

CHAPTER ONE

THEME ANALYSIS, CONCEPTUALIZATION AND PROBLEM STATEMENT

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1. INTRODUCTION

This study is concerned with the reconceptualization of the South African common law definition of rape. It is based on the premise that the common law definition is not sufficient, and it addresses the legal problems relating thereto. Specific attention is given to the current crime of rape with the proposed amendments introduced by the South African Law Commission. This study incorporates clinical case reports, survey studies and journalistic accounts. A literature review for purposes of this study revealed that research material with regard to the identification of rape victims is limited due to an analysis of the categories of victim affected not being done. This can perhaps be attributed to the fact that no adequate classification with regard to rape victims exists in South African legal literature. Where holistic approaches towards the crime of rape are followed, references are made to gender-neutrality. No satisfactory explanation



exists in South African law as to why certain categories of male, female and child victims of penetrative sexual assault should be classified under a gender-neutral definition of rape. This lack of explanation and logical reasoning behind why certain victims of penetrative sexual assault are grouped together can even be extended to the Discussion Papers on Sexual Offences introduced by the South African Law Commission.¹ In the haste to follow the international trends of reformulating the crime of rape as a gender-neutral crime, sight was lost of the reasoning behind why certain victims should actually be classified as rape victims.

A pertinent question that must be essentially asked is: *Why* should certain persons be classified together under the crime of rape specifically? The existence of the common law crime of rape was not created with the purpose of protecting the victim's freedom of choice to have sexual intercourse or not.² Reference to the history of the crime of rape will show that rape was a species of property crime. Hall states the following:³

¹ See "SALC Discussion Paper 85 of 1999" and "SALC Discussion Paper 102 of 2002."

² The crime of sodomy has pertinent relevance for purposes of comparison. The crime of sodomy was an artificial crime that was created for the purposes of criminalizing a particular form of gay expression as opposed to including instances of male rape within its ambit. The crime of rape can also be seen to be an artificial crime that was created as a property crime which punished the theft of virginity. The development of rape law was never intended to protect the victim's freedom of choice. See Hall, C. "Rape. The Politics of Definition" (1988) on 79. This position is analogous to that of sodomy in that the victim's freedom of choice was never the issue. It is therefore submitted that sound reasons need to be furnished when advocating the gender-neutrality of the crime of rape. If the crime of sodomy had been extended to include female victims of forced anal intercourse, sound justification would have to be furnished if it was retained and reformulated as a gender-neutral crime. See further Odem, M.E. & Clay-Warner, J. "Confronting Rape and Sexual Assault" (1998) on 35-36.

³ Hall, C. "Rape. The Politics of Definition" (1988) on 79-80. She further mentions that this system reflected a concept of female sexuality as the property of men, that is a legal object being owned and controlled by those who have legal power over the victim and that consent and non-consent were irrelevant considerations. Rape laws and marriage laws were used as twin mechanisms in the legal regulation of men's rights over female sexuality and reproductive capacity. Rape only came to be seen as a wrong against the victim herself, for which she could demand compensation in the later Middle Ages. The present author supports her view that



The origin and development of rape law demonstrated that it was never intended to protect the victim's freedom of sexual choice, but the proprietary interest of her legal guardian. For centuries rape was a species of property crime, the theft of virginity perpetrated against the victim's guardian, who was the only person entitled to claim compensation for rape. She herself had no claim, as she personally was not perceived to be the injured party. The wrong suffered by the guardian consisted in the reduced bride price which a defiled, that is, a non-virgin daughter could command on marriage. Only gradually did the law recognize that other categories of women could be raped.

The crime of rape has evolved over centuries. The traditional definition has been reformulated to incorporate additional victims such as married women and widows.⁴ The focus is no longer on proprietary interests but the victim's freedom of choice to consent to sexual intercourse or not. There is a predisposition in society towards the reconceptualization of the crime of rape into an anatomically and gender-neutral crime by equating various acts of penetrative sexual assault with rape. Burchell and Milton are of the view that:⁵

Anal intercourse with a man without his consent has all the reprehensible features of a heterosexual rape.

In National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others, it is stated that:⁶

freedom to choose when and with whom to have sexual intercourse is a recently articulated interest, which rape laws were never designed to protect. See further Odem, M.E. & Clay-Wamer, J. "Confronting Rape and Sexual Assault" (1998) on 35 – 36.

⁴ See the "Prevention of Family Violence Act 133 of 1993" and Snyman, C.R. "Criminal Law" (1995) on 424 – 425. See further Burchell, J. & Milton, J. "Principles of Criminal Law" (1997) on 490.

⁵ "Principles of Criminal Law" (1997) on 492 fn 55.

⁶ 1998 12 BCLR 1517 (CC) on 1559 F-G.

This is essential in my view, to prevent persons convicted of sodomy which amount to 'male rape' from having their convictions set aside.

In a further case of **S v M**, Didcott, J is of the view that:⁷

I do not think it would have been a significantly worse case, or indeed a worse case at all, had the appellant raped the complainant in the ordinary sense by having vaginal intercourse with her instead of anal intercourse.

It is submitted that the *boni mores* have changed and that the criminal law should extend the crime of rape as an adequate alternative to the crimes under which certain rape victims are forced to claim redress. The power to extend liability is a phenomenon recognised in the law of delict, where the courts have the power to extend the ambit of delictual liability against the changed *bonis mores*.⁸ One cannot however proceed to totally change the ambit of a crime which was originally created to protect property interests without sound reasoning as to why this should be the case. This study aims at deducing a logical explanation as to why the crime of rape should be extended to male, a broader category of female victims and child victims of penetrative sexual assault. This study will be conducted within a qualitative paradigm and will firstly provide a system of classification of which categories of penetrative sexual assault victims should be incorporated within a reformulated definition of rape. Secondly, this study will attempt to provide a useful framework in identifying victims of sexual assault as rape victims in borderline cases. A distinction will accordingly drawn between

⁷ **S v M** (2) 1990 1 SACR 456 (N).

⁸ See **N v T** 1994 1 SA 862 (K) as well as Labuschagne, J.M.T. "Deliktuele Aanspreeklikheid Weens Verkragting" (1994) on 242 in this regard. See further **Minister of Police v Ewels** 1975 3 SA 590 (A). See also Labuschagne, J.M.T. "Regterlike Misdadskepping: Is die Engelsregterlike Benadering Versoenbaar met die Sekerheidseis van die Strafreë?" (1994) on 130 wherein it states that our courts are enabled to: *[d]ie trefkrag van delituele aanspreeklikheid, teen die agtergrond van die veranderde boni-mores uit te brei*. See further Labuschagne, J.M.T. "Onregmatigheidskriterium in die Straf-en Deliktereg: 'n Regsevolusionere Beskouing" (1993) on 663.

sexual assaults which are penetrative and non-penetrative in nature.⁹ Lastly, it is envisaged that this study could serve as a commentary in the practical application of rape theory and rape law reform to factual situations to assist and ensure the consistent application of a broader definition of rape.

The crime of rape is examined against other common law and statutory crimes relating to sexual offences and in terms of which other penetrative sexual assault victims are classified. These other definitions relating to sexual offences and which also cover victims of sexual assault will be individually examined against the current common law definition. The purpose of assessing these other sexual crimes is to establish whether certain possible categories of penetrative sexual assault which will be identified in this study can be meaningfully covered under a broad spectrum crime of rape.

It will be shown that the psychological effects on potential rape victims who have redress under various other crimes, such as indecent assault, assault with the intent to cause grievous bodily and non-consensual sodomy, mirror the same psychological reactions to those rape victims presently covered under the current common law definition. Specific focus will be on those victims covered, as opposed to those who are not. Furthermore it will be shown that a perpetrator of rape can be either male or female.¹⁰ Various categories of victim and perpetrator can be identified such as male perpetrator and female victim, male perpetrator and male victim, female perpetrator and male victim, and female perpetrator and female victim. Comparative reference is made to the changes in rape laws in Australia, Britain and the United States of America in support of a broader definition. This broader definition of rape would not prejudice victims protected by the current definition but would afford wider protection to 'other' victims. The central question focuses on who is a penetrative sexual assault victim and

⁹ It will be recommended that penetrative sexual assaults be incorporated under the crime of rape and that non-penetrative sexual assaults be prosecuted under the crime of indecent assault.

¹⁰ See Snyman, C.R. "Criminal Law" (1995) on 34. Our law has the power to limit criminal liability as is evident from the case of *S v Chretien* 1981 1 SA 1097 (A) regarding voluntary intoxication.

whether these other victims' interests can be adequately covered under a broad definition of the crime of rape.

In order to understand the current crime of rape it is essential to examine the roots and origin of the crime of rape. The word rape is derived from the Latin word *rapere* which means to steal, seize or snatch away.¹¹ It has been said that our law cannot be accurately described as Roman-Dutch law.¹² Although the South African law pertaining to rape has its roots in Roman-Dutch law, it has undergone subsequent changes, due to English law influence.¹³ Consequently our law may be said to be a combination of Roman-European law and English common law.¹⁴

In Roman Law, rape was regarded as a family concern and it was up to the head of the family to institute action.¹⁵ In later Roman law times *stuprum* covered the act of forcible sexual intercourse. Van Leeuwen defines *stuprum* as:¹⁶

virginis vel viduae honestae illicita defloratio.

¹¹ Scholtmeijer, J. & Hasse, P. "Legal Latin" (1990) on 66. See further Odem, M.E. & Clay-Wamer, J. "Confronting Rape And Sexual Assault" (1998) on 249.

¹² Price, T.W. "The Future of Roman-Dutch Law in South Africa" (1947) on 494; See also Labuschagne, J.M.T. "Ons Gemenerereg en Wetsuitleg" (1984) on 364 *et seq.* See further Lee, R.W. "An Introduction to Roman-Dutch Law" (1915) in general. The phrase Roman-Dutch law was invented by van Leeuwen who employed it as the sub-title of his work "*Paratitla Juris Novissimi*" which was published in Leyden in 1652.

¹³ Joubert, W.A. *LAWSA* vol 6 (1981) on 246.

¹⁴ See Labuschagne, J.M.T. "Regterlike Misdaadskepping: Is die Engelsregterlike Benadering Versoenbaar met die Sekerheidseis van die Strafreë?" (1994) on 128. See also *S v Von Mollendorff* 1987 1 SA 135 (T) where it is evident that our law does not follow English law blindly.

¹⁵ See Labuschagne, J.M.T. "Cases and Comments" (1996) on 322 wherein he also refers to *Dig* 48.5.30.9; *Dig* 48.6.3.4.

¹⁶ Van Leeuwen, S. "*Censura Forensis*" (1741) 1 5 23 1 and means the defloration of a virtuous girl or widow. See further the English translation by Watson, A (ed) "*The Digest of Justinian Volume IV*" (1985) on xxii.

Stuprum could also be committed by persons who committed unnatural sexual acts with men and could be committed with a virgin, a widow or a boy.¹⁷ *Per vim stuprum* was a form of unchastity that was disapproved of.¹⁸ Both males and females could be victims which is evident from the following:¹⁹

Eum autem, qui per vim stuprum intulit vel mari vel feminae.

The Roman Dutch Law did not know the crime of rape *eo nomine*.²⁰ The term *raptus*, which could be used as a synonym for rape, was a species of public violence (*vis publica*) and consisted of violent carrying away.²¹ The *actus reus* of rape was treated as a form of *stuprum* which covered a group of offences related to illicit sexual intercourse. *Stuprum violentum* was closely related to *raptus*. Numerous crimes were classified under *stuprum qualificatum*.²² Unlike the Roman-Dutch crime of rape, which required violence as an element of the crime,

¹⁷ See Labuschagne, J.M.T. "Cases and Comments" (1996) on 322 wherein he also refers to D 48.5.30.9. D 48.6.3.4.

¹⁸ Burchell, J. & Milton, J. "Principles of Criminal Law" (1997) on 490.

¹⁹ See D 48 5 30 9. See further translation in Mommsen, T, & Krueger, P. (ed) "Corpus Iuris Civilis Digesta Vol 1" (1954).

²⁰ *S v Ncanywa* 1992 1 SACR 209 (Ck) on 211 i-j. See Van Der Linden, J. (translated by Henry, J) "Institutes of the Laws of Holland" (1828) on 355 – 356. See further van Leeuwen, S. (ed Decker, C.W.) "Commentaries on Roman-Dutch Law Volume II" (1923) on 298. See also Labuschagne, J.M.T. "Cases and Comments" (1996) on 322 on 322 where it is stated that in the Roman-European law (which term is preferred by the writer thereof to the term Roman-Dutch law) *stuprum* could only be committed upon a female, whereas the Roman law crime of *stuprum* could be committed upon a male and included forced anal intercourse with a male. See further Labuschagne, J.M.T. "Die Penetrasie Vereiste by Verkragting Heroorweeg" (1991) on 148-149.

²¹ Van Leeuwen, S. "Censura Forensis" (1741) on 1 5 23 1 differentiates between *stuprum violentum* and *stuprum voluntarium* of which the latter is not punishable. See also Voet, J. "Commentarius ad Pandectus" (1698) on 48 5 2.

²² Examples are sexual intercourse with mentally handicapped women, intoxicated women or when the victim is under a relationship of authority which is abused or where the girl is under the age of 12 years.



South African law, which followed the English law in this regard, does not require violence.²³ It requires lack of consent as the essential element.²⁴

In English law, rape was originally considered to be the deflowering of a virgin woman, which resulted in her value as a bride being lowered and was thus regarded as a crime against property.²⁵ In 1285 the crime incorporated the elements of force and lack of consent and was redefined as 'unlawful sexual intercourse with a woman without her consent.'²⁶

Since the 1970's, feminists have challenged many of the underlying assumptions relating to rape. Sexual assault became redefined from a victim's perspective.²⁷ Supporters of the movement established rape crisis centres, but it was still evident that the trauma of a rape trial could not be effectively diminished without revised legislation. Feminists also advocated the view that the structure of the law reinforced sexist cultural stereotypes of women and that without change to these laws equality would never be reached in other spheres.²⁸ The belief that rapists are men who are helplessly controlled by their sexual impulses was refuted by feminists. The anti-violence²⁹ and women's movements³⁰ have helped to recognize rape as a violent crime as [*earlier cultural understandings of rape*

²³ See *R v K* 1958 3 SA 420 (A) on 423 B – C. See further *R v C* 1952 4 SA 117 (O).

²⁴ *S v Ncanywa* 1992 1 SACR 209 (Ck) on 212 A - E.

²⁵ Temkin, J. "Rape and the Legal Process" (1987) on 26 – 27. See also Burchell, J. & Milton, J. "Principles of Criminal Law" (1997). See further Hall, C. "Rape. The Politics of Definition" (1988) on 79.

²⁶ In the past, rape was defined as *having connection with a woman other than a man's wife, without her consent*. See *R v K* 1958 3 SA 420 (A) on 421. The reason for this was that on marriage, a woman was consenting to conjugal rights, with the result that a husband could merely be charged with assault. See also Mphahlele, M.S. "From Legal Rape to a Crime. Does that Solve the Problem?" (1993) on 165. This position has since been abolished and marital rape is now recognized. See also Burchell, J. & Milton, J. "Principles of Criminal Law" (1997).

²⁷ Odem, M.E. & Clay-Warner, J. "Confronting Rape and Sexual Assault" (1998) on 41.

²⁸ Odem, M.E. & Clay-Warner, J. "Confronting Rape and Sexual Assault" (1998) on 254. See also in general Brownmiller, S. "Against our Will: Men, Women and Rape" (1975). D'Emilio, J. & Freedman, E.B. "Intimate Matters: A History of Sexuality in America" (1988).

²⁹ Matthews, N.A. "Confronting Rape" (1994) on 152.

³⁰ Elias, R. "The Politics of Victimization" (1986) on 48.



was primarily sexual essentially presuming that man's uncontrollable lust caused him to rape.³¹ This view is contrary to the position previously held by psychoanalytic theorists.³² It has long been a myth that sex rather than power is the motivation for rape.³³

Prior sexual history of the complainant was considered relevant to the issue of consent and credibility. Feminists rejected arguments that prior sexual history was indicative of low moral standards and also the argument that women would claim an encounter to be rape as a form of self-protection against accusations of inappropriate behaviour.³⁴ There is no foundation for beliefs that sexually active women are prone to be liars.³⁵ Furthermore, if one considers that when laying a charge of rape it was and to some extent still is, a difficult court process to endure then it is not likely that a women would be more willing to endure a court process then admit to a sexual indiscretion or adultery.

As a result of the changing social attitudes towards rape since the 1970's, a number of countries such as the United States, Britain and Australia have reformulated their rape legislation. However, uncertainty still prevails as to what should be incorporated under the crime of rape and this has become the focus of dispute in South Africa in more recent times.

Certain feminist authors, such as Temkin, advocate that only women should be primarily protected by rape laws. Temkin states the following in this regard:³⁶

Given man's greater physical strength and woman's consequent vulnerability, the overriding objective which, it is submitted, the law of rape

³¹ Elias, R. "The Politics of Victimization" (1986) on 91.

³² Odem, M.E. & Clay-Warner, J. "Confronting Rape and Sexual Assault" (1998) on 41.

³³ Matthews, N.A. "Confronting Rape" (1994) on 105.

³⁴ Odem, M.E. & Clay-Warner, J. "Confronting Rape and Sexual Assault" (1998) on 255.

³⁵ The existence of a cautionary rule has not aided the cause. The proposed Sexual Offences Bill of 2002 abolishes the cautionary rule in clause 20 where the witness is the complainant in the proceedings, is less than 18 years of age or is the only witness to the offence.

