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**DEFINING THE CRIME OF RAPE
UNDER SOUTH AFRICAN LAW:
A RECONSIDERATION**

BY

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For all other victims of rape



DEDICATIONS

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XXXXXXXXXXXX



"Rightly conceived time is the friend of all who are in any way in adversity, for its many roads wind in and out of the shadows sooner or later into sunshine, and when one is at its darkest point one can be certain that presently it will grow brighter."

(Arthur Bryant: Illustrated London News)



SUMMARY

DEFINING THE CRIME OF RAPE UNDER SOUTH AFRICAN LAW: A RECONSIDERATION

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The study undertaken is concerned with the reformulation of the common law crime of rape from a juridical and socio-psychological perspective. It is based on the premise that the common law definition of rape is insufficient. Specific attention is given to the current crime of rape and the proposed amendments introduced by the South African Law Commission. In the haste to transpose the concept of gender-neutrality implemented in other countries to the crime of rape in South Africa, the basic reasoning behind why the crime of rape should be extended to certain categories of victim has been neglected.

Rape as a form of penetrative sexual assault is critically examined. The focus of this study is to identify categories of penetrative sexual assault victim in order to justify the extension of the crime to certain victims and to facilitate the application of an extended definition to factual situations. The classification of victims is accomplished with reference to psycho-social data in order to provide a plausible explanation as to why the crime of rape, which was originally created as a property crime, should be extended to additional victims. The common law crimes which can be applied to penetrative sexual assault victims are critically examined.

A comparative overview of the definitions of rape adopted in Australia, Britain and the United States of America is undertaken. An investigation is also undertaken into the impact of HIV on rape victims. The extension of the definition of rape to persons who engage in unprotected sexual intercourse with a



person who intentionally exposes him or her to the HIV virus or another life threatening illness is examined. The possibility of consolidating the common law crimes into a statutory offence applicable to harmful HIV related behaviour for purposes of expediency and deterrence is examined.

A perspective is therefore provided as to the motivation behind why additional penetrative sexual assault victims should be classified as rape victims. The efficiency of the current and proposed definitions of rape is highlighted and examined. Where *lacunae* are established, solutions are proposed.



OPSOMMING

DIE OMSKRYWING VAN DIE MISDAAD VERKRAGTING IN DIE SUID- AFRIKAANSE REG: 'n HEROORWEGING

DEUR CHARNELLE VAN DER BIJL

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Hierdie studie behels die heromskrywing van die gemeenregtelike misdaad van verkragting vanuit 'n sosio-psigologiese perspektief. Dis is gebaseer op die uitgangspunt dat die gemeenregtelike definisie van verkragting onvoldoende is. Aandag word spesifiek geskenk aan die misdaad van verkragting, sowel as die voorgestelde wysigings deur die Suid Afrikaanse Regskommissie. In die haas om die konsep van geslags-neutraliteit, wat in ander lande ten opsigte van die misdaad van verkragting geïmplementeer in die Suid-Afrikaanse Reg in te voer, blyk dit dat die basiese beweegrede waarom die misdaad van verkragting uitgebrei moet word na sekere kategorieë slagoffers, agterweë gelaat is.

Verkragting as 'n vorm van geslagentelike aanranding by wyse van penetrasie word krities ondersoek. Die fokus van die studie is om sekere kategorieë slagoffers van sekere aanranding by wyse van penetrasie te identifiseer, ten einde die uitbreiding van die misdaad van verkragting na hierdie slagoffers te regverdig en die toepassing van die uitgebreide definisie op feitlike situasies toe te pas. Slagoffers sal geklassifiseer word met verwysing na psigo-sosiale data ten einde 'n werkbare oplossing te bied waarom die misdaad van verkragting, welke oorspronklik as 'n eiendomsmdaad geskep is, uitgebrei moet word na addisionele slagoffers. Die gemeenregtelike misdade wat aangewend kan word ten aansien van die geïdentifiseerde kategorieë slagoffers word krities ondersoek.



'n Regsvergelykende studie van die definisies van verkragting aangeneem in Australie, Brittanje en die Verenigde State van Amerika word onderneem. Die impak van MIV op slagoffers van verkragting word ook ondersoek. Die uitbreiding van die definisie van verkragting word ondersoek ten opsigte van HIV positiewe persone wat in onbeskermd seksuele omgang deelneem met 'n persoon wat hom of haar doelbewus blootstel aan die MIV virus of 'n ander lewensgevaarlike siekte. Die moontlikheid om die gemeenregtelike misdaad van verkragting van toepassing op skadelike MIV verwante optrede, te konsolideer, ten einde bespoediging en afskrikking ten doel te hê, word geëvalueer.

Perspektief word gegee betreffende die motivering waarom addisionele slagoffers van aanranding by wyse van penetrasie as verkragting slagoffers geklassifiseer moet word. Die effektiwiteit van die huidige en voorgestelde definisies van verkragting word uitgelig en ondersoek. Waar *lacunae* vasgestel word, word oplossings voorgestel.

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CHAPTER ONE

THEME ANALYSIS, CONCEPTUALIZATION AND PROBLEM STATEMENT

1. Introduction
2. Conceptualisation
 - 2.1. *Sexual assault*
 - 2.2. *Perpetrator*
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4. Aim of research
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1. INTRODUCTION

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

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

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

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

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

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



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

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

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

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

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

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

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

⁶ 1998 12 BCLR 1517 (CC) on 1559 F-G.

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

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

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

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

⁷ **S v M** (2) 1990 1 SACR 456 (N).

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



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

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

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

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

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



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

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

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

virginis vel viduae honestae illicita defloratio.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

She also comments as follows:³⁹

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

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

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

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

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

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

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

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

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

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

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

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

⁴⁴ “SALC Discussion Paper 85 of 1999.”

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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



2. CONCEPTUALIZATION

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

2.1. SEXUAL ASSAULT

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

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

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

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

Assault consists in unlawfully and intentionally

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

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

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

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

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

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

⁵³ *Ibid.*

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



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

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

Milton defines indecent assault as an.⁵⁷

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

Snyman defines the crime of indecent assault as follows:⁵⁸

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

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

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

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

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

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

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

⁵⁸ "Criminal Law" (1995) on 419.

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

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

3. *Attempted rape includes unwanted sexual intercourse arising from force or threat of force.*
4. *Rape which includes unwanted sexual intercourse arising from force and includes unwanted sexual intercourse per vaginam or per anum, oral intercourse or penetration by objects.*

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

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

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

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

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

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

2.2. PERPETRATOR

Snyman defines a person as a perpetrator if:⁶³

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

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

The South African Law Commission states:⁶⁵

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

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

⁶⁴ See chapter three in this regard.

