CHAPTER FIVE

A COMMENTARY ON THE PROPOSED DEFINITION OF RAPE AS INTRODUCED BY THE SOUTH AFRICAN LAW COMMISSION

1. INTRODUCTION

The South African rape laws are based on Roman-Dutch law as influenced by English law.[1] The South African position is analogous to the historical positions in Britain and the United States except that the current South African definition of the crime of rape remains a narrow definition, which only covers the rape of a female by a male *per vaginam*.

In chapter three of this study, it was established that a number of the categories of identified penetrative sexual assault victim identified in this study are not covered by the South African common law definition of rape. It was also shown that the common law definition of rape is gender-specific and anatomically specific. It was

[1] The historical position in South Africa was discussed at length in chapter one and will not be repeated here.

submitted that there was no reasonable justification for the exclusivity of the crime of rape. The present author is of the view that no single crime exists in South African law which can offer adequate protection to all the victims of penetrative sexual assault identified in this study. Although there are a number of common law crimes which could apply to rape victims, there is no single crime that can adequately protect all the categories of penetrative sexual assault victim identified in this study. It is submitted that it is imperative to consolidate and recognise all the victims of penetrative sexual assaults under one comprehensive crime to ensure equitable and consistent treatment of all the victims of rape which have been identified. In doing this, the experience of no rape victim will be demeaned. Furthermore certain provisions pertaining to the imposition of life sentences in the Criminal Law Amendment Act only offer protection to rape victims and not to victims of indecent assault.[2]

This study would not be complete without reference to the new proposed legislation on sexual offences. This chapter will be devoted to a commentary on the proposed new definition of rape in order to establish whether the proposed definition of rape will offer sufficient protection to all the categories of identified penetrative sexual assault victim.

2. THE CURRENT STATUS OF THE CRIME OF RAPE

The categories of penetrative sexual assault victims identified in this study which are not covered by the current common law definition of rape 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

[2] Act 105 of 1997.

with the use of an object, orally or digitally on a male or female victim and the situation where a victim is party to unprotected consensual intercourse where the other party intentionally withholds information regarding his or her HIV status. The current definition therefore excludes a great number of victims who are deserving of protection and who are afforded explicit protection in terms of rape legislation in Britain (to a more limited extent as certain forms of penetrative sexual assault are not covered), Australia and the United States. This is clearly a situation that cannot be justified in light of the fact that there has been a universal trend towards amending rape legislation for decades.

Of major importance in recent times is the introduction by the South African Law Commission of a draft bill on sexual offences introduced in August of 1999.[3] The new proposed legislation is definitely a step in the right direction towards the path of reform for the crime of rape. The proposed changes will ensure that more equitable treatment is meted out to all victims of the crime of rape. The proposed definition of rape is focused on equal rights and is based on the premise that both female and male victims of a crime should be treated equally. Of importance is that the same consequences will follow each crime of penetrative sexual assault regardless of the category of penetrative sexual assault victim. The provisions of the proposed bill as introduced in the initial Discussion Paper of 1999 will now be dealt with and a critical analysis will follow.[4] The amendments to the proposed bill which is contained in a subsequent, more recent, Discussion Paper on Sexual Offences of 2002 will also be evaluated.[5]

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[3] As introduced in **"SALC Discussion Paper 85 of 1999."**

[4] **"SALC Discussion Paper 85 of 1999."** See on 265 *et seq.* Note: only the relevant clauses regarding rape are referred to.

[5] **"SALC Discussion Paper 102 of 2002."**

2.1 REFORMING RAPE LAWS

The proposed Bill on Sexual Offences was first introduced in 1999 by the South African Law Commission and excerpts from the 1999 Bill are attached to this study as **'Annexure A'**.[6] The proposed Sexual Offences Bill was amended by a subsequent Discussion Paper in 2002 and excerpts from the 2000 Bill are attached to this study as **'Annexure B'**.[7] The proposed legislation is a far cry from the previous narrow definition. The proposed bill entitled 'Sexual Offences' is more inclusive than exclusive of penetrative sexual assault victims, which is not the case with the common law definition. It furthermore addresses aspects of child abuse as well as offences against mentally impaired persons. Furthermore, a better alternative to the Sexual Offences Act is provided, which will be repealed by the proposed bill in the 2002 Discussion Paper.[8] The current Sexual Offences Act may be viewed as being discriminatory on grounds such as equality, gender and age and is therefore unjust and unconstitutional.[9] The most noticeable amendments to the current common law definition of rape which impact on the categories of penetrative sexual assault victim identified in this study will now be examined.

1. *The concept of 'sexual penetration' introduced covers a wider category of victim.*

The first most striking transformation in the proposed legislation is the concept of 'sexual penetration' which is broad enough to incorporate a wide variety of acts as part of the definition of rape. In terms of chapter one of the definitions in the Sexual Offences Bill of 2002, sexual penetration includes:

> *[any] act which causes penetration to any extent whatsoever by-*

[6] **"SALC Discussion Paper 85 of 1999."**

[7] **"SALC Discussion Paper 102 of 2002."**

[8] Act 23 of 1957.

[9] Sections 9(1) and 9(3) of Act 108 of 1996.

(a) the genital organs of one person into the anus, mouth or genital organs of another person; or

(b) any object, including any part of the body of an animal, or part of the body of one person into the anus or genital organs of another person in a manner which simulates sexual intercourse.

If the definition is analysed, it is evident that the prohibited sexual acts include various forms of penetration such as penetration *per vaginam* and *per anum*, object and digital penetration of both male and female victims. Perpetrators can be male or female. This is in line with the broader and gender-neutral approaches adopted in the state of Victoria in Australia and states in the United States of America such as Washington, Massachusetts, Michigan, New York and Connecticut.[10]

If one analyses the definition of rape in clause 3(1) of the Sexual Offences Bill of 2002,[11] and the definition of sexual penetration cited above, it is evident that the following categories of identified sexual assault victim will be protected.[12]

* 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;

[10] See chapter three in this regard for detail.

[11] See **'Annexure B'** in this regard.

[12] Mentally impaired persons are, by implication, incorporated in all the identified categories of sexual assault 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, digitally or orally on a male or female victim.

It is evident from the categories of sexual assault victims which will be protected that the definition is therefore more gender-neutral. It is also less anatomically-specific and not merely restricted to the current penetration *per vaginam* by the male sex organ. It appears as though the definitions of rape and sexual penetration envisaged by the proposed legislation exclude two categories of victim identified in this study. Firstly, the category of sexual assault victim whereby consensual intercourse occurs but the perpetrator knowingly withholds information regarding his or her HIV/ AIDS status is not provided for. The only provision that may provide relief is clause 3(2)(b) of the 2002 Sexual Offences Bill. However, this clause does not expressly cater for these victims of sexual assault.[13]

Secondly, the new proposed definition of rape fails to take into account a male victim who is subjected to a non-penetrative digital sexual assault. This category of sexual assault victim was suggested as an exception to the penetration requirement in chapter two of this study.[14] It is consequently submitted that the position should be rectified to incorporate these male victims within a broader definition of rape.

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[13] See clause 3(2)(b) which provides that sexual penetration is unlawful is committed under false pretences or fraudulent means. These terms are in turn defined in clause 3(4) and do not specifically include instances such as the withholding of information pertaining to a person's HIV status or life threatening illnesses.

[14] See paragraph 2.7 in chapter two.

2. *The element of consent is replaced with the term 'coercive circumstances.'*

The proposed definition of rape covers a wide variety of circumstances where the use of force is present. The victim is thus not required to prove absence of consent. If the coercive circumstances are present, then the penetration is *prima facie* unlawful. This is contrary to the common law definition where the focus is on lack of consent.

Currently, the emphasis is on the state proving that the victim did not consent beyond reasonable doubt. With the new definition, the accused may raise consent as a ground of justification, but the latter bears the evidentiary burden of proving that the act of sexual penetration did not occur under coercive circumstances and was therefore not unlawful. The present author foresees that a possible problem might arise in that force may be defined in terms of the victim's resistance. This resistance factor might result in an anomaly in that the focus of a trial would then remain on the victim, which is precisely what the proposed legislation is seeking to avoid.

It is evident that the South African Law Commission has attempted to move away from the element of consent which approach is to be favoured. The main purpose for this change would be to protect rape victims from being placed on trial and to focus more on the circumstances of the sexual encounter. It appears that this has been accomplished very cleverly on a technicality. The reason furnished by the South African Law Commission for replacing the consent criterion is that:[15]

> *A shift from the 'absence of consent' to 'coercion' represents a shift of focus of the utmost importance from the subjective state of mind of the victim to the imbalance of power between the parties on the occasion in question.*

The *practical* implications however, remain the same despite the semantic changes. From closer scrutiny, it becomes apparent that the requirements of consent are still

[15] **"SALC Discussion Paper 85 of 1999"** on 118.

present within the element of proscription but under the guise of the term 'coercive circumstances.'

A closer examination of the provisions reveals that there is no real movement away from the requirements of consent. What becomes evident is that the requirements of consent are masked under the provisions of clause 3(2) of the 2002 Bill.[16] Firstly, one of the requirements for valid consent is that the consent must be given voluntarily without any coercion.[17] The implication is that if coercive circumstances are present, then the absence of consent is presumed. With the current definition of rape, the absence of consent has to be proved. With the revised definition the act of penetration is *prima facie* unlawful if coercive circumstances are present.[18] Secondly, consent is excluded by fear when induced by threats or violence.[19] These requirements correspond with the proposed definitional requirements cited for 'coercive circumstances.'[20] Therefore the same requirements pertaining to consent are utilised for the term 'coercive circumstances.' Clauses 3(2)(b) and (c) of the proposed definition of rape in the 202 Bill incorporates the rest of the factors that are usually used as part of the consent criterion. The deduction that can be drawn is that the consent criterion is still present in the revised definition of proscription albeit in an indirect manner.

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[16] This clause refers to the use of coercive circumstances which entails the use of force, false pretences or fraudulent means and also relates to persons incapable of appreciating an act of sexual penetration. Such persons are referred to in clause 3(5) as being persons who are asleep, unconscious, under the influence of alcohol or drugs and mentally impaired persons. This is much the same as the provisions pertaining to the criterion of consent applied in the current common law definition of rape.

[17] See Snyman, C.R. **"Criminal Law"** (1995) on 119. **R v C** 1952 4 SA 117 (O) on 121.

[18] In other words, the consent criterion is subsumed under the element of unlawfulness and can only be used as a ground of justification.

[19] Snyman, C.R. **"Criminal Law"** (1995) on 426. See further **R v C** 1952 4 SA 117 (O) 121A-B.

[20] See clause 3(3)(b) of the proposed definition of rape.

The elimination of the consent criterion can adversely affect the category of penetrative sexual assault victim who is intentionally exposed to the HIV virus or a life threatening illness during consensual intercourse. The reason is that this category of penetrative sexual assault victim is not covered by the provisions of the new definition of rape, if the terms 'coercive circumstances, or 'false pretences and fraudulent means,' are used.[21]

In terms of clause 3(2)(b), which forms part of the definition of rape, acts of sexual penetration are deemed *prima facie* unlawful if they occur *inter alia* under false pretences or by fraudulent means. In terms of clause 3(4) of the definition of rape, false pretences or fraudulent means include circumstances where the victim believes that (a) he or she is committing an act of sexual penetration with a particular person who is in fact a different person (b) an act of sexual penetration is something other than such act or (c) an act of sexual penetration will be beneficial to his or her physical, psychological or spiritual health. Clauses 3(4)(a) (b) and (c) can again be linked to the requirements of consent.

One of the requirements pertaining to the consent criterion relates to the presence of fraud. Fraud, which vitiates consent, can relate an *error personae* which pertains to the *identity*[22] of the person, or the *nature* of the act which is an *error in negotio*.[23] Clause 3(4)(c) can possibly relate to the nature of the act but also the results which follow. This provision differs from the consent criterion as consent is deemed to be valid in terms of the current common law definition of rape where the person is misled with regard to the *results* of the sexual intercourse.[24]

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[21] The reasons why it can be argued that these victims are not covered by the use of the terms 'fraudulent means or false pretences' are discussed elsewhere. If one examines clause 3(4) it becomes clear that harmful HIV related behaviour was not envisaged within the definitional clauses.

[22] Clause 3(4)(a) correlates with this factor. See Snyman, C.R. **"Criminal Law"** (1995) on 426. See further **R v Diana Richardson** 1998 2 CR (R) 201. **Bolduc and Bird v R** 1967 63 DLR 2nd 82 SCC.

[23] Clause 3(4)(b) and to a limited extent clause 3(4)(c). Snyman, C.R. **"Criminal Law"** (1995) on 426.

[24] Snyman, C.R. **"Criminal Law"** (1995) on 427. **R v Williams** 1931 1 PHH 38 (E).

It is submitted that the proposed definition of rape is deficient for purposes of this study as the three explicit inclusions cited above, fail to incorporate the identified penetrative sexual assault victim who is intentionally exposed to the HIV virus during unprotected consensual sexual intercourse. Because of the gravity of the nature of the act, the present author is of the view that it would have been better to expressly include this form of penetrative sexual assault within the definition of rape to avoid possible room for misinterpretation.[25] This is especially relevant in cases where the one party is in fact unaware of his or her HIV infected status as intention is obviously then lacking. The position of this category of penetrative sexual assault victim will again be examined in order to establish whether this category of sexual assault victim is provided for in any other manner by the South African legislative system.[26]

One approach which could be utilised to cater for all the categories of penetrative sexual assault victim identified in this study is the approach followed in the state of Victoria which equates consent with free agreement. The replacement of the consent requirement with the concept of free agreement may appear to be merely a semantic change as the elements are much the same as the South African requirement of consent. However there is no emotive connotation linked with the phrase as it almost has a contractual connotation to it. If free agreement is absent it would be an indicator that no consensus existed with regard to the sexual intercourse. If the victim's words or actions did not indicate consent it is a sufficient indicator that his or her free agreement is absent. The concept of free agreement would also cover the category of penetrative sexual assault victim who engages in unprotected sexual intercourse with a person who intentionally exposes the victim to the HIV virus or other contagious life threatening illness. In such a case it could be argued that the victim did not consent to the risk of contracting a life threatening illness and that his or her free agreement is consequently lacking.

[25] See detailed criticism in paragraph three of this chapter.

[26] See chapter six of this study.

3. The age of consent for males and females has been equalised.

Children between the ages of 12 and 16 years (including mentally impaired minors) who have been identified as penetrative sexual assault victims will still be statutorily protected. Any consent given is vitiated due to a limited capacity to act. The proposed Sexual Offences Bill aims to abolish section 14 of the Sexual Offences Act[27] which deals with minors, and will be replaced with clause 6 in terms of the proposed legislation.[28] This clause provides that an offence is committed if an act of sexual penetration is committed with children between the ages of 12 and 16 years of age.[29] Consequently any same–sex or heterosexual consensual sexual intercourse occurring, where one party is between the age of 16 and 19, is no longer prohibited as is the case with section 14 of the Sexual Offences Act.[30] The age of consent has therefore been equalised. This approach is to be supported.

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[27] Act 23 of 1957. As regards the commission of sexual offences with mentally ill persons, section 15 of the Sexual Offences Act has been replaced with clause 7 of the new proposed Sexual Offences Bill in the 2002 Discussion Paper.[27] If one looks at the definition of 'mentally impaired person' in clause 1 of **'Annexure B'**, it is evident that the definition has been amended to include an inability to appreciate an act of sexual penetration or the nature and consequences of a sexual act. This provision therefore substitutes the terms imbecile and idiot provided for in the Sexual Offences Act. Mentally impaired persons are provided for in terms of the proposed definition of rape in clause 3 and again in clause 7 of the proposed legislation. The former section relates to acts of penetration and the latter section to indecent acts, where the mentally impaired person does not appreciate the nature or consequences of the act, or is unable to resist or is unable to communicate their unwillingness. Defences which may be raised are that the mentally impaired person initiated the acts or if the accused was unaware that the mentally impaired person was so impaired or below the age of 16 years of age.[27] See clause 7(2) of **'Annexure B'**.

[28] The initial proposed legislation was introduced by **"SALC Discussion Paper 85 of 1999"** and more specifically in terms of clause 7 of **'Annexure A'**. It also provided for the persistent sexual abuse of a child in terms of its clause 8. Child was defined as a person under the age of 16 years. The amended proposed legislation introduced in terms of **"SALC Discussion Paper 102 of 2002"** is far more comprehensive.

[29] See **'Annexure B'**.

[30] Act 23 of 1957.

The defences pertaining to this section which deals with minors are the following: if the child was married to the person accused of committing the crime and is not under the age of 12 years, if the accused is below the age of 16 years and if the age of the accused does not exceed the age of the child by three years or if it is proven that the child deceived the accused into believing that he or she was above the age of sixteen years.

4. Child prostitution is introduced as an offence.

The position regarding consensual intercourse with a prostitute is not mentioned in this section as a defence. Instead a new offence of child prostitution is introduced in clause 9 of the proposed legislation.[31] An offence is committed if any remuneration or reward is expended in committing an indecent act or act of sexual penetration where the child is below the age of 18 years. Of interest is the fact that a higher age of consent is required with regard to the crime of child prostitution. An anomaly arises in the sense that no crime is committed where a child between 16 and 18 years consents to sexual intercourse for no reward, but if a reward is offered, a crime is committed. In other words free sexual intercourse with such a minor is not punishable whilst sexual intercourse involving a reward for the minor is punishable.[32] A further peculiarity is that a child who is 15 years old can be convicted of the offence of child prostitution if financial reward is offered to an older child but who is less than 18 years old.

[31] See **'Annexure B'**.

[32] Clause 9(1)(a) makes no mention that the sexual intercourse must be committed under coercive circumstances or that lack of consent must be present. This implies that the minor engages in a voluntary act of sexual intercourse and the presence or absence of a reward makes the act punishable or not.

5. Incest is made gender-neutral.

As regards the common law crime of incest the proposed legislation has broadened the existing crime to make it gender-neutral. Both males and females can be perpetrators of a wide variety of acts classified under a broader definition of sexual penetration.[33]

6. The concept of compelled sexual acts is introduced.

Presently, there are no specific provisions pertaining to a situation where a person forces or compels another person to engage in sexual acts with a third person or with the person who is compelling. It is currently an offence to aid, abet or further the commissioning of any offence. A person may be charged as an accomplice on these counts.[34]

The South African Law Commission first introduced provisions relating to compelled sexual acts in the 1999 Discussion Paper.[35] These provisions failed to take into consideration the fact that if the definition of rape were broadened, most of the acts provided for in the definition of compelled sexual acts would be covered in the definition of rape in any event. These shortcomings were addressed in the 2002

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[33] Clause 5 of **'Annexure B'**.

[34] See **S v D** 1969 2 SA 591 (RA) 592 which provides authority for the view that a person cannot be a vicarious perpetrator to rape and can merely be an accomplice in view of the fact that the crime must be committed by the perpetrators own body. See also Snyman, C.R. **"Criminal Law"** (1995) on 257, where **accomplice liability** is defined as: *[a] person is guilty of an offence as an accomplice if, although he does not satisfy all the requirements for liability contained in the definition of the offence and although the conduct required for a conviction is not imputed to him by virtue of the principles relating to common purpose, he unlawfully and intentionally engages in conduct whereby he furthers the commission of the offence by somebody else.* The word 'furthers' includes any conduct whereby a person facilitates, assists, or encourages the commission of an offence, gives advice concerning its commission, orders its commission or makes it possible to commit it.

[35] **"SALC Discussion Paper 85 of 1999."** See **'Annexure A'**.

Discussion Paper,[36] which provides in clause 4 that the acts to be criminalized as compelled acts are *indecent acts* and not sexual acts as was the case previously. The indecent acts catered for by the proposed legislation exclude acts of sexual penetration, as such acts are provided for in the proposed definition of rape.

The provisions of the proposed legislation are far-reaching in terms of amendments. However, certain provisions can be criticised where adequate protection is not afforded to the categories of sexual assault victim identified in this study. The criticism of the proposed legislation will now be addressed and solutions suggested with regard to problematic aspects of the proposed new definition of rape.

2.2. CRITICISM OF THE PROPOSED LEGISLATION

The 2002 Sexual Offences Bill is to be supported as more categories of penetrative sexual assault victim are covered. It is evident that there is a movement away from the common perception of rape being viewed primarily as a penetrative sexual act *per vaginam*. It recognises that a sexual act involves penetration by way of the male sex organ *per vaginam*, *per anum* or orally *per vaginam*, *per anum* or into the mouth of another and object or digital penetration *per vaginam* or *per anum.* There are however a number of points of criticism that can be raised.

1. *The definition excludes two of the categories of penetrative sexual assault victim identified as rape victims in this study.*

As a point of commencement in order to establish how the 2002 Sexual Offences Bill was formulated, the background to the proposed definition will be briefly mentioned where applicable. The present author is of the view that the 1999 definition was *too broad*, as a result of attempts to prevent *lacunae* in interpretation and that consequently acts that are not really viewed as acts of rape were

[36] **"SALC Discussion Paper 102 of 2002."**

included.[37] This is especially the case as regards the 'penetration' of an ear or nose.[38] The present author would be inclined to classify such an act as a species of indecent assault. Clinical definitions of rape which are liberal, do not even consider or extend the concept as far as nose rape or ear rape.[39] It may be argued that the aforementioned two acts may be degrading, but it cannot be equated with what is generally perceived as acts of rape.[40] This is because present author believes that only the categories of penetrative sexual assault victim identified in this study, which entail sexual assault *per anum* or *per vaginam*, oral and digital rape, should be considered. The primary reason being that these forced acts of sexual penetration *are either acts of sexual intercourse or simulate sexual intercourse. All other acts could be retained under the definition of indecent assault.* This position is rectified in the 2002 Bill, which makes no mention of ear or nasal penetration.

The proposed 2002 definition does however neglect to provide for two categories of sexual assault victim who have been identified as rape victims in this study. Firstly,

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[37] First introduced in the proposed Sexual Offences Act of 1999.

[38] See **'Annexure A'** chapter 1 referring to the definition of sexual penetration. With regard to a victim who is compelled to engage in acts involving the penetration of the male genital organ into the body orifice of an animal, present author believes that this should perhaps have been classified as a serious, but separate crime. The present author is of the view that such a form of penetration should not be linked with rape, unless the *animal is the object used* to cause penetration of *per vaginam* or *per anum*. Although the notion that penetration could be any act causing penetration by any part of the body of an animal *per anum* or *per vaginam*, into another person *per vaginam* or *per anum* or any other orifice, it is present author's submission that 'object' is sufficient to cover animals. The reason is that the latter would be used as an object to cause sexual penetration. It is furthermore present author's view that in addition to penetration *per vaginam* or *per anum*, the phrase 'any body orifice' mentioned in the 1999 Bill should have been restricted to include the mouth only. To extend the definition of rape too broadly and incorporate the ear or nose would perhaps defeat the purpose of the crime of rape. This position is rectified in the 2002 Bill.

[39] See chapter two paragraph 2.2 on the position in Britain.

[40] For example, invasion of ones inner being as in the case of vaginal and anal rape which are viewed as types of intercourse as well as penetration of the mouth by a penis, which is also viewed as a type of intercourse. Ear and nose 'intercourse' are definitely not considered as acts of intercourse or simulated intercourse

the proposed definition does not cater for male victims of digital sexual assault. In chapter two of this study it was recommended that male victims of digital sexual assault be incorporated within the definition of rape. The reason submitted for this inclusion, is that male victims cannot be subjected to a *penetrative* digital sexual assault, involving forced manual stimulation of their sex organ, for obvious anatomical reasons. The present author is of the view that no sound reasons exist as to why digital penetrative sexual assault on a female victim should be regarded as being more traumatic or deserving of legal protection than the forced manual stimulation of the male sex organ. Both acts of digital sexual assault *simulate sexual intercourse*. It is recommended that the digital sexual assault of a male victim be regarded as the exception to the penetration requirement on the grounds of public policy. This form of digital sexual assault is not far-removed from other forms of penetrative sexual assault as it entails simulated sexual intercourse.

Secondly, the proposed legislation does not cater for victims of sexual assault where the one party deliberately withholds information regarding his or her HIV infected status. The three explicit inclusions in clause 3(4) of the definition of rape, relating to false pretences or fraudulent means, fail to consider the position whereby a person's HIV status is deliberately withheld in acts of consensual intercourse. It is submitted that the inclusions were primarily aimed at the *nature of the act and the identity of perpetrator* as being material to the identification of the fraudulent acts as rape. As was shown in chapter three of this study, consent with regard to fraud is not vitiated with regard to age, wealth, health, state of affection, nor as to the *result or consequences* of the fraud.[41]

The South African Law Commission maintains that this category of victim is included in the proposed definition of rape and states that:[42]

[41] Chapter three paragraph 2.1.3.

[42] Executive Summary of **"SALC Discussion Paper 102 of 2002"** on 84.

> *[the] Commission holds the view that the non-disclosure by a person that he or she is infected by a sexually transferable disease prior to sexual relations with another (consenting) person would amount to sexual relations by false pretences and would constitute rape*

The present author is of the view that this is not the case, as there is no express provision made in the proposed Sexual Offences Bill for this category of sexual assault victim. This conclusion can also be validated if one considers that the South African Law Commission contradicts their view in the same Executive Summary wherein it states that:[43]

> *The Commission recommends that criminal sexual activity compounded by deliberate or reckless exposure to HIV/AIDS should be subject to criminal sanction. Two options seem viable in this context. Firstly, to introduce practical measures to ensure successful prosecution of harmful HIV-related behaviour in terms of the common law crimes or, secondly, to create a separate offence specifically criminalising harmful HIV-related behaviour in the context of the commission of a sexual offence.*

It is further stated that they provisionally endorse the second option.[44] These comments belie the intention to incorporate consensual acts of intercourse where the HIV/AIDS status of one party is deliberately withheld from the other party as being expressly part of the definition of rape.

The wording of the definition is also careless in that it does not state 'including but not limited to', resulting in one possible interpretation that these are to be the only inclusions and that interpretation is to be restricted. If the terms 'fraudulent means' or 'false pretences were to be widely interpreted, why then are they limited to three specific situations of blatantly obvious fraudulent acts?

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[43] Executive Summary of **"SALC Discussion Paper 102 of 2002"** on 14.

[44] *Ibid.*

If the criterion of consent or free agreement was retained, this category of penetrative sexual assault victim could be included. This can be explained with regard to the requirement of consent which is that a person must be aware of the true and material facts to which he or she consents.[45]

It is common cause that mistake with regard to the nature of the act and the identity of the person vitiates consent. Consent is valid where the person is misled with regard to the results.[46] It is in this latter category that harmful HIV behaviour would be covered. It is submitted that although consent is valid with regard to the results, in cases where death may ensue, the consent is invalidated on the grounds of public policy.[47] Therefore if applied to this category of penetrative sexual assault victim, the consent is vitiated on the premise that it would be *contra bonos mores*. Consequently a rape would be committed as valid consent would be lacking. This whole issue is dealt with again in detail in chapter six of this study.