³⁶ Temkin, J. "Towards a Modern Law of Rape" (1982) on 400 – 401.

should seek to pursue is the protection of sexual choice – that is to say, the protection of a woman's right to choose, whether, when and with whom to have sexual intercourse.

This view is to be criticised and rejected on the basis that it fails to take into account that certain males may lack physical strength or be coerced by various means including the use of weapons and violence.³⁷

Yet another feminist author, Naffine is opposed to the concept of gender neutrality in Australia and believes that:³⁸

[t]he modern Australian law of rape has been liberalised and democratised to the point that it is no longer even about men and women – what were once the basic, irreducible categories of sexual being.

She also comments as follows:³⁹

Perhaps we should recognise from the outset that the crime of rape is basically a crime by a man against a woman.

Her views have been strongly criticised by the authors Rumney and Morgan-Taylor that although Naffine criticises gender-neutral laws for not reflecting the reality of rape, gender-specific laws are not analysed in a similar manner.⁴⁰ Furthermore it is submitted that a gender-specific definition of rape will exclude more victims than it includes and for that reason it cannot be supported as it is not constitutionally justifiable to elevate certain female rape victim's rights to the

³⁷ For further criticism see Rumney, P. & Morgan-Taylor, M. "Recognizing the Male Victim: Gender Neutrality and the Law Of Rape: Part One" (1997) on 202.

³⁸ Naffine, N. "Possession: Erotic Love in the Law of Rape" (1994) on 23. See further Rumney, P. & Morgan Taylor, M. "Recognizing The Male Victim: Gender Neutrality and the Law of Rape: Part One" (1997) on 206 – 207.

³⁹ "Possession: Erotic Love in the Law of Rape" on 34. *Ibid.*

⁴⁰ See Rumney, P. & Morgan Taylor, M. "Recognizing The Male Victim: Gender Neutrality and the Law of Rape: Part One" (1997) on 211.

exclusion of other victims. It is also submitted that there is no evidence that harm will be caused to female victims if there is a gender-neutral definition of rape.

South Africa has exceptionally high statistics relating to the crime of rape.⁴¹ A source of concern is that these reported incidents merely relate to the common law crime of rape. If one considers that there are additional victims to the crime of rape who are not yet currently protected by legislation, the statistics are in all likelihood grossly underestimated.⁴² Cases of male rape reported in other countries and psychological reports serve as conclusive proof that there can be, and are, other victims of rape too.⁴³ Currently, these additional victims of the crime of rape do not get the requisite recognition, publicity and exposure in South Africa.

During 1999, a Discussion Paper on Sexual Offences was released by the South African Law Commission, which proposed that the common law crime of rape should be replaced by a statutory crime of rape.⁴⁴ The new revised definition provides for a gender-neutral crime of rape and both males and females can be either victims or perpetrators.⁴⁵

⁴¹ In 1999 a total of 39 262 cases of rape were reported to the SAPS which amounts to a ratio of 119 rapes per 100 000 of the population. See “SAPS Crime Information Analysis Departmental letter 410/2000” of 22 August 2000.

⁴² There are current proposed legislative changes to the common law crime of rape drafted by the South African Law Commission which have been distributed for comment, but these proposed changes will be discussed elsewhere.

⁴³ The psychological impact of rape on additional victims of the crime of rape is examined elsewhere and incorporates research reports and case studies by psychiatrists and psychologists. See later the interview held with Ms Lesley-Anne Barnett regarding the psychological and physiological reactions of victims of rape.

⁴⁴ “SALC Discussion Paper 85 of 1999.”

⁴⁵ See “SALC Discussion Paper 85 of 1999” on 266 – 274. It proposes in clause 2(1) that *[a]ny person who intentionally and unlawfully commits an act of sexual penetration with another person is guilty of an offence*. Clause 2(2) of the draft Sexual Offences Act provides that *[a]ny act of sexual penetration is prima facie unlawful if it takes place in any coercive circumstances*.

It is therefore submitted that only a small proportion of rape victims are recognised under South Africa's current narrow definition of rape and that many other victims are left without redress under the common law crime of rape.⁴⁶

Why only 'some' victims and who are the 'other' victims? Consider the following scenarios:

- * A is a woman who is tormented verbally by her attacker and under threat of death is forced to perform fellatio on him after which he turns her around and forces his hands into her simulating intercourse and causing physical and mental pain.
- * B is a man is penetrated by a large object *per anum* by a woman while being held down by an additional two women.
- * C is a man of strong religious convictions and does not intend to have sexual intercourse before marriage. He is on a date with a very attractive but strong woman, who is also HIV infected and knows of her condition. While he is aroused, she pulls down his trousers and forces herself on him.⁴⁷

What do all the above cases have in common? As with rape victims, they have all been sexually violated by penetration. Unlike rape victims, they have no remedy under the crime of rape. These sexually violated 'other' persons have redress under the crime of indecent assault in terms of South African law.

The extent of the problem is highlighted by the South African Police Service which estimates that only one in every thirty-five rapes is reported.⁴⁸ If the reported rape and attempted rape statistic of 37 711 rapes for 2001 was used

⁴⁶ Female victims of vaginal-penile forced intercourse. This consequently excludes anal, digital and oral rape for both male and female victims.

⁴⁷ See Hall, C. "The Politics of Definition" (1988) on 68 for further examples.

⁴⁸ As is evident from information provided by the "SAPS Central Information Management Centre Website" <http://www.saps.co.za/index.html> also cited in the "SALC Discussion Paper 85 of 1999" on 66.



with the one in every thirty five rapes reported estimate, the number of rape victims and attempted rape victims for 2001 would possibly be 1 319 885.⁴⁹ This figure relates to the recognised victims of the crime of rape. If protection were afforded to victims who cannot at present gain redress under the current South African definition, the statistics would no doubt be horrific.⁵⁰

Changing attitudes necessitate a reformed definition of rape. Our law should take note of different legal systems especially those on which its common law was based, as these systems have advanced with the progress of society. Our laws should accordingly be updated to reflect reality, especially as regards this crime.

Unless there are legislative and policy changes in the management of sexual crimes, the plight of victims will be little changed. Attention also needs to be afforded to educational initiatives aimed at prevention of sexual crimes, resource development and strong organizations which can protect all victims and which recognize that males can also be victims of heinous sexual crimes and afford the necessary protection.⁵¹

This study will attempt to identify and categorise various penetrative sexual acts which are currently covered under various other crimes as rape victims in order to promote legal certainty and equity.

⁴⁹ http://www.saps.org.za.8_crimeinfo/bulletin/942000a/rsa.htm "Crime Statistics" accessed 30 November 2001 and 30 August 2002. This covers the number of reported rapes and attempted rapes for the period of January to September 2001 The statistics for rape and attempted rapes for 2000 are 37 556.

⁵⁰ See <http://www.rapecrisis.org.za/statistics> "Statistics" accessed 30 July 2002 where it is shown that if in 1998 a conservative approach of 1 in 20 rapes reported is followed, the number of actual rapes would be 985 600. If a 1 in 35 rapes reported approach was followed the number would stand at 1 724 800.

⁵¹ See "SALC Discussion Paper 85 of 1999" on 14-15 for general discussion on the limitations of the investigation as regards sexual crimes.



2. CONCEPTUALIZATION

Before embarking on this comprehensive empirical and literature study of rape, it is essential that certain important concepts be defined in view of the fact that certain categories of sexual assault victim will be identified relating to sexual offences. Both common and statutory law crimes applicable to sexual offences will be individually examined and measured against the crime of rape. The purpose of the individual examination of the alternate crimes is to establish whether or not the victims of these other crimes can all be meaningfully covered under a new and revised definition of rape. This is only possible after consideration of what categories of sexual assault exist, who exactly is a victim and who fulfils the role specifically as a perpetrator.

2.1. SEXUAL ASSAULT

Research referred to throughout this study will show that there are a number of possible categories of penetrative sexual assault victim who could also be classified as potential rape victims. The nature of the penetrative sexual assault will be expounded upon, to indicate similarities between the various forms of sexual assault and it will also be shown that the rationale behind the perpetrators motives are the same for each category of penetrative sexual assault victim. This comparison of victims of penetrative sexual will be undertaken to serve as an argument as to which categories of victims of penetrative sexual assault should be covered within one comprehensive crime of rape and which sexual assault victims should not.

In order to assist with the categorisation of the various possible types of rape victims, a term had to be chosen which could establish a causal nexus between the possible victims of rape and which could also meaningfully cover these victims who are not currently recognised as rape victims. In order not to confuse or prejudge the issue, the use of the term 'sexual assault' will be referred to instead of indecent assault which is a recognised crime in South African law.

What is envisaged by the term 'sexual assault'? The term sexual assault does not feature in our South African common law. To establish what exactly is meant by the term sexual assault, definitions pertaining to recognised offences in South Africa relating to assault will be examined.

The crime of assault did not form part of our common law and was punished as a form of *iniuria* committed against another person's bodily integrity.⁵² Although useful for purposes of understanding the nature of the term assault, it is an extremely broad crime and cannot be viewed in isolation. Snyman defines the crime of assault as follows:⁵³

Assault consists in unlawfully and intentionally

(a) applying force, directly or indirectly, to the person of another; or

(b) inspiring a belief in another person that force is immediately to be applied to him.

Burchell and Milton's view of assault concurs with that of Snyman and they state that:⁵⁴

It is submitted that though the assault usually takes the form of an actual application of 'force' (including an actual touching), it may take the form of an inspiring – by threats or conduct – of apprehension that such force is to be immediately applied.

Indecent assault is a term which describes most forms of unwanted sexual advances which are not encompassed by the crime of rape. It is a gender-

⁵² Snyman, C.R. "Criminal Law" (1995) on 413.

⁵³ *Ibid.*

⁵⁴ "Principles of Criminal Law" (1997) on 503.



neutral crime.⁵⁵ Burchell and Milton define the crime of indecent assault as follows.⁵⁶

Indecent assault consists in an assault which by nature or design is of an indecent character.

Milton defines indecent assault as an.⁵⁷

[u]nlawful and intentional assault which is or is intended to be indecent.

Snyman defines the crime of indecent assault as follows:⁵⁸

Indecent assault consists in unlawfully and intentionally assaulting another with the object of committing an indecency.

The focus is thus rather on the intention which must be indecent. This view is also supported by case law.⁵⁹

Definitions of sexual assault vary in the context of sociological and psychological literature. Sexual assault takes on various forms. Four types of sexual assault are identified by Schwartz and DeKeseredy.⁶⁰ These are:

1. *Sexual contact which include unwanted sex play.*
2. *Sexual coercion including unwanted sexual intercourse arising from verbal pressure.*

⁵⁵ "SALC Discussion Paper 85 of 1999" on 195 for comprehensive discussion.

⁵⁶ "Principles of Criminal Law" (1997) on 501.

⁵⁷ "South African Criminal Law and Procedure Volume II" (1996) on 467.

⁵⁸ "Criminal Law" (1995) on 419.

⁵⁹ See Burchell, J. & Milton, J.R.L. "Principles of Criminal Law" (1997) on 504; Snyman, C.R. "Criminal Law" (1995) on 419; S v F 1982 2 SA 580 (T).

⁶⁰ Schwartz, M.D. & DeKeseredy, W.S. "Sexual Assault on the College Campus" (1997) on 8-9.

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.*

For purposes of this study, the type of sexual assault mentioned in the fourth category is envisaged to assist with the classification of rape victims. Accordingly the term penetrative sexual assault will be used throughout this study.

Whilst recognizing that other forms of sexual assault exists, this study is specifically restricted to penetrative sexual offences as rape is a penetrative act.⁶¹ It is submitted that non-penetrative acts such as fondling, kissing or other forms of non-penetrative unwanted sex play should not be classified as rape for two main reasons. Firstly, it will confuse the issue between rape and indecent assault. If there was no distinction drawn between different acts covered by these crimes, there would be a duplication of a crime. Secondly, limits have to be imposed on the crime of rape. Present author is of the view that an objective criterion based on the seriousness of the crime needs to be imposed.

Objectively speaking, penetrative offences should be viewed as being more serious than non-penetrative sexual assaults as it is a violation of one's inner being and can in all likelihood cause more physical damage. The present author does not mean to demean the experiences of other victims of sexual assault and recognises that the subjective experiences of sexual assault albeit penetrative or non-penetrative in nature may be viewed in different scales of seriousness by the victim concerned. However, limits have to be imposed. Rape has always been a penetrative sexual act and it is envisaged for purposes of this study that the crime of rape should be extended to other forms of penetrative sexual acts which

⁶¹ Rape entails unwanted penetrative sexual intercourse *per vaginam*. See Snyman, C.R. "Criminal Law" (1995) on 425. See also Burchell, J. & Milton, J.R.L. "Principles of Criminal Law" (1997) on 491. For this reason it should only be extended to acts which are viewed to be acts of penetrative sexual intercourse such as anal, digital or oral intercourse.

will be identified. Accordingly, it is submitted that non-penetrative erotic activity such as fondling of breasts, kissing or indecent touching, without another person's permission be restricted to the crime of indecent assault.⁶²

For purposes of this study sexual assault may be defined as forced penetrative sexual intercourse of one person by another person.

2.2. PERPETRATOR

Snyman defines a person as a perpetrator if:⁶³

[his] conduct, the circumstances in which it takes place and the culpability with which it is carried out are such that he satisfies all the requirements for liability contained in the definition of the crime, or if he acted together with one or more persons and the conduct required for a conviction is imputed to him by virtue of the principles relating to common purpose.

Due to the fact that rape is defined as the *unlawful and intentional sexual intercourse with a woman by a man without her consent* it is evident that a woman who unlawfully and intentionally assists man to rape a woman, cannot be found guilty of being a perpetrator.⁶⁴ She could, however, be held liable as an accomplice.

The South African Law Commission states:⁶⁵

⁶² The present author is of the view that one exception needs to be made and that is in the case of a person forcibly masturbating another man. It will be recommended that this exception be classified under the phenomenon of digital rape, which is penetration *per anum* or *per vaginam*, with fingers or hands. The reason for this is that the forced masturbation of a male could be equated as being the equivalent of digital rape perpetrated on a female and therefore as serious.

⁶³ "Criminal Law" (1995) on 243. See also Burchell, J. & Milton, J.R.L. "Principles Of Criminal Law" (1997) on 331ff. See also *S v Jonathan* 1987 1 SA 633 (A).

⁶⁴ See chapter three in this regard.

⁶⁵ "SALC Discussion Paper 85 of 1999" on 73. See also *R v M* 1950 4 SA 101 (T).



A man cannot be raped, and a woman cannot commit rape. However, a woman who acts as an accomplice of a man who commits rape can on that basis be convicted of rape.

An accomplice is defined by Snyman as:⁶⁶

[somebody] who does not satisfy all the requirements for liability contained in the definition of the crime or who does not qualify for liability in terms of the principles relating to common purpose, but who nevertheless unlawfully and intentionally furthers its commission by somebody else.

As mentioned earlier the crime of rape is gender-specific and only a man can currently be a perpetrator.

For purposes of this study a perpetrator may be defined as such if his or her conduct, the circumstances in which it takes place and the culpability with which it is carried out are such that he or she satisfies all the requirements for liability contained in the definition of the crime.

2.3. VICTIM

A victim may be defined in its most simplistic form as a person to whom something painful or terrible is done or happens.⁶⁷

Synonyms which have been suggested are *casualty, fatality, injured party, sufferer*.⁶⁸

As mentioned earlier a perpetrator is defined as such if his conduct, the circumstances in which it takes place and the culpability with which it is carried

⁶⁶ Snyman, C.R. "Criminal Law" (1995) on 244.

⁶⁷ Alswang, J. & van Rensburg, A. "An English Usage Dictionary" (1988) on 992.

⁶⁸ McLeod, W.T. (ed). "The New Collins Thesaurus" (1985) on 732.

out are such that he satisfies all the requirements for liability contained in the definition of the crime.

Conversely, the present author is of the view that a victim may be defined as a person who is subject to the conduct or actions of a perpetrator and such definition will be used for the purposes of this study.

3. PROBLEM STATEMENT

On the basis of the preceding theme analysis and conceptualisation whereby the field of research is clearly identified, the research problem can be divided into the following questions:

- * How does one distinguish between the various forms of sexual assault and why?
- * Who are the different categories of victims of penetrative sexual assault?
- * Is the current common law definition of rape the appropriate crime to be extended to incorporate other victims of sexual assault?
- * Are the existing crimes relating to sexual offences sufficient and if not, can they be incorporated under a single extended crime of rape?
- * If a comparative analysis of the approach followed in other countries is made, is it possible for a similar approach to be followed in South Africa?
- * Will the new proposed definition of rape as suggested by the South African Law Commission adequately protect all victims of penetrative sexual assault?
- * Can the definition of rape be extended to incorporate victims of unprotected consensual sexual intercourse who are intentionally exposed



to the HIV virus? Furthermore, should the liability for HIV exposure, where a charge of rape is not laid, remain punishable under the common law offences of murder, culpable homicide, assault with the intent to commit grievous bodily harm or attempt to commit these offences or should the common law crimes be consolidated into a statutory crime?