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



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

An accomplice is defined by Snyman as:⁶⁶

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

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

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

2.3. VICTIM

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

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

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

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

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

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



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

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

3. PROBLEM STATEMENT

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

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



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

4. AIM OF RESEARCH

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

5. METHOD OF RESEARCH

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

6. LIMITATIONS OF STUDY

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

7. STRUCTURE OF THESIS

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

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

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

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

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

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

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

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



CHAPTER TWO

VICTIMS OF PENETRATIVE SEXUAL ASSAULT

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

1. INTRODUCTION

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

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



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

2. CATEGORISATION OF VICTIMS OF PENETRATIVE SEXUAL ASSAULT

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

2.1.1. EXAMPLES

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

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

See detail in chapter one.



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

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

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

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

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

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

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

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



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

2.1.2. FREQUENCY

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

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

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

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

Figure 1. Rape Statistics for 1998

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

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

2.1.3. PSYCHOLOGICAL EFFECTS

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

Walter has defined violence as:¹⁹

¹⁵ See chapter one and paragraph 2.2 in this regard.

¹⁶ Groth, A.N. "Men who Rape" on 41.

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

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

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

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

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

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

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

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

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

²¹ *Ibid.*

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.1.4. REASONS FOR UNDERREPORTING

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

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

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

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

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

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

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

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

Each of these rape myths will accordingly be addressed briefly.

- * **"Nothing happened"**

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

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

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

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

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

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

* **“She wanted it”**

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

* **“She deserved it”**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.2.1 EXAMPLES

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

Three types of marital rape have been suggested:⁴⁹

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

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

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

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

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

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

2.2.2. FREQUENCY

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

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

⁵¹ *Ibid.*

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

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

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

⁵⁵ *Ibid.*

2.2.3. PSYCHOLOGICAL EFFECTS

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

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

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

⁵⁶ See <http://www.vaw.umn.edu/1/vawnet/mrape/htm> "Marital Rape" accessed 1 August 2002. See in general Bergen, R.K. "Wife Rape: Understanding the Response of Survivors and Service Providers" (1996) and Russell, D.E.H. "Rape in Marriage"(1990).



2.2.4. REASONS FOR UNDERREPORTING

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

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

2.3. PENETRATIVE SEXUAL ASSAULT: MALE PERPETRATOR – MALE VICTIM

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

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

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

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

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

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

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

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

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

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

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

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

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

2.3.1. EXAMPLES

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

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

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

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

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

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

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

⁶⁷ *Ibid.*



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

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

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

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

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

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

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

⁷⁰ The term used is 'wyfie'.

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

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

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

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

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

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

⁷⁴ *Ibid.*

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

⁸⁷ *Ibid.*

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

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

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

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

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

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

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

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

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

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

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

2.3.2. FREQUENCY

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

¹⁰⁶ *Ibid.*



2.3.3. PSYCHOLOGICAL EFFECTS

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

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

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

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

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

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

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

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

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

¹¹⁰ This includes phobic anxiety.

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

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



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

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

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

¹¹⁴ *Ibid.*

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

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

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

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

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

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

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

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

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

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

¹²⁰ See paragraph 2.2.

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

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

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

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

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

2.3.4. REASONS FOR UNDERREPORTING

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹³¹ Interview of the 15 March 2002.

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

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

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

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

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

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



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

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

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

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

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

2.4.1. EXAMPLES

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

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

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

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

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



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

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

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

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

2.4.2. FREQUENCY

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

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

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

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

Figure 4. Detailed Breakdown of South African Statistics for 1998

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

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

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

2.4.3. PSYCHOLOGICAL EFFECTS

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

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

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



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

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

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

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

2.4.4. REASONS FOR UNDERREPORTING

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

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

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



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

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

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

2.5.1. EXAMPLES

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

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

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

¹⁴⁹ Section 14 of Act 23 of 1957.

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

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

2.5.2. FREQUENCY

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

2.5.3. PSYCHOLOGICAL EFFECTS

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

¹⁵¹ See paragraph 2.3.2.

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

¹⁵³ See the following websites which supports these findings:

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



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

2.5.4. REASONS FOR UNDERREPORTING

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

2.6. PENETRATIVE SEXUAL ASSAULT: FEMALE PERPETRATOR

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

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

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

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



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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

¹⁶⁴ See chapter three.

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



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

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

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

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

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

¹⁶⁷ Section 14 of Act 23 of 1957.

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

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



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

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

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

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

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

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

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

¹⁷³ Section 14 of Act 23 of 1957.



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

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

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

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

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

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

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



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

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

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

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

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



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

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

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

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

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

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



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

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

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

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

¹⁸² "SALC Discussion Paper 85 of 1999".

¹⁸³ This entails penetration by fingers or hands.

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

¹⁸⁵ See chapter six paragraph 1.2 for detail.

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



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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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



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

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

3. CONCLUSION

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

Edwards states:¹⁹⁹

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

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

¹⁹⁸ See chapter six of this study.

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



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

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

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

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



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

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

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

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

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



CHAPTER THREE

CURRENT SOUTH AFRICAN LAW AND VICTIMS OF PENETRATIVE SEXUAL ASSAULT

1. Introduction
2. Existing crimes pertaining to sexual offences which are catered for in terms of South African law
 - 2.1. Common law rape
 - 2.2. Marital rape
 - 2.3. Statutory rape: section 14 of the Sexual Offences Act 23 of 1957
 - 2.4. Non-consensual sodomy
 - 2.5. Indecent assault
3. Conclusion

1. INTRODUCTION

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

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



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

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

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

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

¹ Section 14 of Act 23 of 1956.

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

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

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



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

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

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

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

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

The Law of Evidence Amendment Act of 1988 defines indigenous law as:⁷

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

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

⁷ Section 1(4) of Act 45 of 1988.



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

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

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

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

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

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

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

¹² Act 38 of 1927.

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

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



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

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

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

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

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

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

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

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

husbands and consequently traditional African society does not recognize marital rape as such.¹⁹

The African tradition²⁰ is remarkably different from westernisation and is apparent from a cultural context.²¹ A child's interests may be subordinate to those of the family.²² Certain customary practices may actually amount to assault.²³

The United Nations approach to harmful cultural practices is that:²⁴

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

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

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

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

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

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

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

²³ For example initiation circumcisions or sexual abuse.

²⁴ Article 24 (3) of the United Nations Convention on the Rights of the Child (1989).

