



# CHAPTER THREE

## CURRENT SOUTH AFRICAN LAW AND VICTIMS OF PENETRATIVE SEXUAL ASSAULT

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### 1. INTRODUCTION

In the previous chapter, a study of the different forms of sexual assault was conducted and a number of categories of sexual assault victim were discerned. In this chapter, the current South African crimes pertaining to sexual offences will be critically examined in order to establish which categories of identified penetrative sexual assault victim are adequately protected and catered for in each crime. The deficiencies of each specific crime will be examined and it will also be established whether any of the current South African crimes can incorporate a broad spectrum of penetrative sexual offences. The elements of each possible crime under which male, female and child victims of sexual assault may be catered for will be critically analysed.

This chapter will unfold as follows: Firstly the common law crimes of rape will be examined to establish whether the definition is sufficient or insufficient in catering



for the identified categories of victim of sexual assault. Key issues that will be focused upon are the penetration requirement, the question of consent and when it is vitiated as well as a possible defence of automatism to a withdrawal of consent. Secondly, the crime of marital rape will be analysed with reference to statutory amendments made. Thirdly, the crime of statutory rape will be examined with reference to specific provisions contained in the Sexual Offences Act.<sup>1</sup> Fourthly, the crime of sodomy will be analysed with reference to groundbreaking case law and lastly the provisions relating to the crime of indecent assault will be addressed.

## **2. EXISTING CRIMES PERTAINING TO PENETRATIVE SEXUAL OFFENCES WHICH ARE CATERED FOR IN TERMS OF SOUTH AFRICAN LAW**

In recent times, the issues of rape and sexual assault have become major concerns in our South African criminal law. Because of the works of various feminist and rape support groups, the contemporary understanding of rape has undergone significant revision. Feminists have rejected traditional legal conceptualisations and have refuted rape myths, placing the blame solely on the attacker.<sup>2</sup>

Definitions of rape differ considerably in various countries, but usually involve sexual activity under conditions of force, violence, fraud, or where the victim is a person who is unable to consent because he or she is drugged, intoxicated, unconscious, mentally unsound or under the age of 12 years.<sup>3</sup> In terms of South African law only a man can rape a woman.<sup>4</sup> However in countries such as Britain, the United States of America and in the state of Victoria in Australia, a

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<sup>1</sup> Section 14 of Act 23 of 1956.

<sup>2</sup> Odem, M.E. & Clay-Warner, J. "Confronting Rape and Sexual Assault" (1998) on 44.

<sup>3</sup> Tollison, C.D. & Adams, H.E. "Sexual Disorders, Treatment, Theory, Research" (1979) on 307.

<sup>4</sup> See chapter one. Snyman, C.R. "Criminal Law" (1995) on 424. See also paragraph 2.1.1. of this chapter.



man can also be raped. In the latter two instances, the definition of rape is not limited to penile penetration but includes other forms of penetration such as oral, anal, digital and object penetration.<sup>5</sup>

Before proceeding further with this chapter, the position with regard to persons who are party to customary tradition, and mentally impaired persons, needs to be mentioned. These mentioned persons would also fall within the ambit of the identified categories of sexual assault victim.

Although there is no generally accepted definition, Olivier defines customary law as follows:<sup>6</sup>

*Customary law denotes those legal systems originating from African societies as part of the culture of particular tribes or groups that have continued to exist, supplemented, amended and or superseded in part by:*

- \* *Changing community views and the demands of a changing world;*
- \* *Contact with societies that function within other legal backgrounds;*
- \* *Contact with and influenced by other legal systems; and*
- \* *Direct and indirect influence of foreign (non-indigenous) government structures.*

The Law of Evidence Amendment Act of 1988 defines indigenous law as:<sup>7</sup>

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<sup>5</sup> Labuschagne, J.M.T. "Hoge Raad 22 Feb 1994,NJ 1994, 379" (1995) on 241. This article discusses the position regarding rape in the Netherlands as found in the phrase '*seksueel binnendringen van het lichaam*'. The crime of rape includes digital penetration and is not limited to genital penetration.

<sup>6</sup> Olivier, N.J.J. "Regspluralisme in Suider-Afrika" (1987) on 2-3; See also Olivier, N.J.J. *et al* "Indigenous Law" (1995) on 186.

<sup>7</sup> Section 1(4) of Act 45 of 1988.



*The Black law or customs as applied by the Black tribes in the Republic or in territories which formerly forms part of the Republic.*

Customary law is problematic with regard to the definition and application thereof. There is nothing substantive in writing and each ethnic group lives according to its own ever changing customs.<sup>8</sup> A general principle is that the *paterfamilias* (head of the family) liability is limited to customary delicts.<sup>9</sup> There is, however, provision made in certain legislation, that where there is a conflict between legislation and a customary legal rule, the *statutory measure will take precedence*.<sup>10</sup> This implies that despite customary provisions, a person who participates in customary law can still be held liable for criminal acts. As regards criminal jurisdiction of the courts of chiefs and headmen the only crimes that may be adjudicated upon are:<sup>11</sup>

- \* All common law crimes save for those listed in the 3<sup>rd</sup> schedule of the Black Administration Act.<sup>12</sup>
- \* All customary law crimes except the 3<sup>rd</sup> schedule crimes.<sup>13</sup>
- \* All statutory crimes as appearing in a notice set out by the minister, excluding the 3<sup>rd</sup> schedule crimes.<sup>14</sup>

<sup>8</sup> See "SALC Discussion Paper 85 of 1999" on 231 in which the submissions of the SAPS Child Protection Units in Kwa-Zulu Natal are discussed.

<sup>9</sup> This crime originally comprised sexual wrongs, assault and abduction. See Olivier, N.J.J. "Privaatreg van die SA Bantoetaalsprekendes" (1989) on 273-417. See also Olivier, N.J.J. *et al* "Indigenous Law" (1995) on 99 and 147.

<sup>10</sup> See Section 1 of the Law of Evidence Amendment Act 45 of 1988 where all courts are entitled to apply customary law; See Olivier, N.J.J. *et al* "Indigenous Law" (1995) on 141.

<sup>11</sup> See Olivier, N.J.J. *et al* "Indigenous Law" (1995) on 191. See further Bekker, J.C. "Seymour's Customary Law in Southern Africa" (1989) on 15 – 26.

<sup>12</sup> Act 38 of 1927.

<sup>13</sup> See in general R v Mazibuko 1945 NPD 276; R v Dumezweni 1961 2 SA 751 (A).

<sup>14</sup> Government Gazette 3226 GN 1376, 30 July 1943. Also referred to by Olivier, N.J.J. *et al* "Indigenous Law" (1995) on 191.



Consequently the crimes of rape, murder, assault with intent to cause grievous bodily harm and culpable homicide are excluded from the jurisdiction of customary law.

Certain problems arise as customary law differs from culture to culture, and also the fact that customary law is an oral tradition and passed on by word of mouth and consequently there has not been much information accumulated in written substantive form.<sup>15</sup> As Pieterse aptly states:<sup>16</sup>

*Although cultural practices can be legislatively regulated, such regulation tends not to impact on the lives of those who continue living according to these practices as they have always done. Law in itself does not hunt down its offenders. Legislative measures have never proved particularly adequate in modifying the ways of a traditional community for which state law has little significance, not least because it takes a long time before people become aware of the content of legal provisions. Legislation in itself does not change cultural perceptions or alter the general way in which interpersonal relationships are lived.*

Furthermore there is a difference between human rights and customary law as the former focuses on the rights of the individual, whilst the latter concentrates on the community.<sup>17</sup> The rights of women in terms of the Bill of Rights are continually weighed up against the right to participate and enjoy in the cultural life of one's choice.<sup>18</sup> Women are viewed as being of lesser importance in a patriarchal society and their purpose is viewed to be that of procreation. Because they are viewed as inferior, they are compelled to submit to their

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<sup>15</sup> See Labuschagne, J.M.T. "Die Suid Afrikaanse Verkrachtingsreg: 'n Strafrechtsvergelykende Onderzoek" (1972) on 11 as regards problems relating to substantive customary law.

<sup>16</sup> Pieterse, M. "Beyond the Reach of Law? HIV, African Culture and Customary Law" (2000) on 428.

<sup>17</sup> Pieterse, M. "Beyond the Reach of Law? HIV, African Culture and Customary Law" (2000) on 429 and n 5.

<sup>18</sup> See section 30 and 31 of the Constitution Act 108 of 1996; See further Bennet, T.W. "The Equality Clause And Customary Law" (1994).



husbands and consequently traditional African society does not recognize marital rape as such.<sup>19</sup>

The African tradition<sup>20</sup> is remarkably different from westernisation and is apparent from a cultural context.<sup>21</sup> A child's interests may be subordinate to those of the family.<sup>22</sup> Certain customary practices may actually amount to assault.<sup>23</sup>

The United Nations approach to harmful cultural practices is that:<sup>24</sup>

*States parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.*

In contrast, the African Charter on the Rights and Welfare of the Child provides that:<sup>25</sup>

*States parties to the present charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular:*

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<sup>19</sup> See Pieterse, M. "Beyond the Reach of Law? HIV, African Culture and Customary Law" (2000) on 435.

<sup>20</sup> Each ethnic group had its own legal system. See in general Seymour, W.M. "Native Law and Custom" (1911). See further Seymour, S.M. "Customary Law in South Africa" (1982).

<sup>21</sup> Labuschagne, J.M.T. in "Die Suid Afrikaanse Verkragtingsreg: 'n Strafrechtsvergelykende Onderzoek" (1972) on 8, says of customary law that: *Die volk, met sy eie etniese kern, simboliseer die breë sosio-organiese immateriele kultuurstruktuur. Die reg, as aspek van so 'n struktuur, ontstaan nie alleen vanuit die volk nie, maar staan ook binne juridies – territoriale geldingsgrense in 'n ordeningsdiens tot die volk. Dit word nie voorgegee dat daar nie gemeenskaplike regsreëls by verskillende volkere kan bestaan nie. Waar daar kultuurooreenkomste bestaan kan daar ook gelykluidende regsreëls wees... Die verskillende Bantoevolkere (etniese groepe) het elkeen hul eie regstelsel gehad.* This is indicative of the fact that customary law is not uniform and that customary rules and practices differ from culture to culture.

<sup>22</sup> Bennett, T.W. "Human Rights and African Customary Law" (1995) on 96.

<sup>23</sup> For example initiation circumcisions or sexual abuse.

<sup>24</sup> Article 24 (3) of the United Nations Convention on the Rights of the Child (1989).

<sup>25</sup> Article 21 of the African Charter on the Rights and Welfare of the Child (1990).



- (a) *those customs and practices prejudicial to the health and life of the child.*
- (b) *those customs and practices discriminating to the child on ground of sex or other status.*

Education is still needed to help change society's perceptions towards rape in both our South African criminal law and in customary law. Women who have been covered under the traditional definition have been the target for increased awareness, but other victims of sexual assault including men, need to be included in the process of consciousness raising.

With regard to mentally impaired persons who are sexually assaulted, it is submitted that they can be meaningfully incorporated into any of the categories of sexual assault victim identified in the previous chapter and no specific attention will therefore be expended on a detailed analysis of these persons.

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.<sup>26</sup> Currently the only remedies available to male victims of sexual penetrative assault is to lay a charge of either assault with the intent to cause grievous bodily harm, non-consensual sodomy or indecent assault. The latter category which incorporates anal, oral, digital and object penetration may however be experienced by the victims of such forced penetrative sexual assault as rape. As mentioned in chapter two of this study, from a victim's point of view the violation may well be more traumatic both psychologically and physiologically.<sup>27</sup>

The South African Law Commission has proposed a broader definition of rape which was introduced in a Discussion Paper on sexual offences<sup>28</sup> and

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<sup>26</sup> 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.

<sup>27</sup> Hall, C. "Rape, The Politics of Definition" (1998) on 78.

<sup>28</sup> "SALC Discussion Paper 85 of 1999."



supplemented with a further Discussion Paper in 2002.<sup>29</sup> The focus of these Discussion Papers is on violence against women and children. The proposed amendments will be examined as well as the alternate offences under which victims of sexual assault are currently forced to claim redress under should the crime perpetrated upon them not comply with the definition of rape.

## **2.1 COMMON LAW RAPE**

The common law definition of rape is the only legal definition of rape in South Africa and caters only for female victims of forced sexual penetration *per vaginam*. It is therefore a limited definition which fails to take into consideration that rape is a problem that needs to be dealt with on an individual, social, cultural, legal, economic and political level.<sup>30</sup> The common law definition will be critically examined to establish which category of sexual assault victim is covered by the definition and whether the definition as it stands is sufficient or not.

### **2.1.1. THE ELEMENTS OF RAPE**

In terms of current South African law, the generally accepted definition of rape, in terms of the common law, is the **unlawful and intentional sexual intercourse with a woman without her consent.**<sup>31</sup>

Snyman defines the crime of rape as follows:<sup>32</sup>

*Rape consists in a male having unlawful and intentional sexual intercourse with a female without her consent.*

<sup>29</sup> "SALC Discussion Paper 102 of 2002."

<sup>30</sup> Groth, A.N. "Men who Rape" (1979) on 11.

<sup>31</sup> Burchell, J. & Milton, J.R.L. "Principles of Criminal Law" (1997) on 490; Snyman, C.R. "Criminal Law" (1995) on 424. See also Bailey, F.L. & Rothblatt, H.B. "Crimes of Violence: Rape and Other Sex Crimes" (1991) on 130 –133; Also Temkin, J. "Rape and the Legal Process" (1987) on 25.

<sup>32</sup> Snyman, C.R. "Criminal Law" (1995) on 424.





Hunt defines the crime of rape in similar terms:<sup>33</sup>

*Rape consists in intentional unlawful intercourse with a woman without her consent.*

Burchell and Milton define the essential elements of rape as being:<sup>34</sup>

*(1) unlawful (2) sexual intercourse (3) with a woman (4) without consent  
(5) fault*

The South African Law Commission defines rape as follows:<sup>35</sup>

*Rape consists in a man having unlawful intentional sexual intercourse with a woman without her consent.*

Only a woman can currently be raped in terms of our law and she must be alive at the time of penetration.<sup>36</sup> If a narrow approach is followed then the essential elements are:

- (1) Deed**
- (2) Unlawfulness**
- (3) Fault**

For purposes of this study the current definition of rape is defined as *the unlawful and intentional sexual intercourse with a woman by a man without her consent.*

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<sup>33</sup> Hunt, P.M.A. "South African Criminal Law and Procedure II: Common Law Crimes" (1996) on 435. See Hall, C. "Rape: The Politics of Definition" (1982) on 67.

<sup>34</sup> Burchell, J. & Milton, J.R.L. "Principles of Criminal Law" (1997) on 490.

<sup>35</sup> "SALC Discussion Paper 85 of 1999" on 69.

<sup>36</sup> Snyman, C.R. "Criminal Law" (1995) on 425. See *ibid* on 73-74 for discussion.

#### 2.1.1.1. DEED

This crime is committed only if there is *penetration*<sup>37</sup> of the female vulva by the male penis.<sup>38</sup> The slightest penetration is sufficient and pregnancy and emission of semen is unnecessary. If a man persists with sexual intercourse after the woman has withdrawn consent he could also be found guilty of rape.<sup>39</sup>

Anal, oral, digital and object penetration are thus excluded from the current narrow definition of rape. This means that the first element being the description of the act excludes male and female adult victims of penetrative sexual assault *per anum* both inside and outside of marriage, male and female children of penetrative sexual assault *per anum*, male victims of penetrative sexual assault by a female perpetrator, male, female and child victims of oral, digital or object penetrative sexual assault and victims of consensual intercourse where the one party is infected with HIV/ AIDS and deliberately withholds this information from the victim.

#### 2.1.1.2. UNLAWFULNESS

Prior to the Prevention of Family Violence Act,<sup>40</sup> which has also since been amended by the Domestic Violence Act 116 of 1998,<sup>41</sup> it was not unlawful for a man to rape his wife as acts of forced penetrative sexual assault were not identified as rape. The aforementioned provisions now ensure that a husband can be convicted of raping his wife.

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<sup>37</sup> See Labuschagne, J.M.T. "Die Opkoms van 'n Abstrakte Penetrasie Begrip" (1997). Also Labuschagne, J.M.T. "Die Penetrasie Vereiste by Verkragting Heroorweeg" (1991) on 148.

<sup>38</sup> Snyman, C.R. "Criminal Law" (1995) on 425; Joubert, W.A. *LAWSA* vol 6 (1981) on 247.

<sup>39</sup> Burchell, J. & Milton, J.R.L. "Principles of Criminal Law" (1997) on 492. The case of *R v Handcock* 1925 OPD 147 does however provide support for the view that if consent existed at the commencement of the act, then this is the crucial moment which determines whether rape has been committed.

<sup>40</sup> Act 133 of 1993.

<sup>41</sup> Act 116 of 1998.



The irrebuttable presumption that a boy under the age of 14 years is incapable of committing rape was repealed by the Law of Evidence and the Criminal Procedure Amendment Act.<sup>42</sup> The result is that a boy under the age of 14 years who has criminal capacity can commit rape.<sup>43</sup> In terms of statutory law if a man has intercourse with a girl below the age of 12 years he commits rape, as well as an offence in terms of the Sexual Offences Act.<sup>44</sup> Any consent by the girl is immaterial.<sup>45</sup> If in terms of tribal custom, rape is permitted under certain circumstances, the courts will not regard it as justified.<sup>46</sup>

### 2.1.1.3. FAULT

Rape can only be committed intentionally. According to the principle of contemporaneity, intention (culpability) must co-exist simultaneously with the unlawful act.<sup>47</sup> The man must intend to have sexual intercourse without the woman's consent. *Dolus eventualis* is sufficient, which entails that the state needs to prove that he foresaw the possibility of a lack of free and conscious consent, and reconciled himself to that fact and nevertheless proceeded to have intercourse. With regard to girls under the age of 12 years old, intoxicated, drugged or sleeping women, as well as mentally impaired women, the man must be aware of or at least foresee the possibility of the circumstance which renders consent invalid. This serves as proof of the absence of consent in the various circumstances.<sup>48</sup>

<sup>42</sup> Section 1 of Act 103 of 1987.

<sup>43</sup> Snyman, C.R. "Criminal Law" (1995) on 426. See in general, Milton, J.R.L. "Unfair Discrimination on the Grounds of Gender, Sex...(or) Sexual Orientation: How the Sexual Offences Act does It All" (1997) on 297.

<sup>44</sup> Section 14 (1)(a) of Act 23 of 1957. In *R v Z* 1960 1 SA 739 (A) the appellant was found guilty of contravening section 14(1)(a).

<sup>45</sup> Snyman, C.R. "Criminal Law" (1995) on 346.

<sup>46</sup> Burchell, J. & Milton, J.R.L. "Principles of Criminal Law" (1997) on 491.

<sup>47</sup> Snyman, C.R. "Criminal Law" (1995) on 135.

<sup>48</sup> Snyman, C.R. "Criminal Law" (1995) on 427. Joubert, W.A. *LAWSA* vol 6 (1981) on 250. See also *R v K* 1958 3 SA 420 (AD); *R v Z* 1960 1 SA 739 (AD). See further "SALC Discussion Paper 85 of 1999" on 70.



## 2.1.2. VICTIMS

In terms of the traditional definition of rape only a man can be the perpetrator and a female a victim of common law rape.<sup>49</sup> This entails that the following categories of penetrative sexual assault victim are excluded:

- \* male and female adult victims of penetrative sexual assault *per anum* both inside and outside of marriage;
- \* male and female children of penetrative sexual assault *per anum*;
- \* male victims of penetrative sexual assault by a female perpetrator;
- \* male, female and child victims of oral, digital or object penetrative sexual assault;
- \* victims of consensual intercourse where the one party is infected with HIV/AIDS and deliberately withholds this information from the victim.
- \* females are excluded from the possibility of being perpetrators of rape.

The above categories of sexual assault victim are therefore distinguished and denied redress on the basis of the method of penetration. Therefore, an important aspect directly linked to the common law crime of rape is the *penetration requirement*.

An historical perspective on the requirement of penetration makes it evident that in *Roman law*, it was the head of the family (*bonus paterfamilias*) who decided as to whether there would be further steps taken to prosecute the crime of rape.<sup>50</sup> The various sexual crimes were classified under *stuprum*, which could cover

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<sup>49</sup> See paragraph 2.1.1.

<sup>50</sup> See discussion in Labuschagne, J.M.T. "Die Penetrasie Vereiste by Verkragting Heroorweeg" (1991) on 148 – 149.



violent sexual intercourse, in terms of which both women and men could be the victim, and with non-consensual anal intercourse applying to the latter.<sup>51</sup>

In *Germanic law*, rape was viewed as a wrong committed against the father or husband, rather than the victim herself, this being a continuation of patriarchal rape laws.<sup>52</sup>

In the *Roman-European Law*, sexual intercourse was not a requirement for rape. The focus was rather on the act of violence used by the accused to have sexual intercourse with the victim.<sup>53</sup>

It is therefore evident that more categories of penetrative sexual assault victim were afforded redress in Roman times, and even in the Roman European law the focal point of the crime of rape was the element of violence. This is not the case with our current South African legal definition of rape and the perception of rape also differs from tribe to tribe in South African *customary law*.

Amongst the *South Sotho*, rape was committed if a woman was compelled by violence or threat of violence to submit to sexual intercourse. The focus was on *violence and not on the absence of consent, nor penetrative intercourse*.<sup>54</sup> To misrepresent, as in the case of *R v C*, that a person is the husband of the woman would be sufficient for the crime of rape.<sup>55</sup> However, a man could not commit the crime on his wife. Delictual liability could follow as a consequence of rape.

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<sup>51</sup> *Ibid.*

<sup>52</sup> See Wilda, W.E. "Das Strafrecht Der Germanen" (1829) on 830-842 as referred to in Labuschagne, J.M.T "Die Penetrasie Vereiste by Verkracting Heroorweeg" (1991) on 149.

<sup>53</sup> See Labuschagne, J.M.T "Die Penetrasie Vereiste by Verkracting Heroorweeg" (1991) on 150.

<sup>54</sup> See Labuschagne, J.M.T. "Verkracting in die Inheemse Reg" (1994) on 89 in which it is stated that to overpower a woman (or even to throw her down) would mean that rape was committed.

<sup>55</sup> 1952 4 SA 117 (O).



In the *North Sotho* tribes, rape was committed if *violence* was present and absence of penetration or consent was not a requirement, but merely an aggravating factor.<sup>56</sup> The guardian of a woman could punish the perpetrator with a whipping and the act of rape could also lead to delictual liability. Compensation was usually the award of animals such as goats or cattle.

Amongst the West Sotho, rape was considered a violent crime and *the absence of consent is also not an element* of the crime of rape.<sup>57</sup>

With regard to the Nguni, rape was regarded by some authors as being in much the same vein as a civil case, whereas others, were convinced that it was a criminal case.<sup>58</sup> The general consensus was that it was *based on violence* and punishment was treated as and meted out in the form of a fine. The latter was either paid to the husband or the father depending on the marital status of the victim. Men could not commit rape on their wives and moreover, men had a power of chastisement in terms of which sexual intercourse could be enforced.

Amongst the *KwaNdebele*, rape was seen as a *violent crime* and lack of consent to the crime of rape was not a requirement.<sup>59</sup> However *penetration* was a requirement. A man could not rape his own wife. There also existed an additional crime covering sexual intercourse between young boys or girls, which was regarded in much the form of an unnatural sexual act.

The *Venda* tribes viewed rape as a crime in terms of which *extra-marital* sexual intercourse with a man/ woman occurred *without consent*. A man could thus not rape his wife. Furthermore, the slightest penetration was sufficient to establish liability. Consent was a defence, but because of the lack of a woman's sexual autonomy, the father or husband could give consent. Interestingly enough, if a young girl who had reached puberty gave consent, rape was still committed, which accords with our modern day laws.

<sup>56</sup> Labuschagne, J.M.T. "Verkragting in die Inheemse Reg" (1994) on 89.

<sup>57</sup> *Ibid* for detail.

<sup>58</sup> See Labuschagne, J.M.T. "Verkragting in die Inheemse Reg" (1994) on 87 for discussion.

<sup>59</sup> See discussion in Labuschagne, J.M.T. "Verkragting in die Inheemse Reg" (1994) on 88.



It is evident that from a comparison of the different tribal approaches followed that the crime of rape is perceived to be a violent crime. Disparity predominantly arises with regard to the nature of the act which is also the problem with regard to the legal definition of the crime of rape. The customary law therefore does not cater for all the categories of penetrative sexual assault and does not provide a solution to the question of a broader definition of rape. In addition, there are a number of cases where intra-familial abuse occurs, in the sense of girls being raped by their fathers or other family members and as such, may even be considered to be a norm. In terms of indigenous law, a husband could not commit rape on his wife, although it is a crime in terms of current South African Law. Clearly these acts are covered in the legal definition of rape and cannot be excused as a customary practice.<sup>60</sup> The tribal leaders are not vested with powers or jurisdiction to adjudicate rape as a crime although it may be adjudicated as a delictual act.

As mentioned earlier, the penetration<sup>61</sup> requirement with regard to *rape* in South African law is exclusive and entails penetration of the vulva by the penis,<sup>62</sup> however slight, and no emission of semen is necessary.<sup>63</sup> The crime of *sodomy*

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<sup>60</sup> The customary law position can be criticised for the following reasons:

- \* Except for the Venda people who have had the most liberated and broad definition, *only a woman* could be raped.
- \* Marital rape was not a recognized crime.
- \* Consent as defence could be given by either the father or husband and not the woman herself because of the notion that a woman's reproductive capacity belongs to another.
- \* The crime of rape is not viewed in customary law in as serious a light as with our criminal law, in the light of the fact that the matter could be resolved with the mere paying of a fine (even if it was a hefty fine).

<sup>61</sup> Definitions in other countries have moved away from the idea that rape is merely a narrow definition of non-consensual intercourse between a man and a woman, to a broader gender-neutral offence, focusing on violence rather than the sexual element, as well as the issue of consent.

<sup>62</sup> Burchell, J. & Milton, J.L.R. "Principles of Criminal Law" (1997) on 491; Snyman, C.R. "Criminal Law" (1995) on 425; Hall, C. "Rape, The Politics of Definition" (1988) on 68.

<sup>63</sup> As mentioned, rape consists of the *slightest* penetration of a female organ by a male organ. See Labuschagne, J.M.T. "Die Penetrasie Vereiste by Verkragting Heroorweeg" (1991).



traditionally entailed penetration of the anus of a male by the penis of another male, however slight, and no emission of semen was necessary.<sup>64</sup>

Penetration of a female *per anum* and the forced anal penetration of a male would therefore not be covered by the common law definition of rape but would constitute indecent assault, which would also incorporate acts of object penetration.

Problems of categorization thus occur and the law appears to be fragmented. The question arises as to whether it would not be viable to place all three recognised crimes of forced penetrative sexual assault under one broad definition of rape, so that all victims of penetrative sexual assault are treated equally.<sup>65</sup> Case law has favoured the approach that rape can occur anally and that the punishment should be the same as in the case of vaginal rape.<sup>66</sup> A further question arises: What should happen to a male 'raped' by a woman? Would he be left without a remedy or would it fall under the lesser offence of indecent assault and discriminate between males and females?<sup>67</sup> Furthermore it cannot be said that anal or other forms of penetration are less humiliating, grave or psychologically and physiologically damaging than vaginal penetration.<sup>68</sup> The penetration requirement will now be examined.

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<sup>64</sup> Burchell, J. & Milton, J.L.R. "Principles of Criminal Law" (1997) on 634, Snyman, C.R. "Criminal Law" (1995) on 341.

<sup>65</sup> The species of sexual assault referred to being indecent assault, non-consensual sodomy and the common law definition of rape.

<sup>66</sup> See *S v M* 1990 1 SACR 456 (N) on 457 wherein it states that the victim was subjected to acts of forced penetrative oral intercourse as well as forced penetrative sexual assault *per anum* with the male perpetrator. Didcott J comments on this aspect, but does not take the point further as the defendant was charged with indecent assault and awarded six years imprisonment.