4. AIM OF RESEARCH

This study examines the juridical possibility of reformulating and broadening the current narrow definition of the crime of rape to incorporate victims of sexual offences who are currently excluded. The phenomenon of male on male rape, female on male rape, female on female rape and the traditional male on female rape is critically examined and assessed in order to establish that all the aforementioned perpetrators and victims can be meaningfully covered by an umbrella crime of rape. This reconciliation of the various perpetrators and victims of rape are undertaken by focusing on the psychological consequences, the clinical definitions and shortcomings of each alternate crime under which victims and perpetrators of sexual offences are covered. A broader liability for perpetrators of the crime of rape is envisaged in circumstances whereby the HIV virus is transmitted to rape victims as a result of the rape.

5. METHOD OF RESEARCH

The research methodology entails an extensive literature study into the phenomenon of rape in its various manifestations as well as the risk of HIV transmission created by this phenomenon. This review includes case law, commentators, reports by the South African Law Commission and clinical case studies. To a more limited extent, the information obtained from an interview conducted is included within this study. The comparative method is also used to compare the position in South Africa with that of three countries namely Australia, Britain and the United States of America. All observations and recommendations are theoretically deduced after consultation of relevant literature.

6. LIMITATIONS OF STUDY

This study has some inherent limitations. The substantive, and especially the procedural aspects, relating to rape law reform are more extensive that may potentially be investigated in this study. Other aspects that could have, but are not here canvassed in detail are rape shield law provisions, the application and abolishing of the cautionary rule and rules of corroboration, the provisions of treatment to victims of rape and sentencing in rape matters. This study has however been restricted to specific areas pertinent to the reformulation of a definition of rape in South Africa. The reason being that the definition of rape is the foundational or core issue from which all other related aspects follow. Over the last four years in which this study has been conducted, the reforms pertaining to rape laws in South Africa have been evolving at a rapid pace. This is evident from the introduction by the South African Law Commission of two Discussion Papers pertaining to sexual offences.⁶⁹ This research field therefore remains in flux, constantly developing. However, a study of this nature requires that a time limit be imposed on the research material. The time period that this study is accordingly restricted to covers developments pertaining to the field of rape law reform up to the 30 August 2002.

7. STRUCTURE OF THESIS

Following this introductory chapter, the study will unfold as follows:

In chapter two it will be established who are the victims of forced penetrative sexual assault with specific reference to possible categories of sexual assault victim with reference to case studies, frequency of the crimes committed, reasons for underreporting and the psychological impact on victims of sexual offences.

⁶⁹ "SALC Discussion Paper 85 of 1999" relating to the substantive law and "SALC Discussion Paper 102 of 2002" pertaining to procedural law.

In chapter three the crimes of rape, sodomy, indecent assault in the South African common and statutory law, will be analysed in detail. Reference will also be made to the crime of incest which features prominently in customary law. This will be undertaken in order to establish whether the potential rape victims which have been identified as categories of penetrative sexual assault victim in this study can be adequately catered for in terms of the existing crimes.

Chapter four will be devoted to a legal comparative perspective on the crime of rape in Britain and United States of America and the reforms undertaken relating to the reformulation of a definition of rape.

In chapter five, the proposed amendments to rape legislation will be examined and critically analysed in order to establish whether the categories of victim of forced sexual assault identified in this study will be adequately protected as rape victims.

The interrelationship between rape and HIV/ AIDS will be discussed in chapter six, as well as specific, critical legal questions presented by potentially harmful sexual behaviour in this regard. The possibility of recognising victims of consensual intercourse where the HIV infected status of the other party is deliberately withheld, as rape victims will be investigated. The creation of a separate statutory offence relating to the intentional exposure of persons to the HIV virus and other life threatening illnesses will be critically examined.

In chapter seven the study will be concluded with research findings, evaluations and recommendations.

CHAPTER TWO

VICTIMS OF PENETRATIVE SEXUAL ASSAULT

1. Introduction
2. Categorisation of victims of penetrative sexual assault
 - 2.1. *Penetrative sexual assault: male perpetrator-female victim outside of marriage*
 - 2.2. *Penetrative sexual assault: male perpetrator-female victim inside of marriage*
 - 2.3. *Penetrative sexual assault: male perpetrator-male victim*
 - 2.4. *Penetrative sexual assault: male perpetrator-female child victim*
 - 2.5. *Penetrative sexual assault: male perpetrator-male child victim*
 - 2.6. *Penetrative sexual assault: female perpetrator*
 - 2.7. *Victims of object and digital penetrative sexual assault*
 - 2.8. *Victims of consensual sexual intercourse who are deliberately exposed to the HIV virus by the other party*
3. Conclusion

1. INTRODUCTION

This chapter will be conducted within a paradigm and potential categories of penetrative sexual assault victim will be identified. The similarities and differences between male and female victims of penetrative sexual assault will be highlighted through observation in order to elucidate a contribution towards a new theoretical yet practical understanding of penetrative sexual assault victims.

To address the abovementioned research needs, a number of categories of potential sexual assault victim will be identified and focused upon to establish a causal nexus between the various types of sexual assault victim. In order to reach common ground between these possible categories of sexual assault victim, case studies, the frequency of the crime committed, psychological effects upon the victim and reasons for underreporting will be examined.



An interview was conducted between the present author and Ms Lesley-Anne Barnett,¹ the Head of the Psychology Department at Midrand Graduate Institute, as background into the examination of the psychological reactions displayed by various categories of victims of sexual assault. The purpose of the interview was to establish whether it would be meaningful to incorporate these victims of sexual assault under one umbrella crime of rape after consideration of real life case studies. Ms Barnett was invited to comment on whether in her experience, the physical acts of forced sexual penetration are experienced in the same manner by male, female and child victims of sexual assault. The psychological impact on these victims were also discussed. Ms Barnett has personally counselled about 2000 rape cases and overseen approximately 3000 rape cases. Her comments will be referred to throughout this chapter as she has first hand knowledge of the psychological impact of rape and penetrative sexual assault on victims.

2. CATEGORISATION OF VICTIMS OF PENETRATIVE SEXUAL ASSAULT

As mentioned in the previous chapter, rape is a form of penetrative sexual assault and is frequently considered a sadistic behaviour aimed at causing physical and psychological harm and humiliation to the victim.² Perpetrators of

¹ Ms Barnett has more than 8 years rape counselling experience in various organizations including POWER, the 702 Crisis Centre Bureau and the Trauma Case Clinic (CSVR) and is Head of Psychology at the Midrand Graduate Institute and is also Head of Psychological Services at the Midrand Support Centre. She has a BA Hons Counselling Psychology degree and specializing in the field of rape, her dissertation is entitled “**Attributions Around the Causes of Rape.**”

² It is acknowledged that there are a variety of forms of sexual assault. Due to the fact that rape is a form of penetrative sexual assault, categorisation will take place on the basis of *penetrative sexual assault* in order to establish a causal nexus between the different acts. Kissing and fondling are non-penetrative by nature and will accordingly not be discussed further for purposes of this study. See Tollison, C.D. & Adams, H.E. “**Sexual Disorders, Treatment, Theory, Research**” (1979) on 286. See further on 307 wherein it is mentioned that rape can be said to be a crime that is sexual and mostly aggressive in nature and commonly involves force. The average person thinks of rape in terms of force, violence or lack of consent. Not all rapes

rape are classified by Groth who distinguishes between three types of rapists, namely the:

- * *Anger rapist*: this perpetrator attacks the victim on the spur of the moment with little or no sexual gratification.³
- * *Power rapist*: the focus of this type of rapist is not to harm but to possess sexually (sexual conquest using force).⁴
- * *Sadistic rapist*: aggression is eroticised, abusive acts occur and the focus is also on targets or symbols, which the rapist wants to punish.⁵

The perpetrator's state of mind will therefore determine the manner in which the victim is chosen and violated, and the resultant category under which the victim could be classified. A number of categories of penetrative sexual assault victim will now be identified and examined:

- * Penetrative sexual assault by a male perpetrator on a female victim outside of marriage.
- * Penetrative sexual assault by a male perpetrator on a female victim inside of marriage.
- * Penetrative sexual assault by a male perpetrator on a male victim.
- * Penetrative sexual assault by a male perpetrator on a female child victim.
- * Penetrative sexual assault by a male perpetrator on a male child victim.

produce physical injury as some rapists may only use force to achieve sexual aims, such as coitus, anal intercourse, fellatio or cunnilingus.

³ Groth, A.N. "Men who Rape" (1979) on 13.

⁴ Groth, A.N. "Men who Rape" (1979) on 25.

⁵ Groth, A.N. "Men who Rape" (1979) on 44.

- * Penetrative sexual assault by a female perpetrator.
- * Victims of object and digital penetrative sexual assault.
- * Consensual penetrative sexual intercourse where the perpetrator does not disclose his HIV infected status to the victim.

These forms of sexual assault and resultant psychological and sociological effects will be examined to formulate an argument as to why certain forms of penetrative sexual assault should be classified together under one comprehensive crime. The possible categories or forms of penetrative sexual assault will now be expounded upon.

2.1. PENETRATIVE SEXUAL ASSAULT: MALE PERPETRATOR- FEMALE VICTIM OUTSIDE OF MARRIAGE

Penetrative sexual assault perpetrated by a male against a female victim can take a number of forms namely forced penetrative sexual assault (a) *per vaginam* and (b) *per anum*. The most well-known form of penetrative sexual assault committed by a male perpetrator against a female victim is the crime of rape which entails a penetrative sexual assault *per vaginam*. The crime of rape had its origins in property rights and typically involved a claim by one man against another for damage to property owned by the claimant.⁶ Therefore rape is traditionally viewed as a crime against women.

2.1.1. EXAMPLES

Incidences of rape, being penetrative sexual assault *per vaginam*, are common place in South Africa and can be illustrated by two well-publicised incidents which are the following: During March 1999, a University of Pretoria student was

⁶ Odem, M.E. & Clay-Warner, J. "Confronting Rape and Sexual Assault" (1998) on 248 – 249.

See detail in chapter one.



allegedly raped 15 times by more than nine street vendors who dragged her to a railway station and repeatedly raped her.⁷ In April 1999, a Johannesburg journalist, Ms Charlene Smith was attacked and raped while at home. With the increasing fear of contracting HIV/ AIDS, she was one victim who also could carry the costs of prophylaxis treatment to prevent contracting the deadly disease.⁸

Cases of penetrative sexual assault *per anum* committed by a male perpetrator on a female victim are not the focus of as much attention as penetrative sexual assault *per vaginam*. One reason that may account for this is that acts of penetrative sexual assault *per anum*, with either a male or female victim, are not classified as rape but are seen as a form of indecent assault. If the same act of penetrative sexual assault *per anum* were committed with a male victim it would be said that the victim has been sodomised. This is not the case with female victims and this is one of the first instances where disparities arise between what is essentially the same act of penetrative sexual assault, with merely gender being the differentiating factor.⁹

Female victims are susceptible to a forced penetrative sexual assault either *per vaginam* or *per anum*. Any female victim can be a victim of either form of penetrative sexual assault. Brownmiller states that because women are physiologically vulnerable to sexual attack, once men discovered that they could rape they proceeded to do it as a purposeful act of domination and control.¹⁰ Feminists however made the case that all women are potential victims and all men are potential rapists.¹¹ This was attributed to the fact that rapists were not

⁷ "Verkrachte Student kry Vigsmiddel" *Beeld* 10 March 1999.

⁸ Charlene Smith is one of a group of people who have set up a website for rape survivors being www.speakout.org.za. See "Verkrachte Joernalis se Aanklag teen Polisie, Hospitale, Regering - en Samelewing: My Lewe is nie R400 Werd nie" *Beeld* 24 April 1999. See further the "SALC Fourth Interim Report on Aspects of the Law Relating to AIDS" (2000) on 8.

⁹ Acts of penetrative sexual assault *per vaginam* are viewed as acts of indecent assault. See *S v F* 1982 2 SA 580 (T) and *S v M* (2) 1990 1 SACR 456 (N).

¹⁰ Brownmiller, S. "Against our Will: Men, Women and Rape" (1975) on 6.

¹¹ Odem, M.E. & Clay-Warner, J. "Confronting Rape and Sexual Assault" 1998 on 45.



only strangers but husbands, friends, relatives, dates and neighbours. While credence has to be given to these views it directly impacts on and neglects other victims of sexual assault. Furthermore whereas all the blame was previously blamed on females, all men are now counter blamed as being innately violent. Nevertheless it is evident that a female victim can be subjugated to either a penetrative sexual assault *per vaginam* or *per anum*. The question is whether both these categories of victim can or should be covered under a comprehensive crime. In order to ascertain the answer the frequency of forced penetrative sexual assaults outside the marriage and the psychological effects of the violent act perpetrated will be examined.

2.1.2. FREQUENCY

Despite various awareness and educational efforts by organisations, women still remain the prime targets for the crime of rape in South Africa. This factor is highlighted by the South African Police Services reported rape and attempted rape statistic of 37 711 for 2001 referred to earlier.¹² The Rape Crisis website offers a different viewpoint with regard to the reporting rate of 1 in 36 suggested by the South African Police Services.¹³ They aver that a more conservative figure of 1 in 20 is more accurate and provide the following possible statistics for 1998:¹⁴

¹² http://www.saps.org.za.8_crimeinfo/bulletin/942000a/rsa.htm "Crime Statistics" accessed 1 November 2001. It covers the period January to September 2001.

¹³ <http://www.rapecrisis.org.za> "Statistics" accessed 4 August 2002.

¹⁴ *Ibid.* If applied to the statistics provided for the period January to September 2001, it provides a figure of 754 220 rapes if a one in 20 statistic is used, or 1 131 300 if a one in 30 figure if utilised or 1 319 885 rapes if a one in 35 statistic is used. Certain categories of persons are excluded from the statistics such as penetrative sexual assault of men and male children, oral and digital penetrative sexual assault and object penetrative sexual assault.

Figure 1. Rape Statistics for 1998

	Actual rapes	Per day	Per hour	Per minute
1 in 20	985 600	2 700	113	1.9
1 in 30	1 478 400	4 050	169	2.8
1 in 35	1 724 800	4 725	197	3.3

Penetrative sexual assault *per vaginam*, is therefore still very much a reality for women both at and outside of the home.¹⁵ The recognition of marital rape has been an improvement for female victims who previously had no redress against their husbands. Female victims of forced penetrative rape by men are legally placed in a more advantageous position than other victims of sexual assault. However, they still remain easy targets for either penetrative sexual assault *per vaginam* or *per anum*. A reason for this is that the perpetrator needs to be in control and vent his anger and the outlet used in order to achieve this, would be the one the perpetrator finds the best to accomplish this. This is illustrated by Groth, in a further study of a rapist, named Warren who said *I would have felt like the dominant person, the one in charge*.¹⁶

2.1.3. PSYCHOLOGICAL EFFECTS

Penetrative sexual assault, and more specifically rape, has been recognised as a form of violence.¹⁷ Violence can manifest itself in two forms - violence occurring in nature and human violence, with the latter existing on an interpersonal and intergroup level.¹⁸ Human violence is thus activated individually, in groups or collectively.

Walter has defined violence as:¹⁹

¹⁵ See chapter one and paragraph 2.2 in this regard.

¹⁶ Groth, A.N. "Men who Rape" on 41.

¹⁷ See Matthews, N.A. "Confronting Rape" (1994) on 152. See further Elias, R. "The Politics of Victimization" (1986) on 48.

¹⁸ McKendrick, B. & Hoffman, J. "People and Violence in South Africa" (1990) on 2.

¹⁹ Walter, E. "Terror and Resistance: A Study of Political Violence" (1967) as cited by McKendrick, B. & Hoffman, J. "People and Violence in South Africa" (1990) on 5.

[d]estructive harm... including not only physical assaults that damage the body but also... the many techniques of inflicting harm by mental or emotional means.

The collective category of violence can be subdivided into 'accidental violence' and 'wilful violence'. The latter category being further subdivided into illegitimate and legitimate violence. The determinants of legitimate violence are decided by legal systems on a legal, social and an individual basis.²⁰ Rape, in the context of violence, is seen to be a wilful act of violence using force or threats to induce submission, and thereby invading the intimate self.²¹ The violence aspect is a common denominator between the various forms of sexual assault regardless of gender and has an overwhelming impact on the sexual assault victims.

The characteristics and effects of human violence may be described as follows:

- * Force is a way in which violence manifests itself and entails the use of aggression, coercion, strength and compulsion to behave in a particular manner.
- * Dignity and the rights of any person are affected by violence be it physiological or psychological.
- * The innermost self is invaded.²²

The psycho-sociological consequences for victims of violent acts of penetrative sexual assault are said to be the following:²³

²⁰ McKendrick, B. & Hoffman, J. "People and Violence in South Africa" (1990) on 5

²¹ *Ibid.*

²² McKendrick, B. & Hoffman, J. "People and Violence in South Africa" (1990) on 11 and 23.

²³ Burgess, A. "Rape and Sexual Assault" (1985) on 24; See also Mezey, G.C. & King, M.B. (ed) "Male Victims of Sexual Assault" (1992) on 70; Rumney, P. & Morgan-Taylor, M. "Recognizing the Male Victim: Gender Neutrality and the Law of Rape: Part One" (1997) on 229. Odem, M.E. & Clay-Warner, J. "Confronting Rape and Sexual Assault" (1998) on 215 on

- * Violence invades the psychological and physiological space of victims.
- * Violence evokes fear.
- * Violence damages and can destroy.
- * Violence inhibits and impedes lifestyles.
- * Violence arouses anxiety, dread and terror.
- * Violence dehumanizes.