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



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

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

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

A reason for underreporting of the crime of male rape in South Africa is that many laws, influenced by the history of the crime of rape, have reflected the belief that rape could only be committed on a female.²⁶ Currently the only remedies available to male victims of sexual penetrative assault is to lay a charge of either assault with the intent to cause grievous bodily harm, non-consensual sodomy or indecent assault. The latter category which incorporates anal, oral, digital and object penetration may however be experienced by the victims of such forced penetrative sexual assault as rape. As mentioned in chapter two of this study, from a victim's point of view the violation may well be more traumatic both psychologically and physiologically.²⁷

The South African Law Commission has proposed a broader definition of rape which was introduced in a Discussion Paper on sexual offences²⁸ and

²⁶ Quina, K. & Carlson, N.L. "Rape, Incest and Sexual Harrassment" (1989) on 5. In a random survey with campus students, Quina and Tyre identified one male victim of adult rape for every three female victims.

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

²⁸ "SALC Discussion Paper 85 of 1999."



supplemented with a further Discussion Paper in 2002.²⁹ The focus of these Discussion Papers is on violence against women and children. The proposed amendments will be examined as well as the alternate offences under which victims of sexual assault are currently forced to claim redress under should the crime perpetrated upon them not comply with the definition of rape.

2.1 COMMON LAW RAPE

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

2.1.1. THE ELEMENTS OF RAPE

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

Snyman defines the crime of rape as follows:³²

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

²⁹ "SALC Discussion Paper 102 of 2002."

³⁰ Groth, A.N. "Men who Rape" (1979) on 11.

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

³² Snyman, C.R. "Criminal Law" (1995) on 424.



Hunt defines the crime of rape in similar terms:³³

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

Burchell and Milton define the essential elements of rape as being:³⁴

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

The South African Law Commission defines rape as follows:³⁵

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

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

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

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

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

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

³⁵ "SALC Discussion Paper 85 of 1999" on 69.

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

2.1.1.1. DEED

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

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

2.1.1.2. UNLAWFULNESS

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

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

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

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

⁴⁰ Act 133 of 1993.

⁴¹ Act 116 of 1998.



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

2.1.1.3. FAULT

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

⁴² Section 1 of Act 103 of 1987.

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

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

⁴⁵ Snyman, C.R. "Criminal Law" (1995) on 346.

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

⁴⁷ Snyman, C.R. "Criminal Law" (1995) on 135.

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



2.1.2. VICTIMS

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

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

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

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

⁴⁹ See paragraph 2.1.1.

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



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

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

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

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

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

⁵¹ *Ibid.*

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

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

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

⁵⁵ 1952 4 SA 117 (O).



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

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

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

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

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

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

⁵⁷ *Ibid* for detail.

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

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



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

As mentioned earlier, the penetration⁶¹ requirement with regard to *rape* in South African law is exclusive and entails penetration of the vulva by the penis,⁶² however slight, and no emission of semen is necessary.⁶³ The crime of *sodomy*

⁶⁰ The customary law position can be criticised for the following reasons:

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

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

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

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



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

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

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

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

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

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

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

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



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

In the case of **S v M Didcott** J remarks that:⁷¹

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

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

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

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

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

⁷² Groth, A.N. "Men who Rape" (1979) on 3.

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



- * Lack of consent

- * Penetration of whatever means.

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

2.1.3. CONSENT

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

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

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

⁷⁶ Section 14(1) of Act 23 of 1957.



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

- * *Duress*: Where a woman is forced to submit by way of fear or threats to submit to intercourse, rape is committed.⁸⁶

- * *Age*: Public policy dictates the irrebuttable presumption that girls under the age of 12 years are incapable of consenting to intercourse, and although they might understand the nature of the act and consent to⁸⁷ sexual intercourse, the consent is negated.⁸⁸

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

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

⁷⁹ Joubert, W.A. *LAWSA* vol 6 (1981) on 248.

⁸⁰ Snyman, C.R. "Criminal Law" (1995) on 426.

⁸¹ *Ibid.*

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

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

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

⁸⁵ See the cases of *R v Ryperd Boesman* and *R v C supra*.

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

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

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



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

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

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

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

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

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

⁹² See *R v Ryperd Boesman* 1942 1 PHH 63 (SWA).



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

Consent is therefore excluded by:⁹⁵

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

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

⁹⁴ See R v C 1952 4 SA 117 (O).

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



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

An important aspect relating to the element of consent is the *withdrawal of consent* and the *defence of automatism*.⁹⁶ There exists a viewpoint that should a woman withdraw her consent⁹⁷ after penetration has occurred and the accused does not desist, rape is committed.⁹⁸ It may be argued that automatism can be raised as a defence in this scenario.⁹⁹ Automatism is the legal defence that arises where no act is assumed because of involuntary mechanical behaviour.¹⁰⁰

The author Snyman says on the topic:¹⁰¹

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

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

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

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

⁹⁹ Snyman, C.R. "Criminal Law" on 53 - 55.

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

¹⁰¹ Snyman, C.R. "Criminal Law" on 54.

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



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

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

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

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

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

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

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

2.1.4. CRITICISM OF COMMON LAW RAPE

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

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

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

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

¹⁰⁶ Section 14 of the Sexual Offences Act 23 of 1957.

¹⁰⁷ Snyman, C.R. "Criminal Law" (1995) on 427.



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

2.1.4.1. GENDER-SPECIFIC

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

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

As Rumney and Morgan-Taylor state:¹¹¹

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

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

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

¹⁰⁹ Snyman, C.R. "Criminal Law" (1995) on 425.

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

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

¹¹² Act 108 of 1996.

¹¹³ Section 9(1) and 9(3) of Act 108 of 1996.



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

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

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

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

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

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



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

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

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

2.1.4.2. RAPE IS ANATOMICALLY SPECIFIC

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

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

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

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

¹¹⁹ Section 9(1) and 9(3) of Act 108 of 1996.

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

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

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

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

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

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

¹²¹ "Principles of Criminal Law" (1997) on 198 –199.

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

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

2.1.4.4. THE PENETRATION REQUIREMENT

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

The author Hall states:¹²⁵

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

As Burchell and Milton state:¹²⁶

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

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

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

¹²⁶ "Principles of Criminal Law" (1997) on 492 fn55.



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

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

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

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

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



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

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

2.2. MARITAL RAPE ¹²⁸

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

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

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

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

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



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

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

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

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

2.2.1. THE ELEMENTS OF MARITAL RAPE

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

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

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

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

¹³⁴ Act 133 of 1993.

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



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

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

For the purposes of this study *marital rape is defined in accordance with the provisions of Section 5 of the Prevention of Family Violence Act¹³⁶ and as amended and supplemented by the Domestic Violence Act.¹³⁷*

2.2.1.1. DEED

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

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

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

¹³⁶ Act 33 of 1993.

¹³⁷ Act 116 of 1998.