2. *The element of consent has been replaced semantically with an equally complicated requirement of 'coercive circumstances'.*

The focus of the revised definition of rape is on the term coercive circumstances and less on the issue of consent.[48] The second point of criticism relates to the practical application of this provision in a court of law as one complex term has been replaced

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[45] Snyman, C.R. **"Criminal Law"** (1995) on 121.

[46] See Snyman, C.R. **"Criminal Law"** (1995) on 121. **R v Williams** 1931 1 PHH 38 (E).

[47] The law does not allow a person to consent to be murdered. See **R v Peverett** 1940 AD 213 and **S v Hibbert** 1979 4 SA 717 (D) in general.

[48] This term could probably also include the act of administering a substance for purposes of committing a sexual act as defined in Chapter 2 Section 5 of the proposed bill in **"SALC Discussion Paper 85 of 1999."** It provides that: *Any person who administers or applies to, or causes to be taken by another person any substance with the intent -*

(a) to overpower that other person in order to commit a sexual act with that person, or

(b) to induce that other person to allow him or her to commit a sexual act with that person, is guilty of an offence.

with another. Furthermore, it appears that the element of consent still exists in the definition of proscription albeit under the guise of the term 'coercive circumstances'. The requirements pertaining to consent appear to have been utilised in formulating a definition of coercive circumstances. Whilst understanding the reason why the focus has been cleverly shifted to protect the victim by rather drawing attention to the sexual encounter, a problem still arises with regard to one category of identified penetrative sexual assault victim. This shift in focus proves unsatisfactory in the sense that the category of penetrative sexual assault victim who is deliberately exposed to the HIV virus during consensual sexual intercourse will not be covered. The terms false pretences or fraudulent means are defined in clause 3(4) and relates more to the nature of the act and the identity of the perpetrator.

By defining these terms to apply to three specific situations, the provisions which relate to consent being vitiated if a consent criterion were applied, would be excluded. The provisions pertaining to the crime of fraud could be applicable but then the related provisions pertaining to the proposed definition of rape needs to be amended to incorporate the broad ambit of the aforesaid crime. If the provisions of the crime of fraud were specifically made applicable, this category of identified penetrative sexual assault would in fact be covered.[49]

If one further bears in mind that the crime of rape has evolved from being a property crime where the husband or guardian's freedom of choice was the focus of the crime, to a crime where the victim's freedom of choice to sexual intercourse is the focal point, the criteria of consent still remains. With the use of the terms coercive circumstances and fraudulent means or false pretences, it becomes apparent that the South African Law Commission wanted the focus to be on the circumstances of

[49] Fraud is the unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another. The misrepresentation can consists of an *omissio* where the perpetrator fails to disclose material facts which unless revealed could cause the victim to act to his or her prejudice. The prejudice can be actual or potential prejudice. See Snyman, C.R. **"Criminal Law"** (1995) on 487 – 488. See further **S v Myeza** 1985 4 SA 30 (T) on 31-32. **S v Van den Berg** 1991 1 SACR 104 (T) on 106.

the sexual encounter rather than the consent of the victim which approach is supported.[50]

Milton states that:[51]

> *The matter of consent is now subsumed under the element of unlawfulness, to be raised by the accused as a defence.*

This statement is questionable. The problem is that the requirements of consent pertaining to the current definition of rape are cited as part of the requirements for a sexual encounter envisaged in the proposed definition. One can perhaps try and avoid the use of the term consent on a technicality or as a clever play on semantics, but the essence of the consent criterion remains. As mentioned earlier, one of the requirements of valid consent is that it must be given voluntarily without coercion.[52] If this requirement is worded differently, the presence of coercive circumstances indicates a lack of consent. The criterion for consent is still present. It is therefore evident from a closer examination of the proposed provisions that the requirements for consent still form part of the element of proscription for the proposed definition of rape as opposed to being a ground of justification under the element of unlawfulness.

Why should the consent criterion form part of the element of proscription as opposed to the element of unlawfulness? Snyman says the following:[53]

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[50] Van der Merwe, S. **"Redefining Rape: Does the Law Commission Really Wish to Introduce a Reverse Onus?"** (2001) on 69.

[51] Milton, J.R.L. **"Redefining the Crime of Rape: The Law Commission's Proposals"** (1999) 367. Van der Merwe, S. **"Redefining Rape: Does The Law Commission Really Wish To Introduce A Reverse Onus?"** (2001) on 69.

[52] See further **R v C** 1952 4 SA 117 (O) on 121. **R v M** 1953 4 SA 393 (A).

[53] Snyman, C.R. **"Criminal Law"** (1995) on 89.

> *Strictly speaking, therefore, the test applied in respect of the element of unlawfulness is not one to determine whether the act may not possibly be lawful, because an act which corresponds to the definition of the proscription is presumed to be unlawful.*

This is obviously a reference to the grounds of justification of which consent is one. The phrase that the issue of consent is subsumed under the element of unlawfulness is therefore in question again.[54] The element of proscription which relates to the essence of a crime or definition should not be confused with the element of unlawfulness.

Snyman says further:[55]

> *Before an act can be described as unlawful, it must not only conform to the definition of the proscription but it must also comply with the quite distinct criterion for determining unlawfulness.*

It is submitted that the requirements for the criterion of consent still forms part of the element of proscription in the new proposed definition albeit under the guise of the terms coercive circumstances, false pretences and fraudulent means and the clause pertaining to persons incapable in law of appreciating the nature of an act of sexual penetration.[56]

A further point of contention relating to the proposed definition of rape that has come to the fore, is the provision that an act of penetration is *prima facie* unlawful if committed in any coercive circumstances, under false pretences or fraudulent

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[54] Milton, J.R.L. **"Redefining the Crime of Rape: The Law Commission's Proposals"** (1999) 367.

[55] Snyman, C.R. **"Criminal Law"** (1995) on 63. See further **S v I** 1976 1 SA 781 (RA); **Clarke v Hurst** 1992 4 SA 630 (D) on 652 – 653.

[56] See clause 3(2)(c). This clause is also directly related to the requirement of consent that a person must be capable of forming a will. Valid consent cannot be given where a person is asleep, unconscious, intoxicated or mentally ill. Snyman, C.R. **"Criminal Law"** (1995) on 120.

means or in respect of a person incapable of appreciating an act of sexual penetration.[57] Van der Merwe has strongly criticised the proposed definition of 1999 which appeared to introduce a reverse onus[58] where the accused needs to prove absence of consent in that:[59]

> *[i]t creates a situation where an accused must in flagrant disregard for common–law principles and constitutional values and principles be found guilty, despite a reasonable doubt in the mind of the judicial officer as to whether the accused is innocent.*

Furthermore where the accused raises consent as a defence, the prosecution still bears the onus of proving the element of unlawfulness by proving the absence of consent beyond reasonable doubt.[60] In other words, the prosecution still needs to disprove the defence raised.[61]

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[57] Clause 3(2) of the 2002 Bill on Sexual Offences.

[58] This is found in clause 2(2) of the Sexual Offences Bill of 1999 and clause 3(2) of the amended bill in **"SALC Discussion Paper 102 of 2002."** The 1999 Bill stated that: *[an] act of sexual penetration is* ***prima facie*** *unlawful if it takes place in any coercive circumstances.* The 2002 Bill has extended the meaning to include false pretences or fraudulent means or in respect of a person incapable of appreciating the nature of an act of sexual penetration.

[59] **"Redefining Rape: Does the Law Commission Really Wish to Introduce a Reverse Onus?"** (2001) on 66. The author further distinguishes between an onus of proof and an evidential onus. In the former case the accused must prove his innocence on a balance of probabilities and in the latter there is merely a duty to lead evidence, which has the possibility of being reasonably true. The author indicates that the South African Law Commission create merely an evidential onus instead of an onus of proof. See also **S v Steenberg** 1979 3 SA 513 (B) 517H - 518A.

[60] Van der Merwe, S. **"Redefining Rape: Does the Law Commission Really Wish to Introduce a Reverse Onus?"** (2001) on 64.

[61] Except for defences where the onus of proof is placed on the defendant by statute and with the defence of mental abnormality. See in general the well-known decision of **R v Ndhlovu** 1945 AD 369 in this regard as well as the case of **S v Mahlinza** 1967 1 SA 408 (A).

Van der Merwe is further if the view that the real problem is the fact that an accused who disputes unlawfulness by raising consent as a defence, should bear the burden of proving the presence of consent.[62] This author also mentions that the following consequences will arise with a reverse onus of proof:[63]

* The accused will have to establish on a balance of probabilities that he/ she acted with consent.

* If the accused fails to do this he/ she will be convicted of the crime of rape.

* The conviction will arise even if the accused succeeds in raising a reasonable possibility that consent was in fact present.

* The effect is that the trial may result in conviction even where a reasonable doubt exists as to whether the accused acted with consent.

The above factors conflict with the rights of the accused to a fair trial and to be presumed innocent in terms of section 35(3) of the Constitution.[64] These rights may however be limited in terms of the limitations clause in section 36(1) of the Constitution, as the rights enshrined in the Bill of Rights are not absolute.[65] It can be argued that a reverse onus serves a dual purpose. Firstly, it diverts the focus of court proceedings from the victim and places it on the accused and secondly, it has a deterrent value which can curb the horrendous rape crime rate. The focus would then be placed on the accused to prove that the acts were not committed under

[62] **"Redefining Rape: Does the Law Commission Really Wish to Introduce a Reverse Onus?"** on 67.

[63] *Ibid.*

[64] Act 108 of 1996.

[65] *Ibid.*

coercive circumstances. A reverse onus has however been declared unconstitutional in case law as it conflicts with the right to be presumed innocent.[66]

If the proposed definition of rape is scrutinised the question whether a reverse onus or evidentiary burden is created is crucial. As mentioned earlier it is evident that the requirements of consent still form part of the definition of proscription albeit under a different name. If a crime corresponds with the definition of proscription it is presumed unlawful, hence the use of the phrase *prima facie* unlawful. The lawfulness of the conduct would then have to be proven under the element of unlawfulness by way of a ground of justification. If the requirements of consent fall under the definition of proscription, which is the case with the proposed definition of rape, this means that the lack of consent is then presupposed. Consequently it can be argued that the consent factor is not merely a ground of justification falling under the element of unlawfulness.

One reason that has been furnished as to why the issue of consent should be subsumed under the element of unlawfulness rather than the definition of proscription is that other crimes such as assault and theft have no statement in their definitions that the act concerned has to be committed without the consent of the victim.[67] Whilst supporting this view theoretically it is submitted that the practical application of this principle to the crime of rape is not without its inherent defects. When dealing with the crime of rape the issue of consent cannot be ignored. This is aptly illustrated with the provisions of the new proposed definition of rape. The semantic change in terminology cannot disguise the fact that the requirements of consent still form part of the definition of proscription. The definition of proscription contains the concise description of the requirements set by the law for liability and is therefore the essence of the crime.[68]

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[66] **S v Bhulwana** 1994 2 SACR 706 (C). **S v Coetzee and Others** 1997 1 SACR 379 (CC).

[67] Milton, J.R.L. **"Redefining the Crime of Rape: The Law Commission's Proposals"** (1999) 366.

[68] Snyman, C.R. "Criminal Law" (1995) on 60.

The application of a complicated term, which has replaced another term as equally complex, may prove to be as problematic in practice especially due to this use of semantics which disguises the requirements of the consent criterion. It is suggested that the element of consent could perhaps be replaced with the concept of free agreement adopted in the state of Victoria in Australia. Free agreement entails a voluntary agreement to the act of intercourse and not mere passive submission due to specific circumstances such as intoxication, sleep, duress, fear and mental incapacity. The concept of free agreement does also not have such emotive connotations attached to it as is the case with the consent criterion.

3. *The age differentials for child prostitution and acts of sexual penetration or indecent acts with consenting minors should be equalised.*

The present author is not in favour of the age limit for the offence of *child prostitution* being 18 years of age, as opposed to an age limit of 16 years for sexual acts with *consenting minors.* An anomaly arises. It appears from the provisions relating to offences with minors in the proposed clause 6, that if consensual intercourse occurs between the accused and a child above the age of 16 years and no financial compensation or reward is offered, no crime is committed. On the other hand in the provisions relating to child prostitution in terms of the proposed clause 9 where the child is between the age of 16 and 18 years and consensual intercourse occurs and financial compensation or reward is offered a crime is committed. This is obviously an absurd state of events and it is suggested that the age limit envisaged in terms of section 9 of the new legislation be lowered to 16 years of age.

This proposed legislation is nevertheless to be favoured as it illustrates that the abuse of children is still recognised as a serious offence.[69] It no longer

[69] In light of the fact that mentally impaired persons are usually dealt with when provisions are made for minors, the provision pertaining to mentally impaired persons have also been amended. The provisions relating to *mentally impaired persons*, introduced in the 2002 Bill on Sexual Offences differ from those provisions initially introduced in the 1999 Bill. What is potentially problematic and evident

discriminates in age differentials between heterosexual and homosexual acts. This means that there is no longer a higher age limit for indecent acts which may in fact be less serious, with the age limit being 19 years, as opposed to sexual intercourse with an age limit of 16 years. The new legislation also prevents the anomaly where a younger child commits an act with an older person and the latter is labelled the 'perpetrator.' The new proposed rape clause also provides for acts of consensual intercourse with a boy or girl under the age of 12 years to qualify as rape. It is therefore gender-neutral and the South African Law Commission proposes that the irrebuttable common law presumption that only girl under the age of 12 years are incapable of consenting to sexual intercourse be repealed.

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from both the definitions is that the terms 'any person' could also include a mentally impaired person as a perpetrator. It therefore appears that a mentally impaired person can be charged with the offence of rape or indecent act, if committed with another mentally impaired person as 'any person' covers the latter. The proposed definition of rape states that an act of sexual penetration is *prima facie* unlawful if the person is incapable in law of appreciating the nature of an act of sexual penetration. One therefore sits with an anomalous situation whereby each mentally impaired party will *prima facie* have committed the crime of rape if acts of sexual penetration are engaged in, or the crime of indecent acts with mentally impaired persons, should they indulge in what is categorised as indecent acts. Should they be charged both parties would have to raise a defence that they both induced the commission of the indecent act or act of sexual penetration. In practice however it is doubtful whether the matter would go to court as both would be presumed to be *culpae incapax* as a result of their mentally impaired status. As for the definition of 'mentally impaired person', how does one determine whether the mentally impaired person appreciates the nature of a sexual act or not? Is it to say persons who are not mentally impaired who engage in consensual sexual intercourse, always appreciate the nature of a sexual act and consequently never indulge in sexual intercourse motivated by carnality, which may also be the motivating factor for mentally impaired persons? Fortunately the legislature has seen fit to add in the saving proviso that provides for a defence if the mentally impaired person induces the commission of indecent acts or acts of sexual penetration. Whilst appreciating the fact that mentally impaired persons should be protected from exploitation, one should be careful not to unjustifiably limit rights in the tide of overcautiousness.

4. *The crime of incest is extended instead of being abolished or substantially amended to have limited effect to persons related by affinity.*

The acts of penetration pertaining to the crime of incest have been broadened in the 2002 Sexual Offences Bill to incorporate more sexual acts. The definition of sexual penetration is extended to common law incest.[70] The present author is of the opinion that common law incest should be abolished *in toto* or be substantially amended. In chapter two it was submitted that the retention of the common law crime of incest would be unconstitutional. Firstly, the stigma surrounding what is perceived to be an unnatural sex crime for child victims is great. Children currently classified as victims of common law incest will be protected under the auspices of a statutory offence by clause 6(1) of the 2002 proposed bill on Sexual Offences.

Secondly, with regard to adults related by affinity (by marriage) a number of constitutional rights are infringed such as the rights to equality, privacy and dignity and discrimination occurs on the basis of marital status.[71]

Thirdly, the retention of the crime of incest will result in inequity when applied in practice to married persons as opposed to those who cohabit. If a person cohabits with somebody rather than marries them there is no prohibition on the grounds of affinity and such person could freely marry any relative of their partner in the prohibited degrees. This results in the infringement of the right to equality as a married person in exactly the same situation would be subject to the restrictions of affinity.

Lastly, the policing of the crime would be problematic and will in all likelihood lead to the inconsistent application of the crime in factual situations. The present author recommends that the same considerations, which were applied to the

[70] See the Executive Summary of **"SALC Discussion Paper 102 of 2002"** on 111.

[71] See sections 9(1) and (3), 10 and 14 of Act 108 of 1996.

decriminalisation of the crime of sodomy, should be applied to the crime of incest in order to give effect to the supremacy of the Constitution.

The proposed 2002 Bill on Sexual Offences is to be favoured. The inequitable application of the common law definition of rape to the categories of identified sexual assault victim will be largely ameliorated. The focus has moved from the criterion of consent to the sexual encounter itself. The focus of the new act is also more on the aspect of *unlawful penetration* than consent. This entails that the evidentiary burden on the state is somewhat ameliorated. More importantly *both men and women can now be regarded as victims or perpetrators* and social injustice is now a reality of the past.

3. CONCLUSION

The new proposed legislation is a far cry from the common law definition of rape which is gender-specific and anatomically specific. The 2002 Bill is more inclusive of categories of penetrative sexual assault victims than exclusive, which is not the case with the common law definition of rape. It addresses aspects of child abuse. Furthermore, it provides a better alternative to the Sexual Offences Act 23 of 1957, which will be repealed by the 2002 Bill on Sexual Offences. It was however established that the Bill does not provide for two categories of penetrative sexual assault victims identified in this study.[72]

The South African Law Commission recommends that consent should no longer be an element in the new definition, as it places the victim on trial, especially as regards their sexual history, and places an overly heavy burden on the state. The proposed change will consequently place the evidentiary onus on the accused and it is envisaged that the incidence of reporting will be increased without this additional

[72] Male victims of digital rape involving forced manual stimulation and persons who are deliberately exposed to the HIV virus or other life threatening illnesses during consensual sexual intercourse.

fear and trauma for victims. [73] The present author is, however, of the view that the issue of consent is the essence of whether a rape is committed or not and cannot be ignored or disguised. Furthermore, by partially replacing the consent criterion with an even more complicated element of coercive circumstances, a resistance factor might ensue.[74] The element of free agreement adopted in the state of Victoria in Australia could perhaps be utilised instead of the element of coercive circumstances.

Some authors still view the crime of rape as being a crime of man against woman and that to extend the definition to incorporate other penetrative acts and victims, demotes the meaning of the crime to women and the significance of the traditional definition. [75] This view excludes the possibility that being penetrated by an object can be as traumatic as traditional rape.

Other arguments against rape law reform is that it is gender-specific and that there has been little success in changing societal conditions under which rape occur.[76]

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[73] **"SALC Discussion Paper 85 of 1999"** on 75.

[74] This envisages that some form of resistance has to be displayed by the victim when force is applied to the victim. The consent criterion is replaced not only be the presence of coercive circumstances, but also by provisions in the proposed definition relating to false pretences and fraudulent means and provisions applicable to persons who are incapable in law of appreciating the nature of an act of penetration. See clause 3(2) of **'Annexure B'**.

[75] Naffine, N. **"Possession: Erotic Love in the Law of Rape"** (1994) on 23; See further Rumney, P. & Morgan-Taylor, M. **"Recognizing the Male Victim: Gender Neutrality and the Law of Rape: Part One"** (1997) on 206.

[76] In the United States, the criticism that a gender-specific definition does not reflect the reality of rape came to the fore in the case of **People v Liberta** 1984 485 NYS 2d 207: A husband was charged with the raping and sodomizing of his wife. He argued that rape violated the right to equal protection as appearing in the United States Constitution, as only men were criminalized.
In the *court a quo* it was argued that it was constitutional, as it was aimed at protecting women from assaults by men. In the New York Court of Appeals, it was held that the gender-specific rape laws were unconstitutional on the grounds of equal protection. The court dismissed the notion that men could not be raped by women as sexual intercourse *occurs upon any penetration, however slight, this degree of contact can be achieved without his consent.* (own emphasis).

Despite this, gender-specificity emphasizes the rights of some victims to the exclusion of other victims and on this basis it must be rejected, as it cannot be argued that the crime towards other victims is less important or less traumatic.

A number of disadvantages are evident to those victims of penetrative sexual assault who are unable to gain redress under the traditional definition of rape. These are lower sentences than those imposed under the crime of rape, victims may not have the benefit of procedural protection in court and the law may promote the view that their experiences are taken less seriously and it may consequently be advocated in society too.

With the recognition of male rape the formal acknowledgement is made, that it is a severe form of sexual violence, as serious as that of the traditional crime. Consequently the traumatic experiences of men and women are no longer denied.

The proposed legislation therefore follows the trend in other countries such as Australia, Britain and particularly the United States, where the importance of gender-neutrality is recognised. This is a form of redress extended to ensure just treatment for all male and female victims of rape. These countries do not discriminate between victims and perpetrators.

The majority of categories of penetrative sexual assault victims identified in this study will now be included as rape victims by the proposed legislation. The categories of sexual assault victim who will be included in the proposed definition are victims of: 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; penetrative sexual assault by a male perpetrator on a male child victim; penetrative sexual assault by a female perpetrator on a male victim and

penetrative sexual assault with the use of an object or digitally on a male or female victim.

It has been shown that the category of sexual assault victim of consensual intercourse where the perpetrator deliberately withholds information regarding his or her HIV/AIDS status is not adequately covered as well as male victims of non-penetrative digital assault. Despite the criticism relating to various categories of sexual assault victim, the proposed legislation is to be supported in that it alleviates to a large extent the plight of a number of sexual assault victims who were previously excluded, in the efforts to achieve equality for all victims of rape.

The focus of this study has been substantive in nature and procedural aspects have accordingly not been dealt with. However, it is acknowledged that certain procedural measures such as rape shield laws need to form an essential part of the South African legislative system in order to protect both male and female victims of rape and will be briefly dealt with here. Rape shield laws have the following benefits:

* Evidence as regards prior sexual history will be limited in relation to the issue of consent and will not have an impact on the perception that sexually active persons are likely to be dishonest.

* The reporting of the crime of male rape will be encouraged, thus increasing statistics and knowledge.

* Sensitivity toward the victim by the legal process and officials will improve.

The question may be asked: Can rape shield laws be effectively extended to all the identified categories of sexual assault victim and especially male victims of sexual assault? Assumptions exist that both men involved in a same-sex rape are

homosexual, as one party is active and one party passive.[77] Homosexual bias, however, is more likely to lead to an acquittal, especially if the victim is in fact homosexual.[78] The converse is of course also true. Should a victim have been heterosexual, a defendant may have been convicted under the mistaken notion that the heterosexual victim would never consent to sexual intercourse with another man.[79]

When and how would the rape shield laws apply?[80] Kramer suggests three circumstances under which the aforementioned is applicable: [81] Firstly, when the defendant uses evidence of prior sexual history to *prove the issue of consent*. The rape shield laws were therefore designed to prohibit this sort of evidence.

Rape shield laws could apply equally to both female and male victims of the crime of rape in South Africa. As mentioned earlier, rape shield laws have a dual function. Firstly, to limit prior sexual history evidence as being relevant on the issue of consent. Secondly, to ensure that defendants receive a fair trial especially in cases of alleged same-sex rape, where the victim is married with children. Application of rape shield laws will from a South African perspective, encourage reporting of the

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[77] This assumption is incorrect as it is a noted fact that neither the assailant, nor the victim are homosexual. Furthermore, as previously discussed, rape is an act of power and is not primarily sexually motivated.

[78] See Kramer, E.J. **"When Men are Victims: Applying Rape Shield Laws to Male Same-Sex Rape"** (1998) on 315 wherein it is stated that: *The effects of such bias can be staggering – jurors have gone so far as to acquit men for killing gay victims, despite enormous evidence of guilt.*

[79] See **Commonwealth v Gonsalves** 1986 Mass.App.Ct 499 N.E. 2d 1229 where a 19 year old man was raped and his own father apparently asked if he had tried to prevent the rape by fighting off the assailant/ defendant.

[80] In **Commonwealth v Quartman** 1983 Pa. Super. Ct. 458 A.2d. 994, the Pennsylvania Superior Court stated that although the rape shield laws were designed for the protection of female victims as regards their sexual history, the laws could be extended to male victims too, in the light of the gender-neutral rape statutes in Pennsylvania

[81] See comprehensive discussion in Kramer, E.J. **"When Men are Victims: Applying Rape Shield Laws to Male Same-Sex Rape"** (1998) on 319 – 330.

crime and, in addition, protect male victims from prejudice which could arise as a result of evidence of sexual history and sexual orientation.[82] This is especially relevant to where a defendant seeks to introduce evidence pertaining to the question of consent involving a victim's sexual orientation. The inference intended is that if the victim is a lesbian or homosexual, he or she consented to the act in question.[83] This concept is clearly a fallacy and is consequently irrelevant and inadmissible. Compounded to this is the fact that rape shield laws do not expressly state that evidence of sexual orientation is inadmissible. Kramer, however, wisely comments that the category of sexual orientation is interlinked with that of prior sexual history evidence and on that basis, is inadmissible. [84]

Secondly, where the defendant's uses evidence of prior sexual history to *affect the victim's credibility*. A defendant may use evidence of prior sexual history as evidence to affect the victim's credibility in the sense that the victim may be shown to have lied about the events at hand.[85] After the prosecutor has asked the victim direct questions, the defendant may lead evidence on prior sexual history in order to affect the victim's credibility.

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[82] A case, in which the same conclusion as that in the case of **State v Rodgers** (No.01-C-01-9011-CR-00312) 1991 Tenn.Crim.App.LEXIS 648 (Aug 16, 1991) was not reached, was that of **Commonwealth v Quartman** 1983 Pa. Super. Ct. 458 A.2d. 994. The facts of the latter case were similar to that of the former, in that a male same–sex rape occurred in prison. The court refused to allow evidence that consensual intercourse had previously occurred between the victim and fellow prisoners, as this was exactly what the rape law reform sought to preclude.

[83] This, in fact, has no bearing on consent to that *specific* act. See Kramer, E.J. **"When Men are Victims: Applying Rape Shield Laws to Male Same-Sex Rape"** (1998) on 323 where she states that: *Jurors will not have the same assumption about the possibility of consent in male same–sex rape cases. Instead they may presume that no man would consent to such activity. However, expert testimony about male same-sex sexual behaviour could effectively take care of this problem. Such testimony may make a jury aware of the theoretical possibility of consent without going into intimate details of the victim's life.*

[84] *Ibid.*

[85] See the case of **Olden** v **Kentucky** 1988 488 US 227 in which evidence to the effect that the victim had prior sexual consensual relations with the defendant, was admissible.

Lastly, rape shield laws are applicable where the prosecution's uses evidence relating to the victim's prior sexual history as *evidence of non-consent*. This type of evidence to prove non-consent usually entails testimony to the effect that the victim has never engaged in consensual homosexual acts, or, is not a homosexual. This however could be problematic for defendants, especially as regards sexual orientation, if there is evidence that a victim is married or there are children involved. In addition, a person who is homosexual could be a victim of non-consensual sexual intercourse and by using assumptions related to prior sexual history, could be left without a remedy and be grossly victimised.