Penetrative sexual assault is an expression of power with the need to conquer and control and can be linked to political, economic or social phenomena.²⁴ Groth, Burgess and Holmstrom, in a research analysis of 500 rapists found that rape is an expression of power and anger.²⁵ They state the following:

*Rape, then, is a pseudo-sexual act, a pattern of sexual behaviour that is concerned much more with status, aggression, control and dominance than with sensual pleasure or sexual satisfaction. It is sexual behaviour in the service of non-sexual needs.*²⁶

The victim, whether male or female, is an outlet for perpetrators to vent out their anger. This phenomenon is evident from a case study conducted by Groth on Oliver, a man of above average intelligence who came out of a decent home.²⁷ Oliver felt like a failure and decided to rape.

methods used to try and avoid violence; Russell, D.E.H. "Rape in Marriage" (1982) on 87-110 on aspects of violence in marriage.

²⁴ Matthews, N.A. "Confronting Rape" (1994) on 101 and 106.

²⁵ Burgess, A.W. "Rape and Sexual Assault II" (1988) on 207. Groth, A.N. *et al.* "Rape: Power, Anger and Sexuality" on 1239 - 1243.

²⁶ Burgess, A.W. "Rape and Sexual Assault II" (1988) on 207. Groth, A.N. *et al.* "Rape: Power, Anger and Sexuality" (1977) on 1239-1243.

²⁷ Groth, A.N. "Men who Rape" (1979) on 54 - 56.

I went out looking for a victim...I picked her up... and told her to shut up. During this time, I knew that the way to get cooperation was to hurt her, to inflict pain on her... I suspect a good deal of it was finding a scapegoat for my anger - anger at everybody and anything.

The rationale behind acts of sexual assault and specifically rape can be illustrated with reference to a South African case study of 60 rapists and 60 armed robbers (by Verwey and Louw) between 1984 and 1985. Their research provides the following statistics:²⁸

Figure 2. **Statistics for 1984 –1985 (Verwey and Louw)**

Age	75% of rapists were under the age of 31 years.
Language	91.7% of rapists were Afrikaans speaking, although this could have been attributed to a higher population of Afrikaans South Africans.
Region	64.4% of rapists were raised in the city and is attributed to playing a larger role in their upbringing.
Education	The financial income and educational qualifications were lower in the case of rapists than armed robbers.
Planning	In 89% of cases, the rape was not planned more than one hour before the crime and alcohol was cited as an aggravating factor in the majority of these cases.
Family life	42% of the rapists described their home life in general as being satisfactory.

²⁸ "Die Verkrachter – 'n Empiriese Onderzoek" (1990) on 150 et seq.

The overall impression was that rape was committed as a result of aggression which is indicative of the fact that all sexual assault victims' are persons against whom a violent act and not primarily a sexual act is perpetrated. Factors suggested by the authors Verwey and Louw, for the motivation behind rapes are the following:²⁹

- * It is a defence against dependency needs;
- * It is a transferral of aggression towards the victim;
- * It operates as a defence against homosexual needs;
- * It is a result of a general aggression towards women;
- * A lack of ability to form and sustain meaningful relationships;
- * A lack of security and love as well as a low tolerance in stressful situations.

Groth identifies rape as a violent act rather than a sexual act.³⁰ He identifies psychological motives for rape as being conquest and control, revenge and retaliation, sadism and degradation, conflict and counteraction (the rapist punishes his victim) and status and affiliation. The latter motive entails that the purpose of the rape is to gain peer approval. Again the reasons cited above indicate that no person is immune to a potential attack of sexual assault which is

²⁹ Verwey, E.T. and Louw, D.A. "Die Verkrachter: Deel I" (1989) on 21 *et seq.*

³⁰ Groth, A.N. "Men who Rape" (1979) on 127-129; See further on 5 where he states that the: *[r]apist is in fact a person who has serious psychological difficulties which handicap him in his relationships to other people and which he discharges, when he is under stress through sexual acting out.* Other reasons cited by the aforementioned author, (besides the psychological dysfunction where there are defects in the rapists human development and in the maintenance of intimate relationships) are sexual dysfunction and intoxication; See Rumney, P. & Morgan-Taylor, M. "Recognizing the Male Victim: Gender Neutrality and the Law of Rape: Part One" (1997) on 226.



one reason why these potential victims of sexual assault could be classified under one comprehensive crime of sexual assault: The motives with regard to the perpetrators of the various forms of sexual assault are the same. The focus of the perpetrator is not so much on primarily where to inflict violence and aggression but rather *against whom*, and *how* to inflict the violence that will accord with how the perpetrator is feeling at the commission of the violent act.

Female victims of both forced penetrative sexual assault *per vaginam* and *per anum* by a male perpetrator may display symptoms of Post Traumatic Stress Disorder and Rape Trauma Syndrome. What is Post Traumatic Disorder (PTSD)? It has been described as:³¹

[a] reaction to being exposed to an event which is outside the range of normal human experience. Sometimes it is referred to as Post Traumatic Rape Syndrome too. It is a normal human emotional reaction to an abnormal situation.

The traumatic events can include rape or assault, military combat, torture and serious automobile accidents.³² The symptoms of Post Traumatic Stress Disorder include *inter alia* the following:³³

Intense fear, helplessness or horror; experiencing distressing recollections of the event ie flashbacks; showing significant distress or impairment by the event; either in their social occupational or other important areas of functioning; persistent symptoms of increased arousal (not present before the trauma) as indicated by at least two of the following: difficulty falling or staying asleep; irritability or outbursts of anger; difficulty concentrating; hypervigilance and exaggerated startle response.

³¹ <http://www.survive.org.uk/PTSD.html> "Post Traumatic Stress Disorder in Rape Survivors" accessed 1 August 2002.

³² <http://www.crystalinks.com/stress/html> "Stress - Post Traumatic Stress Disorder" accessed 1 August 2002.

³³ <http://www.survive.org.uk/PTSD.html> "Post Traumatic Stress Disorder in Rape Survivors" accessed 1 August 2002.



What is Rape Trauma Syndrome? The Rape Crisis Organisation describe it as:³⁴

[the] medical term given to the response that survivors have to rape (similar to post traumatic stress disorder).

The physical symptoms of Rape Trauma Syndrome have been noted to be *inter alia* the following.³⁵

Intense fear, helplessness, or horror; physiological symptoms such as bleeding or infections from tears or cuts in the vagina or rectum; repeated and distressing recollections of the event, including images, thoughts, or perceptions; unable to distinguish between past events and reality (flashbacks); distressing and or frightening dreams about the event, denial; numbness and detachment; depression; lack of concentration; a change in sleep patterns a lack of trust in anyone; a feeling of low self esteem and confidence; embarrassment, self-blame and shame and becoming suicidal.

Now that one knows what type of trauma can be experienced by the various types of penetrative sexual assaults, a comparison will be undertaken between the victims of penetrative sexual assault *per vaginam* and *per anum*. For victims of penetrative sexual assault *per vaginam* who were counselled by Ms Barnett the symptoms correlate with those mentioned above and include:³⁶

- * Intrusive thoughts such as nightmares and flashbacks, numbing and depression.

³⁴ <http://www.rapecrisis.org.za/dealing/trauma.htm> "Dealing with Rape: Rape Trauma Syndrome" accessed 1 August 2001.

³⁵ See information on the internet at the following websites: <http://www.survive.org.uk/PTSD.html> "Post Traumatic Stress Disorder in Rape Survivors" and also the following website <http://www.rapecrisis.org.za/dealing/trauma.htm> "Dealing with Rape: Rape Trauma Syndrome" accessed 1 August 2002.

³⁶ These findings correlate with Mezey, G.C. & King, M.B. "Male Victims of Sexual Assault" (1987) on 123. See further <http://www.survive.org.uk/PTSD.html> "Post Traumatic Stress Disorder in Rape Survivors" accessed 1 August 2002.

- * Avoidance of places or people that reminded them of the crime.
- * Hypervigilance which is where they are so scared they have a ritual of locking themselves in places to keep them safe and checking and rechecking windows and locks to ensure that they are secure.
- * Excessive washing and cleansing of themselves.
- * Physiological symptoms such as infections and somatic symptoms such as bleeding *per vaginam* or *per anum* not attributed to infections, as well as vomiting which is a phenomenon of “expelling” or purging the body to rid itself of the attack.
- * Extreme behaviour such as sleeping and eating either too much or too little.
- * Anorexia resulted in a few of the cases and is attributed to the fact that the victims are trying to control other things in their life to compensate for the fact that they could not control the rape.

Ms Barnett counselled 20 women who were infected with HIV/ AIDS as a result of penetrative sexual assault *per vaginam*. The symptoms displayed by these rape victims include the following:³⁷

- * A sense of inevitability and that a death sentence has been carried out. A large number of rape victims who were not infected with HIV/ AIDS displayed an intense desire to live and survive which was found not to be the case of those infected with the deadly virus.
- * The infected rape victims also felt that they would carry a part of the rapist in them forever which they could not purge themselves of.

³⁷ See further <http://www.survive.org.uk/PTSD.html> “Post Traumatic Stress Disorder in Rape Survivors” accessed 1 August 2002.

- * A number of the victims displayed suicidal tendencies and also became homicidal in that they wanted to be killed so that they would not have to endure the mental and physical anguish.
- * They also experienced intense anger which was held not to be the real emotion but an underlying emotion for depression.

Psychological research has shown that both forms of penetrative sexual assault, *per vaginam* and *per anum*, where the female is the victim and the male the perpetrator display symptoms of Post Traumatic Stress Syndrome and Rape Trauma Syndrome. This is indicative of the fact that whatever form the penetration takes, the same serious consequences arise for the victim.³⁸

2.1.4. REASONS FOR UNDERREPORTING

Myths and stereotyping have been largely blamed as causes for underreporting and have been attributed to causing the denial of many instances, involving coercive sexual intercourse, which were actually rapes.³⁹ Researchers have advocated that important consequences and supporting attitudes arise where rape myths are believed in: namely that the more one believe in rape myths the less likely one is to convict someone of rape.⁴⁰

What is a rape myth? It is a stereotypical or false belief about rape, which has in the past denied many victims relief. It is also a mechanism that was used to

³⁸ Victims' perceptions of being vulnerable to attack, impact directly on the amount of precautionary measures taken. Women who feel that they are unable to protect themselves might engage in isolating behaviour such as avoiding certain places. See Odem, M.E. & Clay-Warner, J. "Confronting Rape" (1998) on 41-42 for discussion.

³⁹ Burt, M.R. "Rape Myths" in Odem, M.E. & Clay-Warner, J. "Confronting Rape and Sexual Assault" (1998) on 129.

⁴⁰ See Odem, M.E. & Clay-Warner, J. "Confronting Rape and Sexual Assault" (1998) on 137.

justify dismissal of an incident of rape from the category perceived as a real rape namely forced penile-vaginal intercourse.⁴¹

There are four main classifications of rape myths.⁴² These are the following:

- * *"Nothing happened."*
- * *"No harm was done."*
- * *"She wanted it."*
- * *"She deserved it."*

Each of these rape myths will accordingly be addressed briefly.

- * **"Nothing happened"**

In this category, the *incident is denied*. It stems from previous eras where people believed that accusations of rape were used to cover up incidences of pregnancy out of wedlock or used as a motive for revenge for being jilted.

- * **"No harm was done"**

This myth entails that the *nature* of rape as being a forced and violent act is denied, and is furthermore equated with other voluntary acts of intercourse. Traditionally the proprietary rights of fathers and husbands were regarded as infringed by the crime of rape. Therefore, if a woman did not fall in the category of being the property of either a husband, father or guardian, then no rights were

⁴¹ Burt, M. "Rape Myths" in "Aquaintance Rape: The Hidden Crime" in Odem, M.E. & Clay-Warner, J. "Confronting Rape And Sexual Assault" (1998) on 130.

⁴² Odem, M.E. & Clay-Warner, J. "Confronting Rape And Sexual Assault" (1998) on 131-135.



infringed and no harm done. This myth affected many women, who were regarded as having been devalued by the crime of rape.⁴³

* **“She wanted it”**

This myth implies that the victim is solely to blame and that the act of rape was *deserved* as the attacker was encouraged, or the victim wanted it. Another notion attached to this myth is physical resistance and if it was considered that insufficient resistance was applied, the belief was that she must have “wanted” it.

* **“She deserved it”**

The myth that “she deserved it” entails that the victim must have been *responsible* for the incident.⁴⁴ The blame is thus placed on the victim for having caused her own demise.

The same myths that were, or are still, applicable to female victims could obviously apply to their male counterparts. This could be worse for the latter, especially as males are perceived to be stronger. Consequently rape myths need to be eradicated as they cause additional victimization towards victims and also support violence and allow the assailant to escape punishment. This may be said to be especially true regarding the phenomenon of male penetrative sexual assault.

Various strategies have been applied since the 1970's to increase the reporting and prosecution of rapes of women under the umbrella of the traditional crime of rape *per vaginam*.⁴⁵ In 1987, the official estimate was that one out of every four

⁴³ For example women who were considered promiscuous or prostitutes, who would have had little or no remedies available to them.

⁴⁴ For example if the victim was dressed in a certain manner or behaved flirtatiously, or even found herself in a situation which posed certain risks such as hitchhiking.

⁴⁵ The most successful procedural measures implemented were the rape shield laws as applied in the United States of America. These laws aimed at limiting the trauma to which the rape victim

rapes were reported by women, and reasons furnished were that many women failed to consider that they had been violated in terms of the criminal law and also due to the stigma thereof and the unsympathetic attitude of the police.⁴⁶ In 1996 only 4 309 perpetrators were found guilty out of 50 481 reported cases and in 1997 the position was not much improved with 4 223 convictions out of 52 160 reported cases which could be a serious deterrent for victims when reporting.⁴⁷ With awareness and efforts by organisations it appears that the position is improving and that more cases are being reported. The same cannot be said to be true for male and other victims of forced penetrative sexual assault. For these victims certain acts perpetrated on them are not viewed as falling within the ambit of the crime of rape. It would not seem to be without reason to expect that men outside a marriage would be even more unlikely to report rape, due to the erroneous belief that 'a man cannot be raped.'

2.2. PENETRATIVE SEXUAL ASSAULT: MALE PERPETRATOR – FEMALE VICTIM INSIDE OF MARRIAGE

This form of penetrative assault involving a male perpetrator and female victim inside of marriage is referred to as marital rape. Throughout history it has been acceptable for men to force their wives to have forced penetrative sexual intercourse against their will. The foundation of this exemption can be traced back to Sir Matthew Hale, Chief Justice in 17th century England. Hale wrote:⁴⁸

The husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract, the wife hath given herself in kind unto the husband which she cannot retract.

These statements established the notion that once married a woman does not have the right to refuse sexual intercourse with her husband. Penetrative sexual

was subjugated. See in general Kramer, E.J. "When Men are Victims: Applying Rape Shield Laws to Male Same-Sex Rape" (1998).

⁴⁶ See Mezey, G.C. & King, M.B. "Male Victims of Sexual Assault" (1987) on 123.

⁴⁷ See <http://www.rapecrisis.org.za> "Statistics" accessed 4 August 2002.

⁴⁸ See <http://www.vaw.umn.edu/1/vawnet/mrape/htm> "Marital Rape" accessed 1 August 2002.

assault perpetrated by a male against a female victim inside of marriage can also take two forms namely forced penetrative sexual assault (a) *per vaginam* and (b) *per anum*.

2.2.1 EXAMPLES

Women may be subjected to forced penetrative sexual assault by their perpetrator husband either *per vaginam*, or *per anum*, many times inside the marriage. The focus again, as with forced penetrative sexual assault outside of marriage, would be on forced acts *per vaginam* which would be viewed as rape. In contrast forced acts *per anum* would be viewed as indecent assault.

Three types of marital rape have been suggested:⁴⁹

- * *Battering rape*: this type of rape normally exists where physical and verbal abuse are frequent occurrences in the home and sexual abuse is therefore just a further means used by the perpetrator.
- * *Non-battering rape*: the type of violence used is usually force, which is used to overpower the victim and occurs in homes where there is usually a sexual conflict raging between the spouses.⁵⁰
- * *Obsessive rapes*: This type of rape exists where the perpetrator has an exaggerated sexual obsession and is often interested in pornography. Furthermore it is a perverse and cruel form of rape and often the wife has

⁴⁹ See Le Roux, J. "Geweldsmisdade binne Huweliksverband" (1994) on 179-180. See further www.vaw.umn.edu/1/vawnet/mrape/htm "Marital Rape" accessed 1 August 2002 where researchers categorize marital rape into three types:

- * *Force-only rape*: The husband uses only the amount of force necessary to coerce their wives.
- * *Battering rape*: Husbands rape and batter their wives. The battering may happen concurrently or before or after the sexual assault.
- * *Sadistic or obsessive rape*: Husbands use torture or perverse sexual acts. Pornography is often involved.

⁵⁰ Also termed 'force-only' rape. *Ibid.*

to perform acts, which are both degrading and humiliating. Acts of forced penetrative sexual assault *per anum* may also occur.⁵¹

Women who have been battered and sexually assaulted by their husbands may suffer other physical consequences including broken bones, black eyes, bloody noses, and knife wounds during the attack.⁵² The question again is whether female victims of forced penetrative sexual assault both *per vaginam* and *per anum* should be covered under a comprehensive crime. The frequency of forced penetrative sexual assaults inside the marriage and the psychological effects of the violent act perpetrated will be also be examined to ascertain this.

2.2.2. FREQUENCY

The frequency of marital rape is a seriously underestimated element of rape statistics in South Africa. Researchers estimate that between 10% and 14% of married women experience rape in marriage and have found that marital rape accounts for approximately 25% of all rapes.⁵³ Rape in marriage is therefore an extremely prevalent form of penetrative sexual assault as the victims are particularly vulnerable to their perpetrator husbands.