¹³⁸ 1993 1 SACR 297 (CkA).

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

¹⁴⁰ See detail in par 2.1.2 of this chapter.

¹⁴¹ R v R 1991 4 All ER 481.

¹⁴² Act 116 of 1998.



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

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

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

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

2.2.1.2. UNLAWFULNESS

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

¹⁴³ See chapter two in this regard. He stated that: *[t]he husband cannot be found guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given herself in this kind unto the husband which she cannot retract.* As published in History of the Pleas of the Crown 1736 and referred to by Russell, D.E.H. **“Rape in Marriage”** (1982) on 17. See Pieterse, M. **“Beyond the Reach of Law? HIV, African Culture and Customary Law”** (2000) on 435 where it is mentioned that traditional African society does not know of, nor acknowledge the concept of marital rape.



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

2.2.1.3. FAULT

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

2.2.2. VICTIMS

As mentioned earlier, until the mid-nineties a husband could not be found guilty of raping his wife in terms of common law.¹⁴⁵ The position was rectified with the introduction of the Prevention of Family Violence Act¹⁴⁶ and Domestic Violence Act.¹⁴⁷ The introduction of the former Act recognised the category of female sexual assault victim inside of marriage only. The latter Act provides no distinction between male and female penetrative sexual assault victims inside of marriage and all forms of sexual assault are recognised as being worthy of protection *inter alia* forced sexual assault *per anum* or *per vaginam*, oral and digital intercourse. These acts are not recognised by the statutory regulations as a rape *per se*.

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

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

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

¹⁴⁶ Act 133 of 1993.

¹⁴⁷ Act 116 of 1998.



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

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

2.2.3. CONSENT

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

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

¹⁴⁸ Act 133 of 1993.

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

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



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

2.2.4. CRITICISM OF MARITAL RAPE

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

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

There are two arguments that have been suggested against the incorporation of marital rape within the common law definition of rape. One argument that may be offered is that *to allow marital rape to be included in the common law, may lead to false reporting*. The present author believes that this possibility can occur in any event and one need not be married to misuse the legal process.

The second argument that has been suggested is that *if the spouse is too violent, then a charge of indecent assault may be laid or a divorce obtained.*¹⁵² Firstly,

¹⁵¹ See Hall, C. "Rape. The Politics of Definition" (1988) on 79 - 80 wherein she states that the victim's freedom of choice to sexual intercourse or not was never the focal point of rape laws. She says that: *The origin and development of rape law demonstrated that it was never designed to protect the victim's freedom of choice, but the proprietary interests of her legal guardian... Rape laws and marriage laws were twin mechanisms in the legal regulation of men's rights over female sexuality and reproductive powers.*

¹⁵² See *R v Gumede* 1946 1 PHH 68 N on 87; Also *S v Ncanywa* 1992 1 SACR 209 (Ck) on 235 in which Heath, J states that the fiction of consent and even irrevocable consent by a wife to intercourse with her husband has no foundation in law and also offends against the *boni mores* of society. He further mentions in this regard that: *The husband and wife have in modern society become equal partners with full dominion over their own bodies. To withhold consent to sexual intercourse unilaterally, may be contrary to marital obligation to allow intercourse by the other partner in the marriage and may affect the continued existence of the marriage relationship*

this view belies the notion that rape is a crime and not a civil remedy. Secondly, although indecent assault is a crime with severe penalties, it does not explain or justify why a spouse should seek relief under a different crime, as one less competent verdict then exists. The victim could have access to divorce on the basis of a violent crime and thus both a civil and criminal action can be instituted. Thirdly, if there is no bar to a charge of indecent assault being laid against a spouse, then the same should be applicable to rape and the theory of irrevocable consent has been rejected in case law.¹⁵³

2.2.4.2. ARGUMENTS IN FAVOUR OF THE INCORPORATION OF MARITAL RAPE INTO THE COMMON LAW DEFINITION OF RAPE

Two arguments are raised against the incorporation of marital rape within the common law definition. Firstly it is argued that *consent is the essential element* distinguishing lawful sexual intercourse from rape, which is why the notions of the husband's immunity is a fallacy as it suggests that rape in marriage is non-existent or not serious. The second argument offered is that the marital contract does not condone sexual violence and it is consequently *contra bonis mores* for a victim to be forced to submit to her/ his spouse's sexual demands.¹⁵⁴

Should marital rape, incorporating both male and female victims of sexual penetrative assault, be included within a broader spectrum definition of rape? The present author believes that this should be the case, as the reporting of the crime lies in the hands of the victim although some might not want to report the crime because of feelings of love toward the assailant. There is no physical

between the parties. The marital obligation does not however, entitle the husband to take the law into his own hands by having sexual intercourse with his wife against her will.

¹⁵³ See **S v Ncanywa** 1992 1 SACR 209 (Ck).

¹⁵⁴ See **S v Ncanywa** 1992 1 SACR 209 (Ck) 235 in which Heath J criticizes the irrevocable consent fiction as being *contra bonis mores*. He further mentions that the injured spouse has a civil address. Naturally the same situation in the converse could be applicable to husbands; See also Labuschagne, J.M.T "Nie Konsensuele Geslagsmisdade: 'n Misdaadsistematiese Herwaarding" (1981) at 19. See the following cases which supported the submission that a husband could not be found guilty of raping his wife; **R v M** 1953 4 SA 393 (A); **R v K** 1958 3 SA 420 (A); **S v H** 1988 2 SA 750 (N).



difference between the rapist who rapes a stranger or a family member. All rapists, whether male or female, are guilty of a heinous crime and the fact that spouses may be a victim over an extended period of time, should be an aggravated factor as regards sentencing.

It is submitted that the deficiency in the statutory regulations need to be addressed as only one category of identified penetrative sexual assault victim is identified and catered for. This is the category of female penetrative sexual assault victim inside of marriage. Male victims of penetrative sexual assault inside of marriage are ignored and other forms of penetrative sexual assault are not specifically included in these statutory provisions. Further the category of sexual assault victim where the HIV/ AIDS status is deliberately withheld is not provided for in the statutory regulations. It is proposed that the victims of marital rape also be included in one broad definition of rape.

2.3. STATUTORY RAPE: SECTION 14 OF THE SEXUAL OFFENCES ACT 23 OF 1957

As is evident from Chapter Two of this study, the rate of child abuse is horrific and on the incline.¹⁵⁵ In as far back as 1996, the Child Protection Unit dealt with 35 838 cases of crimes against children and the increase has been estimated at 36% per year since 1993.¹⁵⁶ Statistics of officially reported cases during the mid-nineties (1995-1996) were as follows:¹⁵⁷

- * Rape of children increased from 10 037 to 13 859 (increase in percentage to a staggering 38%).