<sup>67</sup> Indecent assault is referred to as a lesser offence here as it incorporates less serious non-penetrative sexual offences and the provisions of section 51 of the Criminal Law Amendment Act 105 of 1997 providing for minimum sentences for rape, are not available under similar circumstances to the crime of indecent assault.

<sup>68</sup> Hall, C. "Rape, The Politics of Definition" (1988) on 78.





Sexual penetration of whatever form is undoubtedly deeply invasive and is a violation of the intimate self. As was shown in chapter two of this study, victims of forced penetration describe their experience as 'taking something special away from them' and of 'feeling invaded'.<sup>69</sup> Male responses to the trauma of sexual violation are very similar to that of females.<sup>70</sup>

In the case of **S v M Didcott** J remarks that:<sup>71</sup>

*It is not clear to us... whether to have anal intercourse with a woman without her consent amounts to the crime of rape.*

The reasons for the traditional definition of rape i.e. a proprietary interest and protection of virginity, are antiquated in modern times and the definition needs to be broadened so that men and women are equally protected. From a legal perspective it would make sense to regard rape as any manifestation of forcible sexual penetration, in whatever means the perpetrator intends to affect or simulate intercourse.<sup>72</sup> In setting guidelines, there must be some form of penetration and lack of consent, regardless of the gender of the victim or the perpetrator. This would reflect more realistically that anal or object sexual violation can be as traumatic as violation with a penis.<sup>73</sup> There are similarities in all the types of penetrative, forced sexual violations as well as the impact that it has on the victim. These similarities will be able to be meaningfully encompassed by the term rape with the defining elements being:

<sup>69</sup> Quina, K. & Carlson, N.L. "Rape, Incest and Sexual Harassment" (1989) on 29.

<sup>70</sup> Quina, K. & Carlson, N.L. "Rape, Incest and Sexual Harassment" (1989) on 6.

<sup>71</sup> 1990 1 SACR 456 (N) on 457F-G. See in contrast the Australian State of Victoria, where their broad definition of the crime of rape includes the penetration of a penis into the mouth or anus of another. It includes object penetration into the anus or vagina of a person as well as penile-vaginal penetration. It is not gender specific Temkin, J. "Rape and the Legal Process" (1987) on 30.

<sup>72</sup> Groth, A.N. "Men who Rape" (1979) on 3.

<sup>73</sup> Rumney, P. & Morgan-Taylor, M. "Recognizing the Male Victim: Gender Neutrality and the Law of Rape: Part One" (1997) on 206. Thio, A. "Deviant Behaviour" (1995) on 156.

- \* Lack of consent
  
- \* Penetration of whatever means.

All other non-penetrative sexual acts could be punished as indecent assault. A question that is often asked is: 'If a condom is used, is the perpetrator still a perpetrator of forced penetrative sexual assault *per anum* or *vaginam*?' The present author is of the opinion that this is indeed the case as sexual assault has still been committed. The victim has no choice whether they will be sexually assaulted or not, but merely whether they will be protected against sexually transmitted diseases or pregnancy. Therefore the use of condoms should have no impact on conviction at all but perhaps be a mitigating factor in the matter of sentencing. The victims who are forcefully sexually penetrated *per vaginam* or *per anum* would therefore remain unaffected and would still be classified as victims of sexual assault.

### 2.1.3. CONSENT

Currently rape can only take place if the woman has not consented to the intercourse.<sup>74</sup> Whether she has consented is a question of fact.<sup>75</sup> Absence of consent is an element of the act, which means that if the woman does in fact consent to the act of sexual intercourse, the man does not act for purposes of this crime. Consent could be considered as a ground of justification which excludes unlawfulness, although it will not operate as a ground of justification if against the *boni mores* of society. For example, a girl under the age of 16 years cannot give valid consent to sexual intercourse in terms of the provisions of the Sexual Offences Act.<sup>76</sup>

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<sup>74</sup> In the United States the test used is an objective one as regards the issue of consent. In 1988, the standard in most states rested on that of proven lack of consent, where the victim had to resist. See Burgess, A.W. "Rape and Sexual Assault II" (1988) for commentary on 290.

<sup>75</sup> Joubert, W.A. LAWSA vol 6 (1981) on 248; Snyman, C.R. "Criminal Law" (1995) on 427. See *S v J* 1989 1 SA 525 (A).

<sup>76</sup> Section 14(1) of Act 23 of 1957.



Physical resistance is an indicator of a lack of consent and some legal systems incorporate this into their definition, as well as the use of force on the part of the man to overcome the woman's resistance.<sup>77</sup> This was also required under the Roman Dutch law. However, South African law, under the influence of English law, has widened the offence so that intercourse should have occurred without consent, irrespective of whether it was due to force, threat of force, incapacity to consent, fear or fraud.<sup>78</sup> Therefore mere submission is not equated with consent.<sup>79</sup> Consent need not be express. If the victim was overcome by fear to the extent that she never offered outward resistance, consent will be lacking.<sup>80</sup> For consent to be a defence it must be freely and consciously given by the woman.<sup>81</sup> A distinction needs to be drawn between consent, submission and consent induced by fear,<sup>82</sup> fraud,<sup>83</sup> duress, age, lack of mental capacity,<sup>84</sup> intoxication and sleep.<sup>85</sup>

- \* *Duress*: Where a woman is forced to submit by way of fear or threats to submit to intercourse, rape is committed.<sup>86</sup>
  
- \* *Age*: Public policy dictates the irrebuttable presumption that girls under the age of 12 years are incapable of consenting to intercourse, and although they might understand the nature of the act and consent to<sup>87</sup> sexual intercourse, the consent is negated.<sup>88</sup>

<sup>77</sup> Burchell, J. & Milton, J.R.L. "Principles of Criminal Law" (1997) on 493.

<sup>78</sup> *Ibid.* See also "SALC Discussion Paper 85 of 1999" on 74 - 80.

<sup>79</sup> Joubert, W.A. *LAWSA* vol 6 (1981) on 248.

<sup>80</sup> Snyman, C.R. "Criminal Law" (1995) on 426.

<sup>81</sup> *Ibid.*

<sup>82</sup> See *R v C* 1952 4 SA 117 (O); *S v S* 1971 2 SA 591 (A).

<sup>83</sup> It may relate to the nature of the act or identity of the perpetrator. *R v C supra*.

<sup>84</sup> The case of *R v Ryperd Boesman* 1942 1 PHH 63 (SWA).

<sup>85</sup> See the cases of *R v Ryperd Boesman* and *R v C supra*.

<sup>86</sup> *S v S* 1971 2 SA 591 (A). A policeman was convicted of rape because the victim believed that the former would harm her. It was held that fear was sufficient to vitiate consent.

<sup>87</sup> See discussion in Labuschagne, J.M.T. "Geslagsmisdade" (1981) on 23.

<sup>88</sup> Snyman, C.R. "Criminal Law" on 346-347 wherein it discusses the position of intercourse with a girl under the age of 12 years is rape and also an offence in terms of Section 14 of the Sexual



- \* *Fraud*: Consent is vitiated where the fraud induces error as to the *identity* of the person or the *nature* of the act.<sup>89</sup> It is not vitiated with regard to age, wealth, health, state of affection or as to the result of the fraud or its consequences. (For example, the belief that intercourse would make a person fertile).<sup>90</sup>
- \* *Mentally impaired persons*: A person needs to have a certain degree of mental capacity for consent to be valid. A test submitted is whether the woman is "so devoid of reason that she cannot exercise any judgement at all on the question whether she will consent or dissent from intercourse."<sup>91</sup>

It has been stated in case law that 'consent produced by mere animal instinct is sufficient consent.'<sup>92</sup> If she is so devoid of reason that she cannot exercise any judgement with regard to consent it amounts to rape. Consequently, mentally impaired persons are also particularly vulnerable to sexual offences and their position is regulated by Section 15 of the Sexual Offences Act 23 of 1957. Other factors which may negate consent on the part of the victim are:

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Offences Act 23 of 1957. However the person will normally be charged with the more serious offence of rape.

<sup>89</sup> See also the case of *R v Diana Richardson* 1998 2 CR (R) 201. Fraud as to identity was committed, as the defendant misrepresented that she was lawfully qualified to practise as a dentist after she was expelled from the General Dental Council and continued practising. It was found that *consent relates to the whole identity* and that the defendant acted fraudulently in presenting herself, as that which she was not, thus presenting grounds of assault. In the case of *Bolduc and Bird v R* 1967 63 DLR 2<sup>nd</sup> 82 SCC. A medical practitioner did a vaginal examination with a certain Mr Bird being present, who consequently observed the entire procedure, under the pretence of being a medical intern. It was held that the fraud did not relate to the nature of the act, but to Bird's identity, but because the latter did not touch the complainant, he was found not guilty of unlawful assault; See also *R v C* 1952 4 SA 117 (O).

<sup>90</sup> See in general *R v K* 1966 1 SA 366 (A).

<sup>91</sup> See Labuschagne, J.M.T. "Geslagsmisdade" (1981) on 23. See further *R v Ryperd Boesman* 1942 1 PHH 63 (SWA).

<sup>92</sup> See *R v Ryperd Boesman* 1942 1 PHH 63 (SWA).



- \* *Intoxication*: in the sense that there must be such a state of insensibility that the person is rendered incapable of understanding what he/ she is doing.<sup>93</sup>
- \* *Sleep*: unless there was previous consent. Intention includes *dolus eventualis*, which means that a person foresaw that intention was probably lacking and reconciled themselves to the consequences thereof.<sup>94</sup>
- \* *Insensibility*: includes conditions such as being hypnotized, intoxication and being drugged.

Consent is therefore excluded by:<sup>95</sup>

- \* Fear induced by violence or threats.
- \* Intercourse with a sleeping woman (unless consent was given while she was awake).
- \* Intercourse with a woman who is intoxicated, under hypnosis or drugs (her consent is invalid).
- \* Mental defects to the extent that she is unable to give consent.
- \* Fraud relating to identity or the nature of the act (not the results of the act).

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<sup>93</sup> R v K 1958 3 SA 420 (A) in which Judge Schreiner on 421 states that it is more difficult in case law as there are wide degrees of disability and that if a person was only slightly intoxicated and consented, it would be difficult to establish whether the person was in fact raped or not. It is further said that should a man induce a woman to take intoxicants to make her more pliant, it is not rape.

<sup>94</sup> See R v C 1952 4 SA 117 (O).

<sup>95</sup> Snyman, C.R. "Criminal Law" (1995) on 426 and 427; Joubert, W.A. LAWSA vol 6 (1981) on 249. See S v J 1989 1 SA 525 (A).



- \* An arbitrary age limit, which is below the age of 12 years where the girl is irrebuttably presumed to be incapable of consenting to intercourse.

An important aspect relating to the element of consent is the *withdrawal of consent* and the *defence of automatism*.<sup>96</sup> There exists a viewpoint that should a woman withdraw her consent<sup>97</sup> after penetration has occurred and the accused does not desist, rape is committed.<sup>98</sup> It may be argued that automatism can be raised as a defence in this scenario.<sup>99</sup> Automatism is the legal defence that arises where no act is assumed because of involuntary mechanical behaviour.<sup>100</sup>

The author Snyman says on the topic:<sup>101</sup>

*These types of behaviour are often somewhat loosely referred to as 'automatism', since the muscular movements are more reminiscent of the mechanical behaviour of an automaton than of the responsible conduct of a human being whose bodily movements are subject to the control of his will. It really does not matter much in what terms the conduct is described; the question is simply whether it was voluntary, in other words, whether the person concerned was capable of subjecting his bodily movements or his behaviour to the control of his will.*<sup>102</sup>

<sup>96</sup> This may also be termed rape by omission. See *R v Kaitamaki* 1980 NZLR 60 also in "SALC Discussion Paper 85 of 1999." Certain case law namely *R v Handcock* 1925 OPD 147 has favoured a different approach and it was held in this case that should consent be withdrawn and the accused refuses to desist, rape is not committed.

<sup>97</sup> This view is supported by the South African Law Commission in "SALC Discussion Paper 85 of 1999" on 80 and by Milton, J.R.L. "South African Criminal Law and Procedure: Volume II" (1996) on 458.

<sup>98</sup> See contrary viewpoint as expounded in the case of *R v Handcock* 1925 OPD 147.

<sup>99</sup> Snyman, C.R. "Criminal Law" on 53 - 55.

<sup>100</sup> Snyman, C.R. "Criminal Law" on 53. Examples are sneezing, an epileptic fit, somnambulism and a black out. Case examples are *S v Stellmacher* 1983 2 SA 181 (SWA); *S v Johnson* 1969 1 SA 201; *R v Du Plessis* 1950 1 SA 297 (O).

<sup>101</sup> Snyman, C.R. "Criminal Law" on 54.

<sup>102</sup> Snyman also distinguishes between two types of automatism, namely sane and insane automatism. In the case of *sane automatism*, the onus is on the state to prove that the act was

It is the present author's view that a defence of automatism should not be upheld in rape cases unless the accused pleads insane automatism. If the latter is pleaded the accused will not escape the consequences of his crime. The defence is usually used as a last endeavour to try and escape conviction and the accused will consequently have to sow the seed of doubt as to whether he acted voluntarily. It may further be argued that a person is capable of controlling his will, no matter what the circumstances.

The present author is not in favour of a defence of sane automatism being raised in the abovementioned cases of rape as it would cause grave injustice to the victim and society, as the criminal would be released to society and may commit the crime again. A hypothetical example may be used:

*The accused may engage in sexual intercourse with the victim.<sup>103</sup> The victim then pleads with the accused to stop as he starts to deliberately and intentionally hurt her in the process. The accused refuses to desist and is charged with rape and raises a defence of sane automatism. He succeeds with the defence and is released as a free man.*

If the defence of sane automatism is supported for rape it would encourage accused persons to try and use the defence. In a society where the aforementioned crime is on an epidemic scale it would not be beneficial to society as a whole and would undermine the justice system.

The present author is however in favour of a defence of insane automatism, because the accused will either be found guilty and be removed from society, or the defence will succeed and the latter will receive treatment, with the focus being on rehabilitation.

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voluntary and if the defence succeeds, the defendant is released. In the case of *insane automatism*, the onus is on the defendant to prove that he suffered from mental illness, with the latter being detained in a mental institution if successful.

<sup>103</sup> Bearing in mind that in if there were threats causing fear to the victim then mere submission does not equal consent.



#### 2.1.4. CRITICISM OF COMMON LAW RAPE

The South African gender specific definition of rape is insufficient. It excludes the majority of the possible categories of victim of sexual assault. It denies protection of males who have been raped by female perpetrators both inside and outside of marriage; female victims of forced sexual penetration *per anum* both inside and outside of marriage; male and female children of forced penetrative sexual assault *per anum* and *per vaginam*; male, female and child victims of sexual assault who have been anally, orally, digitally and object raped and victims of consensual sexual intercourse where the perpetrators HIV/ AIDS status was deliberately withheld from them.

It protects part of the female population, excluding women who have been raped by other women (orally, digitally or with an object), and male victims. It is difficult to justify and even conceive of the idea why some female victims are more important than other persons.<sup>104</sup> The trauma of the experience touches them all and by broadening the definition, it will promote gender equality as well as equal protection by the law. Victims will not be forced to seek redress in what is perceived to be an unsatisfactory 'lesser' offence of indecent assault, nor to remain silent due to feelings that nobody, including the legal justice system, wants to take them seriously.<sup>105</sup> The issue of statutory rape,<sup>106</sup> which is applicable to girls under the age of 16 years, could then also apply to boys and afford them equal protection under a gender-neutral definition.<sup>107</sup>

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<sup>104</sup> Rumney, P. & Morgan-Taylor, M. "Recognizing the Male Victim: Gender Neutrality and the Law of Rape: Part One" (1997) on 211.

<sup>105</sup> Groth, A.N. "Men who Rape" (1979) on 187. He states that men are reluctant to report their rape by a woman for fear of being thought of as being 'less of a man'. Note further that indecent assault may have as harsh sentences imposed as with the crime of rape but that it is perhaps perceived to be a lesser crime in the sense that victims are not given the same status as the victims of the crime of rape and their fates are not seen to be as serious as the crime of rape or else they would not be denied redress under the aforesaid crime.

<sup>106</sup> Section 14 of the Sexual Offences Act 23 of 1957.

<sup>107</sup> Snyman, C.R. "Criminal Law" (1995) on 427.





The criticism of the current definition of rape will now be addressed with regard to specific issues.

#### 2.1.4.1. GENDER-SPECIFIC

Rape can only be committed by a male perpetrator on a female victim. A woman cannot commit rape and can merely be an accomplice to its perpetration.<sup>108</sup> A husband can be found guilty of raping his wife, and a boy under the age of 14 years, can also be found guilty of committing the crime of rape.<sup>109</sup> The female victim must be alive.

As stated previously, rape originated as a form of property crime and was perpetrated against the victim's guardian who alone could claim compensation for the 'theft of her virginity'.<sup>110</sup> Over the ages rape has developed to encompass other categories of women such as non-virgins and married women. Rape is now the unlawful and intentional sexual intercourse *by a man with a woman* without her consent. Why then extend the definition?

As Rumney and Morgan-Taylor state:<sup>111</sup>

*[g]ender specificity emphasizes the rights of some female rape victims to the exclusion of all other victims of rape. Therefore gender-specific laws can only be acceptable if the rights of some female victims are more important than the rights of everyone else.*

In terms of the Constitution,<sup>112</sup> everyone is to be protected equally by the law and there is to be no discrimination on account of gender.<sup>113</sup> The rights may only

<sup>108</sup> See paragraph 2.1.2. for detail. See also *S v Jonathan* 1987 1 SA 633 (A) 643.

<sup>109</sup> Snyman, C.R. "Criminal Law" (1995) on 425.

<sup>110</sup> Hall, C. "Rape, The Politics of Definition" (1988) on 79.

<sup>111</sup> Rumney, P. & Morgan-Taylor, M. "Recognizing the Male Victim: Gender Neutrality and the Law of Rape: Part One" (1997) on 211.

<sup>112</sup> Act 108 of 1996.

<sup>113</sup> Section 9(1) and 9(3) of Act 108 of 1996.



be limited in terms of section 36 of Act 108 of 1996 if it is 'reasonable and justifiable'. It is difficult to comprehend how it can be justified, when some victims are favoured above others. The question being: Are men, as well as other categories of rape victims, entitled to equal protection? They are unable to claim protection under the present definition of rape and are forced to gain redress under certain lesser offences, whilst their wrong may be greater than that of rape. Another factor pertaining to a gender-neutral definition of rape is whether women would be disadvantaged as a result. The answer to this can only be no. They would still have their remedy, but other victims who are disadvantaged by the exclusion will be equally protected and their wrong will be placed on an equal footing.<sup>114</sup>

The present author is of the view however, that the current definition can be effectively applied to men raped by women. It sufficiently covers the technicalities of the problem, in the sense that penetration of the penis into the vagina is required, *no matter how slight* and emission of semen is not required.<sup>115</sup> *Slight penetration is physiologically easily achieved if the man is overpowered and no arousal as such is therefore required.* The United States case of **People v Liberta** supports this viewpoint.<sup>116</sup> The facts in this case were as follows:

A man was charged with raping and sodomizing his wife. He argued that the crime of rape violated the equal protection clause of the United States of America's Constitution, as it discriminated with regard to the gender of the perpetrator and the victim. The State argued that the definition of rape was constitutional as its objective was to protect women from men, as well as the fact that it is physiologically impossible to rape a man. The legal question asked was

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<sup>114</sup> Rumney, P. & Morgan-Taylor, M. "Recognizing the Male Victim: Gender Neutrality and the Law of Rape: Part One" (1997) fn 215. They also state that: *[t]here are a number of negative consequences for those people excluded. Victims often have to gain redress under laws with lower sentences than for rape. Victims may not have the benefit of procedural protections in court of the kind offered to rape victims; victims may feel aggrieved at the fact that the law appears to take their experiences less seriously than those legally designated as rape.*

<sup>115</sup> Burchell, J. & Milton, J.R.L. "Principles of Criminal Law" (1997) on 492.

<sup>116</sup> 64 NY 2d 152; 485 NYS 2d 207 (1984); Rumney, P. & Morgan-Taylor, M. "Recognizing the Male Victim: Gender Neutrality and the Law of Rape: Part One" (1997) on 210.



whether it is unconstitutional to discriminate between men and women with regard to rape?

In an appeal the New York Court of Appeals held the gender specific rape statute to be unconstitutional as men and women were not equally protected. It dismissed the argument that men cannot be raped by women. The argument is based upon the assumption that, unless a man is sexually aroused, he cannot engage in sexual intercourse and if he is, he is consenting thereto. The court said that:<sup>117</sup>

*[sexual] intercourse, occurs upon any penetration however slight. This degree of contact can be achieved without a male being aroused and thus without his consent.*

#### 2.1.4.2. RAPE IS ANATOMICALLY SPECIFIC

In terms of current South African legislation male, female and child victims of anal, oral, digital and object forced sexual penetration, have no redress under the narrow common law definition of rape.<sup>118</sup> Research referred to in chapter two of this study has shown that that the trauma experienced by these victims are as great as that experienced by rape victims covered under the traditional definition.

Gender-neutrality will ensure that victims of forced penetrative acts will be treated equally with regard to protection of the law and gender, as is envisaged by the Constitution.<sup>119</sup> Gender-neutrality will not reduce the rights of victims under the existing narrow definition, but will serve to increase protection of those victims of

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<sup>117</sup> 67 ALR 4<sup>th</sup> 1127 on 1130; Burchell, J. & Milton, J.L.R. "Principles of Criminal Law" (1997) on 492n56; Rumney, P. & Morgan-Taylor, M. "Recognizing the Male Victim: Gender Neutrality and the Law of Rape: Part One" (1997) on 210.

<sup>118</sup> With the enactment of the new Sexual Offences Bill, the position will obviously change. Children are given limited protection in terms of section 14 of Act 23 of 1957.

<sup>119</sup> Section 9(1) and 9(3) of Act 108 of 1996.



penetrative sexual assault who do not enjoy protection under the current narrow definition of rape.<sup>120</sup>

#### 2.1.4.3. ABSENCE OF CONSENT AS AN ELEMENT OF THE CRIME OF RAPE

If compared with the common law crimes of theft and assault, an accused can be held criminally liable without *proving* the victim's absence of consent to the aforementioned crimes, since the absence of consent is assumed. The idea that absence of consent is not an essential element, is supported by Burchell and Milton.<sup>121</sup>

The common law crime of rape consisted of violence and sexual intercourse, whereby the victim's will or resistance was overcome by violence or even threat of violence.<sup>122</sup> The act of violence would thus take place against the victim's will who would despite efforts of resistance, be overpowered. Gradually, the concept broadened and the absence of consent, whether tacit or express, became the decisive factor.<sup>123</sup>

The present author is of the opinion that *violence* should be distinguished with regard to *inducing submission*, as opposed to rape being a *violent crime*. It is necessary to distinguish between these two concepts, as too much emphasis is placed on the element of lack of consent, and violence is seen as being merely an inducing factor. The real essence of an act of rape is violence, which should not be overlooked.

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<sup>120</sup> Rumney, P. & Morgan-Taylor, M. "Recognizing the Male Victim: Gender Neutrality and the Law of Rape: Part One" (1997) on 215.

<sup>121</sup> "Principles of Criminal Law" (1997) on 198 –199.

<sup>122</sup> Violence consisted of force or threat of force as supported by various Dutch writers – See discussion in Labuschagne, J.M.T. "Nie-Konsensuele Geslagsmisdade: 'n Misdadssistematiese Herwaardering" (1981) on 30.

<sup>123</sup> Threats which induced consent to intercourse could negate the consent and amount to rape. See in this regard *S v Volschenk* 1968 2 PHH 283 (D).



#### 2.1.4.4. THE PENETRATION REQUIREMENT

Although it is wider than in the past, the South African law, by only recognizing penile-vaginal intercourse, is still not broad enough. The common law definition of rape excludes male and female adult victims of penetrative sexual assault *per anum* both inside and outside of marriage, male and female children of penetrative sexual assault *per anum*, male victims of penetrative sexual assault by a female perpetrator, male, female and child victims of oral, digital or object penetrative sexual assault and victims of consensual intercourse where the one party is infected with HIV/ AIDS and deliberately withholds this information from the victim.<sup>124</sup> Whilst one class of victim is properly protected, the majority of the identified categories of penetrative sexual assault victim are not covered.

The author Hall states:<sup>125</sup>

[t]he existence of the natural/unnatural dichotomy cannot explain why anal or oral penetration of an unwilling victim is categorized as less grave an offence than vaginal penetration. *From a victim's perspective such unnatural penetration may well be more traumatic than vaginal rape and may cause considerably more physical injury.*

As Burchell and Milton state:<sup>126</sup>

*[a]nal intercourse with a man without his consent has all the reprehensible features of a heterosexual rape. Nevertheless the law does not recognize such conduct as consisting of the common law crime of rape. It is, of course, punishable as sodomy.*

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<sup>124</sup> See chapter two. See further Rumney, P. & Morgan-Taylor, M. "Recognizing the Male Victim: Gender Neutrality and the Law of Rape: Part One" (1997) on 211.

<sup>125</sup> Hall, C. "Rape, The Politics of Definition" (1988) on 78.

<sup>126</sup> "Principles of Criminal Law" (1997) on 492 fn55.



Since the abolition of consensual sodomy, forced anal intercourse would be classified as a species of indecent assault. The present author is of the opinion that a male can be raped as penetration, however slight is sufficient. This would entail that a woman could in fact be a perpetrator of rape and thus a wife could also be found guilty of committing marital rape.

The South African Law Commission was faced with the question as to whether there should be an all-encompassing offence, which would cover all aspects of penetration and also non-penetrative offences.<sup>127</sup>

There exists criticism against the penetration requirement, which can be summarized as follows:

- \* The complainant is subject to *cross-examination* and trauma herself, with specific regards to how deep the penetration was and what exactly happened. Cross-examination on sensitive issues like this causes the criminal trial to become a secondary source of victimization for the complainant.
- \* Few cases are reported as a result of the trauma of recalling the experience in detail, with the *focus on the victim* rather than the perpetrator, which is found to be a deterrent to reporting.
- \* Another viewpoint offered as to why the penetration requirement is unacceptable is because it is based on the *historical subordination* of women, where the crime was an infringement of the patriarchal rights of the father and husband. This may be attributed to the fact that she was

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<sup>127</sup> See "SALC Discussion Paper 85 of 1999" on 81. The Law Commission refers to various viewpoints such as the Tshwarang Legal Advocacy, who are against a distinction between penetrative and non-penetrative acts based on the view that children are effected by physical and emotional damage in different ways and that if the amount of damage is relevant at sentencing stage. The present author disagrees in the sense that it will lead to discrepancy in sentencing, especially if a child is damaged more emotionally if fondled. You cannot have the same sentences as the *seriousness* of the crimes differ.



perceived to be an asset in her father's estate, of which the value of such 'asset' would be diminished on the occasion of rape.

The present author is of the opinion that there should be a distinction between penetrative and non-penetrative offences. The reason being that if the penetration requirement is adequately broadened to incorporate various acts such as vaginal, anal, object, digital and oral rape, then the less serious offences such as fondling can fall under non-penetrative offences, or in specific, indecent assault, which is a different category of crime. Furthermore, one should not forget that there are graver consequences to penetrative acts, for example, pregnancy, more physical trauma and the risk of AIDS or other sexually transmittable diseases. By retaining the concept of rape with a broader penetration requirement, the sentences will remain high and be seen as equally serious whilst non-penetrative offences could perhaps be retained under indecent assault, and would thus *preserve legal certainty and promote equal sentences*.

## **2.2. MARITAL RAPE** <sup>128</sup>

For centuries the rape of a spouse was not recognised as a crime in South Africa, as was the position in the United States and Britain, and in terms of South African common law non-consensual sexual intercourse without consent between a husband and wife was not unlawful.<sup>129</sup> Hall states in this regard:<sup>130</sup>

*Rape laws and marriage laws were twin mechanisms in the legal regulation of men's rights over female sexuality and reproductive powers.*

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<sup>128</sup> Various terms are used to describe this phenomenon such as "rape in marriage", "marital sex abuse", "wife rape". The latter term is preferred by some authors, as it implies that it is not a gender-neutral offence. Other authors state that the term "spousal rape" confers the idea that a woman can also be the perpetrator (*own emphasis*). See Russell, D.E.H "Rape in Marriage" 1982 on 9. See Le Roux, J. "Geweldsmisdade binne Huweliksverband" (1994) on 177.