In South Africa, the presence of violence in marital relationships is estimated at between 50 – 60%.⁵⁴ Women who are sexually assaulted either *per vaginam*, or *per anum*, by their husbands are likely to be sexually assaulted 20 times or more before they are able to end the violence and are more likely than women raped by acquaintances to experience unwanted oral and anal intercourse.⁵⁵

⁵¹ *Ibid.*

⁵² www.vaw.umn.edu/1/vawnet/mrape/htm “Marital Rape” accessed 1 August 2002.

⁵³ See www.vaw.umn.edu/1/vawnet/mrape/htm “Marital Rape” accessed 1 August 2002. See further Finkelhor, D. & Yllo, K. “License to Rape: Sexual Abuse of Wives” (1985); Russell, D.E.H. “Rape in Marriage” (1990).

⁵⁴ <http://www.rapecrisis.org.za> “Statistics” accessed on 4 August 2002.

⁵⁵ *Ibid.*

2.2.3. PSYCHOLOGICAL EFFECTS

Women who are victims of penetrative sexual assault are likely to experience multiple assaults by someone that they once presumably loved and trusted. The victims therefore tend to suffer severe and long-term psychological consequences. Similar to victims of penetrative sexual assault outside of marriage, the victims of penetrative sexual assault inside the marriage experience the following psychological and physical effects:⁵⁶

- * Short-term psychological effects include PTSD, anxiety, shock, intense fear, depression and suicidal ideation.
- * Long-term psychological effects include disordered sleeping, disordered eating, depression, intimacy problems, negative self-images, and sexual dysfunction.
- * Gynaecological effects include vaginal stretching, miscarriages, stillbirths, bladder infections, sexually transmitted diseases, and infertility.

Psychological research has again shown the victim of penetrative sexual assault inside of a marriage also display symptoms of Post Traumatic Stress Syndrome and Rape Trauma Syndrome regardless of whether the sexual assault is *per vaginam* or *per anum*. Accordingly it is submitted that victims of both categories of sexual assault, *per vaginam* and *per anum* can indeed be meaningfully covered under one comprehensive crime. Both categories of victims' experience Rape Trauma Syndrome which is the psychological phenomenon resulting from an occurrence of rape.

⁵⁶ See <http://www.vaw.umn.edu/1/vawnet/mrape/htm> "Marital Rape" accessed 1 August 2002.

See in general Bergen, R.K. "Wife Rape: Understanding the Response of Survivors and Service Providers" (1996) and Russell, D.E.H. "Rape in Marriage"(1990).



2.2.4. REASONS FOR UNDERREPORTING

Experts estimate that victims of forced penetrative sexual assault inside of marriage, whether *per vaginam* or *per anum*, are less likely to report their assaults than victims of penetrative sexual assault outside of marriage.⁵⁷

The reporting sexual assault may also be hindered because of a woman's relationship to the perpetrator. Factors that may compound the problem of reporting are family loyalty, inability to leave the relationship, fear of the perpetrator wrath and also because they may not be aware that a crime has been perpetrated against them. They may perceive sexual intercourse within marriage as an obligation and define forced sexual intercourse as a duty and not sexual assault and consequently not report the crime. Additional reasons cited for a lack of reporting in rural areas such as the Southern Cape are a lack of permanent police stations.⁵⁸

2.3. PENETRATIVE SEXUAL ASSAULT: MALE PERPETRATOR – MALE VICTIM

Not much attention has universally been given to forcible acts of penetration on males. In South Africa the literature is almost silent. Why? It can perhaps be attributed to the misconception that a male cannot be raped.⁵⁹ The problem of male forced sexual penetration is thus underestimated and ignored and reluctance on the part of men to report their victimization does not aid the problem. From a male victim's point of view the sexual assault *per anum* may well be more traumatic both psychologically and physiologically, in the sense that it is viewed, by the victim, as being 'contrary to nature' and an invasion of the victim's bodily integrity.⁶⁰ Male penetrative sexual assault can also be divided into

⁵⁷ See www.vaw.umn.edu/1/vawnet/mrape/htm "Marital Rape" accessed 1 August 2002. See in general Koss, M. P., Dinero, T.E., Siebel, C A. & Cox, S.L. "Stranger and Acquaintance Rape: Are there Differences in Victim's Experiences?" (1988).

⁵⁸ <http://www.rapecrisis.org.za> "Statistics" accessed 4 August 2002.

⁵⁹ Groth, A.N. "Men who Rape" (1979) on 118.

⁶⁰ Hall, C. "Rape, The Politics of Definition" (1988) on 78.

various categories, such as penetration *per anum*, or *vaginam* (where the perpetrator is a female), oral, digital and object penetration, which may be experienced by the victim of sexual assault as rape. To assist with the classification of possible forms of penetrative sexual assault, the psychological reactions of the different categories of penetrative sexual assault victim will also be dealt with as a useful comparison to indicate why certain forms of penetrative sexual assault, with serious psychological and sociological effects, should be treated in the same manner.

Men are seen as “too big” and “too strong” to be victims.⁶¹ This approach does not effectively recognise and protect men who are weaker and do not possess extraordinary physical strength.⁶² By generalising it fails to consider that individuals are of different stature, regardless of gender, as well as the fact that weapons may be used as a form of coercion. Men can also be overpowered by fear, especially if weapons are used.

Mezey and King feel (whose viewpoint is supported here) that it is important to focus on male victims.⁶³ Firstly, as they do *not have a support system*, in the sense of help or treatment. Secondly, because *victim's co-operation* is vital in reporting crimes and it is essential and in the interests of justice that the criminal does not get away with his behaviour and allow him to commit further acts of victimisation. Crimes of like seriousness should be equally protected.

Failure to recognize men as victims can therefore be attributed to various factors such as their supposed superior strength, a failure to recognize the victimization as an aggressive as well as sexual phenomenon and the fact that rape is defined

⁶¹ Thio, A. “Deviant Behaviour” (1995) on 153.

⁶² Rumney, P. & Morgan-Taylor, M. “Recognizing the Male Victim: Gender Neutrality and the Law of Rape: Part One” (1997) on 202.

⁶³ Mezey, G.C. & King, M.B. “Male Victims of Sexual Assault” (1987) on 123. See also in general Burgess, A.W. & Holmstrom L.L. “Rape Trauma Syndrome” (1974) on 981-7; Also Hough M. & Mayhew P. “The British Crime Survey” (1983) as referred to.

as non-consensual vaginal penetration by a penis.⁶⁴ No recognition is given to the psychological responses such as humiliation, violation of dignity and violence, which correlate with that of females. Men and women deserve to have equal care and protection after a serious violation of their innermost self.

2.3.1. EXAMPLES

*The three men squat silently on the polished floor, eying the sleeping youngster in the corner of the cell. Their bodies are tense, their eyes sly and sinister as they turn to each other in the gloom... One of the attackers goes for the victim's mouth, covering it with rough hands, the other two pin his frantic arms and feet to the floor... His assailants rip his clothes off and brutally rape him lying in the corner blood-stained, bruised and emotionally scarred for life.*⁶⁵

In as far back as 1973 in the United States, a 28 year old Quaker Pacifist named Robert A. Martin was jailed for protesting the Vietnam War.⁶⁶ He describes his first week in the District of Columbia jail was uneventful. The next week during recreation period, he was invited into a cell by other inmates. Then he says that:⁶⁷

[my] exit was blocked and my pants were taken off and I was raped. Then I was dragged from cell to cell all evening.

He was promised protection from some men, but the following evening his 'protectors' orally and sexually penetrated him *per anum*. They collected cigarettes from prisoners awaiting their turn. He eventually managed to escape and was taken to hospital.

⁶⁴ Mezey, G.C. & King, M.B. (ed). "Male Victims of Sexual Assault" (1992) on v. Forced anal penetration would also have fallen under the crime of sodomy.

⁶⁵ Lillah, R. "Men who Rape Men" (1996) on 134. This is a South African real life case study used to illustrate the fact that the possibility of other rape victims cannot be ignored.

⁶⁶ Tollison, D. & Adams, H. "Sexual Disorders" (1979).

⁶⁷ *Ibid.*

The brutality of prison rape can be likened to that of a conventional rape under current law. Lillah⁶⁸ spoke to prisoners who had been victims in some South African prisons where they recounted memories such as juveniles screaming and being indecently assaulted.⁶⁹ The prisoners interviewed mentioned that to avoid gang rape one had to become a gangster's partner with acts involving oral sex and heavy petting.⁷⁰ One prisoner recounted that he was frequently approached for sexual favours and refused, but still felt embarrassed and degraded at being approached.⁷¹

In another account a prisoner refused sexual intercourse with the following consequence:⁷²

They lured the youngster into the toilet, covered the door with a cloth and raped him.

The question arises whether a male as a matter of fact can be raped by another male? Various case studies reported indicate that this question may indeed be answered in the affirmative.⁷³ The case studies contemplate the following scenarios.

- * A heterosexual man becomes intoxicated at an office party. He lets his boss drive him home. He passes out in the car and awakes to find himself in the back seat with his pants down, being anally entered by his boss.

⁶⁸ Lillah, R. "Men who Rape Men" (1996) on 134.

⁶⁹ The term indecent assault is preferred to the term molested as the latter term is a euphemism which tends to deny the seriousness of the crime.

⁷⁰ The term used is 'wyfie'.

⁷¹ See Lillah, R. "Men who Rape Men" (1996) on 134.

⁷² Lillah, R. "Men who Rape Men" (1996) on 135.

⁷³ Thio, A. "Deviant Behaviour" (1995) on 154. These are actual real life scenarios that have occurred.



- * Three navy men, overpower, beat and drag a shipmate to a secluded area of a ship overpower the victim and two assailants hold him down while a third penetrates him anally.
- * A college male student (who happens to be homosexual) meets an older man at a bar, goes to his apartment and is forcibly anally penetrated despite his pleas.

Male victims are met at parties, bars, the navy, prison, or can even be family members of the perpetrator, although the assailants are more likely to be strangers, then is the case with female victims.⁷⁴ As the assailants may be heterosexual or homosexual the terms male rape or same-sex rape are preferred.⁷⁵ The phenomenon of male rape both within and outside of prisons as well as the concept of a female perpetrator will now be examined in closer detail.

Reported male 'rape' may appear to be rare in society but is extremely common in prison.⁷⁶ It usually entails a stronger person overpowering and raping a weaker person and is an expression of dominance rather than sexuality.⁷⁷ In prisons, 'relationships' of humiliation combined with domination⁷⁸ and control of weaker victims exist and are far from being consensual, being rape by force/duress.⁷⁹ Dangers of diseases, such as HIV, are not excluded.⁸⁰

⁷⁴ *Ibid.*

⁷⁵ Thio, A. "Deviant Behaviour" (1995) on 145.

⁷⁶ This is due to limited research and knowledge of how many men are raped in society due to a lack of reporting.

⁷⁷ Thio, A. "Deviant Behaviour" (1995) on 158.

⁷⁸ Groth, A.N. "Men who Rape" (1979) on 5 mentions that the act of rape is always a symptom of psychological dysfunction, whether temporary or chronic and repetitive. He further states that: *It [rape] is usually a desperate act which results from an emotionally weak and insecure individuals inability to handle the stresses and demands of his life.*

⁷⁹ Mezey, G.C & King, M.B. (ed). "Male Victims of Sexual Assault" (1992) on 68.

⁸⁰ See chapter six on HIV/ AIDS. It is also a noted fact that HIV is more easily transmitted via anal intercourse due to the additional trauma caused.



According to the *Prison Law Monitor*⁸¹ one out of five prisoners in the United States of America prisons are raped in comparison with one out of ten females in society as a whole.⁸² The victims are usually slightly built and are overpowered by gangs of prisoners and repeatedly raped.⁸³ The attack as such may involve the victim being beaten and anally or orally penetrated.⁸⁴ Their alternative is to employ 'protectors' but in exchange they usually have to 'service' them. They often become 'slaves' and they may be bartered.⁸⁵

A question that may be asked is whether male rape occurs outside of a prison environment. The reporting of various incidents have led to the conclusion that this is indeed the case. Dooley was raped by a male friend who slept over at his house after a high school prom.⁸⁶ In another incident, a man who was hitchhiking was picked up by a stranger and raped in a deserted building.⁸⁷

In both the above cases, the rapists were not prosecuted due to a lack of pursuing the matter. Why? They possibly shared a number of emotions such as the fear of being perceived as homosexual, fear of the legal process and humiliation and degradation. The stigma attached to the crime is thus an all-pervasive reason for lack of reporting and consequently, a lack of prosecution. The nature of the crime of rape is such that the victim may be stigmatized more than the rapist.

⁸¹ Thio, A. "Deviant Behaviour" (1995) on 154.

⁸² Although according to the authors Mezey and King, the nature and extent of prison rape has not been adequately determined and this is attributed to underreporting, as well as difficulties in attempting this type of research.

⁸³ Thio, A. "Deviant Behaviour" (1995) on 148.

⁸⁴ Tollison, C.D. & Adams, H.E. "Sexual Disorders, Treatment, Theory, Research" (1979) on 311; Mezey, G.C. & King, M.B. (ed) "Male Victims of Sexual Assault" (1992) on 68.

⁸⁵ Tollison, C.D. & Adams, H.E. "Sexual Disorders, Treatment, Theory, Research" (1979) on 312.

⁸⁶ "Male Rape Victims Hide in Shame" *Times – Picayune* 15 June 1997 on A27. See Kramer, E.J. "When Men are Victims: Applying Rape Shield Laws to Male Same-Sex Rape" (1998) on 293.

⁸⁷ *Ibid.*

Understandably, male victims are reluctant to report. But what complicates the problem is the fact that some perpetrators make a valiant effort to cause their victims to ejaculate. As a result of case studies, Groth suggests that the purpose thereof is to discourage the victim from reporting, as the victim's credibility and sexuality will come under close scrutiny and will nullify his allegation of non-consent. This is especially true as the victim may be confused with regard to his physiological response and may misidentify ejaculation with orgasm.⁸⁸

Unlike their female counterparts who may be subject to a single act of rape, men may be continually raped for years suffering physical and psychological pain.⁸⁹ In contrast men have to suffer a violation to their body and where a same-sex rape occurs and a physiological reaction experienced, a heterosexual victim is also confronted with misidentified feelings pertaining to his sexuality. Legal revision is required so that male sexual victimization is not a phenomenon far removed from society.

There are more similarities between male 'rape' and female rape than differences, with regard to the features and elements of the offence, as well as the psychological impact on the victim. As explained earlier, a number of myths and assumptions are used to explain what is actually seen as rape by the male victim. As one victim said:⁹⁰

[I] was 17 or 18 and a guy I know invited me to a party... . They got me drunk...and were chasing me around. I remember going to the bathroom with an alternate door to another room. I remember running through there but they grabbed me and I wound up getting, I guess you'd call it, raped. This happened 10 years ago and I remember I was walking around feeling sick wondering how I could get back at them.

⁸⁸ Groth, A.N. "Men who Rape" (1979) on 123.

⁸⁹ The exception being marital rape where spouses may be subjected to sexual abuse over an extended period of time.

⁹⁰ Groth, A.N. "Men who Rape" (1979) on 135.

The belief that men are strong and are capable of defending themselves and that if he is invaded by another man, he 'must have wanted it' accounts for the lack of reporting of the crime.⁹¹

Tony, a 36 year old prison inmate, was imprisoned for armed robbery and described his prison experiences as follows:

*I felt no sexual attraction to other men but I got angrier and angrier as time went by. The sex itself is not important, it's being in the position to control.*⁹²

The powerful need to control is a way of prison inmates validating themselves as men and is expressed by way of forced sexual intercourse. The process dispossesses the victim of his 'manhood' forcefully and with contempt.⁹³

2.3.2. FREQUENCY

Statistics are rare with regard to the phenomenon of male rape in South Africa which is attributed to a narrow definition of rape.⁹⁴ In the United States of America, evidence has shown that about 10 000 American men are raped every year.⁹⁵ Surveys have revealed that in the United States of America campuses,

⁹¹ In Groth, A.N. "Men who Rape" (1979) on 140 it is mentioned that one man stated: *[I've] got no manhood left – He's turned me into a woman.* Men who have been forcibly sexually attacked by women are even less likely to report the crime, as they would no doubt be regarded in a strange light due to the misconceptions of society. The effect of this is undoubtedly devastating for the victim as his only redress is that of indecent assault or in the early nineties, if his assailant was a man, the crime of sodomy.

⁹² Groth, A.N. "Men who Rape" (1979) on 132.

⁹³ Groth, A.N. "Men who Rape" (1979) on 133.

⁹⁴ <http://www.rapecrisis.org.za> "Statistics" accessed 4 August 2002.

⁹⁵ At least 39 states have gender-neutral statutory rape laws. Further the extent of the problem was undertaken in a study of forced anal intercourse where the subjects used were 17 men, of which a further three were victims of attempted forced anal intercourse. An additional man was forced to perform fellatio. See Mezey, G.C. & King, M.B. (ed) "Male Victims of Sexual Assault" (1992) on 5.



up to 48% of male college students are forced or pressured to have non-consensual sex. The predominant method being the use of physical force⁹⁶ with forced anal penetration being the most popular mode of assault.⁹⁷ Male victims are susceptible to the same techniques used on woman.⁹⁸

Ms Barnett stated during the interview that she had counselled 12 men who were victims of male on male forced sexual penetration and their perceptions were that they had been anally raped and not indecently assaulted. She also recounted her experience of rape victims counselled at Leeukop Prison and mentioned that the prisoners did not have the same issues with regard to rape as men outside of prisons. This she attributed to the fact that they expect to be raped whilst in prison.⁹⁹

In a study undertaken by the South Wales Forensic Psychiatry Service,¹⁰⁰ a series of 22 male victims of rape were identified, who represented 12,5% of male referrals over a six month period from December 1992 up to June 1993.¹⁰¹

⁹⁶ It cannot be readily said that the victims provoked the attacker into using force especially as victims include males and females who occupy all age categories from an infant to an old person; See Groth, A.N. "Men who Rape" (1979) on 7.