¹⁵⁵ Schurink, E. "Statistics of Shame: South African Child Protection System Disintegrating" (1996) on 6. See also "Staggering Statistics On Child And Teenage Sex" *Pretoria News* 9 September 1995 on 5.

¹⁵⁶ See "SALC Issue Paper 10 of 1997" on 15.

¹⁵⁷ *Ibid.*



- * Unlawful anal intercourse (indecent assault) with children showed an increase from 660 – 893 (an increase of 35%).
- * *Sexual offences under the Sexual Offences Act 23 of 1957 increased by 4% from 1 121 to 1 160 cases.*

A set of principles relating to children's interests was developed by a working group, after a conference at the University of Durban Westville in 1994, which was also favoured by the Project Committee.¹⁵⁸ The principles are to be supported in that they provide factors that need to be considered when dealing with child sexual offence victims, which factors can also be applied to adult victims, to try and minimise the manner in which the victim is dealt with by the legal system.

The Sexual Offences Act¹⁵⁹ which was introduced by the South African Law Commission covers various aspects of child abuse, which by definition includes incestuous acts with children, and section 14 is especially relevant regarding sexual crimes against children.¹⁶⁰ The main function of the Act was to regulate what society perceived as moral or immoral behaviour, although these norms continue to change with passing years.

The topic of incest will be briefly dealt with here as children party to incestuous relationships who are under the age of 16 years and engage in sexual intercourse can also be incorporated within the crime of statutory rape.¹⁶¹

The South African Law Commission states:¹⁶²

¹⁵⁸ See in general "SALC Issue Paper 10 of 1997" on 12.

¹⁵⁹ Act 23 of 1957.

¹⁶⁰ Many of the provisions have their origin in Colonial times. See Milton, J.R.L. "The Sexual Offences Act" (1988) on 269.

¹⁶¹ The age of consent relating to persons who are under 19 years and engage in so-called immoral or indecent acts would not be relevant here as incest relates to sexual intercourse. The provisions of section 14 relating to sexual intercourse where the child is under the age of 16 years is applicable.



The criminalizing of incest is often justified on the ground that it prevents a particular and abhorrent form of sexual abuse of children. As incest is only committed by the performance of vaginal sexual intercourse, the crime cannot be used to penalize homosexual abuse of children or indecent assaults upon children or the performance of unnatural sex acts with a child; nor does it punish a female relative abusing a female child.

Another reason cited is that the prohibition prevents persons with the same generic makeup from procreating and producing offspring with possible mental or genetic defects.¹⁶³

The South African Law Commission thus defines the common law crime of incest as the:¹⁶⁴

[unlawful] and intentional sexual intercourse between two persons who on account of consanguinity (blood relationship), affinity (relationship by marriage) or an adoptive relationship may not marry one another.

Snyman defines incest as being the:¹⁶⁵

[unlawful] and intentional sexual intercourse between male and female persons who are prohibited from marrying each other because they are related within the prohibited degrees of consanguinity, affinity or adoptive relationship.

Incest can therefore be defined for purposes of this study as *sexual intercourse between two persons who are related to each other in a degree which precludes a lawful marriage between them.*¹⁶⁶

¹⁶² See "SALC Discussion Paper 85 of 1999" on 138.

¹⁶³ *Ibid.*

¹⁶⁴ See "SALC Discussion Paper 85 of 1999" on 135. As defined by Milton, J.R.L "South African Criminal Law and Procedure: Volume II" (1996) on 234.

¹⁶⁵ "Criminal Law" (1995) on 335.



The prohibited categories are divided into consanguinity, affinity or adoptive relationship:

- * *Consanguinity (blood relationship)*: Persons in the direct line (ascendants and descendants) and collaterals related to a common ancestor, may not have sexual intercourse or marry.
- * *Affinity*: Persons who are relations by marriage in the ascending and descending line.
- * *Adoptive relationship*: This is where a prohibition against marriage or sexual intercourse between adoptive parents and adopted children exists.

Various cultures' approaches towards incest differ. This is especially the case with regard to customary law and these approaches are contrary to the common law definition of incest. A reason for this being that in customary law there is a focus on family and the continuing of the family line. In customary law, however, the incidences of incestuous relationships in the African community¹⁶⁷ are on the increase and in a study undertaken¹⁶⁸ it is stated that rape of children by their

¹⁶⁶ Consent is not an issue, however, rape would occur if there were non-consent. A comparative overview of countries such as Australia and New Zealand, regarding the crime of incest, reveals the following:

In *Australia* the crime is defined in Section 92L of the Crimes Act 1900 and provides that any person who is related in the direct line and linear line, including a half brother/ sister and stepchild, are included.

In *New Zealand*: The crime is defined in Section 130 of the New Zealand Crimes Act of 1961 as sexual intercourse between brothers and sisters including half brothers/ sisters and parents/ grandparents as well as children/ grandchildren. There is however, a condition that the person must know of the relationship between the parties. The sentence imposed is to a maximum of 10 years imprisonment. It also includes *in loco parentis* relationships but the shortfall is that it does not afford similar protection to boys.

¹⁶⁷ See Leclerc-Madlala, S. "Crime in an Epidemic: The Case of Rape and AIDS" (1996) on 35.

¹⁶⁸ *Ibid.*



fathers were virtually unheard of in past decades but is now prevalent.¹⁶⁹ A reason furnished, is that it is more in the line of a preventative approach to avoid contracting the HIV virus, or even to retain the family loyalty so that the father does not die alone.

There are further problems which exist in customary law. Firstly, there is nothing substantive as such (which exists in written form) which may be used as guidelines and therefore uniform application of customary law is difficult.

Secondly, the constitutionality of certain practices may be questioned. There needs to be a balance between customary law and the Bill of Rights in the Constitution of which the former should be interpreted in line with the principles in the Constitution. The Bill of Rights enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.¹⁷⁰

Persons who practice customary law are thus also bound by the Constitution and all criminal laws and statutes of our country. Crimes and their penalties should be meted out equally, so that it will accord with the principles of the interest of justice and not deny rights of certain victims. In light of the aforementioned, the following questions may be asked:

- * Is the *criminalizing* of incest justifiable, especially in the light of sodomy, which has been abolished?
- * Is it *not discriminatory* to retain the crime of incest in view of the constitutional provisions which provide that a person may not be discriminated on the grounds of culture, birth, marital status or privacy?¹⁷¹

¹⁶⁹ This would also include cases of incest especially with very young children who have limited legal capacity and whose consent may be negated.

¹⁷⁰ Section 7(1) of the Constitution Act 108 of 1996.