Further problems arise, where prosecutors introduce such evidence. Although sexual orientation could be used to prove non-consent, it is not irrefutable evidence as to whether the victim consented to sexual intercourse with the defendant or not.[86] Another problematic question arises regarding rebuttal evidence, as the defendant would then be able to lead evidence contradicting the evidence wherein it is claimed that the victim is not homosexual. Prior sexual history evidence would then be relevant. This is exactly what the rape shield laws are designed to limit or prevent. Therefore, although it appears that the prosecution's use of such evidence may assist the victim, it could be extremely prejudicial as regards rebuttal evidence. [87]

A number of procedural measures are in fact introduced in the proposed Sexual Offences Bill of 2002.[88] These measures include, but are not limited to: vulnerable witnesses (clause 13), the appointment of support persons (clause 14), admissibility

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[86] See Kramer, E.J. **"When Men are Victims: Applying Rape Shield Laws to Male Same-Sex Rape"** (1998) on 327 where she points out that evidence that a male victim is 'not gay' does not necessarily mean that he would never consent to sexual intercourse with a man.

[87] An interesting point to note in cases where the victim has been married, or has children, can in the cases of male same-sex rape or alleged male relationships, be used to prove lack of consent and in the case of females it could be used as probability of consent. There is also evidence that homosexual men may marry and have children, but expert evidence would be required in this regard.

[88] These procedural measures will not be dealt with for purposes of this study as they relate to procedural and not substantive law.

of evidence of psycho-social effects of the sexual offence (clause 18), abolition of the cautionary rule (clause 20), the abolition of the rules of corroboration (clause 21), sex offender orders (clause 24) as well as certain provisions providing for the treatment of the victim. These procedural measures are definitely to be favoured, especially those provisions relating to the psychological symptoms as these can serve as evidence that a sexual assault has in fact occurred.[89]

In the next chapter the victims of unprotected consensual intercourse where one party intentionally fails to disclose their HIV status will be the main focus. It will be ascertained whether these victims of sexual assault are provided for in any other way by the South African legal system and if the definition of rape can be extended to incorporate these victims. The impact of HIV/ AIDS in the context of rape legislation will also be appraised. The possibility of creating a statutory crime which consolidates the common law crimes applicable to harmful HIV related behaviour will also be expounded upon.

[89] See chapter two for detail.

CHAPTER SIX

REDEFINING AND RETHINKING RAPE AGAINST THE BACKGROUND OF THE HIV PANDEMIC

1. INTRODUCTION

The prevalence of HIV infection in South Africa is fast reaching epidemic proportions which may to some extent be attributed to the high incidence of rape. Rape is a means through which HIV is transmitted which is why this chapter is devoted to a critical examination of whether the intentional exposure to or transmission of life threatening illnesses can be linked with sexual offences.[1]

[1] See paragraph 1.2. on the transmission of HIV later in this chapter.

In the previous chapters a number of categories of penetrative sexual assault victims were identified as being rape victims. These victims of rape are all at risk of being infected with the HIV virus. A separate category of potential penetrative sexual assault victim identified in this study is a person who is party to unprotected consensual intercourse who is knowingly exposed to the HIV virus. The exposure to the HIV virus could take place deliberately (that is, where the person is aware of his HIV positive status) or where the HIV infected person is unaware of their own HIV infected status.

It was established in the previous chapter that this potential sexual assault victim is not identified as a rape victim by the proposed 2002 Bill on Sexual Offences.[2] The common law crimes which can be instituted for instances of intentional exposure to the HIV virus will be individually assessed to establish whether the aforesaid crimes are suitable for this category of penetrative sexual assault victim. This chapter will further be devoted to motivating why the definition of rape should be extended to persons who are intentionally exposed to the HIV virus during consensual intercourse. Attention will also be expended on whether a separate crime relating to harmful HIV related behaviour should be created.[3] Procedural aspects relating to all the categories of rape victim identified in this study who are exposed to or infected with the HIV virus or life threatening diseases will also be critically examined.

Background relating to the definition and description of HIV/ AIDS will now be provided in order to understand the nature of the disease. Specific reference will be

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[2] See Executive Summary of **"SALC Discussion Paper 102 of 2002"** on 84 where the South African Law Commission are of the view that non-disclosure by a person that he or she is infected with a sexually transmittable disease prior to consensual intercourse would amount to rape due to false pretences. However in the proposed 2002 Bill on Sexual Offences no specific provision is made for such acts. Clause 3 (2)(b) refers to false pretences and fraudulent means. Clause 4 defines these terms and no specific provision is made for the deliberate withholding of information relating to sexually transmittable diseases during consensual intercourse.

[3] The present author submits that the deliberate sexual transmission of other life threatening illnesses should also be incorporated.

made to the transmission of the HIV virus in order to establish a link between victims of penetrative sexual assault and HIV infection. Once established, the existing common law measures will be examined to establish whether this specific category of penetrative sexual assault victim is adequately protected. The possibility of extending the crime of rape to this category of penetrative sexual assault victim will be critically discussed with specific reference to the element of consent.

1.1. DEFINITION AND DESCRIPTION OF HIV/AIDS

The seriousness of HIV infection on the South African population is highlighted with reference to statistics. An estimation of persons infected with the HIV virus in 1999 in South Africa reveals a staggering figure of 4,2 million people.[4] The South African Law Commissions comments as follows:[5]

> *Estimates are that roughly 8% of the total population, or 13% of the adult (ie. sexually active) population (compared to 7% of the total or 11% of the adult population in 1997) is infected. It is estimated that approximately 3.3 million people (adults and children – of which 3.1 million are estimated to be adults) were infected with HIV at the end of 1998.*

As appears from the above, the situation worsens every year and more people with HIV/AIDS will be diagnosed and AIDS deaths reported due to the fact that AIDS follows in the absence of medical treatment, after HIV infection some years after the initial infection.

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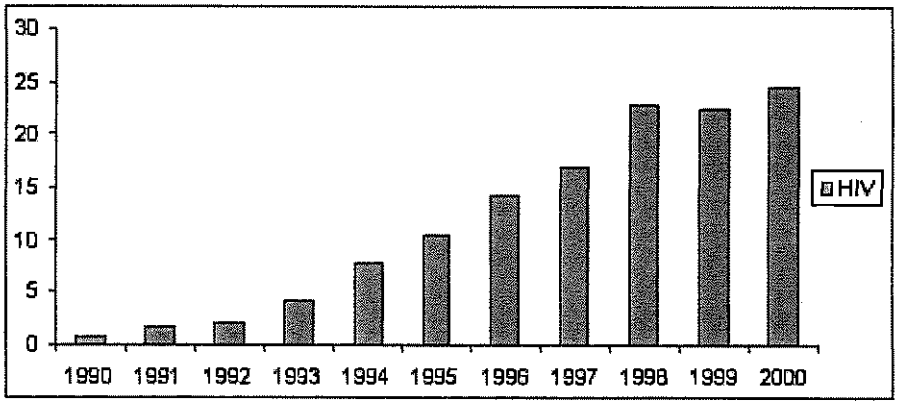
[4] **"SALC Fourth Interim Report on Aspects of the Law Relating to AIDS"** (2000) on 12. See further the Department of Health **"Summary Report-National HIV-Sero-Prevalence Survey of Women Attending Public Antenatal Clinics in South Africa 1999"** (2000) in general.

[5] **"SALC Discussion Paper 84 of 1999"** on 9 in which the figures, as provided by Dr T Muhr (a Metropolitan Life AIDS researcher) are discussed.

The Department of Health initiated HIV surveillance in 1990 by means of annual surveys conducted among antenatal clinics.[6] Based on the 16 548 blood samples tested in October 2000, it is estimated that nationally, 24.5% of the women who were infected with HIV by the end of year.[7] This increase in the prevalence of HIV infection is illustrated below.

Figure 5. **National HIV prevalence trends among antenatal clinic attendees in South Africa: 1990-2000**



The South African Law Commission mentions that although no statistics are available relating to the risk of HIV-transmission during rape and sexual assault, the Commission is of the view that the prevalence of HIV is increased by sexual violence, especially as statistics reveal that sexual transmission accounts for at least 80% of HIV transmission in South Africa.[8]

HIV/ AIDS is a clinical definition given to persons whose immune systems have ceased to function properly.[9] Certain life-threatening illnesses then arise as a result

[6] See http://196.36.153.56/doh/facts/index.html **"Facts and Statistics"** accessed 30 August 2002.

[7] *Ibid.* This is compared to 22.4% in 1999 and 22.8% in 1998.

[8] **"SALC Fourth Interim Report on Aspects of the Law Relating to AIDS"** (2000) on 14. See further http://196.36.153.56/doh/facts/index.html **"Facts and Statistics"** accessed 30 August 2002.

[9] According to scientists it is believed that the origin of the HIV virus is a virus that crossed the species barrier into humans and is related to the Simian (monkey) Immunodeficiency Viruses in Africa. See Whiteside, A. & Sunter, C. **"AIDS: The Challenge for South Africa"** (2000) on 4-5.

of infection with the HIV virus.[10] HIV is the acronym for '**Human Immunodeficiency Virus**' whereas the term AIDS is descriptive of '**Aquired Immunodeficiency Syndrome**'.[11] A brief paraphrased explanation of the name 'Aquired Immunodeficiency Syndrome' as provided by the authors Whiteside and Sunter is as follows:[12] 'Aquired' means that the virus is not spread through casual contact and a person has to do something or have something done to them which exposes them to the virus. The term 'immunodeficiency' means that the virus attacks a person's immune system and makes it deficient so that it is less capable of fighting infections.

AIDS is described as a 'syndrome' as it can present itself as a number of diseases that arise as a result of the failing immune system.[13] The AIDS sufferer will then be prone to illnesses such as certain cancers, tuberculosis or pneumonia, which will prove to be fatal to the AIDS victim which would generally not be the case for persons not suffering from AIDS. Consequently the person does not die of AIDS as such, but as a result of an illness to which the body cannot afford immunity.

A person infected with HIV remains a carrier of the HIV virus for the rest of their lifespan, as the genetic material of the virus becomes a permanent part of the deoxyribonucleic acid (DNA). As a result of HIV infection, the body's immune system is destroyed and no resistance can be offered to illnesses.[14] Most persons

[10] See in general De Jager, F.J. **"VIGS: Die Rol van die Strafreg"** (1991) on 212-216; Arendse, N. **"HIV and AIDS Infected Employees: Some Legal Implications for the Workplace"** (1991) on 218-219; See also **"SALC Discussion Paper 80 of 1999"** on 14-15, fn 42.

[11] See **"SALC Discussion Paper 80 of 1999"** on 14.

[12] Whiteside, A. & Sunter, C. **"AIDS: The Challenge for South Africa"** (2000) on 1.

[13] A syndrome is a number of symptoms that arise simultaneously and are characteristic of a pathological condition.

[14] See **"SALC Discussion Paper 80 of 1999"** on 14.

who have HIV will eventually develop AIDS, which is the final clinical stage of HIV infection. Four stages have been identified, as follows: [15]

The *initial phase* occurs shortly after a person is infected with HIV.[16] This is known as the phase preceding seroconversion and is also known as the window period.[17] The blood tests undertaken to determine HIV infection, are usually done to detect the presence of antibodies and this will lead to a positive result. If undertaken in the window period, false results will be delivered, as the antibodies would not yet have formed.

In the *asymptomatic phase*, which can last on average seven years no symptoms of illness appear and antibodies have already developed. This phase can extend over a long period, although the person's resistance and immunity is diminished.

During the *symptomatic phase* which can last up to three years, the persons immunity takes a plunge and symptoms of life-threatening illnesses[18] such as skin rashes, persistent diarrhoea and dramatic loss of weight occur.[19]

During the final phase *clinical AIDS* (severe symptomatic phase) develops. A person is prone to opportunistic infections. Healthy persons will not usually be affected by the same organisms which cause illness in persons infected with AIDS. A person usually dies within one to two years of diseases such as cancer, pneumonia or tuberculosis and chronic diarrhoea. In South Africa patients with HIV

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[15] See detail in **"SALC Discussion Paper 80 of 1999"** on 18-20; **"SALC Discussion Paper 84 of 1999"** on 24 - 27. See also Whiteside, A. & Sunter, C. **"AIDS: The Challenge for South Africa"** (2000) on 8 - 10.

[16] Not every person exposed to the HIV virus becomes infected with HIV/ AIDS.

[17] This is when antibodies develop to try and protect the body against HIV and occurs 6–12 weeks after exposure.

[18] These illnesses are life-threatening to HIV infected persons due to the fact that their immunity is impaired. For uninfected persons the probability of the illness being life–threatening is minimal.

[19] See **"SALC Discussion Paper 80 of 1999"** on 19.

may have a shortened life expectancy, compared to HIV positive persons for instance in the Unites States of America, due to factors such as malnutrition and severe poverty.[20]

A problem with HIV/ AIDS, especially if considered in a criminal context, is the invisibility of the disease in the window period in which no symptoms are evident. Such an affected person may easily transmit the virus with no knowledge of the illness. This would have an effect on proving intent if a rape was committed by the infected person during this time.[21]

1.2. THE TRANSMISSION OF THE HIV VIRUS

Consideration of the nature of HIV/ AIDS and the means by which it is transmitted is essential in order to establish the potential risk which a rape victim and a person who engages in consensual unprotected sexual intercourse where the HIV status of their partner is deliberately withheld from them, is exposed to.

An infected person is infectious and is able to transmit HIV to other persons despite not displaying any symptoms of the disease. HIV may be transmitted in the following ways: blood contact, semen, vaginal and cervical fluids, breast milk and intravenous drug use.

Although it is identified in urine, tears, saliva, bone marrow and foetal material, the HIV virus has predominantly been found to be transmitted by the above ways due to substantially larger quantities of the virus being present. [22] Consequently, the most frequent means of infecting another is by sexual intercourse; a mother to her foetus or via breastfeeding and exposure to blood such as blood transfusions or the use of

[20] **"SALC Discussion Paper 80 of 1999"** 20 fn 68.

[21] **"SALC Discussion Paper 80 of 1999"** on 29.

[22] Note: HIV cannot be transmitted from casual contact such as breathing, shaking hands or hugging or even the sharing of cutlery. See also **"SALC Discussion Paper 80 of 1999"** on 15.

dirty needles or syringes.[23] Quantification of the actual risk of infection may not be accurate as the risk could vary in the following circumstances as suggested by the South African Law Commission.[24]

* The duration of the act
* Nature of the exposure
* The presence of other sexually transmitted illnesses
* The type of bodily fluid exposed to
* The presence of physical violence.

These factors are now briefly discussed. With regard to the *duration of the act* it is self-explanatory that the longer the exposure, the more of the HIV carriers's bodily fluids are exposed to the victim.[25]

With regard to the *nature of the exposure*, it is common cause that intercourse *per anum* causes more trauma than other forms of sexual intercourse. Furthermore it has been shown by means of statistics that a female having unprotected sexual intercourse with a male is exposed to more than twice the risk than a male having unprotected sexual intercourse with an infected female.[26]

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[23] See Whiteside, A. & Sunter, C. **"AIDS: The Challenge for South Africa"** (2000) on 10 - 16. See Fettner, A.G. **"The AIDS Scare: Answers to Frightening Questions"** (1987) on 25 - 32; Also Fettner, A.G. **"Women and AIDS"** (1986) on 61 – 66.

[24] **"SALC Discussion Paper 80 of 1999"** on 32 - 33.

[25] See also Evian, C. **"Primary AIDS Care"** (1995) on 147.

[26] See Kirby, M. **"Colloquium: AIDS, Health and Human Rights"** (1994) on 248. See further Whiteside, A. & Sunter, C. **"AIDS: The Challenge for South Africa"** (2000) chart 1.3 on 11.

It goes without saying that the presence of certain *sexually transmitted diseases*, with the accompanying ulcers or sores, allows the HIV virus to enter the body with relative ease.

With regard to the *type of bodily fluids* to which the victim is exposed, research has shown that semen contains a greater concentration of the HIV virus as opposed to vaginal fluid.[27] This is one of the reasons why a female victim is twice as likely to contract HIV from an unprotected sexual encounter with a male than if the converse situation were applicable.

Depending on the *nature of violence*, cuts and abrasions can allow the HIV virus access to the body. This factor would increase a rape victim's chances of contracting the disease as violence frequently accompanies acts of rape. Gang rape would, as a matter of speaking, also substantially increase the risk of contracting the disease, as there would not be a single encounter of rape but multiple rapes.

Obviously, if the elements of rape are present, then the act is still rape despite the use of a condom. The use of protection would probably reduce the risk of HIV and liability for HIV under an additional offence, although the offence of rape would still be committed. Research has provided that latex male condoms are highly effective against HIV.[28]

[27] See also **"SALC Discussion Paper 80 of 1999"** on 33.

[28] See **"SALC Discussion Paper 80 of 1999"** on 36 and fn 153 in which it discusses a European study in 1994 of 256 couples of which one had HIV, who consistently used condoms. Between 0-2% became infected.

1.3. THE CAUSAL NEXUS BETWEEN PENETRATIVE SEXUAL ASSAULT AND HIV/AIDS

It is evident that a number of rape victims who are subjected to penetrative sexual assault may become infected with the intentional exposure to or transmission of the HIV virus. These victims are child victims who are made party to forced sexual intercourse in order to cure the perpetrator of his HIV infection, all other categories of identified rape victims and persons who engage in consensual intercourse where the HIV status of their partners is knowingly withheld from them.

The gravity of a rape is compounded where person infected with the HIV virus rapes a victim, who subsequently becomes infected with the disease as the following consequences could arise: [29]

* The victim's life expectancy is shortened especially if the victim is from a poverty-stricken area or is malnourished.

* The victim could be ostracized by family and friends.

* The victim has no or a limited sexual life.

* Procreation is negatively affected.

* The victim experiences psychological and physical trauma.

What therefore needs to be established is whether these factors are severe enough to warrant additional legal protection to the identified victims of rape where the perpetrator is HIV positive, and to the possible category of sexual assault victim where the HIV status of the one party is knowingly withheld. Le Roux agrees with

[29] See **"SALC Discussion Paper 80 of 1999"** on 19.

this view and indicates that the law is designed to protect people from prejudice and harm and its function is to punish an infringement of rights.[30]

The establishing of criminal liability for exposure to the HIV virus is a complex one as a number of clearly distinguishable scenarios arise. Firstly, there are three possibilities arising where the perpetrator commits rape in the form of penetrative sexual assault.

* One situation is where the perpetrator is *aware* of his or her HIV infected status and knowingly exposes the victim to the virus *without the use of protection* such as a condom.

* The second situation is where the perpetrators are *aware* of their HIV infected status and commits the penetrative sexual assault *with the use of protection*. Studies have shown that the use of latex male condoms are extremely effective in preventing HIV transmission.[31]

* The third situation deals with cases where the perpetrator of rape is *unaware* of his or her HIV infected status. This situation has to be dealt with circumspectly as the implications for the entire population could be grave if the elements of *dolus eventualis* or negligence was found to be present in such situations.[32] If *dolus eventualis* was present in such a situation it would entail that the person suspected that he or she is infected but does not take precautions. If the element of negligence was applied it would envisage a

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[30] Le Roux, J. **"Die Toepassing van Strafbeginsels op HIV-Oordrag: 'n Diagnose"** (2000) on 304.

[31] A study in Europe was conducted over a period of 20 months on 256 couples of whom one party was infected with the HIV virus. It was found that 2% of the uninfected partners became infected. The last situation is where the perpetrator is not aware of his HIV status and commits a rape without protection. See Lachman, S.J. **"Heterosexual HIV/AIDS as a Global Problem"** (1995) on 135. See also **"SALC Fourth Interim Report on Aspects of the Law Relating to AIDS"** (2000) on 62.

[32] See Van Wyk, C. **"The Need for a New Statutory Offence aimed at Harmful HIV-Related behaviour: The General Public Interest Perspective"** (2000) on 4 – 5.

situation where the person is not aware of his or her infection although a reasonable person would have foreseen the possibility of infection and taken the precautionary steps of testing themselves. If an element of negligence was applied the entire population would possibly be subject to criminal prosecution.[33] This situation will however be referred to in more detail further on in this chapter.

Clearly all three situations cannot be equated with one another due to differing intentions. The first scenario of exposure is intentional whereas the other actions relating to exposure are not. Where a perpetrator makes use of protection such as a condom it is submitted that criminal liability should only ensue for the rape and not exposure to the virus.[34]

This chapter will be spent on establishing whether the definition of rape can be extended to persons who are knowingly exposed to the HIV virus during consensual intercourse, based on a lack of consent or free agreement. Again this position must be distinguished from instances where the one party is aware of his or her HIV infected status but uses protection or where the person is unaware of their HIV infected status.[35] For the same reasons as mentioned above, the position relating to *harmful HIV related behaviour* where the perpetrator is aware and the victim is

[33] See in general Viljoen, F. **"Stigmatising HIV/AIDS, Stigmatising Sex? A Reply to Professor van Wyk"** (2000) on 11.

[34] In Western Australia a man was found guilty and convicted of causing grievous bodily harm as a result of the fact that he infected a sexual partner with the HIV virus. The prosecutor for the case said that persons should take steps to prevent their partner from contracting the virus. See **"HIV Sex Man Found Guilty"** *The West Australian* 4 October 2002. The implication is that if applied to cases of rape the same criterion should be applied and liability for exposure to the virus should not ensue if the perpetrator uses a condom. If liability had to ensue despite the use of a condom it would have major implications for the general population at large as a standard would have to be consistently applied to everyone. Obviously if a condom is deliberately misused it would constitute a different set of fats altogether as intention would then be present.

[35] It is submitted that a moral duty lies upon the person to inform the other party of their HIV infected status so that an informed choice can be made.

unaware of the material facts, in the context of consensual sexual relations, will only be examined for purposes of this chapter. All victims of consensual intercourse where the HIV status of the one party is knowingly withheld and victims of rape who are exposed to the HIV virus, face the possibility of death, should they be infected. Persons who are infected need to be made aware that they have a responsibility towards protecting others and to know that there punitive measures will be applied should they purposely infect others.[36]

2. ADEQUACY OF SOUTH AFRICAN LAW IN A CONTEXT OF HIV-RELATED SEXUAL OFFENCES

HIV/ AIDS has far-reaching economic and juridical implications, especially with regard to individuals who have been identified as being rape victims. Currently the law makes provision for a sentence of life imprisonment, where the perpetrator of rape knows that he is infected with HIV or AIDS, unless substantial or compelling circumstances exists.[37] These provisions can only be applied to the category of penetrative sexual assault victim, who engages in unprotected sexual intercourse, with an HIV positive partner who is aware of their infected status, if the definition of rape is extended. If this category of penetrative sexual assault victim is recognised as a rape victim then a sentence of life imprisonment can be imposed. The provisions in the Criminal Law Amendment Act only provides for a sentence of life imprisonment where the perpetrator knows about his HIV status.[38] Against this framework the position should be considered where the perpetrator is unaware of his or her HIV status where he or she should actually be aware. The minimum sentences prescribed in the aforesaid Act actually provide a loophole to potential perpetrators. The reason is that if a person suspects they might be infected, he or she can avoid testing and delay potential knowledge of actual infection to ensure

[36] See Leclerc-Madlala, S. **"Crime in an Epidemic: The Case of Rape and AIDS"** (1996) on 36.

[37] Section 51 of the Criminal Law Amendment Act 105 of 1997.

[38] Section 51 of Act 105 of 1997.

that a life sentence for rape cannot be imposed. This aspect pertaining to the minimum sentences will be dealt with elsewhere in this chapter.

Before establishing whether the definition of rape should be extended to the category of penetrative sexual assault victim who is delberately exposed to the HIV virus during unprotected consensual sexual intercourse, the common law crimes applicable to this category of victim will be examined.

2.1. VICTIMS WHO ARE DELIBERATELY EXPOSED TO THE HIV VIRUS DURING CONSENSUAL SEXUAL INTERCOURSE

In chapter one a category of potential sexual assault victim was identified where a consenting party to unprotected sexual intercourse is intentionally made unaware of the other party's HIV infected status. In chapters three and five it was established that this category of penetrative sexual assault victim is not provided for in terms of the current and proposed rape legislation. Before establishing whether the crime of rape should be extended to this category of victim, the common law crimes pertaining to intentional or negligent exposure to the HIV virus will be examined.

2.1.1. THE COMMON LAW CRIMES APPLICABLE TO HARMFUL HIV RELATED BEHAVIOUR

Persons who deliberately or negligently infect others with HIV may be prosecuted under the existing common law crimes.[39] The said person could also be held liable for damages in delict. The victim will then be entitled to monetary compensation for

[39] Although the Law Commission has proposed a draft bill incorporating a statutory offence. See in general De Jager, F.J. **"Vigs: Die Rol van die Strafreg"** (1991) on 212; See further, Van Wyk, C.W. **"Vigs en Die Reg: 'n Verkenning"** (1988) on 317.

the harm caused, as the South African criminal law does not have similar compensatory awards *per se*.[40]

In terms of the South African common law, for criminal liability to ensue, the state must prove beyond a reasonable doubt that an unlawful voluntary act or omission was committed, accompanied by fault and criminal capacity.[41] If all the elements are present, a conviction can be secured under the common law crimes of murder, culpable homicide, assault with intent to cause grievous bodily harm and attempt to commit these offences. In the context of HIV/ AIDS, a person could be guilty of an act (where he or she knowingly infects another) or an omission, where the infected person fails to inform a person of his or her HIV status and does not take precautionary steps to avoid harm. [42]

For a conviction to ensue for the crimes of murder and culpable homicide, the infection with the HIV virus must be proved to be causally linked to the act or omission, the unlawful consequence and to proof of fault.[43] Proof of causation as

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[40] Except for fines which are payable to the state, who then decides how the money is to be applied. In the civil case of **Venter v Nel** 1997 4 SA 1014 (D), the Plaintiff sued the Defendant for damages as the latter had infected the former with HIV during sexual intercourse. The defendant had known about his HIV status since 1990. Damages in the sum of R 344 399.06 was awarded to the Plaintiff for the following for future medical expenses, psychological stress, pain and suffering and a possible reduction of life expectancy. See also **S v Ssenyanga** 1992 76 CCC 3d 216 (Ontaria) where the defendant knew he had HIV/AIDS before he had sexual intercourse with the victim and evidence thus existed that aggravated sexual assault was committed. See further **R v Cuerrier** 1999 127 CCC (3d) 1 (SCC). It is present author's view that persons at risk for AIDS have a moral obligation to prevent the disease.

[41] Burchell, J. & Milton, J.R.L. **"Principles of Criminal Law"** (1997) on 95.

[42] See **Minister van Polisie v Ewels** 1975 3 SA 590 (A) for an example where an omission to act, in order to prevent harm may result in criminal liability.

[43] Labuschagne, J.M.T. **"Oningeligte Geslagsomgang met 'n Vigs-Lyer en die Vraagstuk van Toestemming by Verkragting"** (1993) on 421 states that: *Uit bogaande uiteensetting blyk dat 'n vigs-lyer wat met 'n vrou geslagsomgang het sonder om haar daaroor in te lig, nie aan verkragting nie, maar (ook) aan 'n ernstige aanranding (aanranding met die doel om ernstig te beseer), skuldig kan wees, sterf sy, kan hy aan strafbare manslag of selfs moord skuldig wees.*

regards HIV transmission would be problematic. It would have to be proved that the perpetrator was infected with the HIV virus at the time the act was committed, and could transmit the virus. The victim would also have to be infected by the act of the perpetrator as the source of the infection. Furthermore proof that the victim did not already have HIV at the time of the act would be a requirement. As a result of the window period it would also make proof beyond reasonable doubt difficult, if the victim engaged in sexual activity after the rape, which could lead to HIV infection and also to link the HIV infection to the perpetrator.