⁹⁷ Thio, A. "Deviant Behaviour" (1995) on 153.

⁹⁸ Groth, A.N. "Men who Rape" (1979) on 121.

⁹⁹ See "The Rape Crisis Behind Bars" *New York Times* 29 December 1993. The author of this article Stephen Donaldson, says of his experience: *Twenty years ago, I was gang raped while in jail on a charge for which I was later acquitted. (I was arrested for participating in a Quaker 'pray-in' at the White House to protest the bombings in Cambodia.) I soon learned that victims of prison rape were, like me, usually the youngest, the smallest, the non-violent, the first-timers and those charged with less serious crimes.* He further mentions that the experience of sexual violence usually extends beyond a single incident, often becoming a daily assault. He also says that psychologists and rape counsellors believe that the pent-up rage caused by these assaults can cause the victims to perpetrate the same crimes, especially if they don't receive psychological treatment, once they return to their communities. He states: *Some will become rapists, seeking to 'regain their manhood' through the same violent means by which they believe it was lost.*

¹⁰⁰ See Huckle, P.L. "Male Rape Victims referred to a Forensic Psychiatric Service" (1995) on 187.

¹⁰¹ Groth also undertook a study of male rape and took a sample of 27 males of which 20 sexually assaulted others and 7 were victims. Of 16 persons who assaulted in the community, a mere 4

When the study was undertaken, the *clinical definition* was used to describe non-consensual, forced penetrative acts.¹⁰²

Both the frequency and effects of the crime were studied. The study undertaken comprised 22 men with an age range of 17 – 49 years who were sexually assaulted (raped) at some stage in their lives as can be illustrated in the table below.¹⁰³

Figure 3. Age of Male Victims at the Time of Rape

<u>Age Range</u>	<u>Number of victims</u>
Under 10 years old	8
10 – 15 years old	5
16 – 20 years old	4
26 – 30 years old	2
36 – 40 years old	3

The nature of the ‘rape’ entailed non-consensual sodomy in 19 of the cases while in four of the cases weapons were used. The location of the crime was primarily outdoors with the majority of assailants being strangers. At the time of the rape all of the victims believed that they were in a life-threatening situation and emotional reactions were the same as that found in women.¹⁰⁴

were imprisoned. His findings were that men are assaulted where they live, work, travel and relax. Intimidation was used and the male victims were susceptible to the same techniques by which assailants gain control over female victims. He also found that men who raped other men whilst in prison, actually raped *women* in the community. See Groth, A.N. “Men who Rape” (1979) on 119 *et seq.*

¹⁰² This clinical definition was, however, not legally recognized in Britain and the Sexual Offences (Amendment) Act of 1976, which was in force at the time, defined rape as the forced penile penetration of the vagina, whereas forced anal penetration was considered the less serious crime of non-consensual buggery.

¹⁰³ See Huckle, P.L. “Male Rape Victims Referred to a Forensic Psychiatric Service” (1995) on 188.

¹⁰⁴ The emotional reactions reported were intense fear, anger, physical symptoms and unreality. The long-term effects reported were irritability, conflicting sexual orientation, sexual dysfunction



Nine of the victims were diagnosed with post-traumatic stress disorder. Only five of the 22 male rape victims reported the crime and reasons given by Huckle for non-disclosure were factors such as embarrassment, the victim could not face the attacker in court, the fear that they would not be believe, the fear that they would be perceived by society as being homosexual, being thought of as asking for the victimisation and the homophobic attitudes of the police.¹⁰⁵ Of the five reported cases, three assailants were convicted of indecent assault and given lenient sentences ranging from 18 to 36 months imprisonment.

Huckle's clinical research indicates the following four salient points:¹⁰⁶

- * Rape is about controlling the victim.
- * Male victims experience similar or the same emotional consequences as female victims.
- * Male victims were more likely to be attacked by multiple assailants.
- * Huckle suggests that rape be defined as non-consensual, forced penetrative sexual assault upon a person.

It is evident from the above that discrimination between male and female victims in Britain also caused underreporting and a tremendous disparity in sentencing and with further empirical research and education the position will only be improved.

and loss of self-respect. See discussion by Huckle, P.L. "**Male Rape Victims Referred to a Forensic Psychiatric Service**" (1995) on 188 - 189.

¹⁰⁵ Huckle, P.L. "**Male Rape Victims Referred to a Forensic Psychiatric Service**" (1995) on 190.

¹⁰⁶ *Ibid.*



2.3.3. PSYCHOLOGICAL EFFECTS

Jon, a male sexual assault victim, recounts his experience in a poem which states:¹⁰⁷

*And I just gasp for breath
Because I can't scream anymore
Or live, or die, or laugh, or cry
I'm all used up, I'm all lived out
I guess this is reality
Because nightmares don't get this bad.*

The findings of noted authors Mezey and King and Huckle on the psychological effects of penetrative sexual assault were reiterated by Ms Barnett who mentioned in the interview that for *male victims* of forced non-consensual sexual intercourse who were counselled, the psychological symptoms included:¹⁰⁸

- * Humiliation.
- * Embarrassment, which is attributed to the nature of the language used by the rapists which is extremely depreciating such as 'What kind of a man do you think you are?' or 'If you were a real man you would have been able to prevent this.'
- * Body washing and showering in scorching hot water to "cleanse" themselves.
- * Mistrust of other people

¹⁰⁷ <http://healthyplace.com/communities/abuse/survivors/male/reality.htm> "Male Survivors" accessed 1 August 2001.

¹⁰⁸ This is in concurrence with Huckle's research "Male Rape Victims Referred to a Forensic Psychiatric Service" (1995) on 188 *et seq* as well as Thio, A. "Deviant Behaviour" (1995) on 136. See further Mezey, G.C. & King, M.B. "Male Victims of Sexual Assault" (1987) on 123.

- * Issue revolving around masculinity and that they are weak and not a 'real man.'
- * Rejecting their bodies and having physical symptoms such as constipation. This was attributed to the fact that the victims tend not to want to use that orifice again as a result of the trauma of forced anal intercourse.
- * Intrusive thoughts, numbing and depression.
- * The phenomenon of "learnt helplessness" which is a belief that they cannot control anything in their world and lose control and give up.
- * Men also tended to try and be brave during therapy which was attributed to the guilt factor, in that they felt that they could not protect themselves. This phenomenon was also pronounced where their family was also exposed to the attack and injured as a result thereof.

Sorenson and Siegel performed a study of 3 000 adult residents of Los Angeles in 1983 to examine the effects of sexual assault on male and female victims. They reported that the coercive sexual experiences had similar correlates and effects on the victims regardless of ethnicity or gender.¹⁰⁹ If a comparison is made with other research undertaken in the medical field, female victims experience the symptoms of anxiety,¹¹⁰ depression, tearfulness, somatic complaints, changes in behaviour and long-term disturbance for victims with past psychiatric disturbance.¹¹¹ In contrast, male victims' response to rape has been reported as including feelings of helplessness and submission, as is the case with women.¹¹²

¹⁰⁹ Sorenson, S.B. & Siegel, J.M. "Gender, Ethnicity, and Sexual assault: Findings from a Los Angeles Study" in Odem, M.E. & Clay-Wamer, J. (ed). "Confronting Rape and Sexual Assault" (1998) on 219.

¹¹⁰ This includes phobic anxiety.

¹¹¹ See Mezey, G.C. & King, M.B. "Male Victims of Sexual Assault" (1987) on 123.

¹¹² See Mezey, G.C. & King, M.B. (ed); "Male Victims of Sexual Assault" (1992) on 9.



This trauma experienced by male victims was recognized by the American case of **People v Yates**.¹¹³ This case was the first case in which Rape Trauma Syndrome was extended to male victims. In reaching the decision the court took into account research studies and it was found that both heterosexual and homosexual men displayed symptoms parallel to that of female victims.¹¹⁴

As mentioned earlier, Rape Trauma Syndrome is a species of the genus of Post Traumatic Stress Disorder, which includes reactions to life-threatening events. The same symptoms experienced by female victims of forced penetrative sexual assault *per vaginam* and *per anum* have been noted in male victims of forced penetrative sexual assault.¹¹⁵ These psychological reactions¹¹⁶ include disorganisation, fear, shock, humiliation, traumatophobia - fear of being alone or of being indoors, self blame, depression, feeling a loss of masculinity,¹¹⁷ violation of trust, violation of identity – feeling depersonalised, violation of dignity – especially if it concerns the anus or object insertion, repression, isolation and blame.¹¹⁸

¹¹³ (1995) 637NYS 2d 625 as discussed in Rumney, P. & Morgan-Taylor, M. “**Recognizing the Male Victim: Gender Neutrality and the Law of Rape: Part One**” (1997) on 198 on 230.

¹¹⁴ *Ibid.*

¹¹⁵ Rumney, P. & Morgan-Taylor, M. “**Recognizing the Male Victim: Gender Neutrality and the Law of Rape: Part One**” (1997) on 231.

¹¹⁶ Thio, A. “**Deviant Behaviour**” (1995) on 136. Mezey, G.C. & King, M.B. “**Male Victims of Sexual Assault**” (1987) on 123 describe the psychological reactions for males as including:

- * *Feelings of inadequacy at being overpowered and that their masculinity has been undermined.*
- * *Embarrassment and lowered self-esteem.*
- * *Shame and anger.*

¹¹⁷ Thio, A. “**Deviant Behaviour**” (1995) on 154; Mezey, G.C. & King, M.B. “**Male Victims of Sexual Assault**” (1987) on 127.

¹¹⁸ Quina, K. & Carlson, N.L. “**Rape, Incest and Sexual Harassment**” (1989) on 29.



For men the isolation must be far worse, as keeping a dreaded secret has devastating effects, especially if no sympathy nor understanding is meted out. In a case study:¹¹⁹

[a] former police officer in San Diego told us that a few years ago a sailor came to report that he had been raped by a woman. The police in the station thought he must be drunk, out of his mind or simply weaving a good tale. They laughed him out the door.

This attitude is reminiscent of how married women were treated a few years ago with regard to their being raped by their husbands.¹²⁰ The impact on male victims is the same in the sense of the physical, psychological and sexual effects.¹²¹ Some men have reported that the impact thereof has ruined their lives.

*[I'm] 38 now and I still have flashbacks about it. It still upsets me. I've been thinking about this since I was in prison and I don't think it will ever let me go. I've got to live the rest of my life with these memories.*¹²²

¹¹⁹ Thio, A. "Deviant Behaviour" (1995) on 156 (as discussed by him with regard to material obtained from Sarrel, P. & Sarrel, L. "Can a Man be Raped by a Woman?" Redbook May 1981 on 94).

¹²⁰ See paragraph 2.2.

¹²¹ In a survey undertaken by Mezey, G.C. & King, M.B.(ed) "Male Victims of Sexual Assault" (1992) on 84 *et seq* the following transpired: They published their study in several newspapers and periodicals and as a result, 28 men from the UK contacted them, but only 22 subjects qualified for the analysis. The victims were between the ages of 16 and 82 years old. Seventeen of the victims were victims of forced anal intercourse and only 10 were homosexual. This indicates that the attackers did not necessarily go for homosexual men, but that any man was a potential victim. Only four victims were attacked by strangers and the rest of the assailants were acquaintances, family or lovers. The overall emotional response reported by the men was a feeling of hopelessness and submission and also the belief that their lives were in danger. The findings indicate that the problem of male rape exists outside of institutional settings.

¹²² Groth, A.N. "Men who Rape" (1979) on 138.



Few men that are forcibly sexually penetrated consider reporting the incident due to the factors mentioned previously such as humiliation, embarrassment¹²³ as well as the fact that they could be perceived as 'weak' or 'gay' or worse, not be believed at all.¹²⁴ As one victim said:¹²⁵

[[I]] was angry and embarrassed but frightened because the whole episode was like a fantasy and reality getting mixed up. The fear was to do with my sexual response to the pain.

Severe physical penetrative trauma can be associated with male 'rape' victims who are also prone to HIV transmission¹²⁶ and the transmission of infectious diseases.¹²⁷ The long-term effects have been identified as vulnerability, increased anger, loss of self-esteem and Post Traumatic Stress Disorder which mirrors the reactions of female victims' of sexual assault *per vaginam* and *per anum*, both inside and outside of marriage.¹²⁸

2.3.4. REASONS FOR UNDERREPORTING

According to Mezey and King, male victims have more or less the same reactions to rape as a female victim, but are more stigmatized and consequently report the offence less often.¹²⁹ The aforementioned authors reject the notion that the rapist is an oversexed male on the prowl for an attractive female.¹³⁰ It

¹²³ Mezey, G.C. & King, M.B. (ed) "Male Victims of Sexual Assault" (1992) on 5.

¹²⁴ Mezey, G.C. & King, M.B. (ed) "Male Victims of Sexual Assault" (1992) on 6.

¹²⁵ Groth, A.N. "Men who Rape" (1979) on 128.

¹²⁶ Mezey, G.C. & King, M.B. (ed) "Male Victims of Sexual Assault" (1992) on 2.

¹²⁷ Mezey, G.C. & King, M.B. (ed) "Male Victims of Sexual Assault" (1992) on 70.

¹²⁸ Rumney, P. & Morgan-Taylor, M. "Recognizing the Male Victim: Gender Neutrality and the Law of Rape: Part One" (1997) on 229; Mezey, G.C. & King, M.B. (ed). "Male Victims of Sexual Assault" (1987) on 129.

¹²⁹ "Male Victims of Sexual Assault" (1987) on 122.

¹³⁰ In "Male Victims of Sexual Assault" (1987) on 122 it was held that:

- * The attractiveness of the woman is irrelevant as both old and young fall prey to the crime.
- * Rapists are often married or in relationships and do not need to resort to rape to obtain sexual gratification.

was stated by Ms Barnett¹³¹ that about 20% of the counselled female victims experienced orgasms (which has also apparently been documented in male victims of rape by Groth) as a result of the rape and experienced guilt as a result thereof.¹³² This is attributed to be one of the main reasons why rape victims do not report the rape. The physical results of rape which occur for female victims, mirror the reactions of male victims in this regard. The misconception that if a male victim ejaculates the assumption that he enjoyed it and can therefore not be a rape victim, is to be rejected for this reason.

A reason for underreporting of the crime of male rape in South Africa is that many laws, influenced by the history of the crime of rape, have reflected the belief that rape could only be committed on a female.¹³³ Another reason for underreporting by male victims can perhaps be attributed to myths such as 'men don't cry' or 'men are too big and too strong'. Men may also feel that they will be perceived as being weak as well as the fact that they feel as though their manhood has been forcibly taken away from them and that they have been feminised.¹³⁴

Men in a prison setting, unlike a community rape victim, may be subjugated to these forced acts for years to come.¹³⁵ The victim is emasculated and is in a sense 'robbed of his manhood.'¹³⁶ Once emasculated, he is relegated to a passive role.¹³⁷ The aim of the victimisation is to subjugate, express power over

* Men and women are potential victims, but due to the latter being weaker, they are the easier targets.

¹³¹ Interview of the 15 March 2002.

¹³² Groth, A.N. "Men who Rape" (1979) on 123.

¹³³ Quina, K & Carlson, N.L. "Rape, Incest and Sexual Harrassment" (1989) on 5. In a random survey with campus students, Quina and Tyre identified one male victim of adult rape for every three female victims.

¹³⁴ Mezey, G.C. & King, M.B. "Male Victims of Sexual Assault" (1992) on 71.

¹³⁵ Thio, A. "Deviant Behaviour" (1995) on 148.

¹³⁶ Groth, A.N. "Men who Rape" (1979) on 133.

¹³⁷ Thio, A. "Deviant Behaviour" (1995) on 150.



and humiliate the victim¹³⁸ and consequently it leads to reluctance on the part of the victim to report the crime.¹³⁹

2.4. PENETRATIVE SEXUAL ASSAULT: MALE PERPETRATOR-FEMALE CHILD VICTIM

The sexual abuse of children has been the focal point in recent times in South Africa. As the South African Law Commission states as follows:¹⁴⁰

One of the most serious problems facing law enforcement officers, prosecution services and organisations attempting to assist children who have been sexually abused over a period of time is the requirement, in our law, that every charge must be specified with sufficient particularity.

Various difficulties are encountered when dealing with child victims such as young age and rules of evidence which may exclude certain evidence. Where the abuse takes place over an extended period of time a clear distinction between the separate attacks might not be drawn or the incidences might not be reported for a long time. It will now be looked at whether the child victims of forced penetrative sexual assault also display the same psycho-sociological reactions as adult victims and whether they can also be meaningfully covered under one broad definition.

2.4.1. EXAMPLES

Six small girls between the ages of six and nine years old were raped by a twenty-year old man they knew.¹⁴¹ He threatened to kill them if they told anyone. A reason suggested for what lies behind the rapes is the myth

¹³⁸ Thio, A. "Deviant Behaviour" (1995) on 155.

¹³⁹ Groth, A.N. "Men who Rape" (1979) on 133.