¹⁷¹ Sections 9(3) and 14 of the Constitution Act 108 of 1996.



One reason offered for the criminalization of incestuous acts is that it protects society and prevents the sexual abuse of children.¹⁷² Another reason for the criminalization of incest is that it is aimed at the prevention of genetic defects should there be procreation between persons related in the prohibited degrees. This reason has also been criticised as it cannot apply to persons related by affinity.

Case law¹⁷³ supports the proposition that partial penetration is sufficient and consent is not an element of the crime, although it can be a defence.¹⁷⁴ What about the fact that incest often occurs by mutual consent? No prohibition exists against homosexual persons who engage in consensual sexual relationships. The same argument may be used that if committed by consenting adults in private, it is not the purpose of the law to interfere with consensual sexual activity.

In the **National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others** it was said that:¹⁷⁵

Outside of regulatory control, conduct that deviates from such publicly established norm is usually only punishable when it is violent, dishonest, treacherous or in some other way disturbing of the public peace or provocative of injury. In the case of male homosexuality however, the perceived deviance is punished simply because it is deviant. It is repressed for its perceived symbolism rather than its proof of harm.

¹⁷² The definition of a child is defined in terms of the international treaty of the "Convention on the rights of the child" as being a person under the age of 18 years, unless majority is attained earlier in terms of the law applicable to the child. See also "SALC Discussion Paper 85 of 1999" on 138 wherein it discusses and criticizes the fact that incest cannot be used to penalize homosexual abuse of children or indecent assaults upon children, nor can a female relative be punished for the abuse of children who are female.

¹⁷³ **R v Giles** 1926 WLD 211.

¹⁷⁴ "SALC Discussion Paper 85 of 1999" on 139-142.

¹⁷⁵ 1998 12 BCLR 1517 (CC) on 1563J - 1564A-B.



The same statement could be applied to cases of incest where parties above the age of 16 years engage in consensual sexual intercourse.¹⁷⁶ The question may be asked whether harm is actually caused, where parties above the age of 16 years who are related by affinity (not blood relations), engage in consensual sexual intercourse. An example is where a man has consensual intercourse with his daughter-in-law who is divorced from the man's son. If the daughter-in-law had never married the man's son there would have been no restriction imposed on her marrying the man. If one bears in mind that the termination of a marriage does not remove the prohibition of intermarriage one is clearly faced with an inequitable situation.¹⁷⁷ In addition it could be submitted that discrimination occurs on the basis of marital status.¹⁷⁸

The following submissions regarding the crime of incest were received by the South African Law Commission:¹⁷⁹

The Johannesburg Child Welfare Society was not in favour of a child being punished for incest regardless of any consent given. Their solution is that these children should be dealt with at a childrens' court enquiry or in a diversion programme as it is reflective of a dysfunctional family. Other authors suggested that consent be a defence depending on age. Similarly, this viewpoint was also rejected by others, on the grounds that psychological assessment would be necessary as children's maturity levels differ.

Submissions were also received that parenting figures who were not the biological parents of the child also be included under the crime of incest, as incest is based on sexual relations within a family unit. Other authors were of the view that incest should only be criminalized as regards the position where a

¹⁷⁶ Section 14 of Act 23 of 1957 criminalizes acts of sexual intercourse with minors who are under the age of 16 years of age.

¹⁷⁷ See Snyman, C.R. "Criminal Law" (1995) on 337.

¹⁷⁸ Section 9(3) of the Constitution Act 108 of 1996.

¹⁷⁹ *Ibid.*



person exploits another sexually as they foresee that problems could arise should the state criminalize a consensual act.¹⁸⁰

The present author is of the view that if incest as a crime is abolished, statutory rape could cover instances where children under the age of 16 years engage in consensual sexual intercourse with family members.¹⁸¹ The benefit in the abolishing of the crime of incest is that child victims of penetrative sexual assault and other indecent acts would not be labelled under a crime with a stigma attached thereto. Furthermore it could be argued that sexual intercourse between two consenting adults should not be punished. If one bears in mind that only sexual intercourse *per vaginam* is proscribed in terms of the crime of incest, a problem arises if persons related in the prohibited degrees engage in other forms of sexual intercourse dealt with in this study.¹⁸² An inequitable situation would arise where persons engaging in sexual intercourse *per vaginam* are prosecuted whereas certain persons who engage in other forms of penetrative sexual intercourse are not. An additional factor that needs to be considered is the practical enforcement of the crime. It is practically impossible to police the crime if it is committed between two consenting adults.

It may also be argued that the crime of incest infringes a number of constitutional rights such as equality¹⁸³ and privacy.¹⁸⁴ In the cases of affinity, additional discrimination occurs on the grounds of marital status.¹⁸⁵ The criminalizing of incest could also be viewed as discrimination on the grounds of culture or birth.¹⁸⁶ It is recommended that the crime of incest be abolished or amended for five reasons. Firstly to take into account the stigmatising effect it could have on child

¹⁸⁰ As per the Tshwaranang Legal Advocacy Centre; as per spokesperson Ms Clark Senior Public Prosecutor (Verulam) in "SALC Discussion Paper 85 of 1999" on 142.

¹⁸¹ Section 14 of Act 23 of 1957.

¹⁸² What supports the view that the crime of incest is only limited to sexual intercourse *per vaginam* is the provisions of clause 5 of the proposed Sexual Offences Bill of 2002 which extends the meaning of sexual penetration to incorporate additional forms of sexual intercourse.

¹⁸³ Section 9(1) of Act 108 of 1996.

¹⁸⁴ Section 14 of Act 108 of 1996.

¹⁸⁵ Section 9(3) of Act 108 of 1996.

¹⁸⁶ Section 9(3) of Act 108 of 1996.



victims who are in any event covered by a statutory crime if they are under the age of 16 years. Secondly, inequity arises in certain instances where persons are related by affinity. Persons who could have freely engaged in sexual intercourse or marriage are prohibited from doing so if either party was previously married to a relevant family member in a degree proscribed in terms of the crime of incest. Thirdly, the practical application of the crime to factual situations is problematic. It is highly probable that the practical enforcement of the crime leads to inconsistency depending on the nature of the sexual intercourse in question. Fourthly, inconsistency with regard to the application of the crime to persons who have cohabited with family members in the prohibited degree relating to affinity can arise. This can be illustrated by way of example. If a female cohabits with a man and then moves out and marries his father no incest is committed. However if this same female marries the man and subsequently gets divorced, she is unable to have sexual intercourse with, or marry, the father as the crime of incest will then be committed. This is clearly an absurd state of events. Lastly, if a balancing process is followed it is evident that a severe limitation of constitutional rights occurs which cannot be validly justified especially due to the reasons furnished above.¹⁸⁷ The discrepancies and inequity in a practical implementation of the crime far outweighs the advantages it could possibly have.

