as an umbrella crime. Four types of sexual assault are identified by Schwartz and DeKeseredy. These are: 1. Sexual contact which includes unwanted sex play 2. Sexual coercion including unwanted sexual intercourse arising from verbal pressure 3.Attempted rape includes unwanted sexual intercourse arising from force or threat of force 4.Rape which includes unwanted sexual intercourse arising from force and includes unwanted sexual intercourse per vaginam or per anum, oral intercourse or penetration by objects. See further the SALC Report on Women and Sexual Offences in South Africa *(*1985) 16–7, 20–1 for arguments cited both in favour of, and against, the defining of rape as a sexual assault.

report specific cases of rape based on a legal duty, are covered by the definition of assault. The question is whether it is sufficient for these forms of omission to be covered by this crime or whether these legal interests, which have been identified as pertaining to rape, should not perhaps be incorporated within a further refined definition of rape, i.e. that these identified legal interests, relating to a rape, be specifically catered for by legislation which will specifically provide for such circumstances. As Snyman states:[61] 'In materially-defined crimes, on the other hand, it is not specific conduct which is prohibited, but any conduct which causes a specific condition.'

Omissions in the form of the deliberate infection of another with a life-threatening illness during consensual intercourse, or a failure to report specific cases of rape based on a legal duty, as in the case of the scenario applicable to prison wardens, are arguably forms of conduct which cause a specific condition in the form of an act of sexual penetration.

4. Conclusion

The South African definition of rape is now a materially-defined crime which combines aspects of the two schools of feminist theory. Although an assault covers both acts and omissions, to merely define rape as an assault will also ignore the sexually specific or sexually differentiated functions of rape.[62] Admittedly, the definition of rape does not cover all the differing harms caused by an act of rape, as it is a subjective embodiment of a number of experiences for the victim.[63] However it is difficult to have one unified generic definition of rape as rapes occur in different situations, can constitute radically different harms and also have different meanings for victims.[64] A balance is needed to find a satisfactory approach to the legal aspects dictated by a definition of rape and the social aspects relating to a rape victim's needs especially in the context of omissions. Therefore there may arguably still be room for further legislative refinement once an evaluation of the reforms, and their effectiveness in practice, have occurred.

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61 Snyman op cit (n1) 79.

62 See L Artz & H Combrinck 'A wall of words: Redefining the offence of rape in South African law' (2003) 16 *Acta Juridica* 72, 80. See further the SALC Report on Women and Sexual Offences in South Africa op cit (n60) 16–7, 20–1.

63 Cahill op cit (n9) 194. See Artz & Combrinck op cit (n62) 80.

64 Cahill op cit (n9) 114–5, 194.