With regard to the criminal law element of unlawfulness, transmission of HIV is sexual behaviour which causes harm to others and is consequently unlawful. The question of whether an HIV infected person who engages in consensual intercourse with a person who consents knowing that their sexual partner is infected with the HIV virus is an issue which needs to be dealt with circumspectly.[44]

All common law crimes require intention except for culpable homicide which requires negligence.[45] Negligence is an objective test and exists where the reasonable person would have foreseen certain consequences and taken the necessary steps to avoid these consequences and the perpetrator failed to take any such precautionary steps.[46]

The present author is of the view that it is preferable to criminalize an act of *exposure* to the virus instead of focusing on actual transmission of the HIV virus in order to alleviate the burden on the state. A number of common law crimes namely, rape, murder, culpable homicide, assault with the intent to case grievous bodily harm and attempt to commit these crimes, are relevant to a conviction for the

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The present author supports this viewpoint, but is also of the opinion that a woman who is infected with HIV/ AIDS and rapes a man can also be found guilty of these crimes.

[44] See paragraph 2.1.1 of this chapter.

[45] See in general **"SALC Discussion Paper 80 of 1999"** on 83 - 86.

[46] Snyman, C.R. **"Criminal Law"** (1995) on 193.

intentional or negligent exposure to the HIV virus during unprotected sexual intercourse.

* ***RAPE***

Definition: *Rape is the unlawful and intentional sexual intercourse with a woman by a man without her consent.*[47]

In chapter three the question of consent was dealt with in detail.[48] Consent is an element of the act of rape. Consent can be vitiated on the grounds of fear, duress, age, lack of mental capacity, intoxication, sleep and fraud.[49] It is under the category of fraud that the consent of these victims of penetrative sexual assault could be vitiated. As mentioned in chapter three, consent is vitiated where the fraud relates to the identity of the person (*error personae*) or the nature of the act (*error in negotio*).[50] The consent is not vitiated with regard to the *results* of the act. It is under this category that this victim can be classified. This entails that the consent given by this category of penetrative sexual assault victim is deemed to be valid. Therefore no protection is afforded to this category of identified penetrative sexual assault victim and the current common law definition of rape is therefore insufficient. This aspect will be referred to in more detail further on in this chapter.[51]

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[47] See chapter three paragraph 2.1.1. See further Snyman,C.R. **"Criminal Law"** (1995) on 424. Burchell, J. & Milton, J.R.L. **"Principles of Criminal Law"** (1997) on 490.

[48] *Ibid.*

[49] *Ibid.*

[50] Chapter three paragraph 2.1.1. Snyman, C.R. **"Criminal Law"** (1995) on 121. **R v C** 1952 4 SA 117(O).

[51] See paragraph 2.1.2. of this chapter.

* ***MURDER***

Definition: *Murder is the unlawful and intentional causing of the death of another human being.*[52]

If a victim dies as a result of the HIV virus, being intentionally or recklessly transmitted by an accused to the victim and intention is proved beyond reasonable doubt then the accused could be convicted of murder.

The following problems are envisaged with regard to the common law crime of murder and HIV transmission:[53]

1. The perpetrator might die before the victim. Death, and consequently a conviction for murder, would therefore not ensue.

2. With regard to causation it would be difficult to prove that the victim died as a result of the perpetrators transmission of the HIV virus. This can be attributed to the fact that the causal link can be broken by other acts which could lead to HIV infection either prior to and after the rape.

3. Intention would have to be proved which could be problematic.[54] The perpetrator would have to know about his or her HIV positive status. If the HIV infected perpetrator does not foresee that he or she might infect another person then the element of unconscious negligence is present.[55] Where a perpetrator foresees

[52] Snyman, C.R. **"Criminal Law"** (1995) on 401.

[53] See also Robinson, D. **"Criminal Sanctions and Quarantine"** (1992) on 245-246. See also **"SALC Discussion Paper 80 of 1999"** on 87-88.

[54] One of the three forms being: *dolus directus, dolus eventualis* and *dolus indirectus* would have to be proved.

[55] Snyman, C.R. **"Criminal Law"** (1995) on 205.

the possibility of infecting another but decides unreasonably that it will not ensue this is a form of negligence known as conscious negligence or *luxuria*.[56]

4. The perpetrator must have been aware of his HIV status at the *time of commission of the unlawful act.*

It may be argued that what happens if the perpetrator engages in high-risk activity after the rape? To avoid the evidentiary burden, the onus could perhaps be placed on the accused to prove that he did not have HIV at the time of the alleged rape. This is unsatisfactory as either the perpetrator or the victim may become infected after the rape or sexual assault by another party. The present author does not support a reverse onus in such a situation as it infringes upon the accused's right to be presumed innocent.[57] The probability of the accused having transmitted HIV to the victim may appear extremely high where it appears that both parties are infected but despite this it cannot be ascertained with absolute certainty that this is in fact the case.

Although the common law crimes of murder or attempted murder could be utilised for the category of penetrative sexual assault victim who is intentionally exposed to the HIV virus by their partner, it is not favoured as being the primary remedy. Mere exposure to the virus would be insufficient as actual infection and consequent death would have to arise.[58] The crux of the crime of murder is the unlawful killing of

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[56] *Ibid.*

[57] Section 35 (3)(h) of Act 108 of 1996.

[58] It could be argued that if the perpetrator used protection in the form of a condom it would be quite difficult to secure a conviction of murder as intention would be lacking unless *dolus eventualis* is present. If a condom is used to perpetrate the rape and it is not effective as a preventative mechanism and the rape victim is infected, a conviction under an alternate common law crime could ensue if the elements are met. A perpetrator who is unaware of his HIV infected status would also not be able to be prosecuted under this crime. As mentioned earlier extreme caution would have to be applied if these categories of perpetrator were to be prosecuted under the common law crimes.

another whereas the crime of rape deals with the unlawful and intentional sexual intercourse without consent. Sentences of life imprisonment can be imposed for both of these crimes.[59] The present author is of the view however that if this category of penetrative sexual assault victim could be classified as a rape victim, it would be the better option. Firstly the crime of rape can be instituted while the victim is still alive. Secondly, a conviction for rape would entail that a sentence of life imprisonment could be imposed where the perpetrator knows that he is infected with HIV or has AIDS.[60] Thirdly, the victim would not have to die in order for the requirements of rape to be met which lessens the burden of having to establish a causal nexus between the victim and the HIV infected perpetrator. Fourthly, the mere knowledge of the perpetrator is sufficient for a conviction of life imprisonment.[61] This again entails that it need not be proven that the victim contracted the virus from the perpetrator and consequently died from it. The crime of attempted murder is also insufficient as the minimum sentences do not provide for a sentence of life imprisonment. Consequently only a lesser sentence may be imposed.[62]

* ***CULPABLE HOMICIDE***

Definition: *Culpable homicide is the unlawful, negligent killing of another person.*[63]

More convictions for harmful HIV related behaviour could probably be secured under this crime. The same problems applicable to a charge of murder would, however,

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The reason being that the standard utilised would have to be consistently applied to other situations in law and the potential liability for the general population at large would be enormous.

[59] See section 51(1) and Schedule 2 Part I of Act 105 of 1997.

[60] Section 51 of Act 105 of 1997.

[61] See section 51(1) and Schedule 2 Part I of Act 105 of 1997.

[62] *Ibid.*

[63] See Milton, J.R.L. **"South African Criminal Law and Procedure Vol II Common-Law Crimes"** (1996) on 364; Snyman, C.R. **"Criminal Law"** (1995) on 403.

also apply to a charge of culpable homicide. [64] The test of negligence is designed with social standards in mind. In other words it would have to be established whether conduct which could cause harm to another, was dealt with in the same manner as the reasonable person in the same circumstances.[65]

The South African Law Commission comments as follows: [66]

> *In the case of the crime of culpable homicide, the concept of negligence has three significant components: firstly, from the objective perspective of the reasonable person foresight that death could be a consequence of the conduct in question; secondly, a determination of what steps should reasonably have been taken, in order to prevent the death of the victim; and thirdly, whether the perpetrator in fact took those steps. It is the perpetrator's failure to take those reasonable preventative steps, which determines that he or she was negligent in bringing about the death of the victim.*

A problem arises if the perpetrator uses the defence that he or she did not foresee that the victim would become infected with HIV in the light of the statistic of 1 in 1000 being infected on the first sexual encounter.[67] One possibility, which is not favoured here, is to place the burden of proof on an HIV positive perpetrator to rebut the assumption that he was HIV positive at the time of the rape which will lighten the evidentiary burden for the State. A better solution would be to find the perpetrator

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[64] See paragraph on murder.

[65] See Milton, J.R.L. **"South African Criminal Law and Procedure Vol II Common-Law Crimes"** (1996) on 365.

[66] See **"SALC Discussion Paper 80 of 1999"** on 89. See case law in general: **S v Van As** 1976 2 SA 921 (A) and **S v Bernadus** 1965 3 SA 287 (A) re the reasonable person foreseeing the possibility of death.

[67] See the **"SALC Fourth Interim Report on Aspects of the Law Relating to AIDS"** (2000) on 37. See further **"SALC Discussion Paper 80 of 1999"** on 31.

guilty of attempt to commit one of the other common law crimes.[68] There is no crime of attempted culpable homicide as one cannot intend to be negligent.[69]

An important question that arises is whether a person can be found guilty of culpable homicide in cases where the perpetrator intentionally exposes the victim to the HIV virus. The central question would be whether intention and negligence overlap. Logical reasoning would be that that this can never be the case as these are two entirely different concepts.[70] However, in the Appellate case of **S v Ngubane** the court reached a different conclusion.[71] The court was of the view that:[72]

> *The 'logical impossibility' cannot, however, legitimately be used to justify the conclusion that proof of dolus necessarily excludes culpa.*

The effect of this decision is that if the evidence shows that a person has killed somebody intentionally he or she can still be convicted of culpable homicide. It is questionable whether courts will depart from this decision as the rules of substantive law have been manipulated to solve a procedural problem.[73] In the context of HIV transmission, it appears that the intentional exposure to the HIV virus during a rape could be prosecuted under this crime. Although the present author is not in favour of following this route as it is not a theoretically sound application of substantive law, the application of this case could serve a useful tool in the administration of justice.

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[68] Snyman, C.R. **"Criminal law"** (1995) on 268 where he states that attempts to commit common law or statutory crimes can be punished as attempt. See further section 18 (1) of the Riotous Assemblies Act 17 of 1956.

[69] Snyman, C.R. **"Criminal Law"** (1995) on 404.

[70] See also Snyman, C.R. **"Criminal Law"** (1995) on 204.

[71] 1985 3 SA 677 (A).

[72] 1985 3 SA 677 (A) on 685.

[73] See criticism by Snyman, C.R. **"Criminal Law"** (1995) on 205 fn 64.

* ***ASSAULT WITH THE INTENT TO CAUSE GRIEVOUS BODILY HARM***

Definition: *Assault consists in unlawfully and intentionally:*

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

(b) inspiring a belief in another person that force is immediately to be applied to him or her.[74]

In addition, there must be a certain intention to cause grievous bodily harm. Whether the latter is inflicted is immaterial, as the focus is on the intention.[75] Furthermore the victim need not die for the offence to be committed. The causal link between the act of rape and the victim's resultant death need not be proved, as mere exposure to the virus is sufficient. [76] The perpetrator of sexual assault or rape could therefore be charged under thus crime and the plight of these victims would not be denied in terms of this common law crime.[77]

* ***ATTEMPT TO COMMIT THE COMMON LAW CRIMES***

Section 256 of the Criminal Procedure Act 51 of 1977 provides that if in criminal proceedings the evidence does not prove the commission of that offence but an attempt to commit that offence, then the accused may be found guilty of an attempt to commit that offence.

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[74] Snyman, C.R.**"Criminal Law"** (1995) on 413.

[75] Snyman, C.R.**"Criminal Law"** (1995) on 417 - 418.

[76] **"SALC Discussion Paper 80 of 1999"** on 91. See further Snyman, C.R. **"Criminal Law"** (1999) on 418 where he states that: *A threat of grievous bodily harm may also form the basis for a conviction of assault with intent to cause grievous bodily harm.*

[77] See also **"HIV Sex Man Found Guilty"** *The West Australian* 4 October 2002. In Western Australia, Ronald Houghton was convicted of infecting one of his sex partners with HIV. His defence that he believed the virus could not be transmitted if he did not ejaculate during unprotected sexual intercourse was rejected.

The South African Law Commission states:[78]

> *In the context of HIV/ AIDS this could mean that a person who, knowing his or her HIV positive status, has unprotected sexual intercourse without informing a partner and with the intention (in the form of dolus directus, indirectus, or eventualis) of infecting the partner with HIV, could be guilty of attempt to commit murder or assault. A charge of attempt could also be used where the victim is exposed to, but has not been infected with, HIV.*

It is the present author's view that a prosecution could be successful with a charge of attempt as it is not necessary for a completed crime to be committed. Attempt is a formally defined crime which punishes attempts to commit common law or statutory crimes and the result is irrelevant.[79] The crime of attempt can be effectively used in cases of rape or sexual assault, where exposure to the HIV virus takes place, without having to prove that a complete crime is committed.[80] However, a conviction under the crime of attempt cannot afford the same redress as rape to the category of penetrative sexual assault victim who is intentionally exposed to the HIV virus during consensual sexual intercourse. A penalty of life imprisonment is not available to a conviction of attempt.[81]

It is clear that the identified victims of rape can have additional redress under the crimes of murder, culpable homicide, assault with the intent to cause grievous bodily harm and attempt to commit these offences should a charge of rape not be laid. These common law crimes may afford adequate protection. However, it is evident that the category of penetrative sexual assault victim who is exposed to the HIV virus would be afforded better redress under an extended definition of rape, as a sentence of life imprisonment could follow a conviction. The Criminal Law

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[78] **"SALC Discussion Paper 80 of 1999"** on 92.

[79] Snyman, C.R. **"Criminal law"** (1995) on 268.

[80] Le Roux, J. **"Die Toepassing van Strafbeginsels op HIV-Oordrag: 'n Diagnose"** (2000) on 315.

[81] See section 51(1) and Schedule 2 Part I of Act 105 of 1997.

Amendment Act which makes provision for a life sentence where a male perpetrator commits the rape whilst being aware of his HIV status would have to be amended to reflect the gender-neutral status of the proposed crime of rape.[82]

2.1.2. THE EXTENSION OF THE DEFINITION OF RAPE TO PERSONS WHO ARE INTENTIONALLY EXPOSED TO HIV DURING UNPROTECTED SEXUAL INTERCOURSE, ON THE BASIS THAT VALID CONSENT IS LACKING

It has therefore been established that although the common law crimes could be applied to this category of penetrative sexual assault victim, it is not satisfactory. It is submitted that the definition of rape should be extended to this category of victim as a primary remedy. Firstly, the provisions of the Criminal Law Amendment Act pertaining to a sentence of life imprisonment would be applicable and the victim would not have to contract the HIV virus to be protected.[83] Secondly, these victims can be classified as penetrative sexual assault victims as valid consent to the unprotected consensual sexual intercourse is absent. The reasons why the definition of rape should be extended to this category of penetrative sexual assault victims will now be substantiated.

It was established in chapter three of this study that the current common law definition of rape does not expressly provide for this category of penetrative sexual assault victim. It is submitted that this category of victim could possibly be tacitly included in the current definition based on the absence of valid consent. Consent can be vitiated on various grounds such as fear, intoxication, sleep, duress, insensibility, mental defects, age and fraud.[84] For consent to be valid the consenting

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[82] Section 51 of Act 105 of 1997. The provisions would obviously have to be amended to incorporate gender-neutral provisions relating to the perpetrator or rape victim.

[83] Act 105 of 1997.

[84] Snyman, C.R. **"Criminal Law"** (1995) on 426.

person must be aware of the true and material facts.[85] It has been indicated that the consent given by this category of penetrative sexual assault victim could be negated on the grounds of fraud. Furthermore the fraud which vitiates the consent must be related to the nature of the act (*error in negotio*) or the identity of the man (*error personae*).[86] Consent is deemed to be valid where the woman is misled about the *results* of the sexual intercourse.

The present author is of the view that although intentional infection with the HIV virus or a contagious life threatening illness relates to the results of the act, such instances should vitiate consent. The reason is that they cannot be equated with the general examples such as age, wealth or that a person will be cured of a fertility problem which fall under the results of the sexual intercourse.[87] The results referred to usually entail what is perceived to be some or other benefit for the consenting party. If applied to the category of penetrative sexual assault victims who are deliberately exposed to the HIV virus during unprotected consensual sexual intercourse, the question is to what benefits does this victim possibly consent? This victim may be engaging in the unprotected sexual intercourse for purposes of pleasure or procreation. In both instances there would be consent with regard to the results of the sexual intercourse. Where this same victim is unaware of their partner's HIV positive status due to this information being knowingly withheld from him or her, it surely cannot be argued that this victim is consenting to the results of being exposed to a deadly virus? It is submitted that this category of victim is unaware of the true and material facts to which they are consenting in the purest sense of the form. Surely possible infection with a deadly virus is a material fact? Their valid consent is therefore lacking. Moreover, the phenomenon that consent is valid where it pertains to the results of the sexual intercourse has its foundations in

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[85] Snyman, C.R. **"Criminal Law"** (1995) on 121.

[86] See **R v C** 1952 4 SA 117 (O) and Snyman, C.R. **"Criminal Law"** (1995) on 426. See further **R v Diana Richardson** 1998 2 CR R 201; **Bolduc and Bird v R** 1967 63 DLR 2nd 82 SCC.

[87] **S v K** 1966 1 SA 366 (RA) 368. **R v Williams** 1931 1 PHH 38 (E).

antiquated case law, which cases were not even decided by the Appellate Division.[88]

In the case of **Waring and Gillow Ltd v Sherborne** it was stated that: [89]

> *It must be clearly shown that the risk was known, that it was realised, and that it was voluntarily undertaken. Knowledge, appreciation, consent – these are the essential elements.*

It is therefore submitted that although this category of penetrative sexual assault victim can be classified under the results of the fact, the consent is nevertheless vitiated. The victim is not aware of the true and material facts. An alternate argument that may be furnished is that although the consent technically pertains to the results of the sexual intercourse, the consent will be invalid. The reason is that one cannot legally consent to one's own death as it is considered to be *contra bonos mores*.[90] On this basis the crime of rape should be extended to cover this category of penetrative sexual assault victim as valid consent is lacking.

In chapter five of this study, it was established that the proposed definition of rape introduced by the Sexual Offences Bill of 2002 does not cover this category of penetrative sexual assault victim. The proposed definition is attempting to move away from the consent criterion. It provides that acts of sexual penetration are deemed to be *prima facie* unlawful if committed under coercive circumstances, occurs under false pretences or fraudulent means or in respect of a person who is

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[88] *Ibid.*

[89] 1904 TS 340 on 344.

[90] See Snyman, C.R. **"Criminal Law"** (1995) on 118. See in general **S v Robinson** 1968 1 SA 666 (A) on 678; **S v Peverett** 1940 AD 213; **S v Hibbert** 1974 4 SA 717 (D). See Le Roux, J. **"Die Toepassing van Strafbeginsels op HIV-Oordrag: 'n Diagnose"** (2000) on 312 where she says that the voluntary assumption of risk principle can negate the unlawfulness of the act where one party consents to sexual intercourse while knowing that the other party is HIV-infected.

incapable of appreciating the nature of an act of sexual penetration.[91] It was further established that the three explicit inclusions pertaining to the element of fraud fails to incorporate this category of victim. The conclusion that can be deduced is that this victim is not covered by the proposed definition of rape. The proposed definition would have to be amended to incorporate this category of penetrative sexual assault victim either on the basis of a lack of consent or the absence of free agreement. Alternatively, the grounds pertaining to fraud would have to be amended.

A pertinent issue is the question of what happens if the person consents to unprotected sexual intercourse while knowing that their partner is infected with the HIV virus. On face value the position seems easily ascertainable as practically it would be a contentious issue especially if one encounters a situation where a wife consents to intercourse without the use of protection whilst knowing that her husband is HIV positive. Viljoen says the following:[92]

> *To argue on the basis of common law that a person cannot consent to his or her own death in this context, is artificial. I do not think the situation of two consensual partners is analogous to that of a pact between a potential victim and his or her assassin. The consent in such a situation is to sexual pleasure, and not to death.*

In such circumstances the principle of the voluntary assumption of risk could be applied which could possibly exclude the liability of the husband.[93] In Tennessee in the United States informed consent serves as a defence. It is submitted that this approach is preferred as it is a choice made by two consenting adults who are aware of the true and material facts and free agreement is therefore present.

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[91] See Clause 3(2) of **'Annexure B'** of this study.

[92] See in general Viljoen, F. **"Stigmatising HIV/AIDS, Stigmatising Sex? A Reply to Professor van Wyk"** (2000) on 13.

[93] See the comments by Le Roux, J. **"Die Toepassing van Strafbeginsels op HIV-Oordrag: 'n Diagnose"** (2000) on 312 in this regard.

Women in traditional societies are especially vulnerable to HIV infection. This phenomenon can be attributed to their lack of independence and power in a traditional society where rape is a matter which is settled outside the criminal justice system. [94] If a provision relating to persons who knowingly expose other people to the HIV virus or life-threatening illnesses during consensual intercourse, were incorporated within a definition of rape, it could also provide a useful mechanism for prosecuting rape cases where the victim is party to a customary marriage. If one bears in mind that a number of victims of rape are party to customary marriages the situation is complicated should the victim not lay a charge of rape. This would be the case where victims of marital rape in customary law for instance, do not believe that a crime has been perpetrated against them.[95] If this is the case and an HIV infected person intentionally exposes the victim to the HIV virus during this so called 'consensual' sexual intercourse the consent would be negated as being invalid. The victim could consequently be recognised for what he or she is: a victim of rape.

The problem of HIV transmission is also compounded in customary law as women are viewed as being part of a patriarchal society where reproductive capacity is a legal object.[96] Pieterse states:[97]

> *Because procreation is not possible if a condom is used, sex in an African marriage is almost always unprotected. Women are too afraid to ask their*

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[94] **"SALC Fourth Interim Report on Aspects of the Law Relating to AIDS"** (2000) on 6 and 9. See further Pieterse, M. **"Beyond the Reach of Law? HIV, African Culture and the Customary Law"** (2000) on 436.

[95] This means that the perpetrator would escape the provisions of section 51 of the Criminal Law Amendment Act 105 of 1997 which provides for life imprisonment where the perpetrator knows of his HIV infected status and commits a rape.

[96] Pieterse, M. **"Beyond the Reach of Law? HIV, African Culture and the Customary Law"** (2000) on 435.

[97] Pieterse, M. **"Beyond the Reach of Law? HIV, African Culture and the Customary Law"** (2000) on 437.

husbands to use condoms and those who do are often violently accused of cheating.

It is not hard to imagine that the effect of this, especially where the one party intentionally fails to disclose their HIV infected status during unprotected consensual intercourse, is to increase the spread of HIV infection. The transmission of HIV does not only have social and juridical implications with regard to individuals but also communities. This is especially the case with regard to customary law, its cultural beliefs and polygyny.

Pieterse states further that:[98]

The link between polygyny and HIV exposure is not difficult to conceive. Polygyny is a legitimate and socially accepted way for an African man to have multiple sexual partners. If, therefore, a partner to a polygynous marriage is affected by an outsider, all other partners are exposed to the virus.

A number of traditional beliefs exist which contribute to the growing spread of the virus. Many heterosexual men are of the view that they cannot be infected with the HIV virus, whilst others believe that an HIV-positive man who has sexual intercourse with a virgin will be cured.[99] HIV/ AIDS is furthermore linked to witchcraft in traditional customary society and is a witchdoctor's curse known as *ilumbo* which can be cured by traditional remedies.[100]

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[98] Pieterse, M. **"Beyond the Reach of Law? HIV, African Culture and the Customary Law"** (2000) on 431.

[99] Pieterse, M. **"Beyond the Reach of Law? HIV, African Culture and the Customary Law"** (2000) on 428. **"SALC Fourth Interim Report on Aspects of the Law Relating to AIDS"** (2000) on 10. See further Leclerc-Madlala, S. **"Crime in an Epidemic: The Case of Rape and AIDS"** (1996) on 35-36.

[100] Pieterse, P. **"Beyond the Reach of Law? HIV, African Culture and the Customary Law"** (2000) on 436.

Instances of the intentional transmission or even exposure to the HIV virus during consensual intercourse is not only limited to customary law. In the case of **Venter v Nel** [101] the accused had unprotected sexual intercourse with a woman with whom he co-habited with and intentionally withheld information regarding his HIV status. In the Canadian case of **R v Currier** [102] the accused was warned to use condoms as he was HIV-positive. He had unprotected consensual sexual intercourse with two women and intentionally withheld information regarding his HIV status. In the United States case of **State v Lankford** [103] the court decided that the women's consent to sexual intercourse was invalid due to the perpetrators fraudulent misrepresentation regarding a risk of a venereal disease. The present author is of the view that informed consent should not only be limited to exposure to the HIV virus but should also be extended to other life threatening illnesses.

The question that needs to be addressed is whether a victim of unprotected consensual sexual intercourse who is knowingly exposed to the HIV virus will be adequately protected. It is submitted that this will be the case. The recognition of this category of penetrative sexual assault victim as a rape victim will ensure that the provisions of the Criminal Law Amendment Act, which provides for life imprisonment where a perpetrator rapes a victim while knowing he is infected, will consequently be applicable.[104]

2.2. *THE LEGAL PROVISIONS APPLICABLE TO VICTIMS OF RAPE WHO ARE EXPOSED TO THE HIV VIRUS*

The position with regard to rape victims who are intentionally exposed to or infected with the HIV virus will now be examined. This will be done in order to establish whether all the other identified categories of rape victim who are raped by HIV-

[101] 1997 4 SA 1014 (D).

[102] 1999 127 CCC (3d) 1 (SCC).

[103] 1917 (Del Ct Sess) 102 A 63.

[104] Section 51 of Act 105 of 1997.

positive assailants have adequate protection in terms of South African law. The provisions relevant to the common law crimes find application for these victims as an alternate crime under which action can be instituted should a charge of rape not be laid. The common law crimes will accordingly not be dealt with here again.

The legal provisions which are applicable to rape victims who have been exposed to the HIV virus during the rape is the Criminal Law Amendment Act.[105] These provisions provide for a sentence of life imprisonment where the perpetrator knows that he is infected with the HIV virus or has AIDS. The question may be asked what the position will be where the perpetrator does not know that he is infected with the HIV virus or AIDS. This issue will now be dealt with followed by an examination of the possibility of creating a separate statutory crime to cover such instances.