¹⁴⁰ "SALC Discussion Paper 85 of 1999" on 236.

¹⁴¹ "Six Small Girls Share Rape Horror" *Pretoria News* Friday 14 January 2000 on 4.



*that if people who are HIV positive have sexual intercourse with a virgin, they will be cured.*¹⁴²

A number of incidents such as the one mentioned above, which have been reported by the national press, have served to draw the public's attention to the crime of child rape which is fast developing into a crime with epidemic proportions.

In another incident the rape of Baby Tshepang hit the news headlines when 6 men were accused of raping her which case later collapsed due to DNA evidence, which indicated that they were not responsible for the rape.¹⁴³

There is therefore a predisposition for female children and especially babies to be victims of penetrative sexual assault *per vaginam* or *per anum* as they are easy targets and are easily accessible. In addition the fallacy that if an HIV infected person has sexual intercourse with a virgin they will be cured, is aggravating the number of incidences of child rape.

2.4.2. FREQUENCY

The crimes perpetrated against on South African children alone is staggering which is evident from the following table with a detailed breakdown of statistics relating to sexual offences committed during 1998:¹⁴⁴

¹⁴² As per the councillor who worked with the girls, Mr Sthwenjwa Nyawose.

¹⁴³ "Cops Query Baby-Rape Probe" *Saturday Star* 19 January 2002.

¹⁴⁴ <http://www.home.intekom.com/crisis/stats.htm> "Crimes Against Children" accessed 1 August 2002 from which excerpts were taken.

Figure 4. Detailed Breakdown of South African Statistics for 1998

Crimes (Children 0 - 17yrs)	Gauteng	Free State	KwaZulu Natal	Mpumalanga	North West	Northern Cape	Northern Province	Western Cape	Eastern Cape	Total
Rape & attempted rape	4159	1309	4310	1151	1704	475	1354	2666	2648	19776
Indecent assault – girls	355	116	325	84	117	61	54	771	182	2065
Indecent assault – boys	193	44	175	40	53	39	21	312	93	970
Statutory rape	62	39	104	13	22	18	29	112	74	473
Indecent deeds with boys	16	8	11	2	5	4	9	16	12	83

In one study undertaken in 1998 it was also held that one in every three Johannesburg schoolgirls experiences sexual violence at school, of which only 36% of cases are reported.¹⁴⁵

Ms Barnett stated that the frequency of the child rapes are underestimated because in many instances the child does not understand the nature of what has happened to them. Furthermore they are exposed to the abuse for extended periods of time and tend to expect it. Another obvious factor for underestimating the frequency is the fact that babies and small toddlers cannot speak and it is evident that something is amiss by observation.

2.4.3. PSYCHOLOGICAL EFFECTS

For female child victims of forced penetrative sexual assault who were counselled by Ms Barnett the psychological symptoms included:¹⁴⁶

¹⁴⁵ <http://www.rapecrisis.org.za> "Statistics" accessed 4 August 2002. The Rape Crisis website also mentions that reported statistics are limited in that male child victims are excluded from the ambit of the definition of rape.

¹⁴⁶ Ms Barnett is currently running the Teddy Bear Clinic through Midrand Graduate Institute which is a support group for children of child abuse. See also <http://www.silent-no-more.org/index.html> "The Sexual Assault Crisis & Support Center" accessed 1 August 2002 which findings correlate with Ms Barnett. The psychological symptoms are described as changes



- * Guilt which mostly related to the language used during the rape such as 'It happened because you were naughty' or 'if you don't, I will kill your mommy'.
- * Fear in that they are too scared to go to sleep or to go to school.
- * Aggression towards other children.

- * Role playing in the form of perpetrating the same/ similar abuse on other weaker or younger children.
- * Highly sexualized in nature and played inappropriate games with other children.

- * Many of the child victims were continually raped over an extended period of time by uncles, fathers and stepmothers and stepfathers who touched them and "groomed them" and eventually expect the abuse.¹⁴⁷

Where children were raped in a once-off abuse they recovered quickly depending on their age and physical and mental make-up. It was generally found that the younger the child the easier it was for them to recover.

2.4.4. REASONS FOR UNDERREPORTING

As mentioned earlier children are easy targets because in many instances they cannot speak and therefore cannot report what has happened to them. Ms Barnett mentioned that children who are under the age of seven years are usually unsure of what has happened to them and therefore do not report the

in behaviour such as mood swings, clinging or withdrawal, nightmares or bed wetting, acting out sexually or showing knowledge or interest in sex that is not appropriate for the child's age, loss of self-respect, unsocial behaviour, acting younger than he or she is, fears of certain places, people, or activities, poor schoolwork and frequent absences and shame about his or her body.

¹⁴⁷ Showering them with presents and touching them and increasing the intensity and frequency over time until the children expect it.



incident.¹⁴⁸ With children between the ages of 7 – 14 years Ms Barnett found that the children counselled experienced stronger symptoms and were more inclined to report the crime perpetrated on them.

2.5. PENETRATIVE SEXUAL ASSAULT: MALE PERPETRATOR- MALE CHILD VICTIM

Male children can be the target of penetrative sexual assault *per anum* by a male perpetrator. In South Africa such acts have been recognised by South African law as being a statutory offence.¹⁴⁹

2.5.1. EXAMPLES

*On 13 May 1998, a 51- year old car guard indecently assaulted an 11- year old boy, who was selling religious bookmarks in a parking area. The accused pulled the boy into the veld, ordered the boy to undress and performed acts of indecency on the boy. On two further occasions this same boy was anally penetrated by the accused, and the crime was thereafter reported. The accused was sentenced to 14 years imprisonment.*¹⁵⁰

Male child victims are subject to the same methods used on other victims of penetrative sexual assault as they too are easily accessible and easy targets. In Ms Barnett's experience she found that that there is a predisposition for young boys to be the victims of penetrative sexual assault *per anum* by older men.

¹⁴⁸ See further <http://www.rapecrisis.org.za> "Statistics" accessed 4 August 2002. It is mentioned that among young people who are starting their sexually active lives there is a high incidence of sexual violence coupled with a high level of underreporting.

¹⁴⁹ Section 14 of Act 23 of 1957.

¹⁵⁰ *Pretoria News* 1 October 1999. In another country, the defendant could have been awarded life imprisonment for rape on one account of oral rape and two counts of anal rape.



The results of the study undertaken by the South Wales Forensic Psychiatry Service referred to earlier, reveals that eight of the 22 victims were under the age of ten when they were subjected to penetrative sexual assault *per anum* by male perpetrators.¹⁵¹ A total of 13 out of the 22 victims were subjected to penetrative sexual assault by the time they reached 15 years of age. This is indicative that male children are at higher risk of becoming victims of sexual assault than older men.

2.5.2. FREQUENCY

If one studies the statistics provided earlier, it is evident that the number of reported acts of indecent assault perpetrated on male children is significantly less than the figures provided for female child victims.¹⁵² The frequency of sexual assaults on male children are also underestimated for the same reasons as with female children in that they may not be able to comprehend what has happened to them or if they are perhaps unable to speak.

2.5.3. PSYCHOLOGICAL EFFECTS

Ms Barnett stated that from her case studies, the psychological effects on male children are much the same as those displayed by the female victims.¹⁵³ Accordingly it can be noted that the symptoms are the same for female and male child victims' which correlates with the symptoms experienced by adult female and male victims of penetrative sexual assault. It would therefore not be untoward to include all victims of penetrative sexual assault under one comprehensive definition of rape in that all the victims studied so far display the symptoms of Rape Trauma Syndrome. These findings would imply that they all

¹⁵¹ See paragraph 2.3.2.

¹⁵² See par 2.4.2. The figure provided for in 1998 stands at 2065 for female child victims of indecent assault as opposed to 970 cases pertaining to male children.

¹⁵³ See the following websites which supports these findings:

<http://www.cs.nsw.gov.au/facilities/ecsas/men-surv.html> "Survivors of Child Sexual Assault." accessed 4 January 2001 and <http://www.survive.org.uk/PTSD.html> "Post Traumatic Stress Disorder in Rape Survivors" accessed 1 August 2002.



experience the act of penetrative sexual assault *per anum* or *per vaginam* in the same manner as an act of rape.

2.5.4. REASONS FOR UNDERREPORTING

The main reason attributed to the lack of statistics pertaining to male child victims and consequent underreporting of the crime, is the narrow definition of the crime of rape which excludes them as victims.¹⁵⁴ The same reasons why female child victims do not report the penetrative sexual assault is relevant here.

2.6. PENETRATIVE SEXUAL ASSAULT: FEMALE PERPETRATOR

The focus has been predominantly on male perpetrators being the aggressor of penetrative sexual assaults. The question arises whether a female can also be a perpetrator of penetrative sexual assault. It is submitted that this is indeed the case. Why? Sexual assault and more specifically rape is an expression of power. Power is the means which is employed to rape and can serve as proof of lack of consent. The psychological symptoms for child victims of sexual assault have been noted to have an impact on them when they are older and the gender of the victim or perpetrator makes no difference.¹⁵⁵

There is not much data on female perpetrators *per se* due to a lack of reporting. This impacts on the number of case studies available as well as the frequency with which the crime is committed. The different types of possible victims of a female perpetrator of sexual assault will now be examined.

¹⁵⁴ <http://www.rapecrisis.org.za> "Statistics" accessed on 4 August 2002.

¹⁵⁵ See <http://www.cs.nsw.gov.au/facilities/ecsas/men-surv.html> "Survivors of Child Sexual Assault" accessed 4 January 2001. These are fear and loss of safety, feelings of shame and guilt, difficulties around trusting others, problems around intimacy including sexuality, anxiety and flashbacks, feeling in a trance or outside one's self, substance abuse and compulsive gambling, depression, self-harming or suicidal feelings.



2.6.1. PENETRATIVE SEXUAL ASSAULT: FEMALE PERPETRATOR-ADULT MALE VICTIM

Although the rape of a man by a woman is not currently recognised in terms of our South African law, it is a definite possibility. The rapists in prison are normally more *powerful* than their victims, which is analogous to those perpetrators in the larger society who overpower their female victims.¹⁵⁶ The generalisation that men are strong and women are weak is not always true. Female assailants may be larger in stature. Other means used by female assailants to gain submission are verbal pressure, the use of weapons, blackmail, violence and threats of violence.¹⁵⁷ The following real life comparative case studies illustrate the point:

In Dallas, Texas, a 37-year old man was kidnapped at gunpoint by two women and was forced to have sexual intercourse with them in a parking lot.¹⁵⁸

In a tribe in Vakuta in North Western Melanisia, Macdonald discusses how tribal women rape men from other villages. The means employed being chiefly exhibitionism and when an erection is achieved he is held down while another woman squats over him and forcefully makes him enter her.¹⁵⁹

In modern society, male rape by a female assailant is considered physically impossible because some degree of erection is necessary to effect intercourse.¹⁶⁰ The question which is usually asked is:¹⁶¹

¹⁵⁶ Thio, A. "Deviant Behaviour" (1995) on 155.

¹⁵⁷ Thio, A. "Deviant Behaviour" (1995) on 159.

¹⁵⁸ Groth, A.N. "Men who Rape" (1979) on 187 discusses the article of "Female Rapists Sought in Dallas" *Crime Control Digest* 25 March 1977.

¹⁵⁹ See Tollison, C.D. & Adams, H.E. "Sexual Disorders, Treatment, Theory, Research" (1979) on 312 wherein they refer to Macdonald, J.M. "Rape Offenders and Their Victims" (1971).

¹⁶⁰ Tollison, C.D. & Adams, H.E. "Sexual Disorders, Treatment, Theory, Research" (1979) on 312.



If a woman is able to physically overpower a man, is it possible for her to physiologically rape him?

Most people consider it an impossibility in the sense that if an erection is not achieved, sexual intercourse cannot take place.¹⁶² Another assumption is that a man is unable to achieve an erection whilst he is suffering from fear or if he is upset. According to Philip and Lorna Sarrel, who conducted case studies on this question, it was found that it may be true that anxiety can interfere with an initial and sustained erection, but that not all men react the same. Apparently (according to their research findings), 20% of the men in a study conducted by them managed to attain erections while anxious.¹⁶³ In terms of our South African law the slightest penetration is sufficient.¹⁶⁴ The implication thereof is that a male will in actual fact be able to be a victim of penetrative sexual assault with merely the roles being reversed. Be that as it may, even if a man cannot effect an erection he may also be the victim of object, anal or digital penetrative acts which are just as serious and which it is also submitted can comply with a broader definition of the crime of rape.¹⁶⁵

2.6.2. PENETRATIVE SEXUAL ASSAULT: FEMALE PERPETRATOR-MALE CHILD VICTIM

A male child victim can be subjugated to penetrative sexual assault by a female perpetrator. The perpetrator is an older person who sexually abuses a child and

¹⁶¹ See *Willan v Willan* 1960 2 All ER 463 wherein a husband sued his wife for divorce on the grounds of cruelty. The court failed to recognise him as a victim of rape despite the fact that his wife would resort to violence if he did not wish to engage in sexual intercourse with her.

¹⁶² Thio, A. "Deviant Behaviour" (1995) on 155.

¹⁶³ Sarrel, P. & Sarrel, L. "Can a man be raped by a woman?" *Redbook* May 1981 on 94 in Thio, A. "Deviant Behaviour" (1995) on 156. See further Rumney, P. & Morgan Taylor, M. "Recognizing the Male Victim: Gender-Neutrality and the Law of Rape: Part Two" (1997) on 333 wherein it is stated that: *[m]en or boys have responded sexually to female assault or abuse even though the males' emotional state during the molestations have been overwhelmingly negative-embarrassment, humiliation, anxiety, fear, anger or even terror.*

¹⁶⁴ See chapter three.

¹⁶⁵ Thio, A. "Deviant Behaviour" (1995) on 156.



can be another child who abuses a younger child.¹⁶⁶ The South African law has created a statutory offence under which female perpetrators of sexual penetrative assault can be prosecuted.¹⁶⁷ The question arises as to whether there are cases where a female is a perpetrator of sexual assault against male children. This can be answered in the affirmative. Although in the majority of cases boys are abused by another male, for about 10% of male victims, the perpetrator is a female.¹⁶⁸

In one case Shane Seyer was 12 years old when he was sexually assaulted by his babysitter, Colleen Hermesmann, repeatedly over a period of a few months.¹⁶⁹

Ms Barnett mentioned that in one of the cases she dealt with a female perpetrated acts of forced sexual penetration on 12 of her stepson's friends who were between the ages of 13 and 14 years of age, while her stepson was forced to watch. In another case, Ms Barnett counselled a boy who had been the subject of sexual penetrative assault at the hands of his father's girlfriend. The psychological effects suffered were described by Ms Barnett as being exactly the same as those displayed by male child victims of sexual assault by a male perpetrator.

It is evident that the nature of the sexual assault and the effects are the same for victims of penetrative sexual assault, regardless of their gender, and regardless of the gender of the perpetrator. These male child victims could therefore also be classified with their adult counterparts in a broader definition of rape.

¹⁶⁶ Ms Barnett mentioned in the interview that the majority of child abuse cases she has dealt with usually involves a family member.

¹⁶⁷ Section 14 of Act 23 of 1957.

¹⁶⁸ <http://www.cs.nsw.gov.au/facilities/ecsas/men-surv.html> "Survivors of Child Sexual Assault" accessed 1 August 2002.

¹⁶⁹ See <http://www.vix.com/men/rawdeal/seyer.html> "Shane Seyer Case" accessed 4 August 2002. The case citation as referred to is 1993 WL 57722 (KAN.).



2.6.3. PENETRATIVE SEXUAL ASSAULT: FEMALE PERPETRATOR- FEMALE CHILD VICTIM

The sexual assault of a female child or even female adult by a female perpetrator is a relatively unknown quantity with limited empirical research available on the topic. In Massachusetts the definition of rape does not discriminate with regard to the gender of the offender nor the victim. In one particular case, an 18-year old woman was sexually assaulted by two other women who were sentenced to life imprisonment for committing *rape*.¹⁷⁰ This case presupposes that a female, whether adult or child, can in fact be sexually assaulted in the form of rape by a female perpetrator.¹⁷¹ The form in which it is perpetrated can be in the form of unwanted oral intercourse or with the use of objects or hands.¹⁷²

According to Ms Barnett female children can be subjected to sexual assault in the same manner as male children. As with male child victims the perpetrator is an older person who sexually abuses a child and can be another child who abuses a younger child. The South African law has created a statutory offence under which female perpetrators of sexual assault can be prosecuted.¹⁷³

As with male child victims of forced penetrative sexual assault there is no reason why female children cannot also be categorised with adult victims of sexual penetrative assault. Research undertaken thus far indicates that the seriousness of sexual penetrative assault may result in symptoms of Post Traumatic Stress Syndrome and Rape Trauma Syndrome for victims of sexual assault regardless

¹⁷⁰ Groth, A.N. "Men who Rape" (1979) on 187 discusses the article written by Sullivan, T. "Two Women Sent to Prison for Life for Rape" *Boston Herald American* 19 April 1978.

¹⁷¹ Acts of object and digital penetration are envisaged here. See discussion in paragraph 2.7.1 for detail.

¹⁷² It is submitted that the form of oral intercourse can be perpetrated on the child *per vaginam* or *per anum*. The penetration requirement can also be satisfied if the child is forced to perform an act of penetrative oral intercourse on the female perpetrator *per vaginam* or *per anum*. See also Labuschagne, J.M.T. "Hoge Raad 22 Feb 1994, NJ 1994, 379" (1995) on 241.