<sup>129</sup> See chapter four for detail. See further Odem, M.E. & Clay-Warner, J.C. "Confronting Rape and Sexual Assault" (1998) on 35 – 38.

<sup>130</sup> "Rape: The Politics of Definition" (1988) on 79-80.



Rape in the home was one of the least acknowledged crimes and as Temkin states:<sup>131</sup>

*The Policy Advisory Committee did not see marital rape as a serious social problem.*

Home was thus a dangerous place for wives who would be available for repeated attacks over a period of months or even years, a danger which most other rape victims would not have to endure.<sup>132</sup>

The elements will now be examined to establish which category of sexual assault victim is covered and whether the statutory regulations which have replaced the common law definition are sufficient or not.

### 2.2.1. THE ELEMENTS OF MARITAL RAPE

In the past, marital rape was not criminalized and a husband could only be charged with indecent assault or some other lesser offence.<sup>133</sup> This was repealed by section 5 of the Prevention of Family Violence Act,<sup>134</sup> which has also since been amended by the Domestic Violence Act, which states that:<sup>135</sup>

<sup>131</sup> Temkin, J. "Rape and the Legal Process" (1987) on 41. See also Criminal Law Revision Committee Report (1980) paragraph 32.

<sup>132</sup> See Temkin, J. "Rape and the Legal Process" (1987) on 40 for discussion - In India in 1983, 258 women were burnt to death in dowry related deaths in New Delhi.

<sup>133</sup> Burchell, J. & Milton, J.R.L. "Principles of Criminal Law" (1997) on 491. **S v Ncanywa** 1992 1 SACR 209 (CK).

<sup>134</sup> Act 133 of 1993.

<sup>135</sup> Act 116 of 1998. Sections 1, 2, 3, 6, and 7 have been repealed by the Domestic Violence Act 116 of 1998. The act defines a 'domestic relationship' in section 1 to include husbands and wives as well as partners who are cohabiting, children, family members related by consanguinity, persons engaged, dating or involved in a customary relationship and persons who share the same residence. Any of the aforementioned persons can be subjected to a variety of acts covered by the definition of 'domestic violence' in section 1, which includes but is not limited to physical, emotional, psychological or sexual abuse. The implication is that both husbands and wives can be the victims of sexual assault perpetrated by the other.



*[n]otwithstanding anything to the contrary contained in any law or in the common law, a husband may be convicted of the rape of his wife*

The definition of marital rape as it stood was still discriminatory in the sense that a male spouse cannot be a victim of the crime of marital rape.

For the purposes of this study *marital rape is defined in accordance with the provisions of Section 5 of the Prevention of Family Violence Act<sup>136</sup> and as amended and supplemented by the Domestic Violence Act.<sup>137</sup>*

#### 2.2.1.1. DEED

On appeal, the Ciskei Court of Appeal in **S v Ncanywa**<sup>138</sup> confirmed the common law position that a man cannot be found guilty of rape on his wife.<sup>139</sup> This decision is in support with the narrow approach followed in South African customary law which is supportive of the view that a man cannot be found criminally liable for the rape of his wife.<sup>140</sup>

In other countries such as Britain (at the time of the aforementioned case), the same view was not shared and the rule that a man could not be found guilty of the rape of his wife was rejected.<sup>141</sup>

Section 1 of the Domestic Violence Act provides the following broader definitions which are relevant to marital rape:<sup>142</sup>

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<sup>136</sup> Act 33 of 1993.

<sup>137</sup> Act 116 of 1998.

<sup>138</sup> 1993 1 SACR 297 (CkA).

<sup>139</sup> This decision overruled the court a quo's decision. See criticism of the Ciskei Court of Appeal case in Van der Merwe, D. "Marital Rape, Judicial Inertia and the Fatal Attraction of the Roman-Dutch Law" (1993) on 674.

<sup>140</sup> See detail in par 2.1.2 of this chapter.

<sup>141</sup> R v R 1991 4 All ER 481.

<sup>142</sup> Act 116 of 1998.



*“complainant” means any person who is or has been in a domestic relationship with a respondent and who is or has been subjected or allegedly subjected to an act of domestic violence, including any child in the care of the complainant.*

*“domestic relationship” means a relationship between a complainant and a respondent in any of the following ways:*

*(a) they are or were married to each other, including marriage according to any law, custom or religion.*

The definition of domestic violence includes physical and sexual abuse and the former includes *any act* or threatened act of physical violence towards a complainant. By implication it could include all forms of sexual assault perpetrated by one spouse or person involved in a domestic relationship, upon the other. The distinction between male perpetrator and female victim has therefore been replaced to include both male and female sexual assault victims inside of marriage.

#### 2.2.1.2. UNLAWFULNESS

Prior to the statutory regulations it was not unlawful for a man to have forced sexual intercourse with his wife as such acts were not classified as being rape. The origin of the exemption that a man could not rape his lawful wife can perhaps be traced to the dictum by the Chief Justice of England in the 17<sup>th</sup> Century, Matthew Hale which was referred to earlier this study.<sup>143</sup>

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<sup>143</sup> See chapter two in this regard. He stated that: *[t]he husband cannot be found 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 this kind unto the husband which she cannot retract.* As published in History of the Pleas of the Crown 1736 and referred to by Russell, D.E.H. **“Rape in Marriage”** (1982) on 17. See Pieterse, M. **“Beyond the Reach of Law? HIV, African Culture and Customary Law”** (2000) on 435 where it is mentioned that traditional African society does not know of, nor acknowledge the concept of marital rape.



Marital rape needed to be incorporated within the definition of rape. The gravity of the forcible act of sexual intercourse of a wife without her consent could not therefore justify the denial of redress merely because the rape victim happened to be married to the perpetrator.<sup>144</sup>

### 2.2.1.3. FAULT

Marital rape falls within the ambit of common law rape and the same provisions regulating unlawfulness are applicable to marital rape.

### 2.2.2. VICTIMS

As mentioned earlier, until the mid-nineties a husband could not be found guilty of raping his wife in terms of common law.<sup>145</sup> The position was rectified with the introduction of the Prevention of Family Violence Act<sup>146</sup> and Domestic Violence Act.<sup>147</sup> The introduction of the former Act recognised the category of female sexual assault victim inside of marriage only. The latter Act provides no distinction between male and female penetrative sexual assault victims inside of marriage and all forms of sexual assault are recognised as being worthy of protection *inter alia* forced sexual assault *per anum* or *per vaginam*, oral and digital intercourse. These acts are not recognised by the statutory regulations as a rape *per se*.

It is also not clear whether the category of sexual assault victim, where the partner deliberately withholds information regarding their HIV/AIDS infected

<sup>144</sup> See in general, Labuschagne, J.M.T. "Verkragting binne Huweliksverband" (1991) on 402; Labuschagne, J.M.T. "Misdade tussen Gades" (1980) on 39 – 50; Barrie, G. "Husband and Wife: Rape" (1992) on 237; Borkowski, M. "Marital Violence: The Community Response" (1983); See also *S v Ncanywa* 1992 1 SACR 209 (Ck) on 212. Heath J was in favour of the marital exemption being abolished and gives a thoughtful and enlightened judgement. It was however rejected on appeal.

<sup>145</sup> See Le Roux, J. "Geweldsmisdade binne Huweliksverband" (1994) on 173 *et seq* for detailed discussion.

<sup>146</sup> Act 133 of 1993.

<sup>147</sup> Act 116 of 1998.



status, is included here and would obviously be a shortfall to these statutory regulations. It would seem that the victim of marital rape still remains the wife of the perpetrator husband only in terms of section 5 of the Prevention of Family Violence Act which has not been repealed by the later Act.<sup>148</sup>

The statutory regulations are therefore deficient as they do not provide for the rape of a husband by his wife nor for the category of sexual assault victim where the HIV status of the perpetrator is deliberately withheld. Other forms of penetrative sexual assault are not mentioned and therefore not categorised by the Act as being rape.

### 2.2.3. CONSENT

Previously the irrevocable consent fiction was used.<sup>149</sup> This can, and has been, criticized as a party cannot be expected to agree to sexual intercourse every time one party demands and expects it, whilst the other has no such intentions. This would deny the autonomy of the individual.<sup>150</sup>

A further question arises to justify the irrevocable consent fiction: 'If an individual refuses conjugal rights and is 'raped' by the spouse, why not obtain a divorce?'

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<sup>148</sup> Act 133 of 1993.

<sup>149</sup> This means that married women were not allowed to refuse sexual intercourse when their husbands demanded it. By marriage the wife was irrevocably consenting to all acts pertaining to conjugal rights. See *Holborn v Holborn* 1947 1 All ER 32; *Foster v Foster* 1921 152 TLR 70 – a wife can refuse unreasonable demands; As from 1991, in Britain, the husband was no longer immune from the rape of his wife. See *R v C* 1991 1 All ER 755; See also Edwards, S.S.M. "Sex and Gender in the Legal Process" (1996) on 186.

<sup>150</sup> See the discussion by Mphahlele, M.S. in "From Marital Rape to a Crime: Does that Solve the Problem?" (1993) on 14 in which he states: *Are the spouses supposed to agree to intercourse every time or on every occasion when they are about to indulge in the act? If that is the case, one can make the deduction that the parties can still marry each other and exclude sexual intercourse by agreement. Evidently, the prevention of two women or two men from marrying each other is also rendered senseless by this possibility.*



*The origin of rape has never been focused on choice of sexual freedom, but has been focused on proprietary interests.*<sup>151</sup>

## 2.2.4. CRITICISM OF MARITAL RAPE

The present author submits that the crime of marital rape is insufficient *per se* in that husbands are not recognised as victims of the crime of marital rape. The common law definition of rape does not alter their plight. Various criticisms have been offered both for and against the incorporation of marital rape into the common law definition of rape. These criticisms will be individually examined.

### 2.2.4.1. ARGUMENTS AGAINST THE INCORPORATION OF MARITAL RAPE INTO THE COMMON LAW DEFINITION OF RAPE

There are two arguments that have been suggested against the incorporation of marital rape within the common law definition of rape. One argument that may be offered is that *to allow marital rape to be included in the common law, may lead to false reporting*. The present author believes that this possibility can occur in any event and one need not be married to misuse the legal process.

The second argument that has been suggested is that *if the spouse is too violent, then a charge of indecent assault may be laid or a divorce obtained.*<sup>152</sup> Firstly,

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<sup>151</sup> See Hall, C. "Rape. The Politics of Definition" (1988) on 79 - 80 wherein she states that the victim's freedom of choice to sexual intercourse or not was never the focal point of rape laws. She says that: *The origin and development of rape law demonstrated that it was never designed to protect the victim's freedom of choice, but the proprietary interests of her legal guardian... Rape laws and marriage laws were twin mechanisms in the legal regulation of men's rights over female sexuality and reproductive powers.*

<sup>152</sup> See *R v Gumede* 1946 1 PHH 68 N on 87; Also *S v Ncanywa* 1992 1 SACR 209 (Ck) on 235 in which Heath, J states that the fiction of consent and even irrevocable consent by a wife to intercourse with her husband has no foundation in law and also offends against the *boni mores* of society. He further mentions in this regard that: *The husband and wife have in modern society become equal partners with full dominion over their own bodies. To withhold consent to sexual intercourse unilaterally, may be contrary to marital obligation to allow intercourse by the other partner in the marriage and may affect the continued existence of the marriage relationship*



this view belies the notion that rape is a crime and not a civil remedy. Secondly, although indecent assault is a crime with severe penalties, it does not explain or justify why a spouse should seek relief under a different crime, as one less competent verdict then exists. The victim could have access to divorce on the basis of a violent crime and thus both a civil and criminal action can be instituted. Thirdly, if there is no bar to a charge of indecent assault being laid against a spouse, then the same should be applicable to rape and the theory of irrevocable consent has been rejected in case law.<sup>153</sup>

#### 2.2.4.2. ARGUMENTS IN FAVOUR OF THE INCORPORATION OF MARITAL RAPE INTO THE COMMON LAW DEFINITION OF RAPE

Two arguments are raised against the incorporation of marital rape within the common law definition. Firstly it is argued that *consent is the essential element* distinguishing lawful sexual intercourse from rape, which is why the notions of the husband's immunity is a fallacy as it suggests that rape in marriage is non-existent or not serious. The second argument offered is that the marital contract does not condone sexual violence and it is consequently *contra bonis mores* for a victim to be forced to submit to her/ his spouse's sexual demands.<sup>154</sup>

Should marital rape, incorporating both male and female victims of sexual penetrative assault, be included within a broader spectrum definition of rape? The present author believes that this should be the case, as the reporting of the crime lies in the hands of the victim although some might not want to report the crime because of feelings of love toward the assailant. There is no physical

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*between the parties. The marital obligation does not however, entitle the husband to take the law into his own hands by having sexual intercourse with his wife against her will.*

<sup>153</sup> See **S v Ncanywa** 1992 1 SACR 209 (Ck).

<sup>154</sup> See **S v Ncanywa** 1992 1 SACR 209 (Ck) 235 in which Heath J criticizes the irrevocable consent fiction as being *contra bonis mores*. He further mentions that the injured spouse has a civil address. Naturally the same situation in the converse could be applicable to husbands; See also Labuschagne, J.M.T "Nie Konsensuele Geslagsmisdade: 'n Misdaadsistematiese Herwaarding" (1981) at 19. See the following cases which supported the submission that a husband could not be found guilty of raping his wife; **R v M** 1953 4 SA 393 (A); **R v K** 1958 3 SA 420 (A); **S v H** 1988 2 SA 750 (N).

difference between the rapist who rapes a stranger or a family member. All rapists, whether male or female, are guilty of a heinous crime and the fact that spouses may be a victim over an extended period of time, should be an aggravated factor as regards sentencing.

It is submitted that the deficiency in the statutory regulations need to be addressed as only one category of identified penetrative sexual assault victim is identified and catered for. This is the category of female penetrative sexual assault victim inside of marriage. Male victims of penetrative sexual assault inside of marriage are ignored and other forms of penetrative sexual assault are not specifically included in these statutory provisions. Further the category of sexual assault victim where the HIV/ AIDS status is deliberately withheld is not provided for in the statutory regulations. It is proposed that the victims of marital rape also be included in one broad definition of rape.

### **2.3. STATUTORY RAPE: SECTION 14 OF THE SEXUAL OFFENCES ACT 23 OF 1957**

As is evident from Chapter Two of this study, the rate of child abuse is horrific and on the incline.<sup>155</sup> In as far back as 1996, the Child Protection Unit dealt with 35 838 cases of crimes against children and the increase has been estimated at 36% per year since 1993.<sup>156</sup> Statistics of officially reported cases during the mid-nineties (1995-1996) were as follows:<sup>157</sup>

- \* Rape of children increased from 10 037 to 13 859 (increase in percentage to a staggering 38%).

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<sup>155</sup> Schurink, E. "Statistics of Shame: South African Child Protection System Disintegrating" (1996) on 6. See also "Staggering Statistics On Child And Teenage Sex" *Pretoria News* 9 September 1995 on 5.

<sup>156</sup> See "SALC Issue Paper 10 of 1997" on 15.

<sup>157</sup> *Ibid.*



- \* Unlawful anal intercourse (indecent assault) with children showed an increase from 660 – 893 (an increase of 35%).
- \* *Sexual offences under the Sexual Offences Act 23 of 1957 increased by 4% from 1 121 to 1 160 cases.*

A set of principles relating to children's interests was developed by a working group, after a conference at the University of Durban Westville in 1994, which was also favoured by the Project Committee.<sup>158</sup> The principles are to be supported in that they provide factors that need to be considered when dealing with child sexual offence victims, which factors can also be applied to adult victims, to try and minimise the manner in which the victim is dealt with by the legal system.

The Sexual Offences Act<sup>159</sup> which was introduced by the South African Law Commission covers various aspects of child abuse, which by definition includes incestuous acts with children, and section 14 is especially relevant regarding sexual crimes against children.<sup>160</sup> The main function of the Act was to regulate what society perceived as moral or immoral behaviour, although these norms continue to change with passing years.

The topic of incest will be briefly dealt with here as children party to incestuous relationships who are under the age of 16 years and engage in sexual intercourse can also be incorporated within the crime of statutory rape.<sup>161</sup>

The South African Law Commission states:<sup>162</sup>

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<sup>158</sup> See in general "SALC Issue Paper 10 of 1997" on 12.

<sup>159</sup> Act 23 of 1957.

<sup>160</sup> Many of the provisions have their origin in Colonial times. See Milton, J.R.L. "The Sexual Offences Act" (1988) on 269.

<sup>161</sup> The age of consent relating to persons who are under 19 years and engage in so-called immoral or indecent acts would not be relevant here as incest relates to sexual intercourse. The provisions of section 14 relating to sexual intercourse where the child is under the age of 16 years is applicable.





*The criminalizing of incest is often justified on the ground that it prevents a particular and abhorrent form of sexual abuse of children. As incest is only committed by the performance of vaginal sexual intercourse, the crime cannot be used to penalize homosexual abuse of children or indecent assaults upon children or the performance of unnatural sex acts with a child; nor does it punish a female relative abusing a female child.*

Another reason cited is that the prohibition prevents persons with the same generic makeup from procreating and producing offspring with possible mental or genetic defects.<sup>163</sup>

The South African Law Commission thus defines the common law crime of incest as the:<sup>164</sup>

*[unlawful] and intentional sexual intercourse between two persons who on account of consanguinity (blood relationship), affinity (relationship by marriage) or an adoptive relationship may not marry one another.*

Snyman defines incest as being the:<sup>165</sup>

*[unlawful] and intentional sexual intercourse between male and female persons who are prohibited from marrying each other because they are related within the prohibited degrees of consanguinity, affinity or adoptive relationship.*

Incest can therefore be defined for purposes of this study as *sexual intercourse between two persons who are related to each other in a degree which precludes a lawful marriage between them.*<sup>166</sup>

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<sup>162</sup> See "SALC Discussion Paper 85 of 1999" on 138.

<sup>163</sup> *Ibid.*

<sup>164</sup> See "SALC Discussion Paper 85 of 1999" on 135. As defined by Milton, J.R.L "South African Criminal Law and Procedure: Volume II" (1996) on 234.

<sup>165</sup> "Criminal Law" (1995) on 335.



The prohibited categories are divided into consanguinity, affinity or adoptive relationship:

- \* *Consanguinity (blood relationship)*: Persons in the direct line (ascendants and descendants) and collaterals related to a common ancestor, may not have sexual intercourse or marry.
- \* *Affinity*: Persons who are relations by marriage in the ascending and descending line.
- \* *Adoptive relationship*: This is where a prohibition against marriage or sexual intercourse between adoptive parents and adopted children exists.

Various cultures' approaches towards incest differ. This is especially the case with regard to customary law and these approaches are contrary to the common law definition of incest. A reason for this being that in customary law there is a focus on family and the continuing of the family line. In customary law, however, the incidences of incestuous relationships in the African community<sup>167</sup> are on the increase and in a study undertaken<sup>168</sup> it is stated that rape of children by their

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<sup>166</sup> Consent is not an issue, however, rape would occur if there were non-consent. A comparative overview of countries such as Australia and New Zealand, regarding the crime of incest, reveals the following:

In *Australia* the crime is defined in Section 92L of the Crimes Act 1900 and provides that any person who is related in the direct line and linear line, including a half brother/ sister and stepchild, are included.

In *New Zealand*: The crime is defined in Section 130 of the New Zealand Crimes Act of 1961 as sexual intercourse between brothers and sisters including half brothers/ sisters and parents/ grandparents as well as children/ grandchildren. There is however, a condition that the person must know of the relationship between the parties. The sentence imposed is to a maximum of 10 years imprisonment. It also includes *in loco parentis* relationships but the shortfall is that it does not afford similar protection to boys.

<sup>167</sup> See Leclerc-Madlala, S. "Crime in an Epidemic: The Case of Rape and AIDS" (1996) on 35.

<sup>168</sup> *Ibid.*



fathers were virtually unheard of in past decades but is now prevalent.<sup>169</sup> A reason furnished, is that it is more in the line of a preventative approach to avoid contracting the HIV virus, or even to retain the family loyalty so that the father does not die alone.

There are further problems which exist in customary law. Firstly, there is nothing substantive as such (which exists in written form) which may be used as guidelines and therefore uniform application of customary law is difficult.

Secondly, the constitutionality of certain practices may be questioned. There needs to be a balance between customary law and the Bill of Rights in the Constitution of which the former should be interpreted in line with the principles in the Constitution. The Bill of Rights enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.<sup>170</sup>

Persons who practice customary law are thus also bound by the Constitution and all criminal laws and statutes of our country. Crimes and their penalties should be meted out equally, so that it will accord with the principles of the interest of justice and not deny rights of certain victims. In light of the aforementioned, the following questions may be asked:

- \* Is the *criminalizing* of incest justifiable, especially in the light of sodomy, which has been abolished?
- \* Is it *not discriminatory* to retain the crime of incest in view of the constitutional provisions which provide that a person may not be discriminated on the grounds of culture, birth, marital status or privacy?<sup>171</sup>

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<sup>169</sup> This would also include cases of incest especially with very young children who have limited legal capacity and whose consent may be negated.

<sup>170</sup> Section 7(1) of the Constitution Act 108 of 1996.

<sup>171</sup> Sections 9(3) and 14 of the Constitution Act 108 of 1996.



One reason offered for the criminalization of incestuous acts is that it protects society and prevents the sexual abuse of children.<sup>172</sup> Another reason for the criminalization of incest is that it is aimed at the prevention of genetic defects should there be procreation between persons related in the prohibited degrees. This reason has also been criticised as it cannot apply to persons related by affinity.

Case law<sup>173</sup> supports the proposition that partial penetration is sufficient and consent is not an element of the crime, although it can be a defence.<sup>174</sup> What about the fact that incest often occurs by mutual consent? No prohibition exists against homosexual persons who engage in consensual sexual relationships. The same argument may be used that if committed by consenting adults in private, it is not the purpose of the law to interfere with consensual sexual activity.

In the **National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others** it was said that:<sup>175</sup>

*Outside of regulatory control, conduct that deviates from such publicly established norm is usually only punishable when it is violent, dishonest, treacherous or in some other way disturbing of the public peace or provocative of injury. In the case of male homosexuality however, the perceived deviance is punished simply because it is deviant. It is repressed for its perceived symbolism rather than its proof of harm.*

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<sup>172</sup> The definition of a child is defined in terms of the international treaty of the "Convention on the rights of the child" as being a person under the age of 18 years, unless majority is attained earlier in terms of the law applicable to the child. See also "SALC Discussion Paper 85 of 1999" on 138 wherein it discusses and criticizes the fact that incest cannot be used to penalize homosexual abuse of children or indecent assaults upon children, nor can a female relative be punished for the abuse of children who are female.

<sup>173</sup> **R v Giles** 1926 WLD 211.

<sup>174</sup> "SALC Discussion Paper 85 of 1999" on 139-142.

<sup>175</sup> 1998 12 BCLR 1517 (CC) on 1563J - 1564A-B.



The same statement could be applied to cases of incest where parties above the age of 16 years engage in consensual sexual intercourse.<sup>176</sup> The question may be asked whether harm is actually caused, where parties above the age of 16 years who are related by affinity (not blood relations), engage in consensual sexual intercourse. An example is where a man has consensual intercourse with his daughter-in-law who is divorced from the man's son. If the daughter-in-law had never married the man's son there would have been no restriction imposed on her marrying the man. If one bears in mind that the termination of a marriage does not remove the prohibition of intermarriage one is clearly faced with an inequitable situation.<sup>177</sup> In addition it could be submitted that discrimination occurs on the basis of marital status.<sup>178</sup>

The following submissions regarding the crime of incest were received by the South African Law Commission:<sup>179</sup>

The Johannesburg Child Welfare Society was not in favour of a child being punished for incest regardless of any consent given. Their solution is that these children should be dealt with at a childrens' court enquiry or in a diversion programme as it is reflective of a dysfunctional family. Other authors suggested that consent be a defence depending on age. Similarly, this viewpoint was also rejected by others, on the grounds that psychological assessment would be necessary as children's maturity levels differ.

Submissions were also received that parenting figures who were not the biological parents of the child also be included under the crime of incest, as incest is based on sexual relations within a family unit. Other authors were of the view that incest should only be criminalized as regards the position where a

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<sup>176</sup> Section 14 of Act 23 of 1957 criminalizes acts of sexual intercourse with minors who are under the age of 16 years of age.

<sup>177</sup> See Snyman, C.R. "Criminal Law" (1995) on 337.

<sup>178</sup> Section 9(3) of the Constitution Act 108 of 1996.

<sup>179</sup> *Ibid.*



person exploits another sexually as they foresee that problems could arise should the state criminalize a consensual act.<sup>180</sup>

The present author is of the view that if incest as a crime is abolished, statutory rape could cover instances where children under the age of 16 years engage in consensual sexual intercourse with family members.<sup>181</sup> The benefit in the abolishing of the crime of incest is that child victims of penetrative sexual assault and other indecent acts would not be labelled under a crime with a stigma attached thereto. Furthermore it could be argued that sexual intercourse between two consenting adults should not be punished. If one bears in mind that only sexual intercourse *per vaginam* is proscribed in terms of the crime of incest, a problem arises if persons related in the prohibited degrees engage in other forms of sexual intercourse dealt with in this study.<sup>182</sup> An inequitable situation would arise where persons engaging in sexual intercourse *per vaginam* are prosecuted whereas certain persons who engage in other forms of penetrative sexual intercourse are not. An additional factor that needs to be considered is the practical enforcement of the crime. It is practically impossible to police the crime if it is committed between two consenting adults.

It may also be argued that the crime of incest infringes a number of constitutional rights such as equality<sup>183</sup> and privacy.<sup>184</sup> In the cases of affinity, additional discrimination occurs on the grounds of marital status.<sup>185</sup> The criminalizing of incest could also be viewed as discrimination on the grounds of culture or birth.<sup>186</sup> It is recommended that the crime of incest be abolished or amended for five reasons. Firstly to take into account the stigmatising effect it could have on child

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<sup>180</sup> As per the Tshwaranang Legal Advocacy Centre; as per spokesperson Ms Clark Senior Public Prosecutor (Verulam) in "SALC Discussion Paper 85 of 1999" on 142.

<sup>181</sup> Section 14 of Act 23 of 1957.

<sup>182</sup> What supports the view that the crime of incest is only limited to sexual intercourse *per vaginam* is the provisions of clause 5 of the proposed Sexual Offences Bill of 2002 which extends the meaning of sexual penetration to incorporate additional forms of sexual intercourse.

<sup>183</sup> Section 9(1) of Act 108 of 1996.

<sup>184</sup> Section 14 of Act 108 of 1996.

<sup>185</sup> Section 9(3) of Act 108 of 1996.

<sup>186</sup> Section 9(3) of Act 108 of 1996.



victims who are in any event covered by a statutory crime if they are under the age of 16 years. Secondly, inequity arises in certain instances where persons are related by affinity. Persons who could have freely engaged in sexual intercourse or marriage are prohibited from doing so if either party was previously married to a relevant family member in a degree proscribed in terms of the crime of incest. Thirdly, the practical application of the crime to factual situations is problematic. It is highly probable that the practical enforcement of the crime leads to inconsistency depending on the nature of the sexual intercourse in question. Fourthly, inconsistency with regard to the application of the crime to persons who have cohabited with family members in the prohibited degree relating to affinity can arise. This can be illustrated by way of example. If a female cohabits with a man and then moves out and marries his father no incest is committed. However if this same female marries the man and subsequently gets divorced, she is unable to have sexual intercourse with, or marry, the father as the crime of incest will then be committed. This is clearly an absurd state of events. Lastly, if a balancing process is followed it is evident that a severe limitation of constitutional rights occurs which cannot be validly justified especially due to the reasons furnished above.<sup>187</sup> The discrepancies and inequity in a practical implementation of the crime far outweighs the advantages it could possibly have.