2.2.1. THE IMPOSITION OF MANDATORY MINIMUM SENTENCES FOR CONVICTIONS OF RAPE WHERE THE PERPETRATOR HAS HIV/AIDS

Section 51 of the Criminal Law Amendment Act provides for the imposition of a sentence of life imprisonment where a perpetrator of rape knows that he is infected with the HIV virus or AIDS.[106] This is subject to the proviso that the sentence may be deviated from if 'substantial or compelling reasons' exists.[107]

The provisions can be criticised for three reasons. Firstly, the provisions are gender-specific and would have to be extended to collate with a broader gender-neutral definition of rape. Secondly, the infection of an HIV positive perpetrator is emphasised to the exclusion of other contagious life threatening illnesses. This serves to stigmatise HIV infection as opposed to other contagious life threatening illnesses. It is submitted that the provisions should be extended to cover instances where a perpetrator is aware that he or she is infected with a contagious life

[105] *Ibid.*

[106] *Ibid.*

[107] Section 51(3)(a) of Act 105 of 1997.

threatening illness and nevertheless proceeds to rape a person. Thirdly, the provisions only provide for a situation where the perpetrator knows of his HIV/AIDS infected status. These provisions fail to consider the position where a perpetrator of rape suspects that he may be infected with the virus but has never taken steps to have himself tested when he should have. This provision relating to the perpetrator's knowledge of HIV/AIDS could seriously hinder voluntary testing. The reason being that persons would know that a possible sentence of life imprisonment could be imposed where they are convicted of a rape and they would take no steps to test themselves.[108] This issue of avoidance of testing raises the question of whether the negligence of the perpetrator should be taken into account when reformulating a definition of rape.

The only crime under which negligent infection could be punished is the crime of culpable homicide as our law does not recognise negligent assault. The question whether the negligent exposure to the HIV virus should be criminalized is a contentious one.[109] Due to education and campaigns it could be argued that everyone who is sexually active should be aware that they might be infected with the HIV virus.[110] The implication of this is that every person who is sexually active is a potential criminal on the loose. The present author is of the view that negligent exposure to the HIV virus should not be criminalized. It could be counterproductive to efforts to have people voluntarily tested for the virus and will also place an

[108] See Van Wyk, C. **"The Need for a New Statutory Offence aimed at Harmful HIV-Related behaviour: The General Public Interest Perspective"** (2000) on 2.

[109] See Van Wyk, C. **"The Need for a New Statutory Offence aimed at Harmful HIV-Related behaviour: The General Public Interest Perspective"** (2000) on 2 and Viljoen, F. **"Stigmatising HIV/AIDS, Stigmatising Sex? A Reply to Professor van Wyk"** (2000) on 11.

[110] Viljoen, F. **"Stigmatising HIV/AIDS, Stigmatising Sex? A Reply to Professor van Wyk"** (2000) on 15.

unreasonable restriction on the entire sexually active population who will all face possible prosecution.[111]

The provisions applicable to minimum sentences also fail to consider the position where an HIV–infected perpetrator who is aware that he is so infected, commits a rape with the use of protection such as a condom. Section 51 fails to distinguish between perpetrators of rape who are aware of their HIV infected status and who take precautionary measures to avoid transmission of the HIV virus as opposed to those who don't. The present author is of the view that a perpetrator of rape who is aware of his HIV infected status and is convicted, but takes precautionary measures to avoid exposure of or transmission of the virus, should not be subjected to sentence of life imprisonment for this specific scenario. The use of precautionary measures should be regarded as substantial and compelling circumstances which means that the court could exercise its discretion in such instances.

2.2.2. THE VIABILITY OF CREATING A SEPARATE STATUTORY OFFENCE CRIMINALIZING HARMFUL HIV RELATED BEHAVIOUR

The South African Law Commission view is to be supported where they state that:[112]

> *Crimes are created to protect certain values and interests. As society develops, its values and interests may change resulting in a need to criminalize different forms of conduct. The principal interests that motivate criminalization are maintaining or retaining human and civil rights, maintaining a common community morality, the advancement of collective welfare and protecting the government of the state.*

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[111] *Ibid.* Viljoen says in this regard that sexual intercourse will be stigmatised, as there is no societal gain in prosecuting husbands who unknowingly infect their wives, or consenting adults who indulge in unprotected sexual intercourse.

[112] See discussion in **"SALC Discussion Paper 80 of 1999"** on 41 fn 180; See further Burchell, J. & Milton, J.R.L. **"Principles of Criminal Law"** (1997) on 25, 31-32.

It is submitted that a statutory offence providing for rape victims infected with the HIV virus is not *per se* needed as an additional penalty is provided for perpetrators who rape with knowledge of their HIV infected status.[113] As mentioned earlier, this section would obviously have to be amended to incorporate all the categories of rape victim and perpetrator identified in this study.

A separate statutory offence with mandatory minimum penalties could be created in order to consolidate the common law crimes applicable to harmful HIV related behaviour. The seriousness of intentional exposure to the HIV virus or other life threatening illnesses would thereby be emphasised. The second possibility is that a statutory offence could be created to criminalise reckless or negligent HIV-related behaviour. The present author is not in favour of a statutory offence being created to prosecute negligent HIV related behaviour as it would in effect proscribe consensual sexual activity and place an impossibly large burden on society.

The first option would therefore appear to be the better one. A separate offence which consolidates the common law crimes would provide legal certainty, could serve as a deterrent and would also enhance efficacy in the application of legal measures pertaining to harmful HIV related behaviour to factual situations. could continue unabated. A separate HIV-related offence could also incorporate the intentional transmission of other life threatening illnesses and serve as a competent verdict to a charge of rape. A number of arguments in favour of a separate HIV-related offence have been mentioned by the South African Law Commission. [114]

* It would minimize ambiguities that might occur than if the common law crimes were applied. [115]

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[113] Section 51 of Act 105 of 1997.

[114] See **"SALC Discussion Paper 80 of 1999"** on 95 *et seq* for rationales in favour of a statutory offence as proposed by the South African Law Commission

[115] This relates to the fact that statutory offences may be worded in such a manner as to prevent evidential problems; high-risk behaviour could be focused upon, rather than actual infection and

* Statutory offences are less susceptible to moral and social influences which may cause them to be applied selectively.[116]

* Enacting HIV specific criminal provisions and penalties are justified as the purposes underlying the criminal law are realized.[117]

* An AIDS specific offence would serve as a deterrent.[118]

* HIV specific criminal provisions are justifiable in the light of constitutional provisions.[119]

* The high level of *crime in RSA requires a statutory intervention.*[120]

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clarity would be provided as certain types of behaviour do not always fall precisely within the ambit of common law crimes.

[116] This is because statutory offences specifically set out and define the prohibited behaviour thus enhancing effectiveness. See **"SALC Discussion Paper 80 of 1999"** on 96 *et seq.* See also Laurie, G.T. **"AIDS and Criminal Law"** (1991) on 317.

[117] Societies needs should be taken into consideration and be accounted for in legislative provisions. As HIV/ AIDS has no cure and is in most cases fatal, the perpetrators who have effectively meted out an incredibly debilitating disease and/ or even a death sentence (as a matter of speaking) should be held accountable for their actions. **"SALC Discussion Paper 80 of 1999"** on 97.

[118] By implementing a specific offence, individuals and society at large are discouraged from committing criminal acts. Although it may be argued that as persons who are infected with HIV/ AIDS may feel the have nothing really to lose, it might not stop their behaviour. Ibid on 98 *et seq.*

[119] Section 11 of the Constitution provides that everyone has the right to life and section 12(2): provides that everyone has the right to bodily integrity. Consequently, conduct which may harm these rights, should be prohibited. HIV/AIDS is a disease which inevitably kills, and behaviour which endangers these rights should be prevented and punished. See **"SALC Discussion Paper 80 of 1999"** on 99.

[120] **"SALC Discussion Paper 80 of 1999"** on 104.

Therefore it may be said that a statutory offence should be created as deliberate HIV infection presents a danger to society and needs to be proscribed. It will act as a deterrent. If the requisite protective measures to avoid HIV transmission or exposure are taken then liability for the statutory offence could be excluded. A statutory offence will also promote the theories of retribution and deterrence so that victims do not take the law into their own hands. Deficiencies in the common law will be covered especially where common law crimes such as murder and culpable homicide require the victim to die before the perpetrator is punished.

There are a number of arguments that may be cited against the creation of an HIV-specific statutory offence.[121] One argument is that the Criminal Law Amendment Act already provides for life imprisonment in cases of rape where the perpetrator is aware of his HIV infected or AIDS status and that any additional offence would be unduly victimising the perpetrator.[122] Pantazis states in this regard:[123]

> *To penalise people with HIV/ AIDS is to blame them for their situation, to say they inflicted it on themselves. Their physical vulnerability is perceived as an indication of moral decay.*

Other arguments that may be raised are that current crimes pertaining to harmful HIV behaviour could be covered under the common law crimes,[124] criminal law measures may be counterproductive to public health efforts to address HIV/

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[121] See **"SALC Discussion Paper 80 of 1999"** on 106 - 117 for the eight rationales proposed by the Law Commission.

[122] Section 51 of Act 105 of 1997.

[123] Pantazis, A. **"Against the Criminalisation of HIV-Related Sexual Behaviour"** (1999) on 441.

[124] For example: murder, culpable homicide, assault with the intention to cause grievous bodily harm and also attempts to commit these crimes.
The common law provides for various offences under which harmful HIV related behaviour could be prosecuted and civil remedies could be used. The problems encountered as regards the evidentiary burden, will not necessarily be lacking in the statutory offence, as the latter may not really rely on strict liability, as this conflicts with the Constitution Act 108 of 1996.

AIDS,[125] the criminalisation of harmful HIV related behaviour is not likely to have a vast deterrent effect[126] and over-criminalising will not reduce the crime rate. [127]

Various arguments can be raised against the imposition of an HIV-specific statutory offence. Firstly, a statutory offence may infringe privacy rights. It would have to be established whether there are not less restrictive means to achieve the same

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[125] **"SALC Discussion Paper 80 of 1999"** on 108 and 134. The Law Commission in its conclusions feel that the AIDS epidemic is a public health issue, first and foremost. The implications would be that by enacting AIDS specific laws, it would suggest that the spread of AIDS is due to deliberate or reckless infection. Furthermore a provision, which requires the infected person to know of his infection, may lead to people avoiding being tested and thus avoiding responsibility. Another reason mentioned may be that it will contribute ill-feelings towards people infected with HIV and their families which will lead to less persons going for treatment or testing. See Buchanan, D. **"Public Health, Criminal Law and the Rights of the Individual"** (1995) on 106.

[126] Buchanan, D. **"Public Health, Criminal Law and the Rights of the Individual"** (1995) on 110 *et seq*. Although this view is based on the fact that it is not mostly spread by recalcitrant individuals but by consensual sexual intercourse, my view would be that it would not have a great deterrent effect on recalcitrant individuals, as their motives for raping would still be the same ie. A propensity for violence and this factor coupled with the fact that they do not have much to lose, in the sense that they in all probability will die from the disease, will not stop them from committing the crimes.

[127] **"SALC Discussion Paper 80 of 1999"** on 114 *et seq*. This view entails that by over-utilising criminal sanctions, it will overload and lessen the authority of the criminal justice system and will necessarily stigmatise individuals as criminals. The present author agrees with the above rationale, but does not share the same reasoning as regards the crime rate not being reduced. Another argument that may be propounded is that the more actions which are labelled as crimes, the more the stigma attached to the conviction will be diminished and consequently the authority of the criminal law. The present author disagrees with this argument. More criminals would escape conviction if there were not crimes which were created to cover certain acts and limit ambiguity. This would accordingly increase legal certainty. The South African Law Commission did initially favour legislative measures to regulate harmful HIV behaviour as they felt it was first and foremost a public health issue which could be covered by the common law crimes, which they felt would be sufficient to secure convictions. This viewpoint was subsequently changed and it was felt that there should be a statutory offence. See further Burchell, J. & Milton, J.R.L. **"Principles of Criminal Law"** (1997) on 32.

results.[128] Secondly, it can be argued that the common law crimes offer adequate protection which alleviates the necessity for a statutory crime. This argument can be counter-argued that the common law is imprecise and can consequently lead to inequity when applied to factual situations. Lastly there is the problem of causation and proof as it would be difficult to establish a causal connection between the conduct and its results, depending on what the crime is.

However, the present author is in favour of the creation of a statutory offence pertaining to harmful HIV-related behaviour. It is recommended that although there would be economic costs involved it would be justifiable to create such a statutory offence. Conduct which is currently covered by the relevant common law crimes pertaining to situations where a person intentionally infects or exposes another person to the HIV virus or exposes a person to a life threatening illness could be criminalised.[129] A consolidated crime promotes legal certainty and can be applied not only to sexual assaults but also to other instances of harmful HIV related behaviour.[130]

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[128] Section 36 of Act 108 of 1996.

[129] See **State v Lankford** 1917 Del Ct Sess 102 A 63 where the court decided that the women's consent to sexual intercourse was invalid due to the perpetrators fraudulent misrepresentation regarding a risk of a venereal disease. Present author is in favour of a crime which is not HIV-specific but which incorporates other life threatening illnesses. See further Labuschagne, J.M.T. **"Vigs, Gevolgsaanspreeklikheid, Bedrieglike Weerhouding van Inligting"** (2001) on 562.

[130] For example where a person takes a syringe filled with HIV infected blood and injects innocent people. Certain states in the United States have made provision for an HIV related offence. In the 1994 Annotated Code of the state of Tennessee (United States) sections 39-13-109 provide for criminal sanctions for harmful HIV-related behaviour and includes intimate contact as well as the transfer of infectious bodily fluids in any manner that presents a significant risk of HIV transmission. The state of Florida in section 384.24 of the Florida (United States) Statutes 1997 criminalizes the act of infecting another person and provides that it is unlawful *for any person with the HIV virus, when that person knows that he or she is infected with the disease and when such person has] been informed that he or she may communicate this disease to another person through sexual intercourse, to have sexual intercourse with any other person, unless such other person has been informed of the presence of the sexually transmissible disease and has consented to the sexual intercourse.*

A separate offence could also serve as a competent verdict should a charge of rape fail. Not to acknowledge the seriousness of being deliberately exposed to the HIV virus will deny the rights of the victim. This is because the latter will in all probability experience a shortened life expectancy and diminished quality of life, and would consequently allow the criminal to escape punishment. Criminalizing such conduct will also serve as a deterrent. Furthermore from a social context it is important to hold someone liable as a person who knows that he will not be held accountable, might deliberately infect a large number of people if there is no sanction. By criminalizing intentional exposure to the HIV virus or other life threatening illnesses, a separate statutory crime provides a specific alternative to the crimes of murder, culpable homicide, attempt and assault with intent to do grievous bodily harm thus ensuring a better chance of securing a conviction. The seriousness of harmful HIV related behaviour which is indicative of the latter being more than a public health issue is evident from various acts.[131]

It has therefore been established that the category of penetrative sexual assault victim who is intentionally exposed to the HIV virus is actually a rape victim as valid consent or free agreement is absent. It has furthermore been suggested that although the common law crimes can be applied to a certain extent to instances relating to the intentional exposure of a person to the HIV virus or other life threatening illness, a separate statutory crime is still advisable. The statutory offence could consolidate the essential elements of the common law crimes relevant to an HIV related offence and would promote legal certainty. It is further recommended that the statutory crime be made applicable to additional situations, which pertain not only to sexual assaults, for purposes of expediency and consistency in the application of the law. In light of the fact that the substantive issues surrounding the extension of the crime of rape to this category of penetrative sexual assault victim who is intentionally exposed to the HIV virus has been dealt with, a number of related procedural issues will be touched upon.

[131] See for example the Criminal Procedure Second Amendment Act 85 of 1997 and the Criminal Law Amendment Act 105 of 1997, which is discussed elsewhere.

3. OTHER ASPECTS RELATING TO CRIMINAL PROSECUTION OF HIV POSITIVE PERPETRATORS

Due to concerns raised by victims who need to know whether they have been exposed to HIV or not, the South African Law Commission investigated the possibility of enacting legislation which provides for compulsory testing of persons arrested for sexual offences. [132] The proposed Sexual Offences Act of 2002 does not specifically provide for an HIV-related offence but does make provision in section 22(1) for treatment to be made available to victims of sexual offences.[133] This could perhaps be attributed to the fact that the perpetrator may not be caught and that the victim needs treatment as soon as possible.

Provisions relating to compulsory testing of accused persons will be critically analysed. This will be followed by an analysis of the effect of isolating HIV infected accused and the impact it would have on certain rights. Lastly the legal provisions relating to the implementation of minimum mandatory sentences will be examined to establish whether these measures are consistently applied after a conviction for rape is secured.

3.1. COMPULSORY TESTING OF ACCUSED PERSONS

The new types of HIV testing available are viral load and polimerase chain reaction technique tests.[134] Viral load and polimerase chain reaction technique tests are

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[132] See **"SALC Fourth Interim Report on Aspects of the Law Relating to AIDS"** (2000). See also Labuschagne, J.M.T. **"Ongeligte Geslagsomgang met 'n Vigs-Lyer en die Vraagstuk Van Toestemming by Verkragting"** (1993) on 417.

[133] See **"SALC Discussion Paper 102 of 2002."**

[134] Blood tests that are used to detect the presence of HIV antibodies are the ELISA and Western Blot tests. See Whiteside, A. & Sunter, C. **"AIDS: The Challenge for South Africa"** (2000) on 16-17 where they discuss these tests in greater detail. ELISA is the cheaper test and tests for antibodies found in serum, which has been separated from the red blood cells. If the plastic bead

used to detect HIV itself, rather than antibodies.[135] These tests are also reported to be more accurate but also rather costly.[136]

What is viral load testing? It measures the amount of HIV present in HIV infected persons and is a monitor of the progression of the disease.[137] It may be inaccurate and give a positive testing, however, if the viral load count is low.

PCR testing is an abbreviation for polimerase chain reaction technique and detects the HIV virus in the blood. These tests are not reliable, until approximately one month after exposure to the virus.[138] The PCR test can reflect positive results even if insufficient antibodies are present. It is also an expensive test that has been described as having limited diagnostic results.

DNA testing entails that the spread and the source of the infection can be traced.[139] This test is extremely costly and if a perpetrator is infected with a different strain of HIV infection as well, it complicates the problem of accuracy.[140]

Rapid testing is the cheapest test and uses a sample of blood and a test kit.[141] It provides results within 10-30 minutes. It involves a person pricking his finger and

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coated with HIV proteins changes colour then the test is positive. The Western Blot test is normally used thereafter to confirm the results.

[135] Orthmann, R. **"FDA Approves New HIV Test"** (1996) on 55. Also in **"SALC Discussion Paper 84 of 1999"** on 41. The uncertainty period is said to be reduced to 11 days.

[136] Evian, C. **"Primary AIDS Care"** (2000) on 46.

[137] It has been noted that the higher the viral load, the quicker a person will develop AIDS; See **"SALC Discussion Paper 84 of 1999"** on 41 fn 174.

[138] See **"SALC Discussion Paper 84 of 1999"** on 41 fn 180 wherein it refers to information supplied by Prof. A Heyns of the South African Blood Transfusion Service and Dr R Sowadsky (a communicable disease specialist).

[139] Grubb, A. & Pearl, D.S. **"Blood Testing, AIDS and DNA Profiling"** (1990) on 155.

[140] **"SALC Discussion Paper 84 of 1999"** on 46. See in general **S v R and Others** 2000 1 SACR 33 (WLD). See also Colella, U. **"HIV-Related Information and the Tension Between Confidentiality and Liberal Discovery"** (1995) on 97 - 98.

mixing blood with the chemical solutions in the kit. It is apparently accurate, although a second confirmatory test is advised.

If blood testing of an accused (of sexual offences) is allowed, it will enable a victim to go for post exposure prophylaxis (PEP) treatment immediately, as it has been suggested that it is not effective when administered 24-36 hours after exposure to HIV, which will result in the treatment having no effect.[142] If administered timeously, it can reduce the risk by up to 80% in, for example, occupational exposure.[143]

A number of disadvantages of blood testing for establishing whether the perpetrator is HIV infected become evident. Firstly, a negative result may be obtained due to the perpetrator being in the 'window period.' The victim's health may be in jeopardy in any event. This incorrect information may lead the victim to perceive the result as being clear and that he or she is HIV negative and continue with his or her lifestyle and be a high risk to others. Secondly, flaws in the testing procedure may lead to the test being positive, whereas the accused may not be infected. Thirdly, the victim may be in the window period himself or herself and consequently knowledge of the accused's HIV status may not be conclusive to their own HIV status. It may be argued that it is a waste of time for the perpetrator to undergo testing, as the victim would in any event need to be tested. Lastly, PEP treatment is only effective if administered timeously[144] and from previous discussions, it is evident that the test

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[141] **"Rapid HIV Tests and Testing"** Policy Guidelines prepared by Dr C Evian (Department of Health–April 1999); See also **"Ondersoek Gedoen na Amerikaanse Kits – HIV/ Vigs Toets"** *Beeld* 26 August 1998. See **"SALC Discussion Paper 84 of 1999"** on 43 *et seq.*

[142] See CDC Morbidity and Mortality Weekly Report **"Public Health Service Guidelines for the Management Of Health – Care Worker Exposures To HIV And Recommendations for Post Exposure Prophylaxis"** (1998); See also **"SALC Fourth Interim Report on Aspects of the Law Relating to AIDS"** (2000) on 64–65 fn321.

[143] *Ibid.*

[144] Within a period of 24 hours.

result will not be obtained within the requisite time period.[145] In any event, the cost of PEP is extremely expensive and most victims would be unable to afford the treatment.

The South African Law Commission is of the view that instead of focusing on the testing of sexual offenders, free HIV testing and provision of PEP treatment to victims of rape should rather be provided.[146] In clause 22 of the 2002 Bill on Sexual Offences provision is made for the medical expenses and treatment of victims at the cost of the State. It is not clear whether the provision of PEP would be included as it states that provision will be made where it is established whether the person has sustained physical or psychological injuries as a result of the sexual offence. Without the testing of the offender it would be impossible to establish whether the victim has been exposed to or infected by the HIV virus.

A further reason why the testing of the perpetrator is necessary is to establish whether he or she is infected with the HIV virus, or else the mandatory minimum sentencing provisions will not be able to be imposed.[147] These provisions provide for the imposition of a life sentence, unless substantial and compelling reasons exist, where the perpetrator is aware that he or she is infected with the HIV virus at the time of the rape but nevertheless proceeds. This reason is problematic in the sense that the perpetrator must commit the rape whilst knowing that he is infected with the HIV virus or AIDS. Compulsory testing may prove that the accused is infected but this cannot serve as conclusive proof that the perpetrator was actually aware of his infected status at the time of the rape. It could merely serve as an indicator that the accused was aware that he was infected at the relevant time in question.

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[145] Reduced uncertainty is reached to a period of 11 to 16 days in the case of the most effective test, if detecting the HIV virus itself and not the antibodies, which could take more than 6 weeks to develop.

[146] See **"Executive Summary of Discussion Paper 102 of 2002"** on 18.

[147] Section 51 of Act 105 of 1997.

In **C v Minister of Correctional Services** it was held that: [148]

> *[t]here can only be consent if the person appreciates and understands what the object and purpose of the test is, what the effect of an HIV positive test could be on the person and what the probability of AIDS occurring thereafter is. Evidence was led in this case on the need for informed consent before the HIV test is performed. Members of the medical profession and others who have studied and worked with people who have tested HIV positive and with AIDS sufferers, have developed a norm or recommended minimum requirement necessary for informed consent in respect of a person who may undergo such a blood test.*

Section 37 of the Criminal Procedure Act provides for the compulsory testing of accused persons.[149] These provisions provide that no disclosure of the HIV status of arrested persons to victims of sexual crimes is permitted. Statutory intervention to provide for compulsory testing has been proposed by the South African Law Commission.[150] One proposed intervention is linked to Section 37 as the said section already makes provision for blood testing of an arrested person to ascertain bodily features.[151] Another measure which was introduced is the Compulsory HIV Testing of Alleged Sexual Offenders Bill of 2000.[152] The relevant provisions are attached hereto as **'Annexure C'**. These provisions are very similar to those introduced in the later Compulsory HIV Testing of Alleged Sexual Offenders Bill. [153]

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[148] 1996 4 SA 292 (T) on 301.

[149] Act 51 of 1977.

[150] See **"SALC Fourth Interim Report on Aspects of the Law Relating to AIDS"** (2000) on 119 *et seq.*

[151] The new section is 37A of Act 51 of 1977.

[152] **"SALC Fourth Interim Report on Aspects of the Law Relating to AIDS"** (2000) on 280.

[153] **"SALC Fourth Interim Report on Aspects of the Law Relating to AIDS"** (2000) on xiii.

The purpose of the proposed bill furnished by the South African Law Commission is as follows:[154]

> *The primary purpose of the statutory intervention is to provide a speedy and uncomplicated mechanism whereby the victim of a sexual offence can apply to have an arrested person tested for HIV and to have information regarding the test result disclosed to the victim in order to provide him or her with peace of mind regarding whether or not he or she has been exposed during the attack.*

Section 37 further provides for the ascertainment of the bodily features of an accused and incorporates the use of a blood sample. Of importance is that it is limited to use for evidentiary purposes in criminal proceedings only. This section should be read in conjunction with section 225 of the Act.[155] The relevant subsections pertaining to blood testing in section 37 are attached to this Study as **'Annexure D'**.

The relevant part of section 225(1) is as follows:

> *Whenever it is relevant at criminal proceeding including evidence of the result of any blood test of the accused, shall be admissible at such proceedings.*

Section 37 permits blood samples to be taken which 'may be deemed necessary' to show 'any condition'. These samples may only be taken by medical practitioners, a district surgeon or medical officer of a prison. No consent is required for the taking of a blood sample for the reasons applicable in section 37. A police official may not

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[154] See **"SALC Discussion Paper 84 of 1999"** on 167. They state further that it is also the intent, in enacting the provision to protect the health of victims of crime and others by providing victims with information which may be important in deciding whether or not to take precautions to avoid spreading HIV.

[155] Act 51 of 1977.

take a blood sample but may request it and a registered nurse or medical practitioner may attend to this. A court before which criminal proceedings are pending may also authorize a blood sample to be taken.

The provisions of section 37 thus allows the taking of a blood sample to ascertain the presence of HIV antibodies to ascertain the HIV status of the accused. The testing should have a bearing on evidence and be relevant to a trial. [156]

Section 37 currently does not provide for disclosure of the result of the blood test unless there is evidential value to criminal proceedings. Disclosure of such information will therefore be permitted as evidence to secure convictions on charges of murder, culpable homicide, assault with the intent to cause grievous bodily harm or attempt to commit these offences The information cannot be utilized to relay information to victims outside of criminal proceedings.[157]

The proposed section 37A of the Criminal Procedure Act provides in 37A(1) that a victim of a sexual offence who has laid a charge can apply to a magistrate for the compulsory testing of the perpetrator for non-evidentiary proceedings.[158] The test results should be furnished to the magistrate who will then inform the victim and arrested person.[159] The proposed 2000 Bill on compulsory HIV testing provides that a victim of an alleged sexual offence can apply to a magistrate for an order that the accused be tested.[160] The Bill also provides that only the victim or their representative and the accused be notified about whether the order has been

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[156] It would be relevant on charges of murder, culpable homicide, assault with the intent to cause grievous bodily harm and attempt to commit these offences as regards the imposition of life imprisonment for rape (Section 51 of the Criminal Law Amendment Act 1997).