With regard to the question of marriage, the current position regarding homosexual persons who desire to marry could be upheld for cases of adult consensual, incestuous relationships too.¹⁸⁸ The proviso being that the limitation should apply to marriage between persons related by consanguinity (blood relatives) or adoptive relationship due to being *contra bonos mores*.¹⁸⁹ It is

¹⁸⁷ See Section 36 of Act 108 of 1996. See further the **National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others** 1998 12 BCLR 1517 (CC) on 1539 D-H in general in limiting rights and the balancing process that was followed when advocating the abolition of the crime of sodomy.

¹⁸⁸ The exclusion would be where parties are related by affinity such as a man and his daughter-in-law.

¹⁸⁹ It may be argued that the limitation is justifiable in terms of Section 36 of the Constitution Act 108 of 1996 as it is in the interests of society (the *boni mores*).



recommended that persons that are related by affinity should be allowed to marry. Participants of incest who engage in sexual relationships, would possibly stand the risk of genetically deformed children but that is a decision to be made by free choice on the part of the individuals concerned.¹⁹⁰

It could perhaps also be argued that by decriminalizing incest, children who grow up inside such an environment and who regard the behaviour as normal may be proponents of the crime when they become parents or adults. The present author is of the view that incest by consanguinity and adoptive relationships are not conducive to normal family relationships and could perhaps lead to being perceived as a free license to sexual abuse of family members and especially children. However, if the crime of incest was abolished, children who are under the age of 16 years would be covered by statutory rape. Their consent to the sexual intercourse would be negated due to the inability to appreciate the nature of the act. Rape would be committed if the consensual intercourse with the family member was performed under duress or due to the abuse of a relationship of authority.

The viewpoint that incest should be extended to include a person who is in *loco parentis*, is not supported here, as it would cover caretakers, guardians and teachers. If the child is over the age of consent and can decide for him or herself and voluntarily enter into sexual intercourse, then no real harm is done.¹⁹¹ If the person is coerced, then such conduct amounts to rape.

Society, and especially young children who later become part of society, should be protected as the stigma of incest is bound to cause psychological problems and dysfunction in the life of the child. However, most of the *mores* have changed as regards adultery and homosexuality, and in the light of the aforementioned, it may be argued that it is in the interests of justice that all

¹⁹⁰ There is no guarantee with a normal couple in any event that deformed children will not be born from their marriage or union, but there are no laws in place to avoid this, and even if there were it would be impossible to regulate.

¹⁹¹ Especially if it is a voluntary decision made and the person is able to understand the nature of the act and the consequences.



persons be treated equally by the legal system and that the crime of incest be abolished as long as the consensual activity occurs between adults in private.

The present author does not at all concede that incest is acceptable on any level but merely that it is perhaps a social or moral issue that needs to be seriously dealt with and not be expected to be resolved via the legal system. As mentioned above, consensual relations with children could be punished under a broader consolidated definition of rape but would in any event still be punished under the current statutory crime of rape.¹⁹² It is therefore conceded that the viewpoint that the retention of the crime of incest would be in the interests of morality and family relations does have merit, but this viewpoint is not supported here. Sachs J comments on the decriminalisation of sodomy in the case of the **National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others** that:¹⁹³

A State that recognises difference does not mean a State without morality or one without a point of view. It does not banish concepts of right and wrong, nor envisage a world without good or evil. What is central to the character and functioning of the State, however, is that the dictates of the morality which it enforces, and the limits to which it may go, are to be found in the text and spirit of the Constitution itself.

The present author supports the above view for the crime of incest. To uphold the crime of incest would amount to unfair discrimination on the grounds of birth and in the case of affinity, on the basis of marital status.¹⁹⁴ The constitutional rights to privacy, dignity and equality would also be infringed.¹⁹⁵ It is submitted that the limitation of the aforementioned rights cannot be justified in terms of the

¹⁹² The reasoning is that although the child may have consented it may be said that children have limited capacity to understand the nature of certain acts and on the basis of that the consent would be negated in any event.

¹⁹³ 1998 12 BCLR 1517 (CC) on 1576 E-F.

¹⁹⁴ Section 9(3) of Act 108 of 1996.

¹⁹⁵ Sections 14, 10 and 9 respectively of Act 108 of 1996.



Constitution because the harm caused can be significant and lead to discrimination in the work place and with regard to social opportunities.¹⁹⁶

It is suggested that if the crime of incest was nevertheless retained, that less restrictive means be used to achieve its purpose. The discretion not to prosecute should be available, especially in cases of affinity, so that no conviction or sentence ensues.¹⁹⁷

Now that the crime of incest and its unsuitability as a remedy for child abuse victims has been dealt with, it is pertinent to examine the alternate remedy under which child sexual assault victims can be afforded protection. The elements of statutory rape will now be examined to establish whether the definition as it stands is sufficient or not as a remedy for child sexual assault victims.

2.3.1. THE ELEMENTS OF STATUTORY RAPE

Section 14 (1) of the Sexual Offences Act 23 of 1957 provides that *any male person who:*

- (a) *has or attempts to have unlawful sexual intercourse with a girl under the age of 16 years or;*

¹⁹⁶ Section 36 of Act 108 of 1996.

¹⁹⁷ See "SALC Discussion Paper 85 of 1999" on 147 in general. An important question arises revolving around sentencing for the crime of incest? A person who commits this crime would most probably fall under the category of habitual criminal or recidivist, as it is usually not a once-off crime and it would have to be taken into account that the offence is unlikely to be the first committed by such person. As regards the prosecution of children, the discretion lies with the prosecutors. With regard to consensual relationships between adults, the discretion should also vest with the prosecutor. The Commission is also of the opinion with regard to the prosecution of children that where there is a significant power imbalance between siblings, and the younger or weaker child is sexually abused by the older siblings, rape is committed. This view is supported here as it could be considered to be rape enforced by duress or a position of authority.