With regard to the question of marriage, the current position regarding homosexual persons who desire to marry could be upheld for cases of adult consensual, incestuous relationships too.<sup>188</sup> The proviso being that the limitation should apply to marriage between persons related by consanguinity (blood relatives) or adoptive relationship due to being *contra bonos mores*.<sup>189</sup> It is

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<sup>187</sup> See Section 36 of Act 108 of 1996. See further the **National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others** 1998 12 BCLR 1517 (CC) on 1539 D-H in general in limiting rights and the balancing process that was followed when advocating the abolition of the crime of sodomy.

<sup>188</sup> The exclusion would be where parties are related by affinity such as a man and his daughter-in-law.

<sup>189</sup> It may be argued that the limitation is justifiable in terms of Section 36 of the Constitution Act 108 of 1996 as it is in the interests of society (the *boni mores*).



recommended that persons that are related by affinity should be allowed to marry. Participants of incest who engage in sexual relationships, would possibly stand the risk of genetically deformed children but that is a decision to be made by free choice on the part of the individuals concerned.<sup>190</sup>

It could perhaps also be argued that by decriminalizing incest, children who grow up inside such an environment and who regard the behaviour as normal may be proponents of the crime when they become parents or adults. The present author is of the view that incest by consanguinity and adoptive relationships are not conducive to normal family relationships and could perhaps lead to being perceived as a free license to sexual abuse of family members and especially children. However, if the crime of incest was abolished, children who are under the age of 16 years would be covered by statutory rape. Their consent to the sexual intercourse would be negated due to the inability to appreciate the nature of the act. Rape would be committed if the consensual intercourse with the family member was performed under duress or due to the abuse of a relationship of authority.

The viewpoint that incest should be extended to include a person who is in *loco parentis*, is not supported here, as it would cover caretakers, guardians and teachers. If the child is over the age of consent and can decide for him or herself and voluntarily enter into sexual intercourse, then no real harm is done.<sup>191</sup> If the person is coerced, then such conduct amounts to rape.

Society, and especially young children who later become part of society, should be protected as the stigma of incest is bound to cause psychological problems and dysfunction in the life of the child. However, most of the *mores* have changed as regards adultery and homosexuality, and in the light of the aforementioned, it may be argued that it is in the interests of justice that all

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<sup>190</sup> There is no guarantee with a normal couple in any event that deformed children will not be born from their marriage or union, but there are no laws in place to avoid this, and even if there were it would be impossible to regulate.

<sup>191</sup> Especially if it is a voluntary decision made and the person is able to understand the nature of the act and the consequences.





persons be treated equally by the legal system and that the crime of incest be abolished as long as the consensual activity occurs between adults in private.

The present author does not at all concede that incest is acceptable on any level but merely that it is perhaps a social or moral issue that needs to be seriously dealt with and not be expected to be resolved via the legal system. As mentioned above, consensual relations with children could be punished under a broader consolidated definition of rape but would in any event still be punished under the current statutory crime of rape.<sup>192</sup> It is therefore conceded that the viewpoint that the retention of the crime of incest would be in the interests of morality and family relations does have merit, but this viewpoint is not supported here. Sachs J comments on the decriminalisation of sodomy in the case of the **National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others** that:<sup>193</sup>

*A State that recognises difference does not mean a State without morality or one without a point of view. It does not banish concepts of right and wrong, nor envisage a world without good or evil. What is central to the character and functioning of the State, however, is that the dictates of the morality which it enforces, and the limits to which it may go, are to be found in the text and spirit of the Constitution itself.*

The present author supports the above view for the crime of incest. To uphold the crime of incest would amount to unfair discrimination on the grounds of birth and in the case of affinity, on the basis of marital status.<sup>194</sup> The constitutional rights to privacy, dignity and equality would also be infringed.<sup>195</sup> It is submitted that the limitation of the aforementioned rights cannot be justified in terms of the

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<sup>192</sup> The reasoning is that although the child may have consented it may be said that children have limited capacity to understand the nature of certain acts and on the basis of that the consent would be negated in any event.

<sup>193</sup> 1998 12 BCLR 1517 (CC) on 1576 E-F.

<sup>194</sup> Section 9(3) of Act 108 of 1996.

<sup>195</sup> Sections 14, 10 and 9 respectively of Act 108 of 1996.



Constitution because the harm caused can be significant and lead to discrimination in the work place and with regard to social opportunities.<sup>196</sup>

It is suggested that if the crime of incest was nevertheless retained, that less restrictive means be used to achieve its purpose. The discretion not to prosecute should be available, especially in cases of affinity, so that no conviction or sentence ensues.<sup>197</sup>

Now that the crime of incest and its unsuitability as a remedy for child abuse victims has been dealt with, it is pertinent to examine the alternate remedy under which child sexual assault victims can be afforded protection. The elements of statutory rape will now be examined to establish whether the definition as it stands is sufficient or not as a remedy for child sexual assault victims.

### 2.3.1. THE ELEMENTS OF STATUTORY RAPE

Section 14 (1) of the Sexual Offences Act 23 of 1957 provides that *any male person who:*

- (a) *has or attempts to have unlawful sexual intercourse with a girl under the age of 16 years or;*

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<sup>196</sup> Section 36 of Act 108 of 1996.

<sup>197</sup> See "SALC Discussion Paper 85 of 1999" on 147 in general. An important question arises revolving around sentencing for the crime of incest? A person who commits this crime would most probably fall under the category of habitual criminal or recidivist, as it is usually not a once-off crime and it would have to be taken into account that the offence is unlikely to be the first committed by such person. As regards the prosecution of children, the discretion lies with the prosecutors. With regard to consensual relationships between adults, the discretion should also vest with the prosecutor. The Commission is also of the opinion with regard to the prosecution of children that where there is a significant power imbalance between siblings, and the younger or weaker child is sexually abused by the older siblings, rape is committed. This view is supported here as it could be considered to be rape enforced by duress or a position of authority.



- (b) *commits or attempts to commit an immoral or indecent act with such a girl or boy under the age of 19 years or;*
- (c) *entices or solicits such a girl or boy to the commission of an indecent or immoral act commits an offence.*

In terms of section 14 (3) *any female who:*

- (a) *has or attempts to have unlawful carnal intercourse with a boy under the age of 16 years or;*
- (b) *commits or attempts to commit with such a boy or with a girl under the age of 19 years an immoral or indecent act;*
- (c) *entices or solicits such a girl or boy to the commission of an immoral or indecent act, shall be guilty of an offence.*<sup>198</sup>

#### 2.3.1.1. DEED

Section 14 of the aforementioned Act prohibits *sexual intercourse with children* below the age of 16 years, or the commission of *immoral or indecent acts* with children below the age of 19 years, even with their consent.<sup>199</sup>

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<sup>198</sup> Section 15 of Act 23 of 1957 the provision pertaining to mentally impaired persons, currently reads as follows: *Any person who –*

- (a) *has or attempts to have unlawful carnal intercourse with any male or female idiot or imbecile in circumstances which do not amount to rape; or*
- (b) *commits or attempts to commit with such a male or female, any immoral or indecent act;*  
*or*
- (c) *solicits or entices such a male or female to the commission of any immoral or indecent act, shall, if it is proved that such person knew that such male or female was an idiot or imbecile, be guilty of an offence.*

<sup>199</sup> See Snyman, CR “**Criminal Law**” (1995) on 346. With regard to mentally impaired persons section 15 applies if there was consent to acts of sexual intercourse or immoral activities, but the consent was negated due to a lack of capacity to give valid consent. The perpetrator and victim

### 2.3.1.2. UNLAWFULNESS

The South African Law Commission states:<sup>200</sup>

*Technically section 14 of the Sexual Offences Act 1957 can be characterized as a species of age of consent legislation...The establishment of a so-called age of consent – a chronological age which is a bright line separating valid and invalid consent – has been the result. Section 14 not only establishes the age of consent but also enforces the concept by punishing those who engage in sexual activity with a person who is under the age of consent.*

Therefore acts of sexual intercourse with children below the age of 16 years are *prima facie* deemed unlawful. Acts of intercourse are not unlawful where the person with whom the act was committed was either a prostitute, or otherwise deceived the person so charged, into believing that he or she was over the age of 16 years, or if the parties are married.<sup>201</sup>

Sexual acts, which are perceived to be immoral, are forbidden where the child is below the age of nineteen. The presence of consent to the act of sexual intercourse or sexual activity is thus irrelevant for purposes of this crime.<sup>202</sup>

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can be either male or female. Obviously, if the person had sufficient intelligence and objected, this would satisfy the requirements of the common law definition of rape.

<sup>200</sup> "SALC Discussion Paper 85 of 1999" on 205.

<sup>201</sup> Section 14(2) and Section 14(4) of Act 23 of 1957.

<sup>202</sup> With regard to section 15 of Act 23 of 1957, acts of sexual intercourse and immoral activity with mentally impaired persons are deemed unlawful, regardless of consent. Section 15 further deals with the enticing, committing and attempting to commit, or soliciting of such idiot and imbecile to commit an immoral or indecent act. It is submitted that the incitement or solicitation of a mentally impaired person to commit an indecent or immoral act will not amount to indecent assault and would amount to *crimen iniuria* as there is no assault as such. In the case of *R v H* 1959 4 SA 427 (A) it was stated that the circumstances of each case will dictate as to whether the act was indecent or immoral. What if two persons who are mentally impaired (either an idiot or an imbecile) want to have consensual sexual intercourse or marry? Are they guilty of an offence under Section 15? The relevant portion of section 15(a) reads as follows: *Any person who has or*



### 2.3.1.3. FAULT

The child's consent is no defence and a strict liability offence is thus created.<sup>203</sup>

### 2.3.2. VICTIMS

The category of penetrative sexual assault victim covered by this definition are male and female child victims. The victims with regard to prohibited sexual intercourse are children below the age of 16 years. More specifically sexual intercourse between a male perpetrator and female child victim and between a female perpetrator and male child victim is prohibited. Sexual intercourse with a

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*attempts to have unlawful carnal intercourse with any male or female idiot or imbecile in circumstances, which do not amount to rape...shall, if it be proved that such person knew that such male or female was an idiot or imbecile, be guilty of an offence.* Section 15 places an absolute prohibition on sexual relations with mentally impaired persons. What about criminal incapacity due to mental illness and thus no liability? Acts of non-consent will fall under the crime of rape. In New South Wales a different approach is followed in that there are two offences namely a prohibition against sexual intercourse between any person and a mentally impaired person (described as intellectual disability) if committed with *the intention of taking advantage* of the other person (own emphasis), and secondly, a prohibition against sexual intercourse where a person who is in a position of authority as regards a facility or programme to mentally impaired persons.<sup>202</sup> This viewpoint could be supported as it would enable mentally impaired persons who want to marry to do so as the focus is rather on protecting the aforesaid from other persons taking advantage of the former. As regards mentally impaired persons who of their own free will decide to have consensual intercourse, they should not be found guilty of contravening section 15. *Policy reasons will result in neither of them being convicted.* Furthermore, the section provides that such person *knew such male or female was an idiot or imbecile.* It may be argued that to a mentally impaired person, another person in the same category would appear normal to them, and perhaps they would not be able to draw a distinction in terms of intelligence quota (IQ). Consequently intent would be lacking. It may also be argued that the Act is aimed at sexual exploitation, but if two such persons should decide to engage in sexual activity out of their own free will, that is clearly not sexual exploitation.

<sup>203</sup> See Snyman, C.R. "Criminal Law" (1995) on 348 fn 34. See further Snyman, C.R. "Criminal Law" (1995) on 351 with regard to mentally impaired persons. Consent to the acts of sexual intercourse or immoral activity is negated if committed with a mentally impaired person. The perpetrator must also be aware that the person was mentally impaired for a conviction to ensue.

male perpetrator and male child victim and female perpetrator and female child victim are not classified with a category of prohibited sexual intercourse but as being forbidden immoral or indecent acts. Even with the aforementioned statutory definition, a class distinction occurs between the types of victim, in that forced penetrative sexual assault *per anum*, orally or digitally are potentially excluded from the category sexual intercourse and relegated to indecent or immoral acts. In the case of the commission of these so-called immoral or indecent acts the victims are children below the age of 19 years.<sup>204</sup>

The anomaly here is that the age difference for victims would entail that the age for male children of penetrative sexual assault *per anum*, by a male perpetrator, is three years more than a penetrative sexual assault on a female victim *per vaginam* which is nonsensical.<sup>205</sup>

### 2.3.3. CONSENT

The presence of consent to the act of sexual intercourse or sexual activity is irrelevant for purposes of this crime.<sup>206</sup>

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<sup>204</sup> See Snyman, C.R. "Criminal Law" (1995) on 346.

<sup>205</sup> With regard to mentally impaired persons a perpetrator can be male or female and the victim can be either male or female. An important question thus arises. How does one identify a mentally impaired person? Who is considered to be an imbecile or an idiot and when will a person be guilty of rape or the offence under the Sexual Offences Act 23 of 1957? The terms 'idiot' and 'imbecile' are used (and not mentally disabled persons in general). Case law dictates that the term idiot generally refers to a person with an IQ lower than 25 and an imbecile would be a person whose IQ would fall between the range of 25 and 50. See *S v N* 1979 4 SA 632 (O). See also *R v K* 1951 4 SA 49 (O). See also Snyman, C.R. "Criminal Law" (1995) on 350. In *S v N* 1979 4 SA 632 (O) at 638-639 the court mentions that there is no uniform method of distinguishing between the two categories, but that persons who fall within these categories, have an inability to make decisions regarding sexual intercourse and related acts. See also "SALC Discussion Paper 85 of 1999" on 216. The legislature thus presumes that a person who falls within the categories of idiot and imbecile do not possess the mental faculties to give valid consent.

<sup>206</sup> With regard to mentally impaired persons, consent to acts of sexual intercourse or immoral activities may be present but the consent is negated due to a lack of capacity to give valid consent.

#### 2.3.4. CRITICISM AGAINST STATUTORY RAPE

It is submitted that the crime of statutory rape is insufficient. The author, Snyman, criticises the formulation of the offences in section 14.<sup>207</sup> Firstly, before 1988, the Act provided that it would be a defence if the accused was under the age of 16 years at the time of committing the offence.<sup>208</sup> The problem thus arose that a boy of 12 or 13 years of age could be found guilty of the offence if committed with a girl, who was almost 16 years old *even if the latter initiated the act*.

Secondly, according to the interpretation applied by the courts, the accused cannot rely on his *bona fide* mistake, as regards the girl's age, especially if the girl is almost 16 years old and is more physically developed than others in the same age category. Therefore, the accused's lack of knowledge of unlawfulness, and consequently intent, cannot prevent the latter from being convicted. Section 14 thus contains a *strict liability offence* where culpability is not required<sup>209</sup> and consequently the aforementioned author believes that the general fault principle should rather apply.<sup>210</sup>

Thirdly, as regards the prohibition on immoral and indecent acts with girls under the age of 19 years, it tends to proscribe certain lesbian forms of sexual activity. Snyman submits that he is unsure, as to whether the offence is committed by both parties, or by the active party who is above 19 years of age.<sup>211</sup> He feels that the legislature aims to protect women under the age of 19 years and the latter

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<sup>207</sup> Snyman, C.R. "Criminal Law" (1995) on 346 *et seq.*

<sup>208</sup> This defence was abolished by Section 5 of the Immorality Amendment Act 1988. See also Milton, J.R.L. "The Young Man's Defence" (1991) on 172 for the history of the defence. The crime was placed on the statute books in the Criminal Law Amendment Act 25 of 1893. During the Victorian Era, extra-marital sex was viewed as being unacceptable, but transgressions for young men were pardoned in a hypocritical society and defences were created as escape mechanisms. See also Snyman, C.R. "Criminal Law" (1995) on 348. See also *S v M* 1992 1 SACR 124 (N).

<sup>209</sup> See *R v V* 1957 2 SA 10 (O); *R v V* 1957 3 SA 633 (O).

<sup>210</sup> Snyman, C.R. "Criminal Law" (1995) on 348.

<sup>211</sup> Snyman, C.R. "Criminal Law" (1995) on 349.

should be regarded as the victim and be found not guilty of committing the offence.

Milton also offers criticism against section 14 and his arguments are as follows: Firstly, the section aims to prohibit sexual intercourse with a person under the age of 16 years.<sup>212</sup> Secondly, it further aims to prohibit any form of sexual activity with a person under the requisite age and incorporates both heterosexual and homosexual acts.<sup>213</sup> He states that the definition is deficient because:

1. It does not adequately identify the offender, as it refers to any male or female person and either offender could be the same age or younger than the consenting victim.
2. It discriminates as it prescribes different ages of consent for heterosexual and homosexual persons in that the age for engaging in homosexual acts is higher.
3. He further submits that a reformulation of the offence is required so that it provides for punishment of child sexual abuse with two forms namely physical contact with the child being psychologically or physically damaging and also the misuse of a position of authority to induce the child to participate in sexual activity (whether directly or indirectly).

There is thus no justification in requiring a higher age of consent as regards indecent or immoral acts, in comparison with lawful sexual intercourse. The defences should be retained, although the defence as to the accused being deceived as regards the victim's age is problematic as the latter could be unconstitutional based on the accused's right to be presumed innocent. The

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<sup>212</sup> See Milton, J.R.L. "Unfair Discrimination on the Grounds of Gender, Sex...[or] Sexual Orientation. How the Sexual Offences Act 1957 does It All" (1997) on 297. See also Cameron, E. "Sexual Orientation and the Constitution: A Test Case for Human Rights" (1993) on 450. See also "SALC Discussion Paper 85 of 1999" on 203-207 for detailed criticism and also for the proposed amended definition by Milton.

<sup>213</sup> For instance any indecent or immoral act.





Sexual Offences Act is in need of review due to discrepancies in age and changing norms in society. The present author is of the view that the existence of such an offence is essential to protect the category of child victim of penetrative sexual assault either *per vaginam* or *per anum*. The provisions as they stand do not adequately address all the child victims of sexual assault but related provisions could be incorporated into a broader definition in any event for purposes of expediency and in order to accord seriousness to the problem of sexual offences against children thereby affording protection to the latter.<sup>214</sup>

#### **2.4. NON-CONSENSUAL SODOMY**

If rape is compared with the crime of non-consensual sodomy the essential features are the same, except for gender and the orifice involved.

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<sup>214</sup> With regard to mentally impaired persons, it is present author's view that the crime created by the Sexual Offences Act regulating relations with mentally impaired persons is insufficient and should be abolished. Relevant provisions could be incorporated in a broader definition for purposes of expediency and to protect mentally impaired persons from sexual abuse. Various constitutional rights are infringed by Section 15 of Act 23 of 1957, namely:<sup>214</sup>

- \* The right to equality – the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including...disability. (Section 9(3) of Act 108 of 1996).
- \* Right to dignity. (Section 10 of Act 108 of 1996).
- \* Right to freedom and security and to reproduction. (Sections 12(1)(a) and (2)(a) and (b) of Act 108 of 1996).
- \* Right to privacy (Section 14 of Act 108 of 1996).

To limit these rights, as in the plight of two mentally impaired persons who consent to sexual intercourse with one another, it is present author's view that the limitation of the *right is not justifiable as the nature of the right exceeds the importance of the purpose in this specific case*, of consensual relations between two mentally impaired persons, or if they should wish to marry, they would not be able to consummate the marriage without committing an offence. A problem arising from this is the aspect of procreation, as it may be argued that they would be incapable of caring for the child and that measures such as sterilization should be implemented. This too would be an infringement of their rights, but would again have to be measured in terms of section 36 of the Constitution Act 108 of 1996. The present author is of the opinion that only exploitive relationships should be regulated. In *S v N* 1979 4 SA 632 (O) at 638 – 639, the court states that idiots or imbeciles do not have the ability to make decisions regarding their sexual life and that they have normal sexual desires, but lack mental capacity to express these desired.



The elements of the crime of sodomy prior to 1994 were:<sup>215</sup>

- \* Unlawfulness
- \* Intention
- \* Sexual intercourse *per anum*
- \* Between males
- \* Irrespective of whether or not the passive party had consented.<sup>216</sup>

The word sodomy has two meanings; a general meaning and a more restricted meaning.<sup>217</sup> In the general sense it was a species of the generic crime known as 'unnatural sexual offence'.<sup>218</sup> In the narrow sense it was described as unlawful, intentional sexual relations between two males *per anum*.

Under the Roman law it was considered as another form of *stuprum*.<sup>219</sup> Christian theology condemned it as a sin and as being morally incorrect.<sup>220</sup> Roman Dutch writers regarded it as 'contrary to nature' and criminal and it was characterised under the generic terms *venus monstrosa* or *onkuysheyd tegens de natuur* which was punishable by death, by burning to death.<sup>221</sup> In English law, sodomy is termed 'buggery' and this offence was also punishable by death after 1553.<sup>222</sup>

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<sup>215</sup> This was prior to the implementation of the provisional constitution in 1994 and which is now known as the Constitution Act 108 of 1996. See Snyman, C.R. "Criminal Law" (1995) on 340; Burchell, J. & Milton, J.R.L. "Principles of Criminal Law" (1997) on 632. Verschoor, T. "Misdaad, Verweer en Straf" (1986) on 166.

<sup>216</sup> The crime of sodomy came under scrutiny with the advent of the provisional Constitution Act 200 of 1993. Section 9(3) of the Constitution of 1996, which provides that, nobody may be discriminated against, on the grounds of gender or sexual orientation and thereby, by implication, incorporates anal intercourse, which takes place voluntarily.

<sup>217</sup> Joubert, W.A. *LAWSA* vol 6 (1981) on 213.

<sup>218</sup> Snyman, C.R. "Criminal Law" (1995) on 340.

<sup>219</sup> Watson, A. "The Digest of Justinian Vol IV" (1985) on xxii.

<sup>220</sup> Burchell, J. & Milton, J.R.L. "Principles of Criminal Law" (1997) on 633.

<sup>221</sup> Snyman, C.R. "Criminal Law" (1995) on 340; Burchell, J. & Milton, J.R.L. "Principles of Criminal Law" (1997) on 633.

<sup>222</sup> *Ibid.*



The reasons advanced and mentioned in 1999 by the South African Law Commission for the probable criminalization of sodomy are the following:<sup>223</sup>

- \* It denies the basic purpose of the sexual relationship which is procreation;
- \* It subverts the institution of the family;
- \* Homosexuals corrupt and pervert young people.

Criticism of the above, as reiterated by Milton is that contraception, sterility and abstinence also preclude procreation, but sexual intercourse in these circumstances are not criminalized.<sup>224</sup> As regards the subversion of the family institution, he states that adultery has the same effect, but is no longer criminalized. The third argument cannot be regarded as being persuasive as there is no basis that this generalisation can be rationalised nor justified.

Both consensual and non-consensual acts were punished under the same crime of sodomy. However the crime of consensual sodomy was declared unconstitutional in the case of the **National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others**.<sup>225</sup>

The elements of sodomy will now be examined to establish which category of sexual assault victim is covered and whether the definition is sufficient or not.

#### 2.4.1. THE ELEMENTS OF SODOMY

With the enactment of the Constitution of 1996, Burchell and Milton define sodomy as the:<sup>226</sup>

<sup>223</sup> "SALC Discussion Paper 85 of 1999" on 127 - 128.

<sup>224</sup> "South African Law and Procedure: Volume II" (1996) on 249.

<sup>225</sup> 1999 1 SA 6 (CC).

<sup>226</sup> "South African Law and Procedure: Volume II" (1996) on 632.



*[unlawful] and intentional sexual intercourse per anum between human males.*

Snyman defines sodomy, as it applies after 1994 (in which year the Interim Consitution of 1994 came into operation), as follows:

*A male person commits sodomy if he unlawfully and intentionally is an active or a passive party to anal sexual intercourse with another male person, in circumstances in which the latter has not consented to the act.*

The common-law offence of sodomy in so far as consensual homosexual acts were concerned, was declared invalid and unconstitutional by the Constitutional Court.<sup>227</sup> Uncertainty arises as to whether non-consensual sodomy is still a crime.<sup>228</sup> The present author is of the opinion that acts of non-consensual anal intercourse should be covered by a redefined expanded definition of rape.

For purposes of this study sodomy is defined and committed *if a male person unlawfully and intentionally is an active or a passive party to anal sexual intercourse with another male person, in circumstances in which the party has not consented to the act.*

#### 2.4.1.1. DEED

The act consisted of the anal penetration of the passive party by the male organ of the active party.<sup>229</sup> Other forms of penetration were excluded. The slightest penetration was sufficient and no emission of semen was necessary.<sup>230</sup>

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<sup>227</sup> **National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others** 1999 1 SA 6 (CC). See commentary in "SALC Discussion Paper 85 of 1999" on 127-135. The reason for this is that similar consensual acts if committed between women, or a man and a woman, were not considered a crime and to penalise certain persons for consensual acts is discriminatory.

<sup>228</sup> The detail will be discussed in paragraph 2.4.1.2.

<sup>229</sup> Joubert, W.A. **LAWSA** vol 6 (1981) on 213.

#### 2.4.1.2. UNLAWFULNESS

Two positions have to be distinguished: (1) Prior to 1994

(2) After 1994

- \* *Prior to 1994*: If unlawful, intentional relations occurred between two males *per anum*, it was irrelevant whether the passive party consented to the act or not.<sup>231</sup> If there was no consent, the act could be punished under the lesser offence of indecent assault.<sup>232</sup> If there was consent, the passive party was equally guilty as the active party of committing sodomy.
  
- \* *After 1994*: The Constitution of 1994<sup>233</sup> provides that nobody may be discriminated against on the grounds of sexual orientation. This was incorporated into the Constitution of 1996<sup>234</sup> as stated in section 9(3) of the Bill of Rights which provides that the state may not unfairly discriminate directly or indirectly against any person on the grounds of amongst others 'sexual orientation'. Homosexual intercourse and heterosexual intercourse between consenting adults, which takes place in private, are therefore treated equally. It is unconstitutional to punish consenting adults under the crime of sodomy. As with heterosexual intercourse, which is punishable if it is (1) not in private or (2) non-consensual or (3) committed with a person under the age of consent, so is the case for homosexual sexual intercourse.<sup>235</sup>

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<sup>230</sup> Snyman, C.R. "**Criminal Law**" (1995) on 341; Burchell, J. & Milton, J.R.L. "**Principles of Criminal Law**" (1997) on 634.

<sup>231</sup> Snyman, C.R. "**Criminal Law**" (1995) on 340.

<sup>232</sup> Joubert, W.A. **LAWSA** vol 6 (1981) on 314.

<sup>233</sup> Section 8(2) of Act 200 of 1994. See **S v H** 1993 2 SACR 545 (C) at 552F; **S v A** 1995 2 BCLR 153 (C) in this regard.

<sup>234</sup> Act 108 of 1996.

<sup>235</sup> Burchell, J. & Milton, J.R.L. "**Principles of Criminal Law**" (1997) on 634. There does however exist discrimination as regards age of consent under the Sexual Offences Act 23 of 1957.

The crime of consensual sodomy was declared unconstitutional in the case of the **National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others**.<sup>236</sup> The Constitutional Court confirmed the decision of the Witwatersrand High Court in declaring the common law offence of sodomy unconstitutional and consequently invalid to the extent that it criminalized acts committed between men, which if committed between women or between a man and a woman would not be an offence. The Constitutional Court findings were that the crime of sodomy was not consistent with the following rights in the Constitution:

- \* *The right to equality*, as it differentiated on the grounds of sexual orientation.<sup>237</sup>
- \* *The right to dignity*, as it unfairly discriminated in the sense that it criminalized all sexual intercourse *per anum* between men, regardless of the relationship involved and the age of the persons involved.<sup>238</sup> The consequences were such that homosexual men were subject to the risk of arrest, prosecution and conviction.<sup>239</sup>
- \* *The right to privacy*,<sup>240</sup> as these were consensual acts not harming any other person and was found to be an unfair limitation on this right.<sup>241</sup>

Uncertainty arises as to whether a crime of non-consensual sodomy still prevails. The South African Law Commission mentions that *[c]onsensual homosexual acts are no longer a crime*.<sup>242</sup>

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<sup>236</sup> 1999 1 SA 6 (CC). See also 1998 12 BCLR 1517 (CC).