[157] **"SALC Discussion Paper 84 of 1999"** on 102.

[158] Act 51 of 1977.

[159] Subsections 37A(4) and 37A(6).

[160] Clause 2.

granted or not and that the HIV test results only be conveyed to the victim or their representative and the arrested person.[161]

It makes logical sense that a victim should know his or her assailant's HIV status as far as possible, as the information would be relevant to the changing of a victim's life circumstances.[162] A victim would possibly need to make decisions regarding possible abortion, especially a pregnant woman who has been raped, as a decision regarding abortion would have to be made before waiting for antibodies to develop, the informing of their spouses or partners, deciding whether to obtain treatment such as prophylaxis treatment should the State not be able to provide such treatment and for peace of mind. The rape or sexual assault victim would need to make an informed decision regarding both their own and their loved one's health.[163] Furthermore the additional psychological trauma for victims would be dispelled if confirmation were received that they are not infected if the offender was tested rather than themselves.[164] What is problematic is if the offender cannot be located timeously or at all. To alleviate this trauma the South African Law Commission

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[161] Clauses 2 and 15 respectively.

[162] The victim could possibly obtain Zidovudine (AZT) treatment. AZT is a treatment for persons infected with HIV/ AIDS. There is *no cure* for AIDS. It merely increases the number of Healthy cells and delays the increase of HIV in the body. See **"SALC Discussion Paper 84 of 1999"** on 50 fn 227 referring to Tindall, B; Plummer,D & Donovan, B. **"Medical Management"** (1992) on 218.

[163] For example not to nurse a baby and avoiding pregnancy and the subsequent spread of the virus. A medical practitioner may be subpoenaed to give evidence in court, as medical information is not subject to professional privilege and consequently refusal to testify would be contempt of court. Restrictions may be placed on certain rights and freedoms by the state if in the public interest and it is indeed in the public interest that a person accused of sexual offences be tested for HIV. Although a medical doctor may not otherwise divulge such information without the express consent of the patient; See also **Jansen Van Vuuren and Another v Kruger** 1993 4 SA 842 (A) in which a doctor informed two other doctors on a golf course as to the HIV status of one of his patients. It was held that he acted unlawfully. See also Strauss, S.A. **" Doctor, Patient and the Law"** (1991) on 103.

[164] The victim's rights could be infringed during the waiting period, as certain rights would be limited due to uncertainty and fear regarding the contracting and possible further transmission of the disease.

proposes that treatment be provided as soon as possible to the victim in terms of clause 22 of the proposed Sexual Offences Bill of 2002.[165]

Certain restrictions need to obviously be imposed in cases of compulsory testing in order to protect the rights of the accused. These limitations as provided for in the initial proposed bill are the following:[166]

* It is limited to arrested persons (not those convicted of a sexual offence) and a blood sample may also be ordered by the court during trial or sentencing stage.

* It is limited to alleged sexual offences such as rape, statutory rape and indecent assault.

* It is victim-initiated compulsory testing only in that the victim or his representative may request the test in order to limit invasion of the arrested persons rights.

* A magistrate has authority to grant the testing and a court has discretion to authorize such testing.[167]

* There are strict confidentiality provisions to protect the arrested person's right to privacy.

* The compulsory testing may not be implemented more than 4 months after the alleged offence, as the utility would be impaired.

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[165] See **"SALC Discussion Paper 102 of 2002."** The provision of treatment includes prophylaxis treatment (PEP) which significantly reduces chances of becoming infected with the HIV virus if provided timeously.

[166] See comprehensive discussion in **"SALC Discussion Paper 84 of 1999"** on 167 *et seq.*

[167] Although evidence on oath is required tempered with a certain standard of proof.

* The local health authority will undertake and attend to the performing of the testing.

A problem might arise if the victim contracted HIV from a different source prior or after the rape. Medical tests would have to be conducted to establish the time periods of when the victim roughly contracted HIV and to establish the source of the infection or it could lead to an unfair conviction.[168] Another factor as regards serious crimes as regards prescription is that the crime of murder never prescribes although culpable homicide prescribes after 20 years.[169]

The best solution in order to obtain a conviction would thus be compulsory testing as soon as arrested, although the victim of rape would also need to be tested, to establish a causal nexus in order to lay an additional charge. The new proposed legislation would also provide a choice to the victim as to how to conduct his or her lifestyle especially if exposed to bodily fluids of the accused, as it would provide information as to whether the victim may also be infected.

A number of constitutional rights come into play in whether compulsory testing for HIV infection is justifiable or not. In terms of section 36 of the 1996 Constitution limitations on rights can however be imposed in terms of a law of general application which are reasonable and justifiable. [170]

In terms of section 35(3)(j) of the Constitution, every accused has the right to a fair trial. [171] The accused also has a right not to be compelled to give self-incriminating evidence. In this regard there needs to be a distinction made between

[168] For example DNA testing which can trace the source of infection.

[169] Section 18 of the Criminal Procedure Act 51 of 1977.

[170] Act 108 of 1996.

[171] *Ibid.*

communications and non-testimonial evidence.[172] Section 37 would fall in the latter category and is not a communication made by the accused (such as an admission or confession).

With regard to consent to medical treatment such as HIV testing, every person has the right to privacy and bodily integrity.[173] A person needs to consent to blood testing.[174] How does one justify the invasion of the right to bodily integrity if the accused does not consent? Milton is of the view that the common law defence of necessity is available, as a general defence.[175] This would be desirable on the basis of both legal and social policy as two evils are weighed up: namely, the testing without consent versus the endangering of the victim's and possibly the lives of others.[176]

What about the infringement of the right to privacy?[177] It is a fundamental right that persons with HIV/ AIDS are entitled to privacy regarding their HIV status. Breach of such privacy without consent, or which is unjustifiable, could lead to an action for

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[172] For example: the giving of fingerprints, identification parades and blood samples. See in this regard **"SALC Discussion Paper 84 of 1999"** on 101. See also **S v Maphumulo** 1996 2 BCLR 167 (N); **S v Binta** 1993 2 SACR 553 (C).

[173] Section 12(1) and 14 of Act 108 of 1996. See also **S v R and Others** 2000 1 SACR 33 (WLD) with regard to DNA testing where it acknowledges that certain rights are infringed (34E) but that evidence which is relevant is admissible.

[174] See **Castell v De Greef** 1996 4 SA 408 (C).

[175] Milton, J.R.L. **"South African Criminal Law and Procedure Vol II Common Law Crimes"** (1996) on 88.

[176] **"SALC Discussion Paper 84 of 1999"** on 77. The South African Law Commission, in its First Interim Report on Aspects of the Law relating to AIDS, recommended that a national policy, as regards HIV testing, without informed consent, be adopted by the Department of Health in the following circumstances: where statutory provision or other legal authorization exists for testing without informed consent, on an existing blood sample if it follows an emergency situation or occupational accident and it necessitates information as regards the patients HIV status and as part of testing for epidemiological purposes.

[177] Section 14 of Act 108 of 1996.

damages (for example against the person who disclosed the sensitive information).[178] Once again, for the right to be limited it must be reasonable and justifiable.[179]

Section 14 of Act 108 of 1996 may thus be overridden if the intrusion complies with section 36 of the Constitution. Less restrictive means to achieve the purpose would have to be considered as well as the proportionality between the protected interests. If in the interests of criminal justice, an intrusion on privacy would be regarded as a legitimate purpose in the securing of evidential material for a prosecution.[180] A blood test would therefore need to be performed to establish the presence of HIV.

Therefore information pertaining to HIV infection is necessary for the prosecution of any crime relating to harmful HIV transmission. Conviction of such a crime will be nearly impossible unless the mechanism of taking a blood sample under section 37, the proposed section 37A or the 2000 Bill relating to compulsory HIV testing are utilised as the limitation would then be justifiable.[181] The conclusion that can be reached is that the limitations that can be imposed on an accused's rights to facilitate blood testing can be constitutionally justifiable due to the serious implications for a victim.

3.2. ISOLATION OF INDIVIDUALS AND THE REFUSAL OF BAIL

In cases where there are epidemics, the community's interests are weighed up and measured against those of the individual. The risk imposed is also measured. Measures which can be used to combat the spread of and to control diseases are

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[178] Neethling, J. **"Persoonlikheidsreg"** (1991) on 268 *et seq.*

[179] It can be justified if the person infected gives consent, if ordered by a court or if in the public interest. See **"SALC Discussion Paper 84 of 1999"** on 78.

[180] Steytler, N. **"Constitutional Criminal Procedure"** (1998) on 86 - 87.

[181] See Steytler, N. **"Constitutional Criminal Procedure"** (1998) on 23; See also **Scagell v Attorney General of the Western Cape** 1996 2 BCLR 1446 (CC).

isolation and quarantine, but these are generally not used as medical science has improved and also because of the infringement of individual rights.[182]

If measures are used to limit the individual freedom of the HIV infected accused by means of isolation, it will amount to the denial of bail and the following rights will be infringed in terms of the Constitution of 1996: the right to freedom and security of the person,[183] the right to equality,[184] the right to privacy,[185] the right to freedom of movement,[186] the right to freely reside anywhere in the Republic or to leave the

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[182] See the Bill of Rights chapter in the Constitution Act 108 of 1996; See Baltimore, D **"Quarantining Will Help No One"** (1987) on 70. See further the Regulations relating to Communicable Diseases and the Notification of Notifiable Medical Conditions, 1987 (Government Gazette 11014 dated the 30 October 1987). There are current measures pertaining to isolation and quarantine of HIV/ AIDS infected persons if the following circumstances exist:

1. A local authority is satisfied that the spread of HIV/ AIDS constitutes a danger to health, place under quarantine any person suffering from a communicable disease (such as AIDS) or a person suspected of suffering from a communicable disease (eg. HIV), for a maximum period of (14) fourteen days or for an extended period, by either the Director-General of Health or the Minister of Health in order to prevent the spread of the disease.
2. If there are medically scientific grounds which exist, that a person with HIV may transmit the disease to others, the said person may be removed to a hospital or place of isolation.
3. There is also provision made, in terms of Regulation 17 of the Regulations, for compulsory medical examination, isolation, treatment or hospitalization of a person with AIDS, if instructed by a medical officer of health.

See further **"SALC Discussion Paper 80 of 1999"** on 55 and 59 where according to the South African Law Commission, these regulations have never been applied to persons with HIV or AIDS, in view of the nature of the illness as there is no cure, people could be isolated for the rest of their lives. There is thus currently uncertainty, as the Draft Regulations of 1993 have not been finalized and promulgated. Thus the 1987 Regulations are currently still in force. In the United States and Australia, legislation exists which allows the quarantine or isolation of infected persons, who deliberately create a danger to the community, by engaging in behaviour, which could lead to HIV being transmitted and the limitation of their freedom is thus justified in the public interest.

[183] Section 12 of the Constitution Act 108 of 1996.

[184] Section 9 of Act 108 of 1996.

[185] Section 14 of Act 108 of 1996.

[186] Section 21 of Act 108 of 1996.

country[187] and the right to freely engage in economic activity and to pursue a livelihood anywhere in the RSA.[188]

These rights may be limited only if it is reasonable and justifiable in an open and democratic society based on the values of human dignity, equality and freedom, having regard to the purpose of the limitation and less restrictive means to achieve the purpose.[189] The South African Law Commission's comments in this regard are:[190]

> *Public health measures have as their aim the promotion of public health, while criminal law measures have as their aim protecting society from harm and also retribution. Therefore the latter may be a more suitable way of dealing with recalcitrant individuals. The spread of HIV is surely not primarily the result of deliberate conduct by individuals who know they are infected, but of unwitting transmission of HIV by those who do not know of their infection. The isolation of recalcitrant individuals might thus not have more than a minimal effect on any attempt by the authorities to combat the spread of HIV and the promotion of public health.*[191]

The present author agrees with certain aspects of this viewpoint in the sense that to isolate would have more disadvantages, practically and cost wise. Isolation would also infringe a number of rights. It is present author's view however from evidence conducted in this study that a number of penetrative sexual assaults do involve

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[187] *Ibid.*

[188] Section 22 of Act 108 of 1996.

[189] Section 36 of Act 108 of 1996.

[190] **"SALC Discussion Paper 80 of 1999"** on 60.

[191] They further mention that the small advantage which isolation may hold for public health in general, is disproportionate to the infringement of infringement of individual rights, which isolation, even if based on harmful behaviour may entail. Furthermore, the costs and administration involved in the isolation of recalcitrant individuals would make such measures impracticable. See further Baltimore D. **"Quarantining Will Help No One"** (1987) on 70.

intentional infection as individuals feel that they have nothing more to lose. As mentioned earlier, the Criminal Law Amendment Act provides for retribution in the form of a lengthy prison sentence where a perpetrator of rape deliberately infects another.[192] These provisions would suffice in such circumstances and also provide deterrence to other persons.

3.3. THE IMPOSITION OF MANDATORY MINIMUM SENTENCES

The seriousness of deliberate HIV transmission and indication of the latter of being more than a public health issue is evident in the Criminal Procedure Second Amendment Act[193] and the Criminal Law Amendment Act.[194] The Criminal Procedure Second Amendment Act provides that if a person accused of rape knew that he had HIV/ AIDS then the bail application must be considered by the regional court and bail will be denied unless the accused can prove that it would be in the interests of justice for bail to be granted.[195]

The Criminal Law Amendment provides for minimum sentences relevant to a number of crimes. Before dealing with the relevant provisions in the aforementioned act, the nature and background relating to the implementation of mandatory sentences will be explained.

3.3.1. BACKGROUND TO PRESCRIBED MINIMUM SENTENCES

Previous convictions are one of the grounds, which serve as a justification for heavier sentences as sentencing is also aimed at crime prevention. However punishment in excess of a crime would seem as though the criminal is in addition

[192] Act 105 of 1997.

[193] Act 85 of 1997.

[194] Act 105 of 1997 (The Bail Act).

[195] Act 85 of 1997.

being punished for previous crimes.[196] Due to a number of cases with similar facts, being treated differently, with different forms of sentencing meted out, a number of attempts have been made in order to limit discretion by providing mandatory minimum sentences.[197]

As Chief Justice Corbett states:[198]

> *The imposition of a mandatory minimum prison sentence has always been regarded as an undesirable intrusion by the legislature upon the jurisdiction of the courts to determine the punishment to be meted out to persons convicted of statutory offences and as a kind of enactment, that is calculated in certain instances to provide grave injustice.*

Whilst acknowledging that the above may be true, there still exists a discretion in imposing a sentence greater than the compulsory minimum sentence. The greatest advantage of having a mandatory minimum sentence would perhaps be greater legal certainty. A number of problems have, however, been associated with sentencing discretion and have been identified as by the South African Law Commission.[199] The most important problem that can be identified is that the

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[196] Gross, H. & Von Hirsch, A. **"Sentencing"** (1981) on 282 mentions that whenever it is the criminal and not the crime that measures punishment the principle is violated and the sentence is thus unjustifiable. He further comments that normal sentences may reflect an optimism about future conduct and that this is a good reason for lesser punishment as they are not yet dedicated to crime.

[197] For example: The Abuse of Dependence-Producing Substances & Rehabilitation-Centres Act 41 of 1971.

[198] **S v Toms; S v Bruce** 1990 2 SA 802 (A) on 817.

[199] In the Viljoen Commission of Enquiry into the Penal System of the Republic of South Africa (1971), opposition to interference with the judicial discretion in the form of mandatory minimum sentences, was expressed by the Commission. For example, the prevention of crime (five to eight years) and the indeterminate sentences (nine to fifteen years) and recommended that minimum sentences be abolished and the sentence for prevention of crime was subsequently removed. See **"SALC Appendixes to Discussion Paper 91 of 2000"** on 14 –15. The principles developed by the courts to limit or control the sentencing discretion are ineffective.

existence of a sentencing discretion can be a source of inconsistency and disparity in sentencing practices in South Africa. For this reason, especially the factors indicated below should be reasons enough to examine the possibility of mandatory minimum sentences.

* Judges are not consistent in sentencing practises.

* Different sentences are imposed without reasons being furnished.

* The focus is on rehabilitation in some cases, and on deterrence in others.

Additional factors that may be furnished in favour of mandatory minimum sentences are retribution, disparity is reduced, it incapacitates serious offenders to protect society, it may be a motivation for the accused to cooperate, it deters offenders from committing certain serious crimes, it provides just deserts to the offender, thus indicating societies outrage.[200]

An important reason furnished against the imposition of mandatory minimum sentences is that *it violates judiciary discretion and the rights of the defendant.*[201]

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[200] Oliver, C. **"Evaluating Mandatory Minimum Sentences: What is Practical, Fair and Effective?"** (1998) on 88. Retribution involves a *proportion* between the nature and gravity of the offence, weighed up against the type of punishment to be inflicted. According to Snyman, C.R. in **"Criminal Law"** (1995) on 18 the commission of a crime disturbs the balance of the legal order, and will only be restored when the offender is punished for his crime.

[201] See for example the US case of **United States v Madkour** 1991 2d Cir 930F.zd 234. It may be argued that mandatory minimum sentences undermine the principles of proportionality and mitigation of sentence. See Gross, H. & Von Hirsch, A. **"Sentencing"** (1981) on 272 *et al* where these principles are discussed. *Proportionality* between crime and punishment forms the basis of every justifiable criminal sentence Criminal law follows the principle of proportionality in ascribing liability to various acts. Society is of the view that punishment ought to always fit the crime. This is, however, often not the case in practice and other factors are taken into consideration. The authors are of the view that the appearance of justice may be misleading, meaning that justice may be served, although the wrongdoer may not receive the punishment he deserves. They further state that if penalties in

Other reasons furnished in general, against the implementation of mandatory minimum sentences are that it interferes with judiciary discretion, it is an arbitrary punishment; the length of sentence may be too long as the offender may be deterred by a lesser sentence,[202] each case needs to be judged on its own merit as

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excess of those warranted were included in the social contract, the excess would be justifiable in the form of a contractual obligation. This would be binding on each member of society who commits a crime and would be essential if the well-being of society depended on it. They are also of the opinion that punishment meted out according to the deed is not necessary to keep the law effective and as this is the purpose that justifies punishment in the first place, the punishment which is not needed to affect this is unjustified. Whilst supporting this view in part, it is the present author's view that one should not forget the element of retribution, as to limit the punishment may incite a victim to want to take the law into his own hands or more realistically, will not afford the victim fair treatment, nor seem to treat the crime with the seriousness it deserves. A balance needs to be achieved so that the criminal does not escape unscathed from his crime. Therefore, punishment that fits the crime, is punishment in proportion to the culpability of the criminal conduct and is what the perpetrator deserves for his crime. Punishment is meted out in terms of culpability and must be more or less equal to the crime committed, depending on considerations. It must further not be too minimal or excessive or else justice will not be served. The principal entails that the proportion between the crime and the sentence must be the same and not be more than that which is necessary. The *mitigation of sentence principle* generally results in reduction of sentence, upon good reasons existing. This is founded on humane considerations and sound policy. Various examples exist such as illness, if innocent persons will suffer unduly, or if the criminal tries and makes amends for harm caused, and cooperation with the authorities.

[202] A system of plea-bargaining has been introduced. It is defined as the following in Alschuler, A.W. **"Plea Bargaining and its History"** (1979) on 1: *[the] exchange of official concessions for a defendant's act of self conviction.* See further Isakov,N.M & Van Zyl Smit, D. **"Negotiated Justice and the Legal Context"**. Isakov and Van Zyl Smit define plea bargaining in simpler terms, which is described as: *[the] practice of relinquishing the right to go to trial, in exchange for a reduction in charge and/ or sentence.* See **"SALC Discussion Paper 94 of 2000"** on 7 where various advantages of plea-bargaining have been suggested such as:

* A plea of guilty avoids the need for a public trial and consequently protects the victim from giving evidence and the additional trauma of facing the assailant.
* Other serious offenders may also be brought to justice.
* Both the objects of deterrence and rehabilitation will be served.
* A judge is given discretion, which he may not have under the sentencing guidelines.

cases differ and have their own unique set of facts, there is little evidence of a link between mandatory minimum sentences and deterrence and minimum sentences apply to the crime and not the offender and therefore previous convictions may not be taken into account. [203]

3.3.2. MANDATORY MINIMUM SENTENCES IN CASES OF HIV-RELATED RAPE

The question may be asked whether prescribed minimum sentences for the crimes of rape and cases of harmful HIV related behaviour relating to sexual offences are justifiable? The present author believes that this is indeed the case. It may be true that mandatory minimum sentences do not focus on the rehabilitative motive of punishment, as they do not consider the individual circumstances of the offender as such, in determining an appropriate sentence.[204] The focus is on the *severity* of the crime. Fair treatment of offenders who commit the same crime should technically be increased in that there will not be different types of punishment nor different lengths meted out for different forms of penetrative sexual assault and will therefore be regulated. It has furthermore not been proven in history that if different sentences are laid down for different offenders who commit similar crimes, the offenders will return to society, as rehabilitated decent law abiding citizens. On the other hand if the sentences are too severe, it will also not be in the interests of justice.

What is the alternative? Oliver suggests that a structured grid be created which assigns a certain weight to a certain crime. [205] Deviations such as a suggested ten

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Plea-bargaining has its advantage in that perpetrators of sexual assault and rape may be brought to justice. The disadvantage is that despite these offences being serious the perpetrator will escape with a lighter sentence than he would have if there were no plea-bargaining.

[203] See in general various opinions in this regard which are cited by the **"SALC Discussion Paper 91 of 2000"** Appendix A Part II on 9.

[204] Oliver, C. **"Evaluating Mandatory Minimum Sentences: What will be Practical, Fair and Effective?"** (1998) on 87.

[205] Oliver, C. **"Evaluating Mandatory Minimum Sentences: What will be Practical, Fair and Effective?"** (1998) on 92.

percent is proposed for aggravating and mitigating factors, with the result that the offender is judged by his crime and not his individual circumstances. The following advantages of mandatory minimum sentences are cited by the aforementioned author such as it will answer the publics sense of justice being done, a culture of just deserts is created, the chance factor is diminished,[206] and the deterministic viewpoint is replaced with the indeterministic viewpoint in that responsibility for certain actions are no longer removed.[207]

As mentioned the Criminal Law Amendment Act has a relevant minimum sentencing provision relating to the rape of a woman by an HIV-infected male which is section 51(1).[208] This section provides for the imposition of a sentence of life imprisonment where rape is committed by a person who knows that he is infected with HIV or has AIDS.[209] It would appear that both exposure to or transmission of the virus is covered by this provision. It is submitted that this provision does provide adequate punitive measures to perpetrators of rape who are infected with the HIV virus. The only deficiency is that it applies to the rape of a woman by a man only and would therefore not apply to the categories of rape victim identified in this study, unless a broader definition of rape was implemented. The Act also provides for life imprisonment, subject to the presence of substantial and compelling circumstances, in cases where the rape victim is a girl under the age of 16 years, is physically disabled, mentally ill or involves grievous bodily harm.[210] It is submitted that these provisions would again have to be amended to be gender-neutral in order to provide equitable protection to all victims of rape under these circumstances. The category of penetrative sexual assault who is intentionally exposed to the HIV virus during

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[206] For instance where the criminals take a chance if they know that they will not be heavily sentenced.

[207] Oliver, C. **"Evaluating Mandatory Minimum Sentences: What will be Practical, Fair and Effective?"** (1998) on 92.

[208] Act 105 of 1997.

[209] Schedule 2 Part I of the Act.

[210] *Ibid.*

unprotected sexual intercourse has been identified as a rape victim and the minimum sentences will therefore be applicable.

The biggest practical problem with the introduction of minimum sentences is the escape clause which provides for the court to exercise discretion where 'substantial or compelling circumstances' exist.[211] The question that arises is whether the imposition of minimum sentences is actually mandatory or effective if the discretion of the court can be exercised to negate the prescribed minimum sentence. In **S v Blaauw** the accused was convicted of raping a 5 year old girl.[212] The court held that the court could depart from the imposition of a life sentence where an injustice would be done.[213] This view is supported in the case of **S v Malgas** wherein it was held that the substantial and compelling circumstances need not be exceptional.[214] This approach questions the utility of imposing minimum sentences.

Inequity can also arise if all victims of penetrative sexual assaults are not recognised as being equally victimised. This is evident in the disparity in sentencing for rape and indecent assault. If a person is raped under other circumstances than those mentioned above the sentences which are imposed are at least *ten years* imprisonment for a first offender, not less than *15 years* for a second offender and at least *20 years* for a subsequent offender. The same provisions apply to indecent assault only where it is perpetrated on a child under the age of 16 years. In other situations of indecent assault these specific minimum sentences will not apply. The obviously created disparity in that the perpetrators of penetrative sexual assaults which are classified as rape victims in this study will not be sentenced as harshly as the crimes would fall under the ambit of indecent assault. The practical implication is that an HIV infected perpetrator who rapes a man *per anum* will get less than ten years whereas if the same situation was applied to a female victim the sentence

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[211] Section 51(3)(a) of Act 105 of 1997.

[212] [2001] 3 All SA 588 (C).

[213] [2001] 3 All SA 588 (C) on 589G.

[214] [2001] 3 All SA 220 (A) on 221F.

would be life imprisonment. Redefining the crime of rape will necessitate that the provisions relating to mandatory minimum sentences be amended.

As mentioned above, the provisions of the Act applicable to situations where the perpetrator of rape is aware of his HIV status at the time of the commission of the rape, would apply to the current narrow definition of rape only.[215] This would entail that the other identified categories of sexual assault victim in this study would not be afforded the same redress against an HIV infected perpetrator who is aware of his HIV infected status. The legislature would need to update this provision to reflect the reality of a broader definition of rape. Another interesting point is that the provisions relating to life imprisonment for a perpetrator of rape, who is aware of their HIV infected status, does not apply to a child who is under the age of 16 years.[216] This means that a child who is 16 years old can be sentenced to life imprisonment whereas the same crime committed by a 15 year old is not subject to such a sanction.

A question that may be asked is whether the implementation of mandatory minimum sentences is effective or not.[217] This can be answered with reference to a case study that was undertaken by the South African Law Commission.[218]

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[215] Act 105 of 1997.

[216] Section 51(6) of the Criminal Law Amendment Act 105 of 1997.