¹⁷³ Section 14 of Act 23 of 1957.



of the gender of the victim, or perpetrator, and regardless of whether the penetration is *per vaginam* or *per anum*.

2.7. VICTIMS OF PENETRATIVE ORAL, OBJECT AND DIGITAL SEXUAL ASSAULT

As mentioned earlier, sexual assault as a spectrum definition usually includes but is not limited to the crime of rape.¹⁷⁴ If one takes the premise that rape is a violent penetrative act, it is evident that additional victims of sexual assault can be incorporated within a broader definition of rape. Other forms of penetrative forced sexual assault will now be identified.

The present author will attempt to classify oral, object and digital sexual penetration for purposes of this study. Firstly it needs to be determined what are oral, object and digital sexual assaults and secondly, should these forms of sexual assault be classified with other acts of forced penetrative sexual assault under one comprehensive definition?

If one bears in mind that rape is a form of unwanted penetrative sexual intercourse it makes the classification of penetrative sexual assault victims easier in that other recognised forms of sexual intercourse can be easily referred to. What is envisaged with the term oral sexual assault is unwanted oral intercourse.¹⁷⁵ A male or female victim can be forced to perform an act of oral intercourse on a male or female perpetrator. The unwanted oral intercourse can be perpetrated *per vaginam* or, in less likelihood, *per anum* by the perpetrator on the victim. The converse situation would also satisfy the penetration

¹⁷⁴ Odem, M.E. & Clay-Warner, J.(ed) "Confronting Rape and Sexual Assault" (1998) on 213. See also paragraph one.

¹⁷⁵ The recognised terms that are most commonly used are fellatio and cunnilingus. The former is performed on a male and the latter is performed on a female. See further Labuschagne, J.M.T. "Hoge Raad 22 Feb 1994, NJ 1994, 379" (1995) for a discussion of the position in the Netherlands which recognises digital sexual assault as a form of rape. Penetration is not restricted to the use of the male sex organ.

requirement.¹⁷⁶ It is submitted that where the victim has to perform an act of oral intercourse on a man's sex organ, the penetration of the victim's mouth is sufficient for purposes of the penetration requirement.

Penetrative sexual assault by an object is self-explanatory. It entails the forced sexual penetration of an object either *per anum* or *per vaginam*. The term digital sexual penetration envisaged here is one which the present author recommends to categorise acts of penetrative sexual assault using fingers or hands, which are forcefully inserted *per anum* or *per vaginam*. Digital penetrative sexual assault can be perpetrated *per anum* or *per vaginam*. A problem arises with regard to male victims. Both males and females can have digital penetrative sexual assault perpetrated on them *per anum*. A female can be a victim of digital rape *per vaginam*. However, there is no equivalent penetrative assault that can be perpetrated digitally on a male. It can be argued that the forced manual or digital stimulation of a male victim by a female or male perpetrator could be as traumatic and invasive as that of a digital penetrative sexual assault performed on a female.¹⁷⁷ The present author therefore recommends that an exception be made to accommodate males and ensure that the crime of rape is fully gender-neutral by extending the act of digital penetrative sexual assault to incorporate the forced manual or digital stimulation of a male sex organ.¹⁷⁸

¹⁷⁶ The Australian definition in section 4 of the Common Law Consolidation Act 1935 is preferred here. It states that: *cunnilingus is generally held to include the licking or sucking of the vagina or vulva, including the labia majora, with tongue or mouth*. The present author supports this broader view as it incorporates acts which simulate sexual intercourse.

¹⁷⁷ This could also incorporate the converse situation where the victim is forced to perform the same acts on the perpetrators.

¹⁷⁸ In the state of Victoria in Australia object and digital sexual assault is recognised as being penetrative sexual assault and is classified as rape. Section 38 of the Crimes Act 1958 (Victoria) states that a person commits rape if he or she intentionally sexually penetrates that person without their consent.¹⁷⁸ Furthermore in terms of section 35(1) of the aforesaid act sexual penetration includes the penetration by a penis, objects or other parts of a body into the victim's mouth or *per anum* or *per vaginam*. This is evidence that object and digital rape are serious forms of sexual assault.



It is submitted that the forced sexual assault of the mouth by objects or digitally, should not be classified under one comprehensive definition with other categories of penetrative sexual assault victim. The reason being that present author does not equate this form of penetration as being an act of sexual intercourse or simulated intercourse and should consequently not be classified with acts of penetrative sexual assault.

The second question would be whether these victims of oral, object and digital sexual assault should be incorporated with other victims of sexual assault. It is submitted that this should be the case. The same psychological reactions experienced by victims of sexual assault *per anum* or *per vaginam* are mirrored by victims of object and digital sexual assault. Ms Barnett stated that the symptoms experienced by the victims of oral and object rape counselled by her also experienced the same symptoms of Rape Trauma Syndrome and Post Traumatic Stress Disorder as victims of sexual assault *per vaginam* or *per anum*.¹⁷⁹

Sorenson and Siegel reported the following reactions by victims of penetrative sexual assault, in their study conducted in Los Angeles in 1983, such as anger, resistance, social support-seeking, depression and anxiety, fear and guilt, feelings of being dishonoured and spoilt.¹⁸⁰ They further mention that physical threat and an assault outcome involving oral, anal or vaginal intercourse were associated with greater levels of stress.¹⁸¹

¹⁷⁹ These findings correlate with Rumney, P. & Morgan-Taylor, M. "Recognizing the Male Victim: Gender Neutrality and the Law of Rape: Part One" (1997) on 229 and Mezey, G.C. & King, M.B. "Male Victims of Sexual Assault" (1987) on 129.

¹⁸⁰ See Sorenson, S.B. & Siegel, J.M. "Gender, Ethnicity, and Sexual Assault: Findings from a Los Angeles Study" in Odem, M.E. & Clay-Warner, J. (ed). "Confronting Rape and Sexual Assault" (1998) on 215-216. These sexual assault victims include those who are penetrated with finger or fists and with objects.

¹⁸¹ Sorenson, S.B. & Siegel, J.M. "Gender, Ethnicity, and Sexual Assault: Findings from a Los Angeles Study" in Odem, M.E. & Clay-Warner, J. (ed). "Confronting Rape and Sexual Assault" (1998) on 215.



It is therefore evident that victims of forced oral, object or digital sexual penetration experience the same reactions to the assault as victims of the other categories of forced penetrative sexual assault. It is therefore submitted that, in light of the fact that the victim's experiences of forced sexual penetration are shared and the same reactions are mirrored between them, they could in fact be covered by a broader definition of rape. It is therefore clear that if a broader definition were implemented, which is also envisaged by the South African Law Commission, then acts of non-consensual sexual penetration perpetrated by means other than penile penetration will constitute rape.¹⁸² This would include forced sexual penetration, *per anum* or *per vaginam*, envisaging the use of objects, the use of animals as instruments, digital penetration and forced oral intercourse.¹⁸³

2.8. CONSENSUAL SEXUAL INTERCOURSE WHERE THE PERPETRATOR DOES NOT DISCLOSE HIS HIV STATUS

The matter of consensual sexual intercourse taking place where the one party does not disclose his HIV/ AIDS status whilst aware of his or her infection, is an extremely pertinent issue.¹⁸⁴ The main question is whether this victim who is exposed to or infected by the HIV/AIDS virus in this manner is also a penetrative sexual assault victim.

Victims of penetrative sexual assault are at risk as one of the ways in which the virus is transmitted is via blood and bodily fluids such as semen, vaginal and cervical fluids.¹⁸⁵ It is possible that a person exposed to HIV does not become infected. Research has indicated that the HIV virus can only remain alive for 20 – 60 seconds outside bodily fluids.¹⁸⁶ Furthermore, where a person is exposed

¹⁸² "SALC Discussion Paper 85 of 1999".

¹⁸³ This entails penetration by fingers or hands.

¹⁸⁴ This issue need not be specifically limited to deliberate HIV/AIDS infection during consensual intercourse but could also include instances where victims are infected with sexually transmittable diseases under the same circumstances.

¹⁸⁵ See chapter six paragraph 1.2 for detail.

¹⁸⁶ Van Dyk, A.C. "AIDS: The Health Care Challenge" (1993) on 19.

to injuries from sharp objects contaminated with HIV infected blood the risk is estimated at three in 1000.¹⁸⁷ The risk estimated should there be a single unprotected sexual encounter is one in 1000.¹⁸⁸

In a study of 100 Zulu-speaking youth conducted in Kwa-Zulu Natal it was found that there is a propensity for HIV infected youth to deliberately expose their partners to the HIV virus during consensual intercourse.¹⁸⁹ One 25-year old waiter who was interviewed is reported to have said that:¹⁹⁰

You lose hope. You know you will be rejected, you know you're going to die. All you can do is go off and spread it. It's your only hope knowing that you won't die alone. It's the one thing you have to lean on really.

In a Canadian case the perpetrator who was HIV positive was warned to use condoms in all future sexual encounters which he neglected to do.¹⁹¹ Currier had unprotected sexual intercourse with two females and never informed either of his HIV status. They then brought a charge of aggravated sexual assault but the case was dismissed as it was held that consent is only vitiated by fraudulent misrepresentations relating to the nature of the act and the identity of the perpetrator.¹⁹²

¹⁸⁷ See "SALC Discussion Paper 80 of 1999" on 17. *Doe v University of Maryland Medical System Corporation* 50F 3d 1261 (1995) in which the risk is calculated at 1/42 000 if the status of the blood is not established.

¹⁸⁸ See "SALC Discussion Paper 80 of 1999" on 31.

¹⁸⁹ Leclerc-Madlala, S. "Crime in an Epidemic: The Case of Rape and AIDS" (1996) on 31 *et seq.*

¹⁹⁰ Leclerc-Madlala, S. "Crime in an Epidemic: The Case of Rape and AIDS" (1996) on 32. See further on 35 where the myth relating to child virgins and the HIV virus is discussed. This myth propagates that by having sexual intercourse with a child virgin one will rid oneself of the HIV virus by providing an infusion of clean blood.

¹⁹¹ *R v Currier* 1999 127 CCC (3d) 1 (SCC).

¹⁹² *Ibid.* See also Labuschagne, J.M.T. "Vigs, Gevolgsaanspreeklikheid, Bedrieglike Weerhouding van Inligting en die Vraagstuk van Toestemming by Gewelds-en Geslagsmisdade" (2001) on 558. See also *R v Williams* 1931 1 PHH 38 (E); *R v K* 1966 1 SA 366 (A).



The question arises: Should not this victim also be covered under a broad definition of sexual assault and specifically the category of rape? If it is found that the consent is vitiated then it is submitted that this question could be answered in the affirmative. It is present author's view that the consent is indeed vitiated, as consent given under circumstances where the HIV status is deliberately withheld from the victim cannot be viewed as free or valid consent. The consenting person must be aware of the true and material facts regarding the act to which he or she is consenting for it to be valid consent.¹⁹³ An alternate reasons is that can be furnished is that in cases where consent is given, the consent would be invalid on the basis of public policy as one cannot consent to one's own death.¹⁹⁴ A limitation to this proviso is that the perpetrator must in fact *be aware of his HIV/ AIDS infected status*, which makes the act deliberate. The perpetrator's failure to disclose his infected status should be construed as a form of fraud, which negates consent, and the victim would then fall under the same spectrum of sexual assault as all the other categories of sexual assault victim.

A pertinent issue pertaining to the deliberate exposure of a victim to the HIV virus is the provision of treatment. The provision of post exposure prophylaxis (PEP) treatment is a contentious issue. There is no direct evidence that shows that PEP prevents infection but it has been held to be biologically plausible due to efficacy of treatment in occupational exposures.¹⁹⁵ The South African Law Commission recommends that the State covers the cost for victims of sexual violence who have been exposed to the HIV virus which approach is to be favoured.¹⁹⁶ The cost implication of providing treatment would no doubt be extremely high, given the numbers of sexual assault victims and also the numbers of HIV infected persons who can transmit the virus. This high cost can be justified in that the

¹⁹³ Snyman, C.R. "Criminal Law" (1995) on 121.

¹⁹⁴ Snyman, C.R. "Criminal Law" (1995) on 118. See further *R v Peverett* 1940 AD 213 and *S v Hibbert* 1979 4 SA 717 (D).

¹⁹⁵ "SALC Fourth Interim Report on Aspects of the Law relating to AIDS" (2000) on 73.

¹⁹⁶ See clause 22 of the proposed Sexual Offences Bill of 2002.



cost of not providing treatment would have a negative effect on the economy and would adversely affect the system of health care in the country.¹⁹⁷

It is submitted that victims of consensual intercourse who are deliberately exposed to the HIV virus are victims of penetrative sexual assault, as no valid consent exists. The provisions of treatment should accordingly also be extended to these victims of penetrative sexual assault who can also be victims of rape within a broader definition. Due to the complexity of the matter, an entire chapter will be devoted to harmful HIV related behaviour. The position with regard to victims of penetrative sexual assault who are deliberately exposed to the virus and victims of consensual intercourse who are unknowingly and deliberately exposed to the HIV virus will be critically examined. This will be done in order to establish whether these victims should be protected under a broad spectrum definition of rape in terms of the substantive law.¹⁹⁸

3. CONCLUSION

It is evident from available research literature referred to in this chapter that sexual assault victims and perpetrators can in fact be either male or female. This analysis of who can be a rape victim has challenged erroneous beliefs contained within our legal system. It is however a matter of speculation as to how these other victims of rape will be treated in our law by the legal process.

Edwards states:¹⁹⁹

In statute, only men were considered capable of actively committing a sexual offence, although a woman may passively permit an offence to be perpetrated against her. This belief has only recently been challenged.

¹⁹⁷ See "SALC Fourth Interim Report on Aspects of the Law relating to AIDS" (2000) on 67 fn 330.

¹⁹⁸ See chapter six of this study.

¹⁹⁹ "Female Sexuality and the Law" (1981) on 37 and also in Rumney, P. & Morgan-Taylor, M. "Recognizing the Male Victim: Gender Neutrality and the Law of Rape: Part One" (1997) on 331.

The ability or inability to commit a sexual offence is a judgement derived essentially from the doctrine of sex-gender asymmetry in sexual relations, where the male advances while the female acquiesces...The consequence of this is that men become defined as capable of committing sexual offences whilst women are seen only in the role of victims.

The viewpoint that only females can be the victims of rape is to be therefore rejected. As stated previously, both men and women can be the victims of forced sexual penetration effected by objects, fingers, hands and forced oral sex. The extending of the crime of rape to include all victims of non-consensual sexual penetration is suggested for purposes of policy considerations such as reasonableness, equity and justice in light of the fact that research was referred to which has shown that all victims of sexual assault have the potential of experiencing the same physical and psychological damage.²⁰⁰

It is also evident that many issues are shared by the various categories of sexual assault victim, but despite this, certain categories of victim are ignored under outmoded laws and social biases. The differences in legal issues impact directly on the reporting and classification of the crime by male and male child victims. The inadequacy of the current legal definition of the crime of rape and alternate common law offences under which sexual assault victims can claim redress will be highlighted and examined in the next chapter. It will also be ascertained whether all victims of forced sexual penetration can be meaningfully covered under one broad definition of rape in South Africa.

²⁰⁰ The author Brownmiller, S. states in **“Against our will – Men, Women and Rape”** (1975) on 378: *[t]he penis may remain the rapist's favourite weapon, his prime instrument of vengeance, his triumphant display of power, it is in fact not his only tool. Sticks, bottles and even fingers are substituted for the 'natural' thing. And as men may invade women through their orifices, so too do they invade other men...All the acts of sex forced on unwilling victims deserve to be treated in concept as equally grave offences in the eyes of the law, for the avenue of penetration is less significant than the intent to degrade. Similarly, the gravity of the offence ought not to be bound by the victim's gender. It is submitted that this view is to be favoured.*



Evidence proves that all victims of forced sexual penetration experience the event as traumatic, devastating or stigmatizing.²⁰¹ Men suffer an additional stigma in the sense of a double negative with regard to forced anal 'rape'. They have been forcefully sexually penetrated, as with a female victim, and in addition the act is perceived to have occurred in an unnatural manner, especially if the victim is heterosexual. A greater understanding of the problem is needed and it needs to be acknowledged.²⁰² There appears, thus far, to be no legitimate explanation for our law to discriminate in this manner. No person touched by violent forced sexual intercourse will ever be the same again. Why discriminate and victimize the victim further by not recognizing variations of the same act of violation, invasion and psychological damage? It is still rape.

It is also evident from the above research that the experience of rape and its physiological and mental aftermaths are experienced in a similar manner for all victims of rape albeit male, female or child victim of non-consensual penetration *per anum* or *per vaginam* or oral, object or digital non-consensual sexual intercourse. The symptoms are also dependent on the character of the individual and vary from case to case rather than from *one gender to another*. It is imperative that all victims of rape be treated in a like manner. Rape victims need to be focused on as individuals rather than be discriminated on the basis of one's gender, which will accord with the principles of equity, justice and policy considerations so that no individual victim's experience is undermined or belittled in any way by our justice system.

The next chapter will focus on and critically examine whether the current South African common law and statutory crimes offer adequate protection to each of the potential sexual assault victims identified in this chapter. The definitional elements of each crime will be examined to establish which categories of sexual assault are incorporated and whether a single crime exists which could cover the broad spectrum of identified sexual assault victims.

²⁰¹ Barkas, J.L. "Victims" (1978) on 129.

²⁰² Mezey, G.C. & King, M.B. (ed) "Male Victims of Sexual Assault" (1992) on 73.