<sup>237</sup> 1998 12 BCLR 1517 (CC) on 1528 C-E and 1530 F-1536 A. See also section 9 of Act 108 of 1996.

<sup>238</sup> 1998 12 BCLR 1517 (CC) on 1536 E-1537 A and also section 10 of Act 108 of 1996.

<sup>239</sup> See "SALC Discussion Paper 85 of 1999" on 131.

<sup>240</sup> Section 1998 12 BCLR 1517 (CC) on 1537 B - 1538 E and section 14 of Act 108 of 1996.

<sup>241</sup> See "SALC Discussion Paper 85 of 1999" on 132 where it discusses the courts *in casu* opinion that acts of male rape constitute crimes in term of common law as either indecent assault or assault with intent to do grievous bodily harm.

The implication is that non-consensual sodomy is still a crime. In a contradictory statement the South African Law Commission further state that: *[t]his judgment therefore brought an end to the common law crime of sodomy.*<sup>243</sup>

These conflicting statements create confusion which can only be clarified upon closer examination of the Constitutional Court case.<sup>244</sup> Ackermann, J mentions that the common law definition of sodomy is not limited to private consensual sexual intercourse *per anum* between adult males but also applies where one male has not consented or is below the age of consent and refers to them as cases of so-called 'anal rape' or 'male rape.'<sup>245</sup>

He further mentions that the objective of the common law offence was not the punishing of male rape but rather the perceived need to criminalize a specific form of sexual expression and was accordingly inconsistent with the Constitution.<sup>246</sup> Accordingly it could not be said that the offence of sodomy was purely created to criminalize male rape.<sup>247</sup> He concludes that there is no reason for interfering with the High Court decision which declared the offence of sodomy constitutionally invalid in its entirety.<sup>248</sup>

It therefore appears that the offence of sodomy has been abolished *in toto* subject to the proviso that the retrospective effect of the order is limited to cases of consensual sodomy only.<sup>249</sup>

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<sup>242</sup> "SALC Discussion Paper 85 of 1999" on 131.

<sup>243</sup> "SALC Discussion Paper 85 of 1999" on 133. They were referring to the case of the **National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others** 1998 12 BCLR 1517 (CC).

<sup>244</sup> *Ibid.*

<sup>245</sup> 1998 12 BCLR 1517 (CC) on 1548 D.

<sup>246</sup> Act 108 of 1996. See 1998 12 BCLR 1517 (CC) 1550 B.

<sup>247</sup> 1998 12 BCLR 1517 (CC) on 1550 C.

<sup>248</sup> 1998 12 BCLR 1517 (CC) on 1550 I-1551 A.

<sup>249</sup> 1998 12 BCLR 1517 (CC) on 1559 F-G. This underlying reason for this is to avoid having convictions set aside where cases of male rape were prosecuted as instances of non-consensual sodomy.

### 2.4.1.3. FAULT

- \* *Prior to 1994:* If a passive party voluntarily consented to sexual penetration, he was also guilty of sodomy. If he did not consent, the other party was guilty of sodomy and/ or indecent assault.<sup>250</sup>
- \* *After 1994:* For a conviction of non-consensual sodomy, the accused must have had the intention to have intercourse *per anum* and must have foreseen that the other party was perhaps under age or did not give consent.<sup>251</sup>

### 2.4.2. VICTIMS

The crime could only be committed between human males.<sup>252</sup> Sodomy was thus a status crime. Boys below the age of 14 years could also commit the crime.<sup>253</sup> Sexual relations *per anum* between a consenting male and female was not considered a crime, provided the conduct took place in private.<sup>254</sup>

This means that only one category of sexual assault victim is recognised. The victim who is protected is a male victim of penetrative sexual assault. The common law definition of rape does not cover this category of victim. Present author is of the view that the crime of non-consensual sodomy is inadequate and stigmatising. It only provides for one category of victim whose interests would be able to be protected in a more efficient way by being incorporated into a broader definition of rape.

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<sup>250</sup> Burchell, J. & Milton, J.L.R. "Principles of Criminal Law" (1997) on 634.

<sup>251</sup> *Ibid.*

<sup>252</sup> Joubert, W.A. *LAWSA* vol 6 (1981) on 213.

<sup>253</sup> Burchell, J. & Milton, J.L.R. "Principles of Criminal Law" (1997) on 634.

<sup>254</sup> Snyman, C.R. "Criminal Law" (1995) on 341.



### 2.4.3. CONSENT

- \* *Prior to 1994:* Where unlawful, intentional relations occurred between two males *per anum*, the crime of sodomy was committed. It was irrelevant whether the passive party consented to the act or not.<sup>255</sup> Where no consent was present, a charge could be laid under the offence of indecent assault.<sup>256</sup> If there was consent, the passive party was equally guilty as the active party of committing sodomy.
- \* *After 1994:* As mentioned earlier the Constitution of 1994 had an impact on this crime and provided that nobody may be discriminated against on the grounds of sexual orientation.<sup>257</sup> This was incorporated into the Constitution of 1996 as stated in section 9(3) of the Bill of Rights which provides that the state may not unfairly discriminate directly or indirectly against any person on the grounds of amongst others 'sexual orientation'.<sup>258</sup> Homosexual intercourse and heterosexual intercourse between consenting adults, which takes place in private, are therefore treated equally. Non-consensual sodomy will still be punishable under this category.

### 2.4.4. CRITICISM OF NON-CONSENSUAL SODOMY

The crime of sodomy previously covered voluntary acts by consenting parties, and the same term was also used to indicate non-consensual sexual conduct. The term sodomy has had a long history and has had a stigma attached to it as being a sin and punishable by death.

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<sup>255</sup> Snyman, C.R. "**Criminal Law**" (1995) on 340.

<sup>256</sup> Joubert, W.A. **LAWSA** vol 6 (1981) on 314.

<sup>257</sup> Section 8(2) of Act 200 of 1994. See **S v H** 1993 2 SACR 545 (C) at 552F; **S v A** 1995 2 BCLR 153 (C) in this regard.

<sup>258</sup> Act 108 of 1996.

Burchell and Milton state that:<sup>259</sup>

*[h]omosexual intercourse which is not in private, or is without consent of one of the parties or with a person who is under the age of consent may be punished as sodomy.*

The words 'not in private' by implication incorporates a voluntary act whereas 'without the consent of' indicates a lack of consent. By implication then, the term sodomy incorporates both a voluntary and an involuntary act, whereas the crime of rape is involuntary and indicates a lack of consent, whether committed in private or not.

With regard to non-consensual sexual assault *per anum*, the crime of sodomy as it stood prior to the Constitutional Court case was unsatisfactory.<sup>260</sup> Firstly, it did not cover the violation of a male by a female, as the crime of non-consensual sodomy could only be committed by males. A male victim of penetrative sexual assault *per anum* would in South African law, have had to rely on the lesser offence of indecent assault which also covers non-penetrative sexual acts. This is discriminatory in the sense that everyone is entitled to equal protection of the law.<sup>261</sup>

Secondly, the stigma attached to the word sodomy had a double negative. It has a negative history as it was viewed as being contrary to nature yet a form of it also had the reprehensible features of rape. This could in all likelihood affect the reporting of the penetrative sexual assault due to the inherent stigmas that was attached to this crime.

Thirdly, sodomy covered both voluntary and involuntary elements and the male victim of forced penetrative sexual assault may not have been viewed in the same serious light as that of the female victim.

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<sup>259</sup> *Ibid.*

<sup>260</sup> 1998 12 BCLR 1517 (CC).

<sup>261</sup> Section 9(1) of Act 108 of 1996.

If non-consensual sodomy is compared with rape, the common elements in the crimes of rape and sodomy are: (1) unlawfulness (2) sexual intercourse (penetration) (3) intent (4) absence of consent. The only differences relate to gender and the orifices penetrated, although the terms sexual intercourse and penetration are applicable to both.

The nature of rape by implication, has two components according to Labuschagne, who identifies a sexual component as well as a violent component. He states:<sup>262</sup>

*‘n man wat gewelddadig met ‘n ander man of ‘n vrou per anum geslagsomgang het, voldoen myns insiens ook aan die vereistes: daar is beide ‘n geweldselement en ‘n sekselement teenwoordig.*

Both the crimes of non-consensual sodomy and rape could be viewed as acts of violence expressed in a sexual manner. Once again it must be remembered that violence should be distinguished with regard to the *nature* of the act and as a means of *inducing consent*. The factors excluding consent in rape would have been applicable to non-consensual sodomy.

As previously mentioned by Burchell and Milton:<sup>263</sup>

*[forcible] anal intercourse has all the reprehensible features of a heterosexual rape.*

Nevertheless our law failed to recognize this phenomenon under the common law crime of rape.<sup>264</sup> In light of the fact that the crime of sodomy has been abolished in its entirety, subject to limited retrospective effect where convictions

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<sup>262</sup> Labuschagne, J.M.T. “Die Penetrasievereiste by Verkragting Heroorweeg”(1991) on 156.

<sup>263</sup> Burchell, J. & Milton, J.R.L. “Principles of Criminal Law” (1997) on 492 fn 55.

<sup>264</sup> The position of the male victim is perceived in much the same light of that of females, in the sense that society perceives males as being less at risk and consequently place such situations out of context, being depicted as far removed and rare occurrences. It is no wonder that the stigma attached to such crimes can be seen as a major deterrent in reporting.

of instances of 'male rape' were obtained, it is present authors view that the crime of non-consensual sodomy was unsatisfactory in any event. It only offered protection to one category of victim of penetrative sexual assault, being a male victim who was sexually assaulted *per anum*. These victims of penetrative sexual assault were consequently not afforded the same recognition and protection as the victims of common law rape and the definition was more exclusive than inclusive of sexual assault victims.

## **2.5. INDECENT ASSAULT**

This generic term is used to describe *unlawful sexual acts, other than rape such as anal, oral, digital and object 'rape'* as well as indecent touching or fondling. Both males and females victims of penetrative sexual assault *per vaginam* or *per anum*, who are not covered under the existing definition of rape, have a remedy under this crime. It is a gender-neutral crime.<sup>265</sup> Acts, which are classified under the crime of indecent assault, may be viewed as serious as rape, but do not comply with the current narrow common law definition of rape. The question is whether this crime is sufficient to cover all the acts of penetrative sexual assault or whether the acts covered by this crime should be incorporated into a broader definition of rape. The elements of indecent assault are:<sup>266</sup>

- \* Unlawfulness
- \* Assault
- \* Indecent
- \* Fault.<sup>267</sup>

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<sup>265</sup> "SALC Discussion Paper 85 of 1999" on 195 for comprehensive discussion.

<sup>266</sup> See also "SALC Discussion Paper 85 of 1999" on 194 – 200. They recommend that the crime of indecent assault not be codified as it forms a competent verdict on numerous offences and is gender-neutral; See further *R v Abrahams* 1918 CPD 590; *S v F* 1982 2 SA 580 (T) for the different approaches followed regarding the act and intention.

<sup>267</sup> Burchell, J. & Milton, J.R.L. "Principles of Criminal Law" (1997) on 502.

A woman who has been violated *per anum*, and persons who have been orally, digitally or object penetrated without their consent, must necessarily resort to this crime, even though the acts committed may be classified as rape in terms of common parlance which is clearly unsatisfactory. The present author feels that if the crime of rape cannot be proved, the state can perhaps as a last resort, attempt to fulfil the requirements of the offence of indecent assault as a secondary remedy to the crime of rape.<sup>268</sup>

### 2.5.1. THE ELEMENTS OF INDECENT ASSAULT

Burchell and Milton define the crime of indecent assault as follows:<sup>269</sup>

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

Milton defines indecent assault as an:<sup>270</sup>

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

Snyman defines the crime of indecent assault as follows:<sup>271</sup>

*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.<sup>272</sup>

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<sup>268</sup> The Criminal Procedure Act 57 of 1977 as in section 261 and section 269.

<sup>269</sup> "Principles of Criminal Law" (1997) on 501.

<sup>270</sup> "South African Criminal Law and Procedure: Volume II" (1996) on 467.

<sup>271</sup> "Criminal Law" (1995) on 419

<sup>272</sup> 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).

For purposes of this study *indecent assault may be defined as the unlawful and intentional assault of another with the intention of committing an indecent act.*

#### 2.5.1.1. DEED

Indecent assault consists in unlawfully and intentionally assaulting another with the object of committing an indecent act.<sup>273</sup> Indecent assault comprises most forms of unlawful sexual encounters, other than rape. The following categories are included:

- \* failed rapes;
- \* quasi rapes (have the characteristics of rape which include something other than the penis being inserted as well as where a different orifice is involved);
- \* molestation (touching and fondling).<sup>274</sup>

The crime can incorporate the touching of parts of the body which become sexually aroused and can also contemplate some form of sexual activity, which includes external intercourse, masturbation and oral-genital intercourse, kissing and touching of erogenous parts of the body, although this is not necessarily a decisive factor.<sup>275</sup>

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<sup>273</sup> Snyman, C.R. "**Criminal Law**" (1995) on 419; Milton, J.R.L. "**South African Criminal Law and Procedure: Volume II**" (1996) on 467 defines indecent assault as:

- \* *The unlawful and intentional assault*
- \* *Which is or is intended to be indecent.*

<sup>274</sup> Burchell, J. & Milton, J.R.L. "**Principles of Criminal Law**" (1997) on 501.

<sup>275</sup> Burchell, J. & Milton, J.R.L. "**Principles of Criminal Law**" (1997) on 502.

No actual violence need be used nor harm caused. Mere touching or a threat is sufficient. The assault may take the form of force which includes touching, or the threat of immediate force.<sup>276</sup>

#### 2.5.1.2. UNLAWFULNESS

There must be an absence of consent for the conduct to be rendered unlawful. A girl and boy below the age of 16 are presumed incapable of valid consent.<sup>277</sup> Fraud and duress also exclude valid consent. In cases where consent is *contra bonos mores* it is also not regarded as valid consent.

#### 2.5.1.3. FAULT

The accused must have the intention to assault indecently and his intention can be manifested by means of words or conduct.<sup>278</sup> The emphasis is therefore placed on the *intention* which must be indecent and therefore there *need not be sexual activity* to constitute this crime.<sup>279</sup> There is controversy as to the meaning of the word 'indecent'<sup>280</sup> and whether it includes only acts, words or gestures, which are indecent by nature.<sup>281</sup> There are two contrasting views on the nature of the crime. In *R v Abrahams* it was said that indecent assault is qualified by the *nature* of the act, which itself must be indecent, and not the motive or the purpose of the offender.<sup>282</sup> Therefore it is not indecent if there is no contact with the erogenous parts of the body. In terms of the second view the person's

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<sup>276</sup> See *S v Mngomezulu* 1968 2 PHH 96 (N) regarding threats. See in general *S v F* 1982 2 SA 580 (T).

<sup>277</sup> *Ibid.*

<sup>278</sup> See Burchell, J. & Milton, J.R.L. "Principles of Criminal Law" (1997) on 504 and 505.

<sup>279</sup> Burchell, J. & Milton, J.R.L. "Principles of Criminal Law" (1997) on 503.

<sup>280</sup> See in this regard the commentary in "SALC Discussion Paper 85 of 1999" on 198 where the Johannesburg Welfare Society's view is that it [indecent assault] is an invasion of the person or privacy of the individual. A contrasting viewpoint is offered by the South African Police Service: Serious Violent Crime Component, where they feel that there should be direct physical sexual contact on another person's body by any object, excluding a penis.

<sup>281</sup> See Snyman, C.R. "Criminal Law" (1995) on 419 and fn 7 for discussion.

<sup>282</sup> See *ibid.* See also 1918 CPD 590 on 593.

expresses indecent *intention* and not an indecent *act* itself renders conduct indecent.<sup>283</sup>

This view was supported in the preferred case of **S v F** which advocates that if the accused has the *intention to touch the victim indecently* and conveys his intention, either by words or conduct, he can be found guilty of indecent assault.<sup>284</sup>

As Burchell and Milton state:<sup>285</sup>

*[merely] to touch a person on the hand or arm will constitute indecent assault. The test being whether the message conveyed to the victim, by an act or gesture, is indecent.*

In other words, the *intention* and not the *nature* of the act qualifies the act. Intercourse *per anum* with a non-consenting woman is also classified as indecent assault. The requirement of force has a technical meaning, as the person need not be injured and touch is sufficient.<sup>286</sup>

## 2.5.2. VICTIMS

Indecent assault is a gender-neutral crime, which means that the perpetrator and victim may be of the same or a different sex. An assault can therefore be perpetrated by a male or a female, on a male or a female victim.

A number of the categories of sexual assault victim identified in this study are covered by this offence namely:

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<sup>283</sup> Burchell, J. & Milton, J.R.L. "Principles of Criminal Law" (1997) on 504; Snyman, C.R. "Criminal Law" (1995) on 419.

<sup>284</sup> 1982 2 SA 580 (T). See also **S v Muvhaki** 1985 4 SA 317 (ZH) and **S v M** 1984 4 SA 111 (T).

<sup>285</sup> Burchell, J. & Milton, J.R.L. "Principles of Criminal Law" (1997) on 504 and 505.

<sup>286</sup> Snyman, C.R. "Criminal Law" (1995) on 420.



1. Penetrative sexual assault by a male perpetrator on a female victim *per anum* or *per vaginam* outside of marriage;
2. Penetrative sexual assault by a male perpetrator on a female victim *per anum* or *per vaginam* inside of marriage;
3. Penetrative sexual assault by a male perpetrator on a male victim;
4. Penetrative sexual assault by a male perpetrator on a female child victim;
5. Penetrative sexual assault by a male perpetrator on a male child victim;
6. Penetrative sexual assault by a female perpetrator on a male victim;
7. Penetrative sexual assault with the use of an object, orally or digitally on a male or female victim.

The reason why this crime is not favoured is that it serves as a remedy for less serious non-penetrative sexual assaults such as kissing or touching. To classify serious penetrative sexual assaults together with non-penetrative sexual assaults demeans the experience of the victim in a sense. It is recommended that the crime of indecent assault should therefore be used as a primary remedy for non-penetrative sexual assaults and the crime of rape for penetrative sexual assaults.

The present author is of the view that one category of penetrative sexual assault victim is not completely covered by the definition of indecent assault. The reason being that persons who engage in unprotected consensual intercourse and are deliberately exposed to the HIV virus by their partner cannot technically be included in this crime.

### 2.5.3. CONSENT

As mentioned above there must be an absence of consent for this crime to be committed. Children below the age of 16 are presumed incapable of valid consent.<sup>287</sup> Consent is excluded by fraud, duress and where the rendering of consent would be contrary to public policy.

### 2.5.4. CRITICISM OF INDECENT ASSAULT

The present author submits that indecent assault is insufficient as a main charge to the crime of rape. If it is upheld as a main charge for a crime of penetrative sexual assault, it means that there is one less competent verdict for victims to claim redress under. Indecent assault also covers lesser offences, such as touching or fondling, and it is submitted that a penetrative sexual assault should not be equated with a crime which is non-penetrative by nature. It is therefore felt that it perhaps denies victims of penetrative sexual assault the same recognition and protection as the crime of rape, thus undermining their experience of the crime. In chapter two it was found that all victims of penetrative sexual assault may experience Rape Trauma Syndrome which is indicative of the fact that they feel that their violation is more in line with a rape as opposed to indecent assault.

Various criticisms have been offered both for and against incorporating certain sexual assaults entailing penetration within the crime of indecent assault. These criticisms will be individually examined.

#### *2.5.4.1. ARGUMENTS AGAINST THE CRIME OF INDECENT ASSAULT BEING UTILISED AS A PRIMARY REMEDY FOR PENETRATIVE SEXUAL ASSAULTS*

The only similarities between the elements of rape and indecent assault are (1) unlawfulness (2) intention. Sexual intercourse and penetration are not

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<sup>287</sup> *Ibid.*

requirements as is the case with rape. What makes indecent assault unsatisfactory is the fact that grave and heinous crimes, for example anal intercourse with a woman without her consent and serious sexually penetrative acts, as well as acts of rape, which cannot be proved as such, constitute the same crime as the violation of a person by mere touching.

A woman who has been violently and traumatically penetrated *per anum*, as well as a man who is 'raped' by a woman, have to be satisfied with the crime of indecent assault, which is not always perceived with as much seriousness as rape. The victim who falls under the current definition of indecent assault may suffer more physical and psychological trauma than a victim of rape, but has to be satisfied with a crime, which incorporates mere touching. How, then, can this be equal protection of the law as envisaged in the Constitution?

The South African Law Commission states that the purpose of the offence of indecent assault is primarily to protect sexual autonomy, bodily integrity and the *dignitas* of a person, regardless of gender.<sup>288</sup>

#### 2.5.4.2. ARGUMENTS IN FAVOUR OF THE CRIME OF INDECENT ASSAULT BEING UTILISED AS A PRIMARY REMEDY FOR PENETRATIVE SEXUAL ASSAULTS<sup>289</sup>

Firstly, the offence covers a wide variety of acts and is consequently broad. Secondly, it is a competent verdict on a charge of assault with the intent to cause grievous bodily harm and statutory unlawful carnal intercourse in terms of the Criminal Procedure Act.<sup>290</sup> Thirdly, codification may lead to *lacunae* with regard to interpretation.

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<sup>288</sup> "SALC Discussion Paper 85 of 1999" on 195.

<sup>289</sup> See "SALC Discussion Paper 85 of 1999" on 197 for supporters of the offence being retained including the Attorney-General; Transvaal, South African Police Service: Serious Violent Crime Component, South African National Council for Child and Family Welfare.

<sup>290</sup> Sections 266 and 268 of Act 51 of 1977.

Various countries have however codified the crime of indecent assault such as New Zealand, Australia and Hong Kong. The present author is of the view that the current definition is broad enough to cover lesser sexual acts and with the common law crime of indecent assault not being specific, less serious acts may fall under this crime.

The view that the *intention* should be decisive is also supported here as well as that the definition should be retained, as it will be broad enough to cover *non-penetrative acts*, not falling under the definition of rape.

Furthermore, to continue classifying serious sexual crimes that are viewed as rape by the common man on the street, such as anal, oral or object rape, under the crime of indecent assault does not do justice to a victim's *dignitas*, nor offer adequate protection towards sexual autonomy and bodily integrity. One cannot compare mere indecent fondling or touching with the seriousness of actual penetration. Furthermore, indecent assault is broad enough to cover threats, or the apprehension that force is to be immediately applied.

In conclusion, it is submitted that the offence of indecent assault be retained as a competent verdict for rape but that it be primarily upheld in cases of non-penetrative sexual assault. Acts of penetrative sexual assault *per anum* or *per vaginam* and other forced penetrative sexual acts, currently falling under the crime of indecent assault should rather be incorporated under a broad definition of rape, with absence of consent, intent, unlawfulness and penetration being the decisive requirements.<sup>291</sup> In this way *every person*, may be equally protected in terms of the law with no discrimination in terms of gender.<sup>292</sup>

### **3. CONCLUSION**

Redefining the crime of rape in South Africa is essential, as the law at present makes no visible distinction between males and females, both as offender and as

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<sup>291</sup> Acts which fell under the old crime of sodomy.

<sup>292</sup> Sections 9(1) and 9(3) of Act 108 of 1996.

the victim and the current narrow definition thus excludes many categories of victim who could have gained redress in another country.<sup>293</sup>

In this chapter it was shown that the common law definition of rape is gender-specific and anatomically exclusive. A number of possible categories of penetrative sexual assault were identified in this study yet the common law definition of rape only partially covers one category of sexual assault victim. The common law definition of rape is by its nature more exclusive than inclusive of penetrative sexual assault victims. The categories which are excluded are penetrative sexual assault by a male perpetrator on a female victim *per anum* outside of marriage; penetrative sexual assault by a male perpetrator on a female victim *per anum* 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 *per anum*; penetrative sexual assault by a male perpetrator on a male child victim; penetrative sexual assault by a female perpetrator on a male victim; penetrative sexual assault with the use of an object or digitally on a male or female victim and the victim of consensual sexual intercourse where the HIV/ AIDS status of the perpetrator is withheld. The exclusivity with regard to one category of penetrative sexual assault victim cannot be justified.

Extensive research has been undertaken for purposes of this study and no reasoning can be deduced as to why the rights of certain female sexual assault victims are more important than the rights of any other identified sexual assault victim. Furthermore no logical conclusion can be reached that a gender-neutral offence would prejudice the protection offered to current victims covered by the common law offence of rape. The constitutionality of the common law crime is questionable.

It was also submitted that a broader definition of rape could cover the other possible categories of sexual assault victim identified in this study but that it be limited to cases of penetrative sexual assault. Non-penetrative sexual assault could of course be incorporated within the crime of indecent assault. The

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<sup>293</sup> Mezey, G.C. & King, M.P. "Male Victims of Sexual Assault" (1992) on 116.

position with regard to marital rape was critically examined. It was held that although a man can be found guilty of raping his wife, it is questionable as to whether the converse is true. It is submitted that husbands who are victims of sexual assault should be recognised and included within the spectrum of marital rape and the scope of marital rape is therefore currently exclusive and deficient.

The crime of incest was also examined and held to be in conflict with a number of constitutional rights. It was further established that the crime is difficult to implement and apply consistently in practical situations. This is especially the case with the prohibition relating to affinity. It is submitted that the crime of incest is discriminatory in terms of a number of constitutional rights with no justification for limiting these rights and should accordingly be rejected. Where child victims consent to acts of incest they would be covered by the current statutory offence pertaining to sexual offences.<sup>294</sup>

The crime of statutory rape was critically examined and found to be insufficient and limited as only certain categories of sexual assault victim are covered. It can also be criticised on the basis that certain lesbian forms of sexual activity is proscribed. Furthermore, the offender is not adequately identified and different ages of consent are prescribed for various sexual acts.

The history of, elements and groundbreaking case law pertaining to the crime of non-consensual sodomy was addressed. A number of typical 'male rape' cases have been convicted under the crime of non-consensual sodomy which posed a problem in light of the well-known Constitutional Court case.<sup>295</sup> On a closer examination of case law it was established that the crime of sodomy was never designed to protect cases of 'male rape', but rather to proscribe certain forms of homosexual sexual activity. It is submitted that the crime of sodomy has in fact been abolished in its entirety but with limited retrospective effect to cater for

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<sup>294</sup> Section 14 of Act 23 of 1957. The new proposed Sexual Offences Bill in "SALC Discussion Paper 102 of 2002" also makes provision for these victims should the current statutory offence be repealed.

<sup>295</sup> **National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others** 1998 12 BCLR 1517 (CC).

cases of 'male rape' prosecuted under the offence. Redress can consequently not be afforded to any category of possible sexual assault victim identified in this study.

The crime of indecent assault was analysed to establish whether the possible categories of identified sexual assault victim could be effectively protected under this crime. Although indecent assault is a gender-neutral crime, it was held that the crime is insufficient as a main charge to the crime of rape. Firstly, the crime of indecent assault incorporates lesser offences such as non-penetrative sexual assaults which could demean the experiences of victims of penetrative sexual assault. Secondly, if indecent assault was upheld as a main charge to penetrative sexual offences it would entail one less competent verdict for victims to claim redress under. It is suggested that the crime of indecent assault be retained as a competent verdict for rape but offer a remedy primarily for non-penetrative sexual acts.

Internal consistency is therefore lacking. No coherency is reflected with regard to the nature of the wrong committed to a male victim as opposed to a female victim and discrimination is therefore evident. The laws that apply to rape are closely linked to societal attitudes about what is perceived to be appropriate sexual behaviour or not. If sexual intercourse and the crime of rape are approached and viewed in a traditional manner, it is probable that that a female or male victim of rape will be at the mercy of the legal system's interpretation of whether a crime has in fact been committed or not.

Reform has been materializing for decades in countries such as Australia, Britain and the United States and consequently changing attitudes require a reformed definition of the term rape as well as a changed attitude towards victims by eradicating misconceptions, as these types of views hinder progress and could be extremely problematic as regards male victims of rape.