[217] Minnesota follows a system of presumptive sentencing guidelines which may be illustrated by the Minnesota Sentencing Grid below. Only parts of the grid have been used to illustrate various positions relevant to sexual offences. The Sentencing Guidelines were developed in 1978 by the Minnesota Sentencing Guideline Commission. A Sentence could be reduced by a 1/3rd for good behaviour; See also Frase, R.S. **"Sentencing Guidelines in Minnesota and Other American States. A Progress Report"** (1995) on 169; See also **"SALC Appendixes to Discussion Paper 91 of 2000"** in Appendix A on 20 –21. The presumptive sentences are based on prior record and offence severity which means that retribution is a primary deterrent in sentencing. The presumptive sentence guidelines are to be favoured as they provide respect for the law, reflect the severity of the offence, provides just punishment for the offender and deterrence to future crimes. The present author however prefers the concept of mandatory minimum sentences to presumptive sentencing guidelines as the latter leaves more room for discretion and consequent legal uncertainty. It may be

The purpose of this important research undertaken was to firstly, determine the sentences meted out for various crimes.[219] Secondly, the aim was to determine factors that affected the sentences and thirdly, to examine the impact of the Criminal Law Amendment Act.[220] The study was based on more than 55 000 random cases, using the South African Police Services CAS database, and the representative sample used, comprised 1 400 cases, from the High Court and Magistrates Court.[221]

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argued that the presumptive sentencing guidelines have more self-correcting properties, but present author is of the view that the focus is more on the criminal than the crime and the victim. It was discussed earlier that anal and vaginal rape victims may display the same psychological trauma to the rape. It is therefore submitted that mandatory minimum sentences are to be preferred for the crime of rape. It is not supported for instances of culpable homicide where it is submitted that the courts need to evaluate each case.

Presumptive Sentencing Lengths in months

Severity levels of conviction offence	**0**	**1**	**2**	**3**	**4**	**5**	**6 or more**
Criminal Sexual Conduct, 2nd degree	21	26	30	33-35	42-46	50-58	60-70
Criminal Sexual Conduct 1st degree. Assault – 1st degree	81-91	93-103	105-115	117-127	129-139	141-151	153-163
Murder 3rd degree Murder 2nd degree (felony murder)	144-156	159-171	174-186	189-201	204-216	219-231	234-246
Murder 2nd degree (with intent)	299-313	319-333	339-353	359-373	379-393	399-413	419-433

[218] As prepared by Paschke, R. & Sherwin, H. **"SALC Sentencing Quantitative Research Report"** in Appendix C of the **"SALC Appendixes to Discussion Paper 91 of 2000."**

[219] For example: murder, rape, robbery with aggravating circumstances, culpable homicide. The study consisted of finalised cases in areas such as Johannesburg, Eastrand, Midlands, Craddock, Durban, Port Elizabeth, Boland and the Western Metropole.

[220] Act 105 of 1997.

[221] See Appendix C of the **"SALC Appendixes to Discussion Paper 91 of 2000"** on 5.

The following aspects of the study undertaken with regard to the crime of rape are relevant. Murder and rape had a median effect prison term of merely eight years.[222] This is a relatively low sentence if one considers that the minimum sentence for murder is 15 years and the minimum sentence for rape is ten years.[223] Furthermore, 56% of persons convicted of murder, rape and robbery, with aggravated circumstances, were first offenders and had not been convicted of any crime previously.[224] As regards rape victims, the sentences for female victims, under the age of 12 years, resulted in higher sentences than for older victims. This disparity with the Act is a cause for concern as the Act provides that life sentences should be imposed where the girl is under the age of *16 years*.[225] There was an increase in the percentage of life sentences given for murder and rape, after the implementation of the Act. Further, it was found that Magistrates Courts dealt out approximately 96% of sentences for murder and rape, in the sample of cases.

The conclusion that is reached is that after the implementation the prescribed minimum sentences were not complied with in the majority of cases.[226] The only justification that can be offered is that the Act provides for a lesser sentence when 'substantial and compelling' circumstances exist.[227] On the basis of these findings it

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[222] *Ibid.*

[223] These are the lowest possible sentences prescribed in terms of section 51 of Act 105 of 1997.

[224] Appendix C of the **"SALC Appendixes to Discussion Paper 91 of 2000"** on 7.

[225] Schedule 2 Part I of Act 105 of 1997.

[226] See Appendix C of the **"SALC Appendixes to Discussion Paper 91 of 2000"** on 8: *Even post implementation, not a single median sentence for murder, rape or robbery, with aggravating circumstances, in any of the eight regions exceeded the minimum sentence prescribed by the Act.* See further **S v Malgas** [2001] 3 All SA 220(A) and **S v Blaauw** [2001] 3 All SA 588(C) in this regard.

[227] Section 51(3)(a) of Act 105 of 1997. Interestingly enough, it was found that before the implementation of the Act, the sentences meted out by the High Court were on average 17,5 years for rape, in contrast with an average of 7,5 years in the Magistrates Courts. The factors cited by the South African Law Commission, as possibly affecting sentence prior to the implementation of the act are: region, offence, court jurisdiction, age of the accused, gender of the accused, race of the latter, prior convictions and age of the rape victim. Data samples used were from the police prisons and courts. See **"SALC Appendixes to Discussion Paper 91 of 2000"** in this regard.

could be a compelling argument for the fact that mandatory minimum sentences are not finding practical application and are merely theoretical legal provisions.

Prior to the implementation of the new act, the percentage for types of sentence applied in violent crimes were 67% of cases involved imprisonment with no suspension and 20% of cases involved imprisonment with no suspension.[228] It is apparent that prison sentences were the type of sentence that was the most used for violent crime and it is interesting to note that only 4% were given correctional supervision. [229]

An interesting comparison is to compare the minimum sentences as required by the Act as opposed to sentences imposed, *prior* to the aforementioned Act. This is indicated as follows by the South African Law Commission also in a percentage form.[230] The minimum sentence for rape is ten years. Prior to the in 70% of rape cases the sentence was below the prescribed minimum in the Act. The other 30% of the sentences were equal to or greater than the minimum in the Act.[231]

Therefore it would appear that the minimum sentences are higher than the majority of sentences previously applied. To indicate why mandatory minimum sentences are favourable, it is necessary to have regard to statistics of sentences, which show discrepancies in sentencing, depending on which region the crimes are committed. See **'Annexure E'** in this regard.[232] It appears that the Cape jurisdictional areas imposed fewer years' imprisonment as regards murder and rape. As is evident from the table, imprisonment for culpable homicide is almost non-existent, which is alarming in the sense that if a person who indulges in harmful HIV related behaviour

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[228] Criminal Law Amendment Act 105 of 1997. Paschke, R. & Sherwin, H. **"Quantitative Research Report on Sentencing"** (2000) in **"SALC Discussion Paper 91 of 2000"** Appendix C on 26

[229] *Ibid.*

[230] See **"SALC Discussion Paper 91 of 2000"** Appendix C on 30 Table 4. Again only the sections relevant to the rape and harmful HIV-related behaviour are used.

[231] *Ibid.*

[232] Table 5 of **"SALC Discussion Paper 91 of 2000"** Appendix C on 32.

is convicted of culpable homicide, and murder is not proven, the defendant almost gets away with the crime. Furthermore, the sentences meted out for rape are alarmingly low. Minimum mandatory sentences are perhaps advantageous in the sense that they would not cause public outrage in the sense that a rapist or person who deliberately indulges in harmful HIV related behaviour, would not escape the consequences of their crime.

After the implementation of the Act it appears that minimum mandatory sentences have not had a significant effect on the number of years an accused is sentenced to. For rape the average years imprisonment has risen from merely eight to ten years.[233] With regard to the age of the victim, rape sentences were previously not affected by the age of the victim, but the Act now prescribes that a sentence of ten years will be meted out generally for the rape of a woman 16 years and older.[234] As regards a victim below the age of 16 years, a sentence of life imprisonment may be imposed.[235] The Act does permit a court to depart from minimum sentence if substantial and compelling circumstances exist.

After the implementation of the Act, the percentage of sentences meted out since, which have actually complied with the Act, can be illustrated with data obtained by the Law Commission and attached as '**Annexure F**'.[236]

It is evident that only a minority of cases complied with the requisite sentences. A reason for this may be that the court found 'substantive and compelling reasons' to depart from the prescribed sentence.[237] The position with regard to the imposition of sentences remains much the same for murder prior to the implementation of the Act, as the sentences imposed are still below the prescribed minimum. This study also

[233] **"SALC Discussion Paper 91 of 2000"** Appendix C on 49.

[234] Section 51(2)(b) of Act 105 of 1997.

[235] Schedule 2 Part I.

[236] **"SALC Discussion Paper 91 of 2000"** Appendix C on 49 table 24 on 56.

[237] Section 51(3)(a) of Act 105 of 1997.

reveals low conviction rates which could account for this as only 5.4% of the 30 000 pre-implementation cases reported to the police, were convicted.[238] Problems with the sample too are that conviction rates are low, so it is not easy to establish how effective minimum mandatory sentences are as a deterrent.

A problem with the sentencing grid is evident with the crime of culpable homicide as the situation largely depends on the defendant's circumstances. In the United States the sentencing grid system works well and provides a certain amount of legal certainty. The sentencing grid system would work well for the crimes of rape and murder, and due to the high rate of crime in South Africa, it is present author's view that mandatory minimum sentences as per the Act are useful for serious crimes such as rape and murder. This would have to be subject to the proviso that the court uses its discretion strictly and that the sentences are only deviated from in exceptional cases or else the practical implication of the mandatory sentences will be of little force and effect. These crimes are almost on an epidemic scale and the perpetrators of penetrative sexual assault and who engage in harmful HIV related behaviour need to be made aware that there are serious consequences which will ensue should they engage in certain conduct and thus know they will not escape lightly.

Again the problem of culpable homicide arises even with mandatory sentences as harmful HIV related behaviour may also be covered under this crime. It is however in the interests of justice that other acts which fall under culpable homicide not be incorporated into mandatory minimum sentences as the facts differ from case to case.[239]

[238] **"SALC Discussion Paper 91 of 2000"** on 18.

[239] For example a father who rides over his child with his car and the child consequently dies.

4. CONCLUSION

The creation of HIV related provisions by a competent legislature prescribing certain conduct can take various forms. Firstly, a statutory offence could be created which consolidates the common law crimes applicable to harmful HIV related behaviour. Secondly, the definition of rape could be broadened to incorporate the victims of unprotected consensual intercourse, who are exposed to the HIV virus. In doing so, the mandatory minimum sentences can then be applied to all victims identified in this study who are exposed to the virus. Thirdly, the existing common law crimes could be enforced. Criminal liability under a statutory offence has the elements of unlawful conduct, criminal capacity and fault, depending on the legislatures formulation of the offence. [240]

In this chapter the relevance and possible problems associated with harmful HIV related behaviour in a context of sexual offences was examined. The nature and impact of the HIV virus was discussed in order to establish the possible impact of HIV infection on rape victims. The adequacy of the common law crimes which could be applied to secure convictions for harmful HIV related behaviour were critically analysed. Due to possible shortcomings in existing legislation it was proposed that a new separate statutory offence be created but that it not only be restricted to sexual offences, nor the HIV virus, but that other life threatening illnesses also be incorporated within its ambit. The existence of a statutory crime, which deals with intentional exposure rather than actual infection, is also recommended as it would alleviate the evidential burden on the State. A separate crime could also be applied in sexual offences where a charge of rape is not laid.

The existing common law crimes can serve as a competent verdict to a statutory offence of harmful HIV related behaviour as they are broad enough to incorporate harmful HIV related behaviour and their penalties are sufficient. The transmission of

[240] In the form of *dolus directus/ indirectus, or dolus eventualis or negligence*. See Burchell, J. **"Principles of Delict"** (1993) on 33.

HIV is harmful to human life, as death could ensue. It is a legally recognized harm and society's interests need to be protected. To knowingly infect or expose another person to the HIV virus could thus fulfil the requirements for the offences of murder, attempted murder or infliction of grievous bodily harm. To infect another person negligently could amount to culpable homicide, if death ensues. It has been established that the common law crime of culpable homicide is the only crime applicable to instances of negligence as there is no recognised crime of negligent assault in South African law.

A new category of rape victim was also identified and focused upon. The category of penetrative sexual assault victim, who unknowingly engages in consensual intercourse with another party who knowingly conceals his or her HIV status from the victim should be identified as a rape victim, for two main reasons. Firstly, it was argued that valid consent or free agreement to the sexual intercourse is lacking. Secondly, by incorporating such persons within a definition of rape the provisions of the Criminal Law Amendment Act relating to minimum sentences will find application where the perpetrator is HIV infected.[241]

The possibility of compulsory testing of persons accused of rape was examined with reference to the provisions in the Criminal Procedure Act, the Criminal Procedure Amendment Bill of 1999 and the Compulsory HIV Testing of Alleged Sexual Offenders Bill of 2000. It may be argued that the accused's rights to freedom and privacy will be infringed. If these rights are weighed up against the victim's right to life, and the interests of society, the limitation on the rights to freedom and privacy may be justified. [242] Limitation of the aforementioned rights would also be far less restrictive than quarantine and isolation. The latter concepts were also examined

[241] Act 105 of 1997. It is recognised however, that a sentence of life imprisonment may not always ensue after conviction. This is attributed to a discretion which may be applied where substantial and compelling circumstances exist.

[242] See in general on mandatory AIDS testing Gostin, L.O. *et al* **"AIDS Screening, Confidentiality and Duty to Warn"** (1987) on 361 – 365.

and rejected as not being viable due to the extreme limitation on the accused's rights.

With regard to the limitation of rights in the HIV/ AIDS context the following criteria have been posed:[243]

(1) Does the particular measure actually achieve its objective in combating the spread of HIV?

(2) Does the proposed measure invade a crucial and fundamental human right?

(3) If so, is there a pressing social need for the infringement and is it the least restrictive way possible of obtaining the particular objective?

It is the present author's view that despite shortcomings and problems, it is important that a victim nevertheless be informed within a certain period of the perpetrator's HIV status for their own peace of mind.[244] The probability that the accused is past the window period would, on a reasonable probability, be quite high. The system is not infallible as questions may arise as to whether the perpetrator was not perhaps infected after the rape by somebody else. Another situation that could arise is that the victim may have infected the perpetrator during the rape. Adequate proof would have to be furnished in the light of medical evidence especially for a conviction of life imprisonment to ensue in terms of the mandatory minimum sentences.

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[243] Cameron, E. & Swanson, E. **"Public Health and Human Rights–The AIDS Crisis in South Africa"** (1992) on 202 -220. See also **"SALC Discussion Paper 84 of 1999"** on 133.

[244] The provision of treatment as envisaged in the proposed Sexual Offences Bill of 2002 will alleviate a lot of additional trauma to a rape or sexual assault victim who suspects that they might have been infected with the HIV virus if administered timeously.

The implementation of a system of mandatory minimum sentences was also critically examined. Mandatory minimum sentences can be used as an effective tool in curbing serious crimes such as rape and murder.[245] A number of problems were established with regard to the imposition of minimum sentences when applied to persons who are convicted of rape whilst knowing that they are HIV infected or have AIDS. Firstly, the minimum sentencing provisions are not gender-neutral and would have to be amended to collate with a broader definition of rape. Secondly, the provisions applicable to HIV infected perpetrators neglects to include other contagious life threatening illnesses. This serves to emphasis HIV infection to the exclusion of other contagious life threatening illnesses thereby creating a stigma. Thirdly, the court has the discretion to depart from minimum sentences where 'substantial and compelling' circumstances exist. Although necessary, the minimum sentences are to a certain extent negated where a discretion exists.

Despite these shortcomings the present author is of the view that mandatory sentences need to be advocated for the crime of rape and be extended to cover all perpetrators and victims of rape. It provides for just sentences the severity of which escalates with the number of offences, rather than the severity of the offence which prevails with presumptive sentences. Rape is a serious intentional crime, no matter what the form, and the possibility of HIV infection can be a factor for each type of penetration. Mandatory sentencing may seem to be a harsh form of punishment but it is vitally needed as a deterrent especially in South Africa where rape is on epidemic proportions. The criminal needs to know that there will be harsh repercussions and that he or she will not necessarily get away with a lenient sentence for his intentional crime. Likewise all victims need to be treated fairly and seriously as rape is an intentional inhumane crime which potentially destroys lives.

As mentioned it has been established that in South Africa the sentences are not being applied consistently, due to the provisions which allow for a deviation if

[245] Also for other serious crimes such as armed robbery and kidnapping.

substantial and compelling circumstances arise.[246] This discrepancy in sentencing needs to be addressed or else the system of mandatory sentences is rendered futile. With the broadening of the definition of rape, the provisions of the mandatory minimum sentences will apply to both male and female perpetrators. Harsher penalties such as life imprisonment will therefore apply to criminals with prior convictions and those who rape and infect victims with the HIV virus. In this manner hopefully our criminal legal system will be a formidable system providing a clear deterrent. At the same time, however, all victims of sexual crimes and especially male and female rape victims, can be assured that justice will be done and not only be seen to be done.

The next chapter will focus on a consolidation of all the work concentrated on, and conclusions drawn during the course of this study will be highlighted. This will be done in order to establish whether the categories of penetrative sexual assault victim, who have been identified as rape victims, are protected effectively in terms of the South African law. The study will conclude with recommendations on how to rectify the *lacunae* established within the South African law.

[246] Section 51(3)(a) of Act 105 of 1997. See further **S v Malgas** [2001] 3 All SA 220(A). **S v Blaauw** [2001] 3 All SA 588(C).

CHAPTER SEVEN

CONCLUSION AND RECOMMENDATIONS

1. CONCLUSION

The study undertaken addresses the crime of rape from a broad substantive context and juridical perspective. It is a compendium of socio-psychological and legal aspects pertaining to the current and proposed definition of rape. This study further provides the reasoning why the current common law definition of rape should be extended to certain categories of penetrative sexual assault victims. Classification of victims is crucial to the reformulization of the crime of rape and currently no legal literature is devoted to the classification of potential rape victims. Literature pertaining to rape laws tends to focus on the approaches adopted in other countries, as opposed to formulating a rationale for the extension of the definition of rape to include certain classes of persons.

This study is further aimed at the practical application of a revised definition of rape to borderline factual situations where it is not easily established whether a certain sexual assault victim is a rape victim or not. Assumptions and erroneous ideologies epitomised by the current narrow South African definition of rape are challenged. Consideration is also given to an explanation of why the incorporation of other identified categories of penetrative sexual assault within the context of rape is justifiable. Comparative reference is made to the changes in other countries with a focus on a broader definition on the basis of gender-neutrality.

It has been shown that possible differences in the interpretation of common law crimes can affect the principle of *nullum crimen sine lege* negatively.[1] This principle has special relevance to the crime of rape in that due to possible differences in interpretation a perpetrator falling within an identifiable category of penetrative sexual assault with the same characteristics of rape may be found not guilty of the crime of rape but of some lesser crime. It is submitted that the *boni mores* have changed and that the ambit of the crime of rape should be extended by domestic rape legislation. A reformulation of the offence of rape would not prejudice the victims protected by the current gender-specific definition but would afford wider protection to the other excluded victims of forced penetrative sexual assault.

In chapter one a general introductory orientation has been provided, certain key concepts have been defined and specific analytical questions are posed highlighting the research problem. The history of rape is discussed and it is evident that the crime of rape was originally implemented to protect the proprietary interests of males with specific regard to virgins and not the rights of women in general. Gradually the crime of rape has developed to include other victims such as widows and married persons. Although the crime of rape was never designed to take into account different victims of penetrative sexual assault or the victim's freedom of choice, it is submitted that the crime of rape has evolved. Accordingly the victim's freedom of choice to the sexual intercourse became an essential requirement and there is a tendency towards moving away towards a broader penetration requirement and gender-neutral definition. The questions posed raise the issue of whether the current common law crime of rape can be justified by obliterating antiquated dogma, especially if a comparative analysis of the wider gender-neutral approach followed in other countries is made. Furthermore the possibility of incorporating additional victims of forced sexual penetration has been considered.

Another issue raised is whether deliberate or negligent transmission of the HIV virus to victims of the crime of rape should manifest itself in a separate crime. The possibility of criminalizing conduct where persons deliberately expose other parties

[1] This is known as the principle of legality. See Snyman, C.R. **"Criminal Law"** (1995) on 34 - 48.

to the HIV virus is raised. Lastly, the question was asked was whether the proposed new Sexual Offences Bill would effectively bridge the *lacunae* of the common law definition of rape so that all victims and perpetrators may be treated equally.

In chapter two a number of categories of sexual assault victim have been identified. The categories of victim of penetrative sexual assault identified are a male perpetrator on a female victim *per vaginam* or *per anum* 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 or 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 unprotected consensual sexual intercourse where the one party is deliberately exposed to the HIV virus.

It has been established that there is a causal nexus between the psychological and physiological reactions experienced by the various categories of penetrative sexual assault victim regardless of gender. The psychological reactions displayed in all the identified categories of penetrative sexual assault victim mirror the effects of Rape Trauma Syndrome. Rape Trauma Syndrome is a recognised psychological reaction displayed by victims of rape. Consequently it is submitted that there is no significant difference between the nature and impact of the physiological or psychological effect of a penetrative sexual assault upon any male or female victim. To deny the identified categories of penetrative sexual assault protection under the crime of rape would effectively demean the experiences of penetrative sexual assault victims who perceive the sexual violence perpetrated against them as a rape. It can therefore be argued that there is no justification for distinguishing between the various categories of sexual assault victim.

In chapter three the current crime of rape adopted in South Africa was examined from a juridical and empirical perspective. Attitudes and perceptions of rape advocated in customary law, which is patriarchal by nature, was also assessed. A central question which arose is whether the common law definition of rape should be

retained. The common law definition of rape is the only legal definition of rape in South Africa and caters for female victims of forced sexual penetration *per vaginam* only. It has been established that the common law definition currently excludes more than what it includes, with regard to perpetrators, victims, the nature of penetration and the type of penetration. It is therefore gender-specific and anatomically-specific. Each element of the current definition of rape has been critically examined and it has been established that male victims of penetrative sexual assault can also qualify as victims of rape and that perpetrators can be female. The possible defences of lack of consent and automatism to the crime of rape were critically examined and rejected on the merits thereof. The current definition of rape has also been examined against the background of customary law.

The elements of alternate crimes under which victims of forced penetrative sexual assault can claim redress have also been analysed in order to establish whether these crimes can adequately provide protection to all eight identified categories of penetrative sexual assault victim. It has also been established that this is not the case and that various inadequacies could be identified with regard to the nature and elements of these statutory and common law offences.

The phenomena of customary law and incest have also examined. It has been proposed that the crime of incest be abolished *in toto* or be substantially amended for a number of reasons such as the inequity that arises in the practical application of the crime as well as the stigma which attaches itself to victims. Child victims who are party to incest can be covered by statutory rape in terms of current law and will also be protected in terms of the proposed legislation. The retention of the common law crime of incest will result in disparity of treatment for certain persons related by affinity when applied to factual situations. If a person is married, certain restrictions apply on the basis of affinity whereas if this same party merely cohabits with the other person no bar arises should they wish to marry a person who is directly related to their partner. The provisions of incest are thereby circumvented in cases where persons merely cohabit with one another. It has been submitted that a number of constitutional rights are infringed and that the policing of the crime will be problematic. It has further been submitted that incest is a social and religious issue

which needs to be resolved by the appropriate forums and not regulated by legislation. Not only is the retention of the crime of incest unconstitutional, but it has to be recognised that the law cannot decriminalise one form of consensual intercourse between consenting adults, such as sodomy, but yet uphold incest as a crime where it occurs between consenting adults.

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

Non-consensual sodomy has also been examined with regard to the elements and groundbreaking case law pertaining to this crime. A number of typical 'male rape' cases have been convicted under the crime of non-consensual sodomy. It has been 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. [2] It is submitted that the crime of sodomy has in fact been abolished in its entirety but with limited retrospective effect to cater for 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 under this crime.

The crime of indecent assault has also been analysed to establish whether the possible categories of identified penetrative sexual assault victim could be effectively protected under this crime. It has been submitted that despite the gender-neutrality of the crime, the crime is insufficient as a main charge to the crime of rape. The reason being that lesser offences such as non-penetrative sexual assaults are incorporated which could demean the experiences of victims of penetrative sexual assault. In addition, if indecent assault is upheld as a main charge to penetrative sexual offences it would entail one less competent verdict under which victims may claim redress under. It is however recommended that the

[2] **National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others** 1998 12 BCLR 1517 (CC).

crime of indecent assault be retained as a competent verdict for rape, but offer a remedy primarily for non-penetrative sexual acts.

It can therefore be concluded that the current crime of rape is a limited and inadequate definition which fails to protect most of the categories of penetrative sexual assault victim identified in this study. The common law definition therefore 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.

In chapter four a comparative and historical perspective of the approach to rape reform is followed. The position on the definition of rape in Australia, Britain and the United States of America is critically examined. This was undertaken in order to find a single definition of rape which could be applied to all the categories of penetrative sexual assault victim identified in this study. The approaches followed in various states of Australia differ and have a tendency towards being gender-specific. The measures implemented in the state of Victoria are gender-neutral and a broad definition of rape is adopted. The position is Victoria is the preferred approach for purposes of this comparative study. It has been established that 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. All the possible categories of sexual assault victim identified in this study will be protected if this approach was adopted in South African law. The concept of 'free agreement' relates directly to the element of consent and could be utilised as an essential element within the South African definition of rape. The term 'free agreement' is conceptually broad enough to also apply to the category of penetrative sexual assault victim who is deliberately exposed to the HIV virus during unprotected consensual sexual intercourse. In such instances there is no free agreement or valid consent and the victims consent is accordingly vitiated.

It has been shown that the definition adopted in Britain remains partially gender-specific as various perpetrators and sexual assault victims are excluded from its ambit, which makes the definition deficient for purposes of this study. The British definition of rape has been established as being the least suitable as its definition

would offer the least protection, to all the identified categories of penetrative sexual assault victim. The definition implemented in Britain is therefore unsatisfactory and problematic due to its deficiencies and cannot be transposed into South African law. In the United States, a number of states follow a gender-neutral approach. Although it has been established that there are certain definitional elements which could be utilized from a South African perspective, no definition of rape adopted in these states can be singled out for purposes of this study. Certain aspects of the definitions adopted in Washington and Connecticut could however, be utilised in reformulating a broader definition of rape in South Africa.

Elements of the definitions followed in Massachusetts, Florida, Nebraska, Washington and Victoria in Australia, could be utilised to formulate a comprehensive definition of rape. The conclusion that can be reached is that not a single definition followed in any of these countries could be effectively transposed directly into South African law, in order to offer adequate protection to all the categories of sexual assault victim identified in this study.

In chapter five the new proposed Sexual Offences Bill introduced by the South African Law Commission is critically examined. If enacted, the new proposed legislation will have a far-reaching impact on domestic rape legislation. The proposed bill includes more victims of penetrative sexual assault identified in this study than those victims it excludes. This is not the case with the current common law narrow definition. The proposed legislation furthermore addresses aspects of child abuse. A better alternative to the Sexual Offences Act 23 of 1957 is provided, which will be repealed by the 2002 Bill on Sexual Offences.

It is evident that the focus in the proposed definition is on the term 'coercive circumstances' and less on the issue of consent. Currently, the emphasis is on the state proving that the victim did not consent, beyond reasonable doubt. With the new definition, the accused may raise consent as a defence, but the latter bears the evidentiary burden of proof. The focus of the new act has also been held to be more on the aspect of unlawful penetration rather than consent. This entails that the evidentiary burden on the state is somewhat ameliorated. More importantly, both

men and women can now be regarded as victims or perpetrators. Most of the identified victims of penetrative sexual assault will be adequately protected by the proposed substantive provisions in the definition. It has been argued that victims falling within the following categories of penetrative sexual assault victim would be protected, namely: 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 and penetrative sexual assault with the use of an object or digitally on a male or female victim.