Various aspects will be discussed in the ensuing chapters to postulate a solution on how best to protect the possible categories of sexual assault victim. This will entail criticism of the current narrow definition of rape in terms of foreign



comparative law and an examination of the proposed new Sexual Offences Draft Bill introduced by the South African Law Commission. Shortcomings in the proposed bill will also be highlighted. The purpose will be to unify acts of penetrative sexual assault that are currently only given limited redress in terms of certain existing crimes, under the crime of rape, to reflect a coherent whole.



## CHAPTER FOUR

# CRITICISM OF THE DEFINITION OF RAPE: A COMPARATIVE PERSPECTIVE

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|------|---------------------------------|
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### 1. INTRODUCTION

In the previous chapter the current legal measures applied in South Africa pertaining to the categories of penetrative sexual assault victim identified in this study, were critically examined to establish whether the penetrative sexual assault victims are adequately protected in terms of South African law. The conclusion deduced was that no single legal measure exists which can effectively protect all the possible categories of sexual assault victim identified in this study. A comparative and analytical examination of the legal provisions adopted in other countries, provides a useful and essential framework in order to deduce a legal definition, that most aptly offers the best protection to all victims of forced penetrative sexual assault identified in this study. An examination of the history of the United States and Britain reveals that there has been much legislative activity in redefining rape. Various approaches to the crime of rape are currently followed in other countries.<sup>1</sup> Wider approaches to

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<sup>1</sup> See discussion in Labuschagne, J.M.T. "Die Penetrasie Vereiste by Verkragting Heroorweeg" (1991) on 150-151. In terms of section 242 of the Netherlands Criminal Code, it is a punishable

the crime of rape are adopted in Australia,<sup>2</sup> Canada,<sup>3</sup> Norway<sup>4</sup> and the Netherlands<sup>5</sup> and in certain states, such as Rhode Island<sup>6</sup> and Connecticut.<sup>7</sup>

To establish whether the categories of sexual assault victim identified in this study can be incorporated into one broad spectrum definition of rape, the legal position with regard to the crime of rape will be critically examined in the following three countries, namely: Australia, Britain and the United States of America.

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offence to compel a woman, with violence or threat of violence, to have sexual intercourse. The English definition is based on statute and is focused on statute and entails that intercourse is deemed complete only on proof of the slightest penetration, whereas in contrast, the German and Swiss laws demand penetration and the slightest contact is insufficient.

<sup>2</sup> In *Australia*, rape includes penetration of the mouth or anus of another, including penetration with objects.

<sup>3</sup> In *Canada*, the focus is on severe violations of integrity and extends to all acts of penetration, including vaginal, oral or anal penetration and an objective test is followed.

<sup>4</sup> In terms of *Norwegian law*, both a man and a woman can be a perpetrator or a victim.

<sup>5</sup> In the *Netherlands*, in the *Hoge Raad Case (Hoge Raad 22 Feb 1994 NJ 1994 379* (also discussed in the article by Labuschagne, J.M.T. of the same name in 1995 *De Jure* 28 on 241), the perpetrator was accused of digital rape (placed his hands inside a girl of 12 years old). The term '*seksueel binnendringen van het lichaam*' had replaced that of the term '*vleselijke gemmenschap heppen*' and the court submitted that it was not limited to genital penetration and that digital rape as indeed covered by the definition.

<sup>6</sup> See discussion in Labuschagne, J.M.T. "**Die Opkoms van 'n Abstrakte Penetrasiebegrif by Geslagsmisdade**" (1997) on 461. The author discusses the *Rhode Island* case of *State v Beaulieu* 1996 (Supr. Ct of Rhode Island) 674 A 2d 377 wherein the following facts come to the fore: A man was accused of committing cunnilingus on his 7 year old stepdaughter and the question was asked whether B's actions amounted to penetration. The court found that sexual penetration is required, but not actual penetration, such as penetration of the vagina and this would consequently include cunnilingus. One would thus be guilty of first-degree sexual assault.

<sup>7</sup> In *Connecticut*, the General Statutes, already in 1997, distinguished between sexual intercourse and sexual contact. The former includes vaginal and anal intercourse, fellatio or cunnilingus, between persons regardless of gender, including object penetration and the slightest penetration is sufficient. The latter involves any contact with intimate parts of a person for sexual gratification, or degradation of another person. See Labuschagne, J.M.T. "**Die Opkoms van 'n Abstrakte Penetrasiebegrif by Geslagsmisdade**" (1997) on 462 - 463.

## **2. A COMPARATIVE PERSPECTIVE**

This chapter will be devoted to a comparative study of the definitional elements of three countries in order to establish which definition can be utilised to deduce an effective definition of rape that can be applied in South Africa. Firstly, a brief overview of the rape measures adopted in Australia will be analysed with specific reference to the provisions applied in the state of Victoria. Of particular interest is the approach adopted with regard to the element of consent which has relevance in formulating a broader definition of rape. Secondly, the position followed in Britain will be referred to in light of the fact that the South African common law is largely based on British law. The clinical definition of rape as well as the legal definition of rape will be critically examined. Groundbreaking case law will be referred to in order to establish which category of sexual assault victim identified in this study is protected. Lastly, the rape provisions applied in certain federal states in the United States of America will be analysed.

### **2.1. THE POSITION IN AUSTRALIA**

A comparison of the legal provisions adopted in certain states in Australia and more specifically, the state of Victoria, provides extremely useful insight into how victims of penetrative sexual assault can be protected. The manner in which the element of consent is dealt with under the term 'free agreement' is of special importance and provides a useful framework of comparison with regard to the definitional elements of rape.

#### **2.1.1. HISTORICAL PERSPECTIVE**

In the 18<sup>th</sup> and 19<sup>th</sup> centuries under English common law, which was the direct source of Australian common law, rape was an offence against the owner of the

woman.<sup>8</sup> In as early as 1976 in Australia, the Law Reform Commissioner published a report in which it recommended reform with regard to the law of evidence and procedural law.<sup>9</sup> The aim was to limit the trauma suffered by the victim by taking into consideration factors such as the giving of evidence, the extensive length of time in which trials are conducted and prior sexual history.<sup>10</sup> Subsequently the Crimes Act (Victoria) 1958 has been amended and the definition of rape now incorporates a broader and more flexible definition which is gender-neutral and includes various forms of penetrative sexual assault.<sup>11</sup>

In certain states Australia has moved away from a narrow gender-specific definition to a gender-neutral offence. In 1986 in Western Australia the crime of rape was abolished and replaced with a system of graded sexual assaults.<sup>12</sup> A general definition of consent was also incorporated into its Criminal Code.<sup>13</sup> In Queensland the crime of rape was also based on a narrow gender-specific definition. The crime of rape was defined on much the same lines as the South African definition, namely 'sexual intercourse with a woman without her consent'.<sup>14</sup> This definition has since been amended and has replaced 'female' with 'another person'.<sup>15</sup> In Victoria five Acts have made substantial amendments to sexual offences since April 1959 when

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<sup>8</sup> Either her husband or father. See <http://www.greenleft.org.au> "Rape Laws: The Other Assault" accessed 30 August 2002.

<sup>9</sup> See Law Reform Commissioner Victoria Report 1976.

<sup>10</sup> *Ibid.*

<sup>11</sup> See Section 35(1) of the said Act. See also Crome, S. *et al* "Male Rape Victims: Fact and Fiction" (1999) on 60 *et seq* for general discussion of the position in Victoria. The maximum penalty for rape was increased to 25 years

<sup>12</sup> See "SALC Discussion Paper 85 of 1999" on 106.

<sup>13</sup> Section 324G of the Western Australian Criminal Code. See "SALC Discussion Paper 85 of 1999" on 107.

<sup>14</sup> See "SALC Discussion Paper 85 of 1999" on 89.

<sup>15</sup> Section 347 of the Queensland Criminal Code. This was on the recommendation of the Criminal Code Review Committee. See also "SALC Discussion Paper 85 of 1999" on 89-90 for discussion.

the Crimes Act of 1958 was proclaimed.<sup>16</sup> The position in Victoria is to be favoured as it applies a broad definition of rape which is not anatomically-specific nor gender-specific.

### 2.1.2. REFORMING RAPE LAWS

The present author supports the broad and gender-neutral definition of rape as found in the criminal statutes of the state of Victoria as it provides adequate protection to most of the categories of sexual assault victim identified in this study. The elements of rape in terms of the definition in the state of Victoria are *non-consensual penetration, of the victim's anus or vagina, by a penis, finger or object, or by the penetration of the mouth by the penis.*<sup>17</sup>

Sexual penetration is defined as:<sup>18</sup>

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<sup>16</sup> See [http://www.interpol.int/Public/Children/Sexual Abuse/National laws htm](http://www.interpol.int/Public/Children/Sexual%20Abuse/National%20laws.htm) "Sexual Offences Laws – Australia (State of Victoria)" accessed 20 February 2002.

These Acts are:

- \* The Rape Offences (Proceedings) Act 1976 No 8940/1976
- \* The Crimes (Sexual Offences) Act 1980 No 9509/ 1980
- \* The Crimes (Sexual Offences) Act 1991 No 8/1991
- \* The Crimes (Rape) Act 1994 No 81/1991
- \* The Sentencing (Amendment) Act 1993 No 41/1993.

The gender-neutral and wide approach adopted in the above provisions could easily be endorsed and incorporated within the South African legal system to provide for all the categories of identified sexual assault victim.

<sup>17</sup> The Crimes Act 1958 (Victoria) Sections 35, 37 – 38. See also *Iss v R* 1987 163 CLR 447, wherein there are various degrees of seriousness as regards the different means of penetration, in Crome, S. *et al* "Male Rape Victims: Fact and Fiction" (1999) on 60. Aggravating factors include the use of a weapon, violence and trauma caused to the victim. This definition best supports present author's view.

<sup>18</sup> In terms of Section 35(10) of the Crimes Act 1958 (Victoria) as amended by the Crimes (Sexual Offences) Act 1991.

- (a) *The introduction (to any extent) by a person of his penis into the vagina, anus or mouth of another person, whether or not there is emission of semen; or*
- (b) *The introduction (to any extent) by a person of an object or a part of his or her body (other than the penis) into the vagina or anus of another person, other than in the course of a procedure carried out in good faith for medical or hygienic purposes.*

In terms of the Crimes Act (Victoria), rape is committed if a person:<sup>19</sup>

- (a) *intentionally sexually penetrates another person without that person's consent, while being aware that the person is not consenting or might not be consenting; or*
- (b) *if after sexual penetration he or she does not withdraw from a person who is not consenting, upon becoming aware that the person is not consenting or might not be consenting.*

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<sup>19</sup> See section 38 of The Crimes Act 1958 (Victoria) in this regard. See further [http://www.interpol.int/Public/Children/Sexual\\_Abuse/National\\_laws](http://www.interpol.int/Public/Children/Sexual_Abuse/National_laws) "**Sexual Offences Laws – Australia (State of Victoria)**" accessed 20 February 2002. The legislation of Interpol member provides in section 48 of the Common Law Consolidation Act 1935 that the definition of rape is as follows: *A person who has sexual intercourse with another person without the consent of that other person –*

- (a) *knowing that that other person does not consent to sexual intercourse with him or*
- (b) *being recklessly indifferent as to whether that other person consents to sexual intercourse with him,*  
*shall (whether or not physical resistance is offered by that other person) be guilty of rape and liable to be imprisoned for life.*

In terms of section 4 of the Common Law Consolidation Act 1935 a broad definition of sexual intercourse is also followed. It includes the penetration of the *labia majora* or anus of a person by any part of the body of another person and includes fellatio or cunnilingus. The latter incorporates acts which involve the sucking or licking of the vagina or vulva, which approach is supported here.

Furthermore consent is equated with the term 'free agreement'.<sup>20</sup> The judge at trial is required to give direction on consent.<sup>21</sup> If the victim's words or actions do not indicate consent, then it is sufficient to show that his or her free agreement is absent. Free consent is not necessarily present if either the person did not physically resist or protest or the victim did not sustain physical injury.

As regards the accused's version that there was indeed consent, it must be considered as to whether the belief is reasonable.<sup>22</sup> If the above definition were to be applied to the various possible categories of sexual assault victim identified earlier in this study, it is evident that the following categories of sexual assault victim are adequately covered:

- \* Penetrative sexual assault by a male perpetrator on a female victim *per anum* or *per vaginam* outside of marriage;
- \* Penetrative sexual assault by a male perpetrator on a female victim *per anum* or *per vaginam* 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;
- \* Penetrative sexual assault by a female perpetrator on a male victim;

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<sup>20</sup> Instances of non-consent include the use of force, fear of force, harm to others, unlawful detention, unconsciousness, intoxication (drugs or alcohol), sleep, incapability of understanding the nature of the act, error as to the identity or nature of the act. See Crome, S. *et al* "Male Rape Victims: Fact and Fiction" (1999) on 61.

<sup>21</sup> Section 37 of the Crimes Act 1958.

<sup>22</sup> See *R v Laz* 1998 1 VR 453 on 460.

- \* Penetrative sexual assault with the use of an object or digitally on a male or female victim.

The category of sexual assault victim where consensual penetrative sexual intercourse takes place, but the one party deliberately does not disclose their HIV/AIDS infected status, may also possibly be covered by the aforementioned definition. It may be argued that free agreement is absent, or alternatively, that free consent would be withheld if the victim knew of the HIV/AIDS infected status. The definition of Victoria is therefore to be favoured, as it is a broad definition, which does not exclude any form of sexual penetrative assault, identified in this study, from its ambit.

### 2.1.3. CRITICISM OF THE DEFINITION OF RAPE IN AUSTRALIA

It has been shown that the definition of rape followed in Victoria could be effectively utilised to incorporate all the possible categories of sexual assault victim identified in this study.<sup>23</sup> Although consent forms part of the definitional elements of rape, the present author is of the view that this does not detract from the utility of the definition. The term 'free agreement' is broad enough to ensure that instances of non-consent are covered as well as instances whereby the HIV status of one party is not disclosed during consensual penetrative sexual intercourse. The element of consent will always play a role in the crime of rape in some form or another as it forms the crux of whether a rape has been committed or not.<sup>24</sup> The element of intention and more specifically, *dolus eventualis*, is also a criterion in establishing whether consent was present or absent.

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<sup>23</sup> The only category excluded due to the penetration requirement are male victims of digital sexual assault where the man is manually stimulated but no penetration takes place.

<sup>24</sup> A number of instances cater for instances where consent is negated. Examples are *inter alia* cases of submission due to duress or fear, illness, drunkenness (so-called passive consent).



Crome, McCabe and Ford comment on the position of male rape in Australia as a whole and feel that there is limited legal consensus on definitions of male sexual assault which is due to a failure to think through and link the types of conduct involved into a consistent area of law. They state as follows:<sup>25</sup>

*Even though most legal definitions involve concepts of sexual penetration, force or intimidation and lack of consent, there remain many unresolved issues: These require an examination of gender relationships and of the boundaries between individuals, and acknowledgement of the enactment of sexually abusive behaviour by abused individuals. It is clear that the broader the legal definition of sexual assault, the more cases will be identified as victims.*

It is thus difficult for victims, especially male victims, to report a crime that is not properly acknowledged. As mentioned above, a broad definition is favoured in Victoria which is gender-neutral and not anatomically or object specific.<sup>26</sup> The maximum penalty for rape is 25 years imprisonment. The state of Victoria therefore offers more flexibility than Western Australia and New South Wales, as it is more generally worded. The latter states tend to leave definition of certain components to common law. In the past, Queensland's rape laws were focused on females which position is mirrored in current South African law. The crimes on male victims were

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<sup>25</sup> Crome, S. *et al.* "Male Rape Victims: Fact and Fiction" (1999) on 60. See also comparison with the Swedish Penal Code (chapter 6 section 1) which provided as early as 1984 that: *[i]f a person by violence or by threat involving, or appearing to the threatened person as imminent danger, forces the latter to copulate or have comparable sexual intercourse, he or she shall be sentenced for rape.*

<sup>26</sup> The definition of sexual penetration is:

- \* the introduction (to any extent) by a person of his penis into the vagina, anus or mouth of another person, whether or not there is emission of semen; or
- \* the introduction (to any extent) by a person of an object or a part of his/ her body (other than the penis) into the vagina or anus of a person, other than in the course of a procedure carried out in good faith, for medical or hygienic purposes.

treated as lesser offences, which resulted in low reporting in Queensland and other states.<sup>27</sup>

Statistics of the state of Victoria reveal that the numbers of reported rape cases are relatively low for male victims, but seem to be on the incline. In 1991, the total rape offences reported were 729 of which only 42 were reported by men, whereas in 1992, 29 rapes and 459 assaults on men were reported.<sup>28</sup> An explanation for the significant difference in numbers could be that there were a number of actual rape acts committed, but were classified under assaults because the victims did not perceive themselves as having been raped.<sup>29</sup> In 1993, the total rapes reported on males were 93 and assaults on males were 758 whereas in 1994/1995, the total rapes on males reported were 89 while 881 assaults were reported.<sup>30</sup> As regards the gender of offenders, in 1991/1992 there were 399 male assailants committing crimes on females, with four female on female attacks. As regards male rape, 39 were male assailants and there was one case which involved a female offender.<sup>31</sup>

From the above statistics it would appear yet again that the crime of rape, as defined, occurs predominantly against women. It has to be considered that perhaps

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<sup>27</sup> See **“SALC Discussion Paper 85 of 1999”** on 89 - 91; See also Queensland’s Criminal Code and in specific sections 347 and 348, wherein it refers to the perpetrator and victim as ‘person’ thereby making the definition gender-neutral. Crome, S. *et al.* **“Male Rape Victims: Fact and Fiction”** (1999) on 61.

<sup>28</sup> Crome, S. *et al.* **“Male Rape Victims: Fact and Fiction”** (1999) on 62. See further <http://www.greenleft.org.au> **“Rape Laws: the other Assault”** accessed 30 August 2002. It is mentioned that in Australia less than one in four rapes are reported, of which only one in three rape cases result in a conviction.

<sup>29</sup> *Ibid.*

<sup>30</sup> Crome, S. *et al.* **“Male Rape Victims: Fact and Fiction”** (1999) on 62.

<sup>31</sup> *Ibid.*

male victims have been neglected or that they do not report, as they do not perceive themselves to be the victim of a recognised crime.<sup>32</sup>

It can be deduced that the approach in Victoria can be utilised from a South African perspective.<sup>33</sup> Although the state of Victoria offers the most comprehensive definition of the crime of rape, the remainder of the states in Australia are limited as regards penetration and consent. It is evident that occurrences of male rape are still underreported and with development of further law reform, the position will probably change.

## **2.2. THE POSITION IN BRITAIN**

Initially, South African law closely followed the position of Britain with regard to rape law. However, British law has undergone extensive reform and has revised its definition from 'unlawful and intentional sexual intercourse with a woman without her consent'<sup>34</sup> to 'it is an offence for a man to commit rape' and is further limited to only include penile penetration of the vagina or anus.<sup>35</sup> The British position will therefore be critically examined with regard to the crime of rape to establish whether its reforms are extensive enough to incorporate all victims of forced penetrative sexual assault. Attention will be expended upon the clinical and legal definition of rape and

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<sup>32</sup> See "Rape Law Reform Evaluation Project Report no 1: The Police Code of Practice for Sexual Assault Cases: An evaluation report by Heenan and Ross" (1995) in Crome, S. *et al.* "Male Rape Victims: Fact and Fiction" (1999) on 63 for criticism of findings.

<sup>33</sup> It is broad enough to incorporate oral and digital rape. The present author supports this viewpoint as the crime of rape is not committed if any object other than a male sex organ is forced into a victim's mouth. For example, if the assailant forced confectionary such as a candy stick into the victim's mouth, this act would be assault, or indecent assault, depending on the formers intention.

<sup>34</sup> Temkin, J. "Rape and The Legal Process" (1987) on 25.

<sup>35</sup> Section 142(2)(a) of the Criminal Justice and Public Order Act 1994. See also Rumney, P. & Morgan-Taylor, M. "Recognizing the Male Victim: Gender Neutrality and the Law of Rape: Part One" (1997) on 199.

related issues in order to establish whether the British definition of rape could be transposed into South African law.

### 2.2.1. HISTORICAL PERSPECTIVE

At common law, the initial narrow definition of rape can be attributed to the origin of the crime. In the 12<sup>th</sup> century the law was concerned with the protection of virgins and in some cases, a widow could not lay a charge for rape, as she was not a virgin.<sup>36</sup> In 1285 rape was extended to include any woman.<sup>37</sup> Rape was defined as the unlawful and intentional sexual intercourse with a woman without her consent.<sup>38</sup>

In 1980 and 1984, the Criminal Law Revision Committee examined the definition of rape.<sup>39</sup> The Criminal Law Revision Committee England Report 1984 was drafted by the Criminal Law Revision Committee, who recommended that the offence of rape should be retained as is, together with the maximum penalty of life.<sup>40</sup> They commented that the definition of rape should not be reformed as it is a distinctive form of wrongdoing, as well as the fact that rape can cause pregnancy.<sup>41</sup> Their argument failed to consider the implications for infertile, sterile, menopausal and pre-pubertal females. Furthermore, as emission of semen was unnecessary as a requirement, that contention served no purpose.<sup>42</sup> The Committee was also in favour of retaining buggery as a crime, which covered anal intercourse. It was only

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<sup>36</sup> Temkin, J. "Rape and the Legal Process" (1987) on 27. See also Hall, C. "Rape: The Politics of Definition" (1988) on 79 – 80.

<sup>37</sup> Temkin, J. "Rape and the Legal Process" (1987) on 27.

<sup>38</sup> Huckle, P.L. "Male Victims Referred to a Forensic Psychiatric Service" (1995) on 187. Rogers, P. "Male rape: The Impact of a Legal Definition on the Clinical Area" (1995) on 303.

<sup>39</sup> Temkin, J. "Rape and the Legal Process" (1987) on 30 fn42 and fn43.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*

<sup>42</sup> Temkin, J. "Rape and the Legal Process" (1987) on 178.

in the nineties that the position was somewhat changed and it was established by legislation and case law that a man could in fact be raped.<sup>43</sup>

Buggery was defined as non-consensual anal intercourse between males, as well as between men and women. It also covered consensual acts committed in public (committed by males only).<sup>44</sup> Therefore violent anal intercourse was equated under the same heading as consensual 'buggery' between a man and a woman.<sup>45</sup> The position with regard to buggery is congruous with what the South African definition of sodomy used to be.

With regard to the crime of indecent assault, the English case of **R v Willis** illustrated the important principles of this crime.<sup>46</sup> The *nature of the act* is the determinant as to whether it is indecent or not. It may relate to less serious acts, such as placing a hand under clothing or on erogenous zones of the body, or it may take the form of fellatio.

The Committee was in favour of keeping the three crimes separate, as buggery and rape were thought to be substantially more humiliating than the crime of indecent assault *per se*. Temkin argues that object penetration, or oral sex, may be far worse and traumatic than the offences of rape or buggery.<sup>47</sup> The Commission also studied the position in Victoria in Australia.<sup>48</sup> The Commission then left the matter open.

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<sup>43</sup> The Criminal Justice and Public Order Act 1994. See also **R v Richards** 1996 2 Cr App. R (S) 167.

<sup>44</sup> Before the new definition of 1994, non-consensual anal intercourse was viewed as a lesser offence with a maximum of 10 years imprisonment, as opposed to a life sentence for rape.

<sup>45</sup> Temkin, J. "**Rape and the Legal Process**" (1987) on 31.

<sup>46</sup> 1974 60 Cr App R(S) 149 as in Mezey, G.C. & King, M.B (ed). "**Male Victims of Sexual Assault**" (1992) on 118.

<sup>47</sup> Temkin, J. "**Rape and the Legal Process**" (1987) on 32.

<sup>48</sup> Temkin, J. "**Rape and the Legal Process**" (1987) on 30. In terms of the Crimes Act 1958 section 2A(2) of Victoria, rape has been redefined to include the penetration of the penis into the mouth or anus or vagina of any *person*, as well as the insertion of objects into the vagina or anus.

It is evident thus far that the legal position with regard to rape, buggery and indecent assault are analogous to the South African definitions of rape, non-consensual sodomy and indecent assault. The reforming rape laws will now be appraised to establish which category of possible penetrative sexual assault victim has since been incorporated into the definition of rape.

## 2.2.2. REFORMING RAPE LAWS

In Britain, male rape was recognized clinically before legally. In 1995, the clinical definition was used to incorporate forced, non-consensual penetrative acts.<sup>49</sup> In terms of the clinical definition, male rape is described as:

*[n]on-consensual forced penetrative sexual assault upon a person.*<sup>50</sup>

The position prior to 1995 was that a narrow definition of rape prevailed as contained in the British Sexual Offences Amendment Act of 1976.<sup>51</sup> Forced anal penetration was classified as non-consensual buggery with a lesser penalty. In 1987 in Britain, male rape did not fall within the strict definition of rape which was the forced penile-penetration of the vagina (the man could be the assailant only) and men were only covered by the crimes of indecent assault and buggery, which position is similar to that of the current position in South Africa.<sup>52</sup> A comparison with a clinical definition is useful as it provides a useful basis for a broader definition of the crime of rape. It is also indicative of the fact that the medical profession also recognises the possibility of an extended definition of the crime of rape and if an

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<sup>49</sup> Huckle, P.L. "Male Rape Victims Referred to a Forensic Psychiatric Service" (1995) on 187.

<sup>50</sup> Huckle, P.L. "Male Rape Victims Referred to a Forensic Psychiatric Service" (1995) on 191.

<sup>51</sup> This entailed the forced penile penetration of the vagina. As mentioned elsewhere forced anal penetration was defined as non-consensual buggery and a lighter sentence than that imposed for the crime of rape prevailed. It is evident from the above that discrimination between male and female victims in Britain also caused underreporting and a tremendous disparity in sentencing.

<sup>52</sup> Mezey, G.C. & King, M.B. "Male Victims of Sexual Assault" (1987) on 123.

extended definition of the crime of rape is recognised medically it can serve as a proponent to a broader legal definition.

In terms of the clinical definition, male rape is described as:

*[n]on-consensual forced penetrative sexual assault upon a person.*<sup>53</sup>

In November 1994 an amendment to the definition of rape was introduced and the notion of gender-neutrality was accepted by the House of Lords and was incorporated into section 142 and section 143 of the Criminal Justice and Public Order Act 1994.<sup>54</sup> The new crime was introduced by section 142(2)(a) of the Criminal Justice and Public Order Bill 1994 as:<sup>55</sup>

*[a] man commits rape if he has sexual intercourse with a person (whether vaginal or anal) who at the time of intercourse, does not consent to it.*

Morgan and Rumney-Taylor state that the amended definition more *accurately reflects the modern understanding of sexual violence, its nature and consequences.*

<sup>56</sup> This supports the view that the law should reflect the *mores* of society in terms of which the common man on the street views rape as a gender-neutral offence. The expanded definition has closed the *lacunae* in the law where males and transsexuals were excluded.

The legal and clinical view of male rape, nevertheless, do not coincide. The lack of definitions of male rape in clinical papers are prevalent, with the focus being on

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<sup>53</sup> Huckle, P.L. “Male Rape Victims Referred to a Forensic Psychiatric Service” (1995) on 191.

<sup>54</sup> Gender-neutrality means that the law is applicable to both men and women, as assailants, or victims.

<sup>55</sup> See also Edwards, S.S.M. “Sex and Gender in the Legal Process” (1996) on 335.

<sup>56</sup> Morgan-Taylor, M. & Rumney, P. “A Male Perspective on Rape” (1994) on 1490. See also *Cossey v UK* 1991 2 FLR 492 as referred to in which it was stated that it is not legally possible to change ones sex with the consequence that if born male, a hermaphrodite cannot be raped.

sexual assault, entailing a wide variety of penetrative sexual acts perceived as rape.<sup>57</sup> In a survey in Britain, 130 male victims were subjected to acts of forced oral penetration and object penetration with knives and were found to have been as traumatised as victims of rape.<sup>58</sup> A distinction is therefore drawn between penetrative and non-penetrative acts, the former being regarded as having experienced more trauma than the latter. How does this affect male sexual assault victims who are forced to penetrate the assailant, being either a male or a female? It is present author's view that the concept of penetration envisaged in the clinical definition is broad enough to incorporate this type of penetration so that any form of penetration would be included.