The categories of penetrative sexual assault victims identified in this study who are not adequately protected in terms of the proposed legislation, relates to those victims of consensual intercourse who are deliberately exposed to the HIV virus and male victims of non-penetrative digital sexual assault. The proposed definition has also been criticised with regard to the broadening of the definition of incest as the present author is in favour of abolishing the crime of incest *in toto* due to its unjustifiable conflict with certain constitutional rights. Furthermore it has been submitted that the age limit should not be 18 years of age for the offence of child prostitution, as opposed to an age limit of 16 years for other offences with consenting minors, as this results in discrimination. The different age limits imposed for offences results in a crime being committed where a minor who is 15 years old or an adult person engages in consensual sexual intercourse with another minor who is less than 18 years of age and offers the latter a reward. In another situation if no reward by an adult person is offered to a minor who is between the ages of 16 and 18 then no offence is committed. Where a minor who falls within this category consents to sexual intercourse then a crime is committed.

A conclusion that is drawn is that the proposed legislation follows the trend in other countries such as Britain, Australia and particularly the United States where the importance of gender-neutrality is recognised and is to be favoured. Despite this, it

has been submitted that a *lacunae* exists within the proposed definition of rape pertaining to two categories of victim identified in this study. As mentioned above, male victims, who are subjected to non-penetrative digital sexual assault which simulates sexual intercourses, are excluded from the ambit of the proposed definition of rape, as well as victims of penetrative sexual assault who are deliberately exposed to the HIV virus.

In chapter six the category of penetrative sexual assault victims who are intentionally exposed to the HIV virus during unprotected consensual sexual intercourse has been focused upon. The impact of HIV/ AIDS on these identified penetrative sexual assault victims has been appraised. The nature, development and effect of HIV/AIDS have also been examined. The current legal position with regard to HIV/ AIDS has been critically examined with reference to the common law crimes relevant to a conviction for harmful HIV related behaviour and the element of fault was focused upon.

The common law crimes which are relevant to prosecuting harmful HIV behaviour were examined to establish whether this category of victim is adequately provided for. It has been established that this category can be covered by the common law crimes but should rather be covered by an extended definition of rape. Firstly, the provisions of the Criminal Law Amendment Act, which prescribes sentences of life imprisonment where rape is perpetrated by a person, who is aware that he is infected with the HIV virus or has AIDS, will be applicable.[3] Secondly, the victim would not have to contract the virus to be protected under the crime of rape. Thirdly, it has been established that valid consent to the unprotected sexual intercourse is absent as the victim is not aware of the true and material facts to which he or she is consenting. The definition of rape can therefore be effectively extended to cover this category of victim as valid consent or free agreement is absent.

[3] Section 51 of Act 105 of 1997. The minimum sentence will not however be imposed where substantial or compelling circumstances dictate that a lesser sentence be imposed.

The legal provisions applicable to victims of rape who are intentionally exposed to the HIV virus or other contagious life threatening illness have also been examined. The provisions in the Criminal Law Amendment Act which provide for mandatory minimum sentences for a conviction for rape, have been criticised for various reasons. Firstly, the provisions are gender-specific and would have to be amended to cater for a broader definition of the crime of rape. Secondly, the infection of an HIV positive perpetrator is emphasised to the exclusion of other contagious life threatening illnesses. Thirdly, the provisions only apply to a situation where the perpetrator is aware of his HIV infected status. The position where a perpetrator suspects that he may be infected is not covered. It has been argued that this awareness factor could have a negative impact on sentencing. It could lead to persons avoiding having themselves tested so that a sentence of life imprisonment cannot be imposed on conviction as the awareness factor would be lacking.

The possibility of creating a separate statutory offence which criminalizes harmful HIV related behaviour has also been examined. It has been suggested that a statutory crime pertaining to harmful HIV related behaviour be created. It has been established that various common law crimes can be applied to harmful HIV related behaviour. However these crimes are not without their own inherent problems and shortcomings. It has therefore been suggested that various elements applicable to the relevant common law crimes pertaining to harmful HIV related behaviour be consolidated into a statutory offence for purposes of legal certainty and to serve as a possible deterrent.

The necessity for alternate substantive provisions regarding deliberate infection or exposure to the HIV virus can also be highlighted with reference to the position of victims of penetrative sexual assault within the patriarchal ambit of customary law. The plight of persons who are victims of marital rape and more specifically, those who are party to customary law and unions, need to be given earnest consideration when reformulating a definition of rape, or creating a separate offence which criminalizes deliberate exposure to the HIV virus and other contagious life threatening illnesses. The reason for this is that these persons often do not perceive themselves to be victims of rape and consequent reporting of the crime of

rape is diminished. This can be combated with the imposition of a separate offence relating to harmful HIV related behaviour, as an alternate charge to the crime of rape would be provided. Adequate redress and additional protection would therefore be available to these victims of penetrative sexual assault who are subjected to harmful HIV related behaviour.

The possibility of compulsory HIV testing of persons arrested for rape and an aggravated sentence for perpetrators who deliberately infect rape victims with the HIV virus has also been considered and favoured. The constitutional implications and infringements of possible rights were also taken into account with regard to compulsory testing. The provisions of Section 37 of the Criminal Procedure Act 51 of 1977 and the proposed amendment to the aforementioned section have also been critically examined. The conclusion reached that has been reached is that a separate substantive statutory offence relating to harmful HIV related behaviour is essential.

The imposition of mandatory minimum sentences for perpetrators of penetrative sexual assault, who knowingly expose rape victims to the HIV virus, has been examined and supported. As indicated above, there are a number of shortcomings in the Criminal Law Amendment Act applicable to minimum sentences which need to be addressed. However, the imposition of mandatory minimum sentences is desirable as a procedural measure in order to offer adequate protection to the aforementioned identified category of penetrative sexual assault victim.

2. RECOMMENDATIONS

This study has drawn attention to the subject of additional categories of penetrative sexual assault victim, who are for all intents and purposes rape victims, the surface of which is skimmed through and largely ignored in terms of South African legal literature. It is the present author's submission that a broader and gender-neutral offence is necessary in order to afford adequate protection to all the identified categories of penetrative sexual assault victim.

A view exists that the crime of rape as being a crime of men against women and that to state otherwise demotes the meaning of the crime to women and to extend the definition diminishes the significance of the traditional definition.[4] This view excludes the possibility that being penetrated by an object can be as traumatic as traditional rape. Other arguments against rape law reform are that it is gender specific and there has been little success in changing societal conditions under which rape occurs.[5] Gender-specificity emphasizes the rights of some victims to the exclusion of other victims and on this basis it must be rejected, as it cannot be argued that the crime towards other victims is less important or less traumatic.

A number of disadvantages are evident to those victims who are unable to gain redress under the traditional definition of rape. These can be cited as being lower sentences than those offered under the crime of rape, victims may not have the benefit of procedural protection in court and the law may promote the view that their experiences are taken less seriously, views that may consequently be advocated in society as well. With the recognition of male rape and other forms of penetrative sexual assault as rape the formal acknowledgement is made that penetrative sexual assault is a severe form of sexual violence, as serious as that of the traditional crime of rape. Consequently the traumatic experiences of male and female victims of rape are no longer denied.

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[4] Naffine, N. **"Possession: Erotic Love in the Law of Rape"** (1994) on 23. Other reasons for preserving rape as a gender specific crime is the risk of pregnancy and the fact that it occurs predominantly against women. See Rumney, P. & Morgan-Taylor , M. **"Recognizing the Male Victim: Gender Neutrality and the Law of Rape: Part One"** (1997) on 218.

[5] In the United States, the criticism that a gender neutral definition does not reflect the reality of rape came to the fore in the case of **People v Liberta** 1984 NYS 485 2d 207: A husband was charged with the raping and sodomizing of his wife. He argued that rape violated the right to equal protection as appearing in the United States Constitution, as only men were criminalized. In the *court a quo* it was argued that it is constitutional, as it is aimed at protecting women from assaults by men. In the New York Court of Appeals, it was held that the gender specific rape laws were unconstitutional on the grounds of equal protection. The court dismissed the notion that men could not be raped by women as sexual intercourse *occurs upon any penetration, however slight, this degree of contact can be achieved without his consent* (own emphasis).

The definition of rape has been extended in various countries and a broader penetration requirement is advocated. There is support in favour of the common law definition of rape being retained substantially in its current form, but as a gender-neutral offence. This would of necessity dictate that statutory intervention would be necessary in any event.[6]

Another view is that the common law definition be abolished and replaced with a gender-neutral and broader definition incorporating indecent assault. The view of the Attorney General of Transvaal is that the crime of rape should be retained, but that serious penetrative acts falling under the current definition of indecent assault, have sentences as serious as that of rape.[7] The present author disagrees with this view. The clinical fraternity, victims, as well as the ordinary person on the street, refer to acts of sexual penetration as rape. To ignore the mores of society would demean the experiences of these additional victims of rape. It is therefore submitted that the crime of rape should be retained as such and be extended by way of statute. For example in the prison setting, male prisoners are often referred to as having been gang *raped* (not assaulted).[8] To classify different sexual penetrative acts under a different category on the basis of gender or even penetration, would serve to undermine what is essentially seen and experienced by a victim of penetrative sexual assault as rape.

Indecent assault is not viewed on the same footing, nor seriousness as rape. This is evident if one takes cognisance of the minimum sentences that can be imposed for rape and indecent assault. The Criminal Law Amendment Act provides for a sentence of life imprisonment where rape is committed under certain circumstances and no similar provision is made for indecent assault.[9] If these circumstances are not present, imprisonment of at least 10, 15 and 20 years for a first, second or third

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[6] See **"SALC Discussion Paper 85 of 1999"** on 83 and in specific the reference to the Association for Persons with Physical Disabilities, Northern Cape.

[7] *Ibid.*

[8] See Lillah, R. **"Men who Rape Men"** (1996) on 134 *et seq.*

[9] Section 51(1) of Act 105 of 1997.

offender respectively, can be imposed.[10] There are no similar provisions for the crime of indecent assault unless a conviction is secured for an indecent assault on a child under 16 years which involves infliction of bodily harm.[11] If such penetrative acts were not classified under the category of rape, certain protection in a trial may also not be afforded. Rape shield laws could be enforced for penetrative sexual acts classified as rape, as is the position in other countries.[12]

Should acts of forced sexual penetration be covered under the crime of sexual assault or rape? In the United States, a number of states have repealed their common law statutes to encompass a broader offence, whilst other states have unified the previous common law offences under one offence with degrees of seriousness involved which carries over the previous penalties when determining the degree of seriousness.[13]

The South African Law Commission in a report in 1985, gave arguments when confronted with the same question, both in favour of and against reform. [14] There are two arguments that were cited in favour of reform. Firstly, rape is a violent crime and if it were changed to sexual assault the aspect of violence would be emphasised.[15] Secondly, the definition is defective as it is not gender-neutral and ignores other forms of sexual assault such as oral, anal and object penetration.

There are four arguments cited against reform.[16] Firstly, if the emphasis is placed upon violence it would be returning to the position of the common law and at present rape has developed away from the requirement of violence and this has resulted in the extension of the definition of rape. Secondly, the stigma and trauma would not necessarily be removed by changing the name to sexual assault. Thirdly, an

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[10] Section 51(3) of Act 105 of 1997.

[11] *Ibid.*

[12] Kramer, E.J. **"When Men are Victims: Applying Rape Shield Laws to Male Same-Sex Rape"** (1998) on 296.

[13] Burgess, A.W. **"Rape and Sexual Assault II"** (1998) on 276.

[14] **"Report on Women and Sexual Offences in South Africa"** (1985) on 16 – 17.

[15] *Ibid.*

[16] **"SALC Report on Women and Sexual Offences in South Africa"** (1985) on 20 - 21.

umbrella crime might lead to legal uncertainty. Lastly, the essential element of rape is intercourse without consent, while the essential element of assault is the application of violence without consent.

There are flaws in the above statements which can be highlighted. The statement that 'the law has moved away from the requirement of violence and this has resulted in the extension of rape' can be criticised on the grounds that rape was an exclusive concept that did not even recognise marital rape until recently. The *so-called extension of rape was more exclusive than inclusive as it excluded marital rape and still excludes anal, oral, digital and object rape.*

Moreover, the contention that violence is not an essential element of rape but of assault only, is questionable. Whilst recognizing that rape is an act, which lacks consent, one cannot deny the fact that the nature of rape is one of violence. Rape is not meant to be a pleasurable sexual act, which the perpetrator bestows upon the victim. The presence of force or threat of force (which could lead the victim to passively submit to the act) is indicative of the element of lack of consent. The lack of consent criteria is presupposed with regard to statutory rape.

As for the proposal introduced in 1999 by the South African Law Commission that lack of consent be replaced with the term coercive circumstances, the present author is of the view that the replacement will not necessarily have the desired practical effect. The present author acknowledges and supports the movement away from the attention being focused upon the victim to the circumstances of the sexual encounter. However it is submitted that the semantic changes involving the replacement of one complicated term 'lack of consent' for other terms such as 'coercive circumstances' and 'false pretences and fraudulent means' and instances where 'a person is unable to appreciate the nature of an act of sexual penetration' will not necessarily have the desired effect when applied to factual situations. The reason being that it appears that the inherent requirements of consent have been essentially retained in the definition of proscription of the proposed crime of rape as opposed to being subsumed under the element of unlawfulness as a ground of justifiation. In addition, it has been noted in the United States that force or coercive

circumstances have been defined by courts in terms of the resistance used by the victim to repel the attack which the reforms are designed to avoid.[17] A reasonable person test may have to be applied to decide whether the victim reacted reasonably and offered adequate resistance. This would serve to undermine the reform and purpose of the term coercive circumstances.

It is submitted that if the lack of consent criteria is to be retained albeit under a different name that the criteria not be presupposed in terms of an evidentiary burden under the definition of proscription. A person is after all presumed innocent until proven guilty. Lack of consent implies the use of force or threat of force in any event which is analogous to the use of coercive circumstances. An alternate criterion which could be used is the concept of free agreement adopted in the state of Victoria, Australia. The present author recommends that the criteria applicable to the issue of consent be retained as part of the definition of proscription of rape as practical problems have to a large extent been ameliorated with usage and time. In comparison the use of a term such as coercive circumstances as a criterion, will not be without its own teething problems, practical difficulties and complications.

The contention that the renaming of the crime of rape to sexual assault will not lead to the removal of trauma is true. Trauma and stigma will always be present for the victim. If the term rape was retained and not sexual assault for instance, then at least all oral, anal and object violations could be treated equally and the victims be recognized for what they are – *rape victims and not indecent assault victims*.

It is present author's submission that an umbrella crime of sexual assault, covering all sexual violations, might lead to legal uncertainty. Therefore the solution would be to incorporate all rape victims penetrated and raped by whatever means, included under the term rape and to have all the remaining lesser non-penetrative sexual offences under indecent assault.

[17] Odem, M.E. & Clay-Warner, J. **"Confronting Rape and Sexual Assault"** (1998) on 253.

Some authors view the crime of rape firstly, as being a crime of men against women.[18] Secondly, that to state otherwise demotes the meaning of the crime to women. Thirdly, to extend the definition demotes the significance of the traditional definition. This view excludes the possibility that being penetrated by an object can be as traumatic as traditional rape.

Other arguments against rape law reform is that the crime of rape is gender specific and that there has been little success in changing societal conditions under which rape occurs.[19] Gender specificity emphasizes the rights of some victims to the exclusion of other victims and on this basis it must be rejected, as it cannot be argued that the crime towards other victims is less important or less traumatic.

A number of disadvantages are evident to those victims who are unable to gain redress under the traditional definition of rape such as lower sentences than those implemented for a conviction of rape can be imposed on the perpetrator, victims may not have the benefit of procedural protection in court and the law may promote the view that their experiences are taken less seriously which may consequently be advocated in society too.

With the recognition of male rape and other forms of penetrative sexual assault as rape, the formal acknowledgement is made, that these acts are a severe form of sexual violence and are as serious as that of the traditional crime. Consequently the traumatic experiences of men and women are no longer denied.

Developments in various countries have implemented a gender-neutral approach and a broader penetration requirement, however the Republic of South Africa is not

[18] Naffine, N. **"Possession: Erotic Love in the law of Rape"** (1994) on 23; Also see Rumney, P. & Morgan-Taylor, M. **"Recognizing the Male Victim: Gender Neutrality and the Law of Rape: Part One"** (1997) on 206.

[19] In the United States, the criticism that a gender-neutral definition does not reflect the reality of rape came to the fore in the case of **People v Liberta** 1984 NYS 485 2d 07.

amongst them. Common parlance in these countries regard the term rape as both the sexual assault of a male and a female. [20]

The present author is in favour of a gender-neutral and broader definition, which protects all persons equally under the law as a result of the fact that male victims and 'other' victims of penetrative sexual assault cannot at present gain redress under the current South African narrow definition of rape.[21] By recognizing male rape and extending the definition to include forcible acts of oral, anal, digital and object penetration, equality will be promoted. Consequently, effect can be given to the equality clause and all victims of rape treated alike, as envisaged in section 9(1) of the Constitution. [22]

In a country promoting equality on the grounds of gender and equal protection of the law, it is essential to recognize and acknowledge the victims who have been subject to the same intrusive violation of their bodies. Rape is an intrusive act which occurs in various forms. More assiduous work is needed to revise and improve the law and not to let it remain stagnant and antiquated. Many penetrative sexual assault victims who have been identified as rape victims for purposes of this study, at present, fall outside the ambit of the current narrow definition of rape. These victims are:

1. Men raped by men

2. Men raped by women

3. Male and female victims of oral, anal, digital and object rape.

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[20] For example various states in the United States, Australia, Canada and to a limited extent in Britain.

[21] See also Rumney, P. & Morgan-Taylor, M. **"Recognizing the Male Victim: Gender Neutrality and the Law of Rape: Part One"** (1997) on 211-213.

[22] Act 108 of 1996.

4. Victims of consensual sexual intercourse who are exposed to or deliberately infected with the HIV virus or a contagious life-threatening illness.

These issues are not just matters for scholars to ponder upon, but also for the justice system and mechanisms which enforce the provisions of rape. Whilst supporting the new proposed Sexual Offences legislation and the provisions made for the various identified categories of penetrative sexual assault victim, deficiencies still persist within the proposed provisions relating to the law of rape. [23] There should be no latitude within domestic rape legislation for *lacunae* to exist as it will allow rapists to perpetrate acts of sexual violence with near impunity. The following solutions are recommended:

1. *The common law definition of rape needs to be extended to incorporate other victims of penetrative sexual assault.*

It has been shown that all the victims of penetrative sexual assault identified in this study experience the sexual violation as a rape. The same socio-psychological reactions are displayed by male and female victims of penetrative sexual assault. By recognising these victims as rape victims they will not be forced to lay a charge under the crime of indecent assault which not only has lesser penalties but also incorporates less serious sexual acts which are non-penetrative in nature. The 2002 Bill on Sexual Offences is quite extensive in its reforms. However in the haste to extend the concept of gender-neutrality to certain categories of sexual assault victim, sight was lost on the reasoning behind why certain victims should actually be classified as rape victims

2. *The proposed definition of rape needs to be extended to include two categories of sexual assault victim.*

Two categories of sexual assault victim identified in this study are not covered by the proposed definition of rape. The victims who are not covered are male victims of

[23] See chapter five in this regard.

non-penetrative digital sexual assault who are subjected to forced manual stimulation and victims of consensual sexual intercourse who are deliberately exposed to the HIV virus. If a consent criterion was retained, the latter's consent would be vitiated as the victim would not be aware of the true and material facts. It is recommended that the definition of rape be extended to male victims of non-penetrative digital sexual assault and that deliberate exposure to the HIV virus be criminalized in a separate offence. It is further recommended that this separate offence not only be restricted to harmful HIV behaviour but be extended to the deliberate exposure to other life threatening illnesses too.

3. *The age of consent needs to be equalised with regard to offences committed against minor prostitutes.*

An anomalous and inequitable situation arises in that the age of consent is higher where a person has consensual intercourse with a minor for reward as opposed to where no reward is offered. This entails that 'free' sexual intercourse with a minor is not punishable whereas if a reward is offered, a crime is committed.

4. *The common law crime of incest needs to be abolished.*

It is submitted that the crime of incest is antiquated and stigmatising. Child victims are offered better protection under the current Sexual Offences Act or the proposed new Bill on Sexual Offences of 2002.[24] The provisions of the crime of incest are discriminatory and need to be amended. A gross miscarriage of justice is inevitable in practical situations with regard to persons who are related by affinity. These are persons who are related by marriage and not by blood. The example is given that where persons are married certain restrictions apply but if these same persons had merely cohabited there is no bar to future relations with other pertinent family members. The essence is that a family unit is created in each but the family unit that is legally recognised as being formed by marriage has certain restrictions

[24] Act 23 of 1957.

attached thereto by virtue of the crime of incest. Furthermore the policing of the crime will inevitably lead to inconsistent practical application to factual situations.

5. *The Criminal Law Amendment Act of 1997 needs to be amended.*

With the broadening of the crime of rape to include additional victims and perpetrators, the mandatory minimum sentences applicable will have to obviously be amended.

6. *Deliberate exposure to the HIV virus and other life threatening illnesses needs to be criminalized.*

It has been indicated in this study that certain victims of rape who might be deliberately exposed to the HIV virus do not lay a charge of rape as they do not perceive themselves to be rape victims. It is recommended that a separate statutory offence be adopted to protect these victims and other victims who are deliberately exposed to the HIV virus or other contagious life threatening illnesses. For purposes of expediency and consistency it is further recommended that the creation of such an offence be extended to incorporate victims who are not necessarily penetrative sexual assault victims.

3. IMPLICATIONS FOR FURTHER RESEARCH

This study has concentrated on a specific theme which is to reformulate the current narrow definition of rape. It is acknowledged that this study can possibly be subjected to criticism as certain aspects have not been dealt with. The juridical possibilities that can relate to the crime of rape and its specific elements are extensive. Accordingly only specific substantive aspects of the law pertaining to the redefinition of the crime of rape has been dealt with according to the theme chosen. The procedural aspects relating to the reformulisation of the crime of rape is extensive and could form the topic of a number of dissertations alone. This study has provided the information behind the skeletal structure of gender-neutrality with

regard to the classification of rape victims. Despite this there are a number of implications for further research on rape law reform. These are:

* More *research* needs to be conducted with regard to the recognition and fair treatment of rape victims.

* A new, comprehensive and *revised definition needs to be implemented.*

* All rape victims need to be recognised by the law and society

* By recognizing other victims of penetrative sexual assault as rape victims, perpetrators of these acts can be punished on the same level and manner as convicted persons under the present definition so that *no discrimination occurs, with regard to punitive measures of acts committed which are identifiable as rape.*

* A *balance* is needed to find a satisfactory approach to the legal aspects as well as the social aspects relating to the victim's needs.

* The crime of indecent assault should rather be applied as a primary remedy to lesser offences which involve no acts of sexual penetration.

* The broadening of the concept of rape to acts of penetration such as oral, anal, object and digital penetrative sexual assault, the values envisaged in the Constitution will be promoted. This will ensure that *all victims* and *perpetrators* of the crime of rape will be treated fairly and equally. [25]

* The adoption and implementation of *rape shield laws* in our justice system will afford victims greater protection and increase reporting.

[25] Sections 9(1) and 9(3) of Act 108 of 1996.

* Additional penalties for deliberate exposure to the HIV virus pertaining to rape victims within a new revised definition of rape are needed as well as a separate statutory offence relating to harmful HIV-related behaviour to provide additional protection to victims.

A new definition of rape could be effectively instituted, as is the case in Nebraska and Connecticut. Reform is desperately needed to meet the current needs of people and to comply with the new Constitution.

4. SYNTHESIS

In chapter one it was stated that the aim of the research was to ascertain whether the crime of rape is the appropriate crime to be reformulated to incorporate additional victims of sexual assault. This question is pertinent especially if the purpose behind the creation of the original crime is considered. The crime of rape was created as a property crime. In order to provide the basic reasoning behind why the crime of rape should specifically be extended to other victims of sexual offences, a reconciliation based on the nature of the penetrative sexual assault, the potential perpetrators and victims and the psychological consequences experienced by victims of sexual offences was undertaken.

The crime of rape is a penetrative sexual assault which has as a consequence, the phenomenon Rape Trauma Syndrome. Accordingly victims of sexual offences were classified into categories of penetrative sexual assault victim and an investigation into the psychological consequences experienced by these victims was undertaken. A causal nexus between the categories of victims of penetrative sexual offences identified in this study and the crime of rape has therefore been established. The crime of rape should therefore be extended to incorporate all the categories of penetrative sexual assault victims which have been identified as rape victims in this study. It is evident that due to a lack of categorisation of certain penetrative sexual assaults by the South African Law Commission, *lacunae* exists within the proposed definition of rape in the Sexual Offences Bill of 2002. The present author therefore suggests the following definition:

"*Sexual penetration*" means the slightest penetration of the anus or *labia majora* of a person by any part of the body of another person or an object which includes fellatio or cunnilingis or any sexual contact with the sex organs of a person in a manner which simulates intercourse.

"Free agreement" means any circumstances where valid consent is lacking or where there is a lack of knowledge as to the true and material facts pertaining to the sexual intercourse.

Rape

1. **Rape is the unlawful and intentional sexual penetration of a person without free agreement.**

2. **A person found guilty of an offence, without aggravating factors, under subsection 1 shall be liable to a mandatory prison sentence of 15 years in the case of a first conviction, and in the cases of a second conviction or the presence of aggravating factors, to a minimum sentence of life imprisonment in the absence of substantial or compelling circumstances.**

Deliberate exposure to the HIV virus or contagious life threatening illnesses[26]

1. **Any person who has human immunodeficiency virus infection or a contagious life threatening illness and who knows of such infection and nevertheless proceeds to have unprotected sexual intercourse, whether consensual or otherwise, with a person without disclosing their infected status, or engages in intentional harmful behaviour which may lead to**

[26] Again one would has to distinguish between consensual and non-consensual crimes as with the former, knowledge that one person is infected would be a defence and it is further present author's submission that a delictual action may be instituted for both consensual (if the person instituting action has no knowledge of the other party's infection) and non-consensual acts of sexual intercourse.

another person contracting the illness is guilty of an offence and shall be liable to life imprisonment.

2. **If the perpetrator has human immunodeficiency virus infection, it shall not be a bar to the laying of a charge under the common law offences of rape, murder, culpable homicide or assault with the intent to cause grievous bodily harm or attempt to commit these offences.**

In conclusion, the view of Groth may be supported where he states: [27]

> *It makes more sense to regard rape as any form of forcible sexual assault, whether the assailant intends to effect intercourse or some other type of sexual act. There is sufficient similarity in the factors underlying all types of forcible sexual assault – and in the impact such behaviour has on the victim – so that they may be discussed meaningfully under the single term of rape.*

[27] Groth , A.N. **"Men who Rape"** (1980) on 3.