The question arises as to the reason for the lack of a clear clinical definition of rape. Many researchers classify oral, object and digital sexual assault as a species of rape and a reason furnished is that it is viewed from a *psychological* and *physical* perspective. Various advantages on the clinical issues, arising from the legal definition are cited namely: greater legal redress for male victims, the quality of research into prevalence will improve and services will be developed to assist and treat victims.<sup>59</sup>

Prior to the amendment males could merely be victims of non-consensual buggery, which held a penalty of a maximum of only ten years as opposed to rape which carries a maximum penalty of life imprisonment. The first case of male rape to appear in British case law is the case of **R v Richards**.<sup>60</sup> This case was a landmark decision as it was the first case to be decided in Britain after the amendment to the

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<sup>57</sup> See in general Rogers, P. "Male Rape: The Impact of a Legal Definition on the Clinical Area" (1995) on 303 *et seq.*

<sup>58</sup> Rumney, P. & Morgan-Taylor, M. "Recognizing the Male Victim: Gender Neutrality and the Law of Rape: Part Two" (1997) on 344.

<sup>59</sup> Rogers, P. "Male Rape: The Impact of a Legal Definition on the Clinical Area" (1995) on 304 - 305.

<sup>60</sup> 1996 2 Cr. App. R (S) 167. See also Rumney, P. & Morgan-Taylor, M. "Sentencing for Male Rape" (1996) on 262.



rape laws as introduced in Section 142(1) and (2) of the Criminal Justice and Public Order Act of 1994. The amendment sought to include penile penetration *per anum* and *per vaginam*.

The facts if the **Richard** case was as follows: The victim was an 18 year old male who was led by R, the defendant who was 25 years old at the time, to a park. The latter grabbed the former around the throat who was then forced to perform fellatio on the defendant who also attempted to rape the victim. R orally penetrated the victim's mouth and ejaculated. The defendant pleaded not guilty.

Lowry J looked at various factors in convicting and sentencing the defendant and R was convicted of indecent assault. He was sentenced to 6 years imprisonment for each count as well as life imprisonment for the *attempted rape* and attempted buggery of a male person. He looked at the defendant's prior convictions, as the latter had previously also committed an offence on a young girl, the fact that more violence was used than was needed to commit the offence and also the fact that he also pleaded not guilty, resulting in the victim having to give evidence. He also decided that the main concern was the protection of the public, as there was a high possibility that the defendant would commit further offences in the future if not confined for an indefinite period, as he was also diagnosed with a psychopathic personality disorder. Consequently Judge Lowry decided that a determinate sentence was inappropriate and that the appropriate sentence for attempted rape was life imprisonment.<sup>61</sup>

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<sup>61</sup> The court took into account the case of **R v Billam** 1986 8 Cr App R (S) 48. In this case the court mentions that attempted rape would normally have a lesser penalty than a complete rape. However aggravating factors may be so severe as to make the attempt more serious than the completed offence. It is further stated that where there is a severe personality disorder, that the public is at risk, a life sentence may be imposed. In other cases such as **R v Fenton** 1992 13 Cr App R (S) 85 and **R v Hodgson** 1968 52 Cr App (R) 113, various factors were mentioned such as, a long sentence may be imposed where the offences are severe enough; where it is apparent from the nature of the offences that the defendant has a history of an unstable characteristics and personality disorders and where the offences are particularly grave causing severe injury.

Criticism that may be offered with regard to the **Richard** case is: What happens in cases where the facts are analogous to the aforementioned case but the defendant does not have a personality disorder? It would appear that a lesser penalty would then be applicable. A second point of criticism that is relevant is that the judge does not refer to the crime solely as rape *per se* but associates the sexual assault with the crime of buggery. Nevertheless it is evident that Britain has afforded recognition to the male victims of rape with this groundbreaking case.

As males can now also be victims of rape, the limited bar to cross-examination would also be applicable.<sup>62</sup> Shortcomings of the legislation entail that questions regarding previous sexual history are not prohibited. Consequently allegations of previous homosexual behaviour could be damaging to the credibility of a heterosexual person. The other stigma that male victims are homosexual, could also possibly affect the complainant's credibility should he be examined. Temkin suggests that it would be counterproductive to extend rape views to include male victims, as the latter would suffer the same poor treatment as females.<sup>63</sup>

This view is not supported by the present author. Although it may be true that female victims might have been treated shoddily initially by police officials and the legal process, the position has dramatically changed with rape reforms. It is furthermore submitted that failure to recognise male victims of rape could cause more harm if the crimes were not recognized. The criminal would have a double victory and it would give leeway to continue unabated in a spate of crimes should the latter so wish. With recognition, the position is bound to change, which would

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See also Rumney, P. & Morgan-Taylor, M. "**Sentencing for Male Rape**" (1996) on 262.

<sup>62</sup> Section 2(1) Sexual Offences Amendment Act 1976.

<sup>63</sup> Temkin, J. "**Rape and the Legal Process**" (1987) on 39. See also Morgan-Taylor, M. & Rumney, P. "**A Male Perspective on Rape**" (1994) on 1490.

diminish any poor treatment that might be received by the police officials and the courts.<sup>64</sup>

As regards the offence of buggery, it is still partly retained and has the following consequences:<sup>65</sup>

- \* If committed against a person under 16 years of age or with an animal, the penalty is life imprisonment;
- \* If committed against a person under the age of 18 years with the accused being over 21 years of age, the penalty is 5 years imprisonment;
- \* In the remainder of cases, the penalty is 2 years imprisonment.

The retention of buggery is not favoured by present author who feels that the protection offered to sexual assault victim is both limited and stigmatising. The crime of indecent assault is also being viewed with growing seriousness. In the case of **R v Wilson**, a 53 year old woman was forced off her bicycle by the appellant, and forced to touch the latter's genitalia before he ejaculated in her mouth and face.<sup>66</sup> He was awarded a nine-year prison sentence as the judge regarded this type of invasion as serious as vaginal rape.<sup>67</sup> The crime of indecent assault could therefore be utilised for non-penetrative acts. Victims of sexual assault could be covered under the crime of indecent assault which could serve as a competent verdict to a case of rape.

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<sup>64</sup> A solution suggested, has been increased education, and already there have been trained officers who assist male victims through medical examinations and the legal process.

<sup>65</sup> Rumney, P. & Morgan-Taylor, M. "Recognizing the Male Victim: Gender Neutrality and the Law of Rape: Part One" (1997) on 199.

<sup>66</sup> 1993 14 Cr App R (S) 627; 630-631.

<sup>67</sup> See also the case of **R v Hiscock** 1992 13 Cr App R (S) on 24-26 where a 5 years imprisonment sentence was imposed where a 15 year old girl was orally raped, as the court found the act to be in some ways *more nauseating and repellent than a vaginal rape*.

Criticism against the British definition is that it is still too narrow. The recent rape law reforms recognize male victimization and is partially gender-neutral in that it is an offence for men to commit rape.<sup>68</sup> Despite the reform, the definition still excludes oral rape, digital and object rape, which crimes would only be afforded redress under the crime of indecent assault.<sup>69</sup> It also excludes female perpetrators of sexual assault on a male or female victim.<sup>70</sup>

The criticism of the British definition will now be addressed in detail, in order to establish whether the British definition is suited to the categories of sexual assault victim identified earlier in the Study and which are deserving of protection in the South African law.

### 2.1.3 CRITICISM OF THE DEFINITION OF RAPE IN BRITAIN

A question may be asked whether the new law in Britain is justifiable and whether the British definition of rape can be transposed into our South African law to offer adequate protection to the various identified categories of sexual assault victim postulated in this study? The following factors may play a role.

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<sup>68</sup> Section 142(2)(a) Criminal Justice & Public Order Act 1994.

<sup>69</sup> See **R v Wilson** 1993 Cr App R (S) 627 on the position regarding oral rape.

<sup>70</sup> See Rogers, P. "**Male Rape: The Impact of the Clinical Definition on the Clinical Area**" (1995) on 305 where criticism of the phenomena of male rape offered is as follows:

- \* The lack of literature on the topic which is related to a lack of interest, and awareness, on the subject of male rape and other types of rape.
- \* The legal definition only protects some male victims, which is of concern as those who do not meet the criterion will be ignored in epidemiological studies.
- \* Only one conviction for male rape occurred in the six months after the enactment of the new definition.

1. *Acts of vaginal and anal penetration are similar and equitable.*

Initially male victims of forced penetrative sexual assault were not afforded equitable protection which was not the case with their female counterparts. Non-consensual buggery was regarded as a less serious crime than the crime of rape.<sup>71</sup> Three cases illustrate this:

- \* In the case of **Jackson** a retarded man was sodomised by an HIV-positive assailant. The accused was sentenced to a mere 6 years imprisonment.<sup>72</sup>
- \* In the case of **Payne** a quadriplegic was totally unable to defend himself and was sodomised.<sup>73</sup> His assailant was sentenced to 4 years imprisonment.
- \* In **R v Wall** a male was threatened with a razor blade and sodomised in prison.<sup>74</sup> The accused was sentenced to 6 years imprisonment. It was mentioned in the case that buggery should not be equated with rape, as the latter is regarded as the most serious sexual offence, and carries a higher maximum sentence.

It was only in the case of **R v Mendez** that forced sexual assault *per anum* was equated with growing seriousness and Glidewell J states that:<sup>75</sup>

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<sup>71</sup> Rumney, P. & Morgan-Taylor, M. "Recognizing the Male Victim: Gender Neutrality and the Law of Rape: Part One" (1997) on 220.

<sup>72</sup> 1988 10 Cr App. R (S) 297; Also referred to by Rumney, P. & Morgan-Taylor, M. "Recognizing the Male Victim: Gender Neutrality and the Law of Rape: Part One" (1997) on 222.

<sup>73</sup> 1994 15 Cr. App. R (S) 395.

<sup>74</sup> 1989 11 Cr. App. R (S) 111.

<sup>75</sup> 1992 13 Cr. App. R (S) 95.

*[f]orcible buggery of a woman is equitable to rape, but worse than normal vaginal rape...one might regard this as an aggravated rather than a standard rape.*

In other words, forced penetrative sexual assault *per anum* is viewed as an aggravated form of rape. Based on this the British definition of rape would offer equitable protection to the following identified categories of sexual assault victim. It would cover the victimisation of a female victim of penetrative sexual assault *per anum* or *per vaginam*, both inside and outside of marriage by a male perpetrator and would also offer protection to a male victim of sexual assault *per anum* by a male perpetrator. A number of the possible categories of sexual assault victim identified in this study would not be covered and the definition is therefore deficient for this reason.

2. *The motives of the assailants are similar, irrespective of the sex of the victim.*

As mentioned earlier in this study, the motivation for the sexual assault is the assertion of power, rather than sexual motivation.<sup>76</sup> Children and elderly men are also victims of rape which is attestation to the fact that sexual gratification is not the primary motive. Accordingly the British definition falls short on this aspect as it fails to consider other categories of sexual assault victims who are also deserving of protection.

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<sup>76</sup> See chapter two. Groth, A.N. "Men who Rape" (1979) on 124 - 133. As mentioned elsewhere the psychological motives advocated are conquest and control, revenge and retaliation, sadism and degradation, conflict and counteraction and status and affiliation.

3. *The trauma and consequences of rape are similar for both men and women.*<sup>77</sup>

It has been shown in this study, that victims of penetrative sexual assaults may all suffer similar physical injury and psychological trauma such as Rape Trauma Syndrome.<sup>78</sup> Post-traumatic stress disorder is also a classification of trauma from which victims suffer.<sup>79</sup> The British definition is deficient in this regard as it neglects a number of categories of penetrative sexual assault victim which have been identified. The British definition therefore still needs to broaden the rape definition, especially as regards other forms of rape, but nevertheless the case of **R v Richards** has been a breakthrough in that it has recognised the seriousness of crimes committed on male victims.<sup>80</sup> However, it has the shortfall in that object and oral sexual assaults as well as female assailants are not recognised. The female perpetrator of a penetrative sexual assault on a male or female victim can only held liable under the crime of indecent assault.<sup>81</sup>

This exclusion may be attributed to the same common misconceptions experienced in South African law and globally which were expounded upon earlier.<sup>82</sup> As

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<sup>77</sup> Rumney, P. & Morgan-Taylor, M. "Recognizing the Male Victim: Gender Neutrality and the Law of Rape: Part One" (1997) on 228.

<sup>78</sup> See chapter two in this regard.

<sup>79</sup> See discussion elsewhere in chapter two on psychological consequences.

<sup>80</sup> 1996 2 Cr. App. R (S) 167. As mentioned elsewhere, male victimization previously constituted the offence of buggery, which included vaginal and anal intercourse with an animal. The principle of gender-neutrality is now incorporated within their domestic rape legislation. It recognizes that a male too can be raped.

<sup>81</sup> For acts of forced oral, object, digital or penile-vaginal sexual intercourse.

Note: The maximum penalty for indecent assault is 10 years imprisonment in comparison with life imprisonment for rape as found in section 37 of the Sexual Offences Act 1956 (as amended).

<sup>82</sup> See chapter two of this Study. This relates to the belief that men could actively commit a sexual offence, whereas the woman could only passively acquiesce and allow the offence to be committed against her. The converse of this situation was not seen to be possible. Hence the belief arises that a man cannot be raped by a woman.

mentioned elsewhere, it is often thought that it is biologically and physically impossible for a man to be raped. Surely, it is asked, it would only be possible if he were willing? It has been suggested that what the male does he does on purpose and consequently the act must be a voluntary act.<sup>83</sup> Research referred to in chapter two of this study has shown that men can obtain erections in violent circumstances and can even ejaculate with consequential trauma of humiliation, anxiety and terror.<sup>84</sup> A further misconception accounting for the narrow British definition is that a woman does not have the physical strength to rape a man.<sup>85</sup> Why then is male rape regarded, even in Britain, as a hypothetical event? The fact of the matter is that there is only limited evidence involving representative samples of rape of men by women. The crime of male rape is consequently underestimated. Limited reporting also affects available data as regards female assailants. The same reasons identified in chapter two of this study which account for the limited data are applicable here.<sup>86</sup> A reason suggested for the narrow definition surrounds the question as to why females would be motivated to rape? The same reasons are

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<sup>83</sup> See in this regard **Willan v Willan** 1960 2 All ER 463: A husband alleged that he was physically assaulted by his wife. If he did not oblige and conform to sexual intercourse when his wife required it, she resorted to violence. The court was concerned about whether the act of sexual intercourse after the violence, condoned the wife's behaviour, thus barring the divorce. The court found that it did condone the act as the sexual intercourse was viewed as a voluntary act.

<sup>84</sup> Rumney, P. & Morgan-Taylor, M. "**Recognizing the Male Victim: Gender Neutrality and the Law of Rape: Part One**" (1997) on 231 and fn167. See chapter two for more detail.

<sup>85</sup> These misconceptions are that the woman may be armed; the woman may in fact be stronger than the male victim; there might be a gang of women who overpower the man and the victim may be drugged. As regards this, section 4 of the Sexual Offences Act 1956 excludes males as victims, in its provisions which make it an offence to administer drugs to a woman, to enable a man to have sexual intercourse with the former.

<sup>86</sup> The notion that men are not encouraged to show emotion or vulnerability, may also discourage the latter from reporting the crime, as well as the phenomenon where male victims minimize or normalise their experiences of sexual violence is also blamed for the lack of reporting in Britain. See Rumney & Rumney, P. & Morgan-Taylor, M. "**Recognizing the Male Victim: Gender Neutrality and the Law of Rape: Part Two**" (1997) fn174-176.



suggested as is applicable to males, such as power and control and possible past sexual abuse.<sup>87</sup>

Although the British definition is one step further in treating male and female victims similarly and recognises anal penetration as an aggravated form of rape it is to be rejected because victims of both genders are excluded from the ambit of the new legislation.<sup>88</sup> The following categories of sexual assault victim which have been identified in this study are not covered by the legislation:

- \* Penetrative sexual assault by a female perpetrator on a male victim;
- \* Penetrative sexual assault with the use of an object or digitally on a male or female victim;
- \* Consensual sexual intercourse where the one party fails to disclose their HIV/AIDS infected status to the victim.

A better definition of rape as suggested by the British authors Morgan-Taylor and Rumney would have been:<sup>89</sup>

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<sup>87</sup> See Parrot, A. & Bechhofer, L. "Acquaintance Rape: The Hidden Crime" (1991) on 207-208; See also Rumney, P. & Morgan-Taylor, M. "Recognizing the Male Victim: Gender Neutrality and the Law of Rape: Part Two" (1997) on 343.

<sup>88</sup> **R v Mendez** 1992 13 Cr. App. R (S) 94 on 95.

<sup>89</sup> Morgan-Taylor, M. & Rumney, P. "A Male Perspective on Rape" (1994) on 1490. The original amendment suggested to the definition of rape was debated in the House of Commons. The definition of "sexual intercourse" was to have included vaginal or anal penetration to any degree, by any part of the assailant's body, or any object, and would have also incorporated non-consensual oral sex. This definition was consequently withdrawn in favour of the current more narrow definition. See also Huckle, P.L. "Male Victims Referred to a Forensic Psychiatric Service" (1995) on 191 where he states: *Rape should not be defined by gender but by recognizing it for what it is: non-consensual forced, penetrative sexual assault upon a person.*

*[vaginal] or oral penetration to any degree by any part of the assailants body or any object and shall include non-consensual oral sex.*

The *lacunae* would therefore be closed and all possible categories of sexual assault victim would be equitably protected.<sup>90</sup> The conclusion that may be deduced is that some aspects of the British definition could be transposed into the South African law, but the overall effect would be inequitable for the excluded categories of sexual assault victim's which has been identified. Change will only take place with increased knowledge and case studies performed on the topic to increase awareness of the prevalence of this type of rape. Again, if a definition only protects some rights, how does one justify the lack of protection afforded to other victims, whose rights are not of lesser importance than those who are protected. Although only one conviction occurred within 6 months after the amended definition, it is a breakthrough in the legal definition and provides material for more convictions to follow.

### **2.3. THE POSITION IN THE UNITED STATES OF AMERICA**

A comparative analysis would not be complete without reference to the United States due to the difference between legislative measures adopted in its numerous states. The various states have their own legal provisions pertaining to the crime of rape. Many states in the United States of America have realized that more legal research is required and that the justice system needs to be extended to incorporate more victims of sexual assault. This was largely due to the fact that rape was an extremely difficult crime to prove and consequently rape victims were questioned extensively about their sexual history. Should the victim have had a sexual history, he or she was regarded with suspicion, as it was thought the person was more likely to consent to sexual intercourse.

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<sup>90</sup> Vaginal, anal, oral and digital rape.

The feminist movement questioned the laws regarding rape and placed pressure on the legislature to limit evidence of a victim's prior sexual history at trial. Consequently statutes termed the 'Rape Shield Laws' were adopted.<sup>91</sup>

Although female victims have suffered mistreatment due to the justice system, the situation has improved and trained officials have been recruited to assist victims.<sup>92</sup> There is no reason why male rape victims will not also be afforded the same protection if mechanisms are improved and research increased. This will eliminate judicial misconceptions of the dynamics of male victim abuse and change perceptions and attitudes.

Many American states have therefore broken away from the shackles of the traditional definition of rape and offer protection to all victims alike.<sup>93</sup> Substantial research has been conducted on prison rape in the United States. Rape Trauma Syndrome has even been extended to men as a result of research conducted, which

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<sup>91</sup> Michigan was the first state to pass their rape shield laws in 1974. All statutes have a feature in common as the automatic admissibility of proof of unchastity is rejected. See Kramer, E.J. **"When Men are Victims: Applying Rape Shield Laws to Male Same-Sex Rape"** (1998) on 300. In South Africa it has been held that the complaint should be lodged at the earliest opportunity as is reasonably expected, without undue delay. See *R v C* 1955 4 SA 40 (N). See also Labuschagne, J.M.T. **"Die Klagte by Seksmisdade"** (1978) at 19 – 20. See further *R v Osborne* 1905 1 KB 551 on 559 for comments by Ridley J as regards the accused's defence that the complainant never raised a "hue and cry" also in **"SALC Issue Paper 10 of 1997"** on 25. Certain case law indicates that to report a crime a few years after the crime has been committed may be accepted. In *R v P* 1967 2 SA 497 (R), several years had passed since the first act of intercourse. In *R v Gannon* 1906 TS 114 – 10 days had passed and in *R v T* 1937 TPD 389 – 6 weeks had elapsed. The complainant needs to show consistency and rebut a defence of consent. Consent, however is not always an issue (for example if the child is less than 16 years of age as in the case of statutory rape).

<sup>92</sup> Odem, M.E. & Clay-Warner, J. **"Confronting Rape and Sexual Assault"** (1998) on 254. See further Bohmer, C. **"Rape and the Law"** in Parrot, A. & Bechhofer, L (ed). **"Acquaintance Rape: The Hidden Crime"** (1991) on 317 - 327 and 329 - 333.

<sup>93</sup> Odem, M.E. & Clay-Warner, J. **"Confronting Rape and Sexual Assault"** (1998) on 44 - 45.

indicated that men and women experienced the same trauma.<sup>94</sup> The approach followed in Nebraska seems to be the best approach which could be applied to South African law, so that there could be a distinction between serious penetrative sexual crimes as opposed to less serious non-penetrative crimes.

In order to understand how the definitions presently adopted in a number of states were formulated, the history of the crime of rape will be discussed followed by an analysis of the reforming rape laws. Specific attention will be given to the aims of the rape law reform, the common law approach adopted in various states and the different crimes formulated to cater for possible victims of sexual assault. Lastly, the position with regard to rape laws adopted in various states will be critically examined and a conclusion deduced as to whether any provisions pertaining to the crime of rape can be effectively transposed into South African rape legislation.

### 2.3.1. HISTORICAL PERSPECTIVE

In the United States the crime of rape was derived from the British common law. The British common law definition of rape was transferred to the colonies and was described as the carnal knowledge of a woman by force and against her will and was distinguished by the element of *non-consent*, although the various states later codified their common law.<sup>95</sup>

Earlier the definition focused on the sexual element of rape rather than that of violence, and various safeguards were imposed to avoid false accusations. For this purpose certain requirements were focused upon. These requirements entailed victim credibility and corroborating evidence was required. In addition, a resistance

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<sup>94</sup> **People v Yates** 1995 637 NYS 2d 625. Rumney, P. & Morgan-Taylor, M. “**Recognizing the Male Victim: Gender Neutrality and the Law Of Rape: Part One**” (1997) on 230.

<sup>95</sup> See Donat, P.L.N & Emilio, J.D. “**A Feminist Redefinition of Rape and Sexual Assault: Historical Foundations and Change**” (1992) on 9 - 22.

standard was imposed and was an indicator of non-consent.<sup>96</sup> Previous sexual conduct and history were considered. The reform began when problems were experienced with the interpretation of the law. The crime was moreover increasing at an alarming rate.<sup>97</sup>

During the colonial period, sexuality was directed towards marriage and the creation of lawful heirs. The English colonies were influenced by the Church, and the focus was on the family unit which was regarded as the central unit, with *males being dominant and females submissive*. In order to regulate deviance, the Church, Courts and community formed an alliance so to speak, in order to monitor private sexual behaviour and to limit sexual expression to marriage. Women had the heaviest responsibility as regards premarital sexual intercourse as a woman's value was equated with whom she married and her ability to produce an heirs who were not illegitimate.<sup>98</sup> Colonial Society held the entire community responsible for upholding morality and sexual crimes were punished severely.<sup>99</sup>

A raped woman was perceived as impure and could not expect to marry into a family of good repute. Most of the cases reported were where assailants came from a lower social class than that of the victim or if the victim was a married woman who had physically resisted. Non-consent was proved by means of physical resistance, verbal resistance and immediate disclosure of the rape to both family and neighbours.<sup>100</sup>

By the 19<sup>th</sup> Century the focus was more on *individual choice*. Women became more empowered as they could be employed. Morality and purity still played a role as

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<sup>96</sup> Odem, M.E. & Clay-Warner, J. "Confronting Rape and Sexual Assault" (1998) on 253.

<sup>97</sup> See discussion in Burgess, A.W. "Rape and Sexual Assault II" (1988) on 271 *et seq.*

<sup>98</sup> See Odem, M.E. & Clay-Warner, J. "Confronting Rape and Sexual Assault" (1998) on 36.

<sup>99</sup> See Donat, L.N & Emilio, J.D. "A Feminist Redefinition of Rape and Sexual Assault: Historical Foundations and Change" (1992) on 9 – 22.

<sup>100</sup> Odem, M.E. & Clay-Warner, J. "Confronting Rape and Sexual Assault" (1998) on 36.

regarded the obtaining of a spouse. If a woman was raped she was sometimes blamed for the rape and ostracized.<sup>101</sup>

During the course of the 20<sup>th</sup> Century, psychologists started analysing deviant sexual behaviour towards understanding the cause thereof and eventually the focus was on the rapist and the latter was believed to be mentally ill or to have a character disorder, with the focus being on the act of rape being *sexual as opposed to violence*. Sexual psychopath laws were implemented and offenders were sent to mental institutions as opposed to receiving sentences of imprisonment. Some perceptions were that the woman contributed to the attack and laws were passed which required evidence of penetration, corroborative evidence and testimony regarding prior sexual history.<sup>102</sup>

Within the formation of the feminist movement, reform began and a changing consciousness arose.<sup>103</sup> The movement formulated a new definition from the victim's perspective and challenged the notion that rapists were predominantly controlled by sexual urges. The focus was more on domination and control. A need was seen for greater measures to be implemented to assist traumatized victims and consequently rape crisis centres, victim units at hospitals and properly trained police as regards rape victims, were provided to assist victims.<sup>104</sup>

By the seventies, the reform started to peak in the United States and by 1980 almost every state was contemplating some form of reform to the law relating to rape.<sup>105</sup>

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<sup>101</sup> Odem, M.E. & Clay-Warner, J. "Confronting Rape and Sexual Assault" (1998) on 37.

<sup>102</sup> Donat, P.L.N & Emilio, J.D. "A Feminist Redefinition of Rape and Sexual Assault: Historical Foundations and Change" (1992) on 9-22.

<sup>103</sup> See Odem, M.E. & Clay-Warner, J. "Confronting Rape and Sexual Assault" (1998) on 40-42.

<sup>104</sup> See in general Deckard, B.S. "The Woman's Movement: Political, Socioeconomic and Psychological Issues" (1983).

<sup>105</sup> Andenaes, J. "The General Prevention Effects of Punishment" (1966) on 970. See further Donat, P.L.N. & Emilio, J.D. "A Feminist Redefinition of Rape and Sexual Assault: Historical

Michigan was one of the first states to introduce reform by way of the Michigan Criminal Sexual Conduct Statute of 1975. In terms of this legislation four degrees of sexual conduct were introduced, with the definition favouring gender neutrality. Various factors such as the following were used to distinguish between the various degrees of criminal conduct:

- \* The presence or absence of penetration or sexual contact.
- \* The use of a weapon.
- \* The age of the victim.
- \* Infliction of physical injuries.

The United States offers the most probable solution to the issue of providing a definition best suited to the categories of sexual assault victims identified in this study merely because of its composition of a vast number of states with different legal systems. A number of states have had vast and far-reaching legislative reforms. The reforming rape laws will now be appraised to establish whether a suitable and comprehensive definition exists which incorporates all the categories of penetrative sexual assault victim identified in this study.

### **2.3.2. REFORMING RAPE LAWS**

Previously there were low conviction rates for the crime of rape and this was attributed to jury mistrust of the rape complainant. The reforms were aimed at protecting privacy during trials and were intended to encourage victims to report the crime. With the reform, evidentiary characteristics such as lack of eyewitnesses, delayed reports, absence of injury and incomplete penetration were not seen as

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**Foundations and Change**" (1992) on 9-22. Odem, M.E & Clay-Warner, J. "**Confronting Rape and Sexual Assault**" (1998) on 39.

major obstacles as in the pre-reform era. Rape shield provisions were implemented with a view to protecting complainants and witnesses and focusing on the relevance of evidence by lowering the evidentiary standards.<sup>106</sup> The use of expert evidence was also introduced.<sup>107</sup> The criteria utilised for the admissibility of expert evidence are relevance,<sup>108</sup> expertise<sup>109</sup> and knowledge.<sup>110</sup>

The aims of the rape law reform were:<sup>111</sup>

- \* To end the additional unnecessary trauma faced by complainants when exposed to the legal process.
- \* To recognize the crime as one of violence.
- \* More effective administration of criminal justice.

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<sup>106</sup> See Kramer, E.J. “When Men are Victims: Applying Rape Shield Laws to Male Same-Sex Rape” (1998) on 296.

<sup>107</sup> See Burgess, A.W. “Rape and Sexual Assault” (1985) on 333.

<sup>108</sup> The probative value must be of more value than the prejudice caused to the defendant, or the misleading of the jury; nor cause undue delays or waste time.

<sup>109</sup> The expert must have expertise with specific regard to facets of knowledge, skill, experience, training or education. In various cases such as **State v Saldanha** 1982 Minn. 324 NW 2d 227, the evidence was not accepted as being reliable, as the expert testified on the basis of her opinion that a rape had occurred. See **State v McGee** 1982 Minn.324 NW 2d 232. See further Burgess, A.W. “Rape and Sexual Assault I” (1985) on 334 where Burgess concurs with case law which reveals that such evidence is indeed reliable and acceptable, as it does not fall within the jurors basic knowledge. Furthermore, findings were that the potential prejudice does not outweigh the probative value and at trial the focus is on the victim and not the defendant. The jury is thus offered this type of evidence to assess the case in addition to other evidence. This is especially the case should the defendant allege consent.

<sup>110</sup> The expert testimony must not relate to facets which fall within the knowledge of the average person or jury.

<sup>111</sup> Burgess, A.W. “Rape and Sexual Assault II” (1988) on 277.



- \* To permit prosecution of a broader range of offences.
- \* To effect this, new offences were created with a broader definition which were gender-neutral with a focus on assault and battery, with degrees of the offence being determined by the following factors such as the nature of the act; the type of force; the age of the victim; the relationship between the victim and offender.

Rape was traditionally defined as the unlawful carnal knowledge of a woman by a man, forcibly, and without her consent.<sup>112</sup> Vaginal penetration by the male sex organ was required. Forcible anal intercourse constituted sodomy. Traditionally the crime of sodomy covered every unnatural act of intercourse between males and included voluntary or involuntary acts of anal or oral intercourse as well as acts with a beast. The slightest degree of penetration was needed and no emission of semen was necessary.<sup>113</sup> The legislature repealed the sodomy statute with the adoption of the new Criminal Code.<sup>114</sup>

Section 213.0 of the Model Penal Code now includes forced anal intercourse as a form of rape.<sup>115</sup> Lack of consent thus distinguished rape from other crimes of illicit sex.<sup>116</sup> Force indicated non-consent. Rape law reform was needed, as male victimization was thought to be less serious and marital rape was not recognized as a crime.<sup>117</sup> By 1988, 24 states had repealed the common law statutes. Some states' statutes were gender neutralized and others broadened the concept to

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<sup>112</sup> See Odem, M.E & Clay-Warner, J. "Confronting Rape and Sexual Assault" (1998) on 248.

<sup>113</sup> Bailey, F.L. & Rothblatt, H.B. "Crimes Of Violence: Rape and Other Sex Crimes" (1991) on 344 and 345.

<sup>114</sup> Section 213.0 of the Model Penal Code.

<sup>115</sup> Rape Statute-Non-Genital Intercourse 3 ALR 4<sup>th</sup> 1009 on 1010.

<sup>116</sup> Odem, M.E. & Clay-Warner, J. "Confronting Rape and Sexual Assault" (1998) on 249-254. See further Bohmer, C. "Rape and The Law" in Parrot, A. & Bechhofer, L (ed). "Acquaintance Rape: The Hidden Crime" (1991). Also Burgess, A.W. "Rape and Sexual Assault II" (1988) on 271.

<sup>117</sup> Burgess, A.W. "Rape and Sexual Assault II" (1988) on 273.

include object penetration.<sup>118</sup> A number of states created new offences with non-consensual sexual contact as a basis.

Michigan departed from the common law and introduced reform in the form of the Michigan Criminal Sexual Conduct Statute of 1975.<sup>119</sup> Its concept of rape entails elements of sexual penetration, criminal intent and lack of consent. It delineated the crime into four degrees of sexual criminal conduct depending on age, danger to the victim and injuries caused.<sup>120</sup> The reform recognised rape as being violent and offered more protection to victims in the aftermath of the crime.

The phenomena of prison rape, however, brought male rape to the attention of the United States judiciary system. In an enquiry into the Philadelphia prison system in 1968, the consequent report described male rape as akin to an epidemic.<sup>121</sup> The investigation ascertained that 156 acts of sexual assault occurred (of which 19 were oral penetrative sexual acts), but came to the conclusion that over a two year period, the figure was estimated at 2 000 cases, of which merely 94 incidents were reported. Reasons given include a fear of retaliation and lack of interest on the part of the prison authorities.<sup>122</sup>

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<sup>118</sup> Burgess, A.W. "Rape and Sexual Assault II" (1988) on 276 and 277.

<sup>119</sup> Odem, M.E & Clay-Warner, J. "Confronting Rape and Sexual Assault" (1998) on 45. See Donat, P.L.N. & Emilio, J.D. "A Feminist Redefinition of Rape and Sexual Assault: Historical Foundations and Change" (1992) on 9 - 22. Burgess, A.W. "Rape and Sexual Assault II" on 285. See also "SALC Discussion Paper 85 of 1999" on 95 - 99.

<sup>120</sup> Burgess, A.W. "Rape and Sexual Assault II" on 285. See also "SALC Discussion Paper 85 of 1999" on 95 - 99.

<sup>121</sup> Rumney, P. & Morgan-Taylor, M. "Recognizing the Male Victim: Gender Neutrality and the Law of Rape: Part Two" (1997) on 348.

<sup>122</sup> *Ibid.*

An estimate by Weiss and Friar suggest that one in four Americans can be expected to be raped whilst in prison.<sup>123</sup> A judge even mentions that:<sup>124</sup>

*[a] new inmate can expect to be subjected to homosexual (the present author prefers the term same-sex as victims, or those who rape the former may not in fact be homosexual) gang-rape his first night in jail, or it has been said, even in the van on the way to the jail.*

The fact that incidents such as these occurred, compounded by the feminist movement, resulted in many states in America reformulating and broadening their definitions of rape to incorporate male victimization.

In a survey of 623 students (of which 43% were male) at the University of South Dakota, it was found that 22% of females and 16% of men reported at least one incident of forced sex in their lifetime.<sup>125</sup>

States such as Michigan<sup>126</sup> and New York<sup>127</sup> have also featured a gender-neutral approach. Michigan has a statutory crime known as criminal sexual conduct. This has replaced the previous narrow definition, whereby it currently focuses on sexual

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<sup>123</sup> "Terror in the Prisons" (1975) on 61 as referred to in Rumney, P. & Morgan-Taylor, M. "Recognizing the Male Victim: Gender Neutrality and the Law of Rape: Part Two" (1997) on 348.

<sup>124</sup> Blackman J in **United States v Bailey** 1980 444 US 394 on 421. In another case of **Hutto v Finney** 1978 437 US 678 on 681, Judge Stevens said that: *[s]ome potential victims dare not sleep; instead they would leave their beds and spend the night clinging to the bars nearest the guards station.*

<sup>125</sup> See Rumney, P. & Morgan-Taylor, M. "Recognizing the Male Victim: Gender Neutrality and the Law of Rape: Part Two" (1997) on 366.

<sup>126</sup> **State v Stevens** 1986 510 A 2d 1070, 67 ALR 4<sup>th</sup> 1123.

<sup>127</sup> **People v Liberta** 1984 64 NY 2d 485, NYS 2d 567.

penetration, or other sexual contact, under coercive circumstances. Lack of consent on the part of the victim need not be proved, although it may be a valid defence.<sup>128</sup>

The crime of criminal sexual conduct exists in four degrees and covers rape, assault and indecent assault.<sup>129</sup> The most serious crime being first-degree criminal sexual conduct, which has application where the accused is armed, or is used in connection with other crimes, or where force is used and it resulted in injury. The maximum penalty is life imprisonment.<sup>130</sup>

Second and third degree sexual assault covers non-penetrative sexual assault and penetration obtained by force, where no personal injury is involved. The maximum penalty is 15 years imprisonment. The fourth degree is a non-penetrative sexual assault where no personal injury results. The maximum penalty is 2 years imprisonment or a monetary penalty.<sup>131</sup>

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<sup>128</sup> See Temkin, J. **“Rape and the Legal Process”** (1987) on 115 - 116; See also **“SALC Discussion Paper 85 of 1999”** on 96 – 98; Marsch, C. *et al.* **“Rape and the Limits of Law Reform”** (1982) on 50-52 as well as Estrich, S. **“Rape”** (1986) on 1155.

<sup>129</sup> See **“SALC Discussion Paper 85 of 1999”** on 96 - 97 for detail.

<sup>130</sup> These provisions can be compared with section 51 of the Criminal Law Amendment Act 105 of 1997 which provides for different minimum sentences applicable to rape where certain aggravating factors are present.

<sup>131</sup> See Labuschagne, J.M.T. **“Geslagsmisdade”** (1981) on 28 for discussion on the position in Norway. Where any use is made of violence or threat of violence to induce sexual intercourse, it is an offence for both men and women who can be either victims or perpetrators. The key elements are violence, or the threat of violence, and unlawful sexual intercourse. It is also stated that sentences ranged from three months to 6 years. See **“SALC Discussion Paper 85 of 1999”** on 91 - 92 for discussion on Yugoslavia. This country has a broad definition and focuses on forced physical penetration and is defined as *the sexual penetration, however slight, of the vagina or anus of the victim, by the penis of the perpetrator or any object used by the perpetrator or of the mouth of the victim, by the penis of the perpetrator, by coercion or threat or force against the victim or a third person.*

The definition of rape in Washington is a broad definition which would cover all the categories of identified sexual assault victim except the category of sexual assault victim where the HIV/AIDS status of the perpetrator is deliberately withheld. The definition provides that:<sup>132</sup>

*A person is guilty of rape in the first degree when such a person engages in sexual intercourse with another person by forcible compulsion.*

“Sexual intercourse” is defined as:<sup>133</sup>

*[a]ny penetration of the vagina or anus, however slight, by an object, when committed on one person by another, whether such persons are of the same or opposite sex and also includes any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another.*

In a Florida Statute of rape ‘female’ has been changed to ‘person’ and a male can be convicted of anal rape.<sup>134</sup> In Massachusetts, penetration encompasses penetration of a genital or anal opening, or penetration by a sexual organ (however slight) including inanimate objects.<sup>135</sup> Rape incorporates lack of consent, consent induced by fear or fraud and being under the age of consent.<sup>136</sup>

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<sup>132</sup> Revised Code Washington (ARCW) 1994 S9A.44.010.

<sup>133</sup> See Revised Code Washington (ARCW) 1994 section 9.79.140 and 170 (1977) as incorporated by the Assimilative Crimes Act 18 U.S.C. 13. Also in Rumney, P. & Morgan-Taylor, M. **“Recognizing the Male Victim: Gender Neutrality and the Law of Rape: Part Two”** (1997) on 350. See also **United States v Smith, William & Komak** 1978 574 F 2d 988.

<sup>134</sup> Bailey, F.L. & Rothblatt, H.B. **“Crimes of Violence: Rape and other Sex Crimes”** (1991) on 130.

<sup>135</sup> Bailey, F.L. & Rothblatt, H.B. **“Crimes of Violence: Rape and other Sex Crimes”** (1991) on 131.

<sup>136</sup> Bailey, F.L. & Rothblatt, H.B. **“Crimes of Violence: Rape and Other Sex Crimes”** (1991) on 133, 134 and 202.

In Connecticut, an offence of sexual assault exists which distinguishes between sexual intercourse and sexual contact. Sexual intercourse is described as:<sup>137</sup>

*[a]nal intercourse, fellatio or cunnilingus between persons regardless of sex. Penetration, however slight is sufficient ...and does not require emission of semen. Penetration may be committed by an object.*

It has been recognised that some assaults are far worse than completed rapes. The state of Nebraska bases its sex laws on sexual penetration, which includes anal intercourse, fellatio, cunnilingus or any intrusion, however slight, or any intrusion into any part of the victim's body. It includes objects inserted into genital or anal openings. Sexual assault is involved where there is forced sexual contact which does not involve penetration.<sup>138</sup>

This is perhaps a best possible option for South African rape law where a distinction is drawn between acts of penetration and non-penetrative acts. The possible categories of identified sexual assault being: penetrative sexual assault by a male perpetrator on a female victim *per anum* or *per vaginam* outside of marriage; penetrative sexual assault by a male perpetrator on a female victim *per anum* or *per vaginam* 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; penetrative sexual assault by a female perpetrator on a male victim; penetrative sexual assault with the use of an object or digitally on a male or female victim including victims of consensual intercourse where the HIV/AIDS status of the perpetrator is not disclosed, could fall under the definition of rape. Acts which are not classified as penetrative sexual assaults such as kissing and fondling could be classified under the crime of indecent assault. It is a realistic distinction and does

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<sup>137</sup> Labuschagne, J.M.T. "Die Opkoms van 'n Abstrakte Penetrasiebegrip by Geslagsmisdade" (1997) on 462 as found in the General Statutes par 53a-65(2).

<sup>138</sup> Hopkins, J. (ed). "Perspectives on Rape and Sexual Assault" (1984) on 14.

not discriminate on the grounds of forced oral, digital, anal, genital or object intercourse and is gender-neutral.

The approach followed in American case law indicates a support for a gender-neutral approach more than 25 years ago.

- \* In the case of **Brinson v State** a state rape statute was held unconstitutional as it did not extend the same protection to males as it did to females.<sup>139</sup>
- \* In **Meloon v Helgemoe** a statutory rape law was found to be unconstitutional as it did not extend the same protection, which females under the age of consent enjoyed, to males.<sup>140</sup>
- \* In **State v Levier** a rape statute defined sexual intercourse as including any act between **persons** involving sex organs, mouth or anus (therefore regardless of gender).<sup>141</sup>
- \* In **People v Liberta** it was held that the gender-specific rape statute was unconstitutional on the grounds of equal protection and found that men can be raped by women.<sup>142</sup>

As mentioned earlier, a further reform which assisted the victim's plight was the introduction of the rape shield laws. The rape shield laws were implemented due to the following considerations:<sup>143</sup>

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<sup>139</sup> 1973 Fla. App. D1 278 So 2d 317 as discussed in 99 ALR 3d 129 on 135.

<sup>140</sup> 1977 CA1 NH 564 F 2d 602 as in 99 ALR 3d 129 on 141.

<sup>141</sup> 1976 16 Wash App. 332, 555 P 2d 1003 in 3 ALR 4<sup>th</sup> 1009 on 1011. The definition corresponds with that of Connecticut.

<sup>142</sup> 64 NY 2d 152, 485 NYS 2s 207 (1984).

<sup>143</sup> Kramer, E.J. "When Men are Victims: Applying Rape Shield Laws to Male Same-Sex Rape" (1998) on 303.

- \* The need to increase the reporting of rape.<sup>144</sup>
  
- \* To reduce acquittals of guilty defendants.<sup>145</sup>

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<sup>144</sup> The feminist movement believed that victims were deterred from reporting rape due to the fact that during the court hearing, evidence of the latter's prior sexual history was admissible. Consequently many victims were discouraged from pressing charges. This is attributed to the fact that intimate details of their personal lives would be a focus point during the trial and victims would be subjected to additional trauma. Rape shield laws are especially needed to protect male victims of sexual assault as various reasons are attributed to males' reluctance to report their crime. Society perceives males as strong and consequently able to defend themselves and should they not be able to, then they fear that their act will not be regarded as involuntary and forced. This consideration correlates with the findings made earlier by psychiatrists and psychologists. See in general **People v Yates** 1995 637 NYS 2d 625 - 629. Also Kramer, E.J. "**When Men are Victims: Applying Rape Shield Laws to Male Same-Sex Rape**" (1998) on 304 - 305. A further factor that prevents reporting of the crime is the fact that their prior sexual history will be examined and scrutinized during the trial. By allowing this evidence to be inadmissible, it has been found that rape shield laws have increased convictions for rape. See Spohn, C.C. & Horney, J. "**The Impact of Rape Law Reform on the Processing of Simple and Aggravated Rape Cases**" (1996) on 882 where they analysed data in Detroit on rape cases where the simpler cases of rape have gone to trial since the rape law reform. They also hypothesise that either victims report their crimes more frequently, alternatively, that police and prosecutors have changed their criteria on which rape cases to proceed with. This is an indication that the rape shield laws have changed attitudes towards crime. In addition the rape law reform has helped change societies' attitudes towards rape. The only place where rape shield laws have had no real effect are in prisons, as inmates who report and identify rapists often become victims of violence and murder.

<sup>145</sup> An unfortunate consequence of allowing evidence of prior sexual history was the fact that the defendant, who was in fact guilty, was often acquitted. It has been found that jurors have acquitted men where the victim has been seriously injured as a result of the admissibility of the sexual history of the victim. See LaFree, G.D. "**Rape and Criminal Justice: The Social Construction of Sexual Assault**" (1989) on 217 - 218 where he states that: *[[j]urors were less likely to believe in a defendant's guilt, where the victim had reportedly engaged in sex outside of marriage... whereas the number of charges, injury and weapons did not have a noticeable effect on verdicts. Again, this type of evidence, if applied to male rape cases, can also lead to unjust acquittals. The same would apply to males who have had some form of prior homosexual activities. See Kramer, E.J. "**When Men are Victims: Applying Rape Shield Laws to Male Same-Sex Rape**" (1998) on 310 wherein she states: *[o]n the other hand, if the prosecution sought to introduce evidence that the victim is not gay, the**



- \* The recognition of the lack of probative value of prior consensual sexual acts.<sup>146</sup>
  
- \* The lack of connection between chastity and truthfulness.<sup>147</sup>

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*defendant could be unjustly convicted.* In **People v Hackett** 1984 Mich. 365 NW 2d 120 on 126 a defendant introduced evidence of the victims homosexuality to affect his credibility as a witness.

<sup>146</sup> The historical foundation is based on the notion that women who have had a sexual history are more likely to consent to sexual acts than otherwise. However, in this day and age, it is argued that there are many young people who engage in premarital sexual intercourse. But this is not indicative that they would select any person indiscriminately with which to indulge in sexual relations. Consequently, both genders select certain partners and reject others. This invalidates the concept that if a person has sexual intercourse previously with a selected partner, they are more likely to consent again to any person.

<sup>147</sup> Another misconception that existed is that women who were regarded as being without virtue were regarded as more likely to be untruthful. This was not held to bear the same weight for men. Men, unlike women, have not been discredited or perceived in a bad light, should they have had a sexual history. See Galvin, H.R. “**Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade**” (1986) on 787 where it is stated that: *What destroys the standing of females in all the walks of life has no effect whatsoever on the standing for truth of males.* See also **State v Sibley** 1895 Mo. 33 SW 167 on 171. See further Kramer, E.J. “**When Men are Victims: Applying Rape Shield Laws to Male Same-Sex Rape**” (1998) on 308 fn 74. This same consideration could have a negative impact on female and homosexual victims of sexual assault. This is another reason why rape shield laws need to form an integral part of a legal system. The effect of the rape shield laws is that the onus of proof is shifted to the defence, as evidence of the victim's prior sexual history is prohibited. The resistance of consent standards are thus eliminated. It has been suggested that expert evidence presented earlier on in the case, which relates specifically to the case at hand, will be beneficial to the state's case. Therefore, scientific expert testimony on Rape Trauma Syndrome has been introduced as part of the rape shield law measures. If the findings of the expert indicated that the victim experienced the symptoms of Rape Trauma Syndrome then this would be an indication that the victim had been raped. See Burgess, A.W. “**Rape and Sexual Assault**” (1985) on 332. The emphasis has therefore shifted to the defendant's state of mind, in the sense that the jury had to decide as to whether the defendant's belief that the victim consented, was reasonable and in good faith. See discussion on **State v Saldana** 1982 Minn.324 NW 2d 227 on 333, in which the appellant was charged with first - degree criminal sexual conduct and in which it was alleged that the victim had consented. An expert, being a rape victim counsellor was used to rebut the evidence. Findings by the expert were that the typical behaviour of rape victims was displayed, it

Prior to the rape shield laws, the sexual history of female rape victims was highly probative evidence as regards the issue of consent.<sup>148</sup> With regard to male victims of penetrative sexual assault, prior sexual history evidence can be as damaging. This is especially the case if the male victim previously had sexual intercourse with other men. Such evidence has no real bearing as to whether the victim in fact consented to sexual intercourse with that particular defendant.<sup>149</sup> The damaging nature of the evidence<sup>150</sup> as well as reliving the entire crime again, coupled with a

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was stated that the victim was definitely raped and that it was not believed that the rape had been fantasized (it had actually happened).

<sup>148</sup> Case law however seems to belie this idea of protection in that it has shown that there can indeed be probative value in evidence of prior sexual history of a male same-sex rape victim. In **State v Rogers** (No.01-C-01-9011-CR-00312) 1991 Tenn.Crim.App.LEXIS 648 (Aug 16, 1991), the Tennessee Criminal Appeals Court reversed a conviction because the court *a quo* had not permitted the defendant to introduce evidence that the victim had in fact had sexual relationships with two prisoners at the prison where both the defendant and victim were incarcerated. It is clear that although a victim previously engaged in sexual relations with other men, it does not *per se* mean that he consented to that particular defendant's advances. See Kramer, E.J. "**When Men are Victims: Applying Rape Shield Laws to Male Same-Sex Rape**" (1998) on 320 for a discussion where the court rejects the idea that the evidence of the victim's sexual history may be relevant where the defendant presents evidence that the victim consented due to incompetent witnesses and inconsistencies in the victim's statements.

<sup>149</sup> The exclusion being, if the prior sexual acts were in fact with the defendant. Again one could argue that it is irrelevant as to whether there was consent on that specific occasion. This is a similar situation that applies to the question of marital rape. See also Kramer, E.J. "**When Men are Victims: Applying Rape Shield Laws to Male Same-Sex Rape**" (1998) on 320 for a supporting view which states that: *The fact that someone has consented to homosexual acts on a previous occasion is no more proof that he or she consented at the time of an alleged single (same) sex rape than prior consensual heterosexual relations would be in the case of male/female rape* (own emphasis).

<sup>150</sup> Not only that, but also various factors could have an effect on the verdicts reached. Examples which can be cited where a lesser sentence might be imposed are: the attractiveness of the victim, the moral values of the victim, where prior sexual history is focused upon, the race of both the victim and defendant, the nature of the rape and if it was felt that the woman precipitated the rape. See Burgess, A.W. "**Rape and Sexual Assault**" (1985) on 323 *et seq.* See also Feild, H. & Bienan, L. "**Jurors and Rape**" (1980) in general.

fear of disbelief deterred the victim from reporting the rape.<sup>151</sup> Due to the fact that this study is concerned with the substantive aspects of the law relating to a definition of rape, no further reference will be made here to rape shield provisions, which are procedural in nature, as this alone could form an entire topic of a dissertation.<sup>152</sup> One does however have to keep in the back of one's mind that certain procedural aspects have to out of necessity be incorporated within the substantive law in order to facilitate a practical application of rape legislative provisions.<sup>153</sup>

### 2.3.3. CRITICISM OF THE DEFINITION OF RAPE IN THE UNITED STATES OF AMERICA

The approaches followed in various states differ radically. Many states have replaced the rule that a woman had to resist to the utmost as a means of indicating non-consent.<sup>154</sup> Some states have also created a series of graded offences with penalties being dependant on factors such as coercion, age of the victim and the infliction of injury.<sup>155</sup> The present author does not support the Michigan definition, for the very reason that there are degrees of seriousness involved. Who is to decide in which category a particular act falls, and what about borderline cases? A further discrepancy arises between first degree and second and third degree acts as the former entails a maximum sentence of life imprisonment, whereas the latter a mere maximum of 15 years in comparison. One may find that certain sexual acts falling within these categories, may be even more reprehensible and the term 'personal injury' could lead to disparity, when applied in various cases.

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<sup>151</sup> Kramer, E.J. "When Men are Victims: Applying Rape Shield Laws to Male Same-Sex Rape" (1998) on 296.

<sup>152</sup> See chapter five in this regard.

<sup>153</sup> Examples that can be cited are rape shield provisions relating to prior sexual history, the admissibility of expert evidence relating to psycho-social effects of the sexual offence and vulnerable witnesses.

<sup>154</sup> Odem, M.E. & Clay-Warner, J. "Confronting Rape and Sexual Assault" (1998) on 253.

The state of Alabama, however, has clung to outdated notions and retained the gender-specific offence. The reasoning is that the consequences for males do not seem as serious as it is for women. An unwanted pregnancy is,<sup>156</sup> for example, excluded and the loss of virginity for males is not equated with as much seriousness as for females.<sup>157</sup>

Despite the position followed in the aforementioned states, the position in the United States as a whole is to be favoured. Many states are proponents of a gender-neutral definition and can definitely find application in the context of our South African criminal law. Although there is not a single definition which can be effectively used to offer adequate protection to all the identified categories of sexual assault victim in this study, elements of the definitions followed in Massachusetts, Florida, Nebraska, Washington and Victoria in Australia, could be utilised to formulate a comprehensive definition of rape.

### **3. CONCLUSION**

It is evident from this chapter that each country has its own particular definitional elements pertaining to the crime of rape. Although the approaches followed in the various states of Australia differ and may be gender-specific, the measures implemented in the state of Victoria are gender-neutral and promulgates a broad definition of rape. The position in Victoria is the preferred approach for purposes of this comparative study. Logistically speaking, the definitional elements of rape in the state of Victoria could be effectively transposed into South African law. The definition adopted in Victoria caters for perpetrators of either gender and also incorporates all the possible categories of sexual assault victim identified in this

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<sup>155</sup> Odem, M.E. & Clay-Warner, J. "Confronting Rape and Sexual Assault" (1998) on 256.

<sup>156</sup> One again thinks of this in relation to rape victims who are sterilised, are pre-pubital or have reached menopause.

<sup>157</sup> See discussion in Rumney, P. & Morgan-Taylor, M. "Recognizing the Male Victim: Gender Neutrality and the Law of Rape: Part Two" (1997) on 352.

study. More particularly the concept of 'free agreement' which relates directly to the element of consent could be effectively incorporated into a South African definition of rape. The term 'free agreement' is conceptually broad enough to also apply to the category of sexual assault victim who is party to consensual intercourse where their partner fails to disclose their HIV status. In such a case there is no free agreement and the victims consent is negated.

It was shown that the definition adopted in Britain remains partially gender-specific, in that certain perpetrators and sexual assault victims are excluded from its ambit, which makes the definition deficient for purposes of this study. The definition implemented in Britain is therefore unsatisfactory and problematic due to its deficiencies and cannot be transposed into South African law.

The approaches followed in certain states in the United States can be favoured as being gender-neutral. It was established that there were certain definitional elements which could be utilized from a South African perspective, but that no definition could be singled out to the exclusion of others. However, aspects of the definitions adopted in Washington and Connecticut could be utilised in reformulating a broader definition of rape in South Africa.

The next chapter of this study will deal with the proposed changes envisaged by the South African Law Commission. The proposed Sexual Offences Act will be analysed as first introduced in 1999<sup>158</sup> as well as the amendments to the proposed bill envisaged by the 2002 Discussion Paper on Sexual Offences.<sup>159</sup> The new proposed legislation will be critically examined to establish whether all the categories of sexual assault victim identified in this study will be adequately protected. Solutions will be suggested where possible *lacunae* exist in the proposed new legislation.

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<sup>158</sup> See Annexure A of "SALC Discussion Paper 85 of 1999" on 265.

<sup>159</sup> See Annexure A of "SALC Discussion Paper 102 of 2002" on 105.