- (b) *commits or attempts to commit an immoral or indecent act with such a girl or boy under the age of 19 years or;*
- (c) *entices or solicits such a girl or boy to the commission of an indecent or immoral act commits an offence.*

In terms of section 14 (3) *any female who:*

- (a) *has or attempts to have unlawful carnal intercourse with a boy under the age of 16 years or;*
- (b) *commits or attempts to commit with such a boy or with a girl under the age of 19 years an immoral or indecent act;*
- (c) *entices or solicits such a girl or boy to the commission of an immoral or indecent act, shall be guilty of an offence.*¹⁹⁸

2.3.1.1. DEED

Section 14 of the aforementioned Act prohibits *sexual intercourse with children* below the age of 16 years, or the commission of *immoral or indecent acts* with children below the age of 19 years, even with their consent.¹⁹⁹

¹⁹⁸ Section 15 of Act 23 of 1957 the provision pertaining to mentally impaired persons, currently reads as follows: *Any person who –*

- (a) *has or attempts to have unlawful carnal intercourse with any male or female idiot or imbecile in circumstances which do not amount to rape; or*
- (b) *commits or attempts to commit with such a male or female, any immoral or indecent act;*
or
- (c) *solicits or entices such a male or female to the commission of any immoral or indecent act, shall, if it is proved that such person knew that such male or female was an idiot or imbecile, be guilty of an offence.*

¹⁹⁹ See Snyman, CR “**Criminal Law**” (1995) on 346. With regard to mentally impaired persons section 15 applies if there was consent to acts of sexual intercourse or immoral activities, but the consent was negated due to a lack of capacity to give valid consent. The perpetrator and victim



2.3.1.2. UNLAWFULNESS

The South African Law Commission states:²⁰⁰

Technically section 14 of the Sexual Offences Act 1957 can be characterized as a species of age of consent legislation...The establishment of a so-called age of consent – a chronological age which is a bright line separating valid and invalid consent – has been the result. Section 14 not only establishes the age of consent but also enforces the concept by punishing those who engage in sexual activity with a person who is under the age of consent.

Therefore acts of sexual intercourse with children below the age of 16 years are *prima facie* deemed unlawful. Acts of intercourse are not unlawful where the person with whom the act was committed was either a prostitute, or otherwise deceived the person so charged, into believing that he or she was over the age of 16 years, or if the parties are married.²⁰¹

Sexual acts, which are perceived to be immoral, are forbidden where the child is below the age of nineteen. The presence of consent to the act of sexual intercourse or sexual activity is thus irrelevant for purposes of this crime.²⁰²

can be either male or female. Obviously, if the person had sufficient intelligence and objected, this would satisfy the requirements of the common law definition of rape.

²⁰⁰ "SALC Discussion Paper 85 of 1999" on 205.

²⁰¹ Section 14(2) and Section 14(4) of Act 23 of 1957.

²⁰² With regard to section 15 of Act 23 of 1957, acts of sexual intercourse and immoral activity with mentally impaired persons are deemed unlawful, regardless of consent. Section 15 further deals with the enticing, committing and attempting to commit, or soliciting of such idiot and imbecile to commit an immoral or indecent act. It is submitted that the incitement or solicitation of a mentally impaired person to commit an indecent or immoral act will not amount to indecent assault and would amount to *crimen iniuria* as there is no assault as such. In the case of *R v H* 1959 4 SA 427 (A) it was stated that the circumstances of each case will dictate as to whether the act was indecent or immoral. What if two persons who are mentally impaired (either an idiot or an imbecile) want to have consensual sexual intercourse or marry? Are they guilty of an offence under Section 15? The relevant portion of section 15(a) reads as follows: *Any person who has or*



2.3.1.3. FAULT

The child's consent is no defence and a strict liability offence is thus created.²⁰³

2.3.2. VICTIMS

The category of penetrative sexual assault victim covered by this definition are male and female child victims. The victims with regard to prohibited sexual intercourse are children below the age of 16 years. More specifically sexual intercourse between a male perpetrator and female child victim and between a female perpetrator and male child victim is prohibited. Sexual intercourse with a

attempts to have unlawful carnal intercourse with any male or female idiot or imbecile in circumstances, which do not amount to rape...shall, if it be proved that such person knew that such male or female was an idiot or imbecile, be guilty of an offence. Section 15 places an absolute prohibition on sexual relations with mentally impaired persons. What about criminal incapacity due to mental illness and thus no liability? Acts of non-consent will fall under the crime of rape. In New South Wales a different approach is followed in that there are two offences namely a prohibition against sexual intercourse between any person and a mentally impaired person (described as intellectual disability) if committed with *the intention of taking advantage* of the other person (own emphasis), and secondly, a prohibition against sexual intercourse where a person who is in a position of authority as regards a facility or programme to mentally impaired persons.²⁰² This viewpoint could be supported as it would enable mentally impaired persons who want to marry to do so as the focus is rather on protecting the aforesaid from other persons taking advantage of the former. As regards mentally impaired persons who of their own free will decide to have consensual intercourse, they should not be found guilty of contravening section 15. *Policy reasons will result in neither of them being convicted.* Furthermore, the section provides that such person *knew such male or female was an idiot or imbecile.* It may be argued that to a mentally impaired person, another person in the same category would appear normal to them, and perhaps they would not be able to draw a distinction in terms of intelligence quota (IQ). Consequently intent would be lacking. It may also be argued that the Act is aimed at sexual exploitation, but if two such persons should decide to engage in sexual activity out of their own free will, that is clearly not sexual exploitation.

²⁰³ See Snyman, C.R. "Criminal Law" (1995) on 348 fn 34. See further Snyman, C.R. "Criminal Law" (1995) on 351 with regard to mentally impaired persons. Consent to the acts of sexual intercourse or immoral activity is negated if committed with a mentally impaired person. The perpetrator must also be aware that the person was mentally impaired for a conviction to ensue.

male perpetrator and male child victim and female perpetrator and female child victim are not classified with a category of prohibited sexual intercourse but as being forbidden immoral or indecent acts. Even with the aforementioned statutory definition, a class distinction occurs between the types of victim, in that forced penetrative sexual assault *per anum*, orally or digitally are potentially excluded from the category sexual intercourse and relegated to indecent or immoral acts. In the case of the commission of these so-called immoral or indecent acts the victims are children below the age of 19 years.²⁰⁴

The anomaly here is that the age difference for victims would entail that the age for male children of penetrative sexual assault *per anum*, by a male perpetrator, is three years more than a penetrative sexual assault on a female victim *per vaginam* which is nonsensical.²⁰⁵

2.3.3. CONSENT

The presence of consent to the act of sexual intercourse or sexual activity is irrelevant for purposes of this crime.²⁰⁶

²⁰⁴ See Snyman, C.R. "Criminal Law" (1995) on 346.

²⁰⁵ With regard to mentally impaired persons a perpetrator can be male or female and the victim can be either male or female. An important question thus arises. How does one identify a mentally impaired person? Who is considered to be an imbecile or an idiot and when will a person be guilty of rape or the offence under the Sexual Offences Act 23 of 1957? The terms 'idiot' and 'imbecile' are used (and not mentally disabled persons in general). Case law dictates that the term idiot generally refers to a person with an IQ lower than 25 and an imbecile would be a person whose IQ would fall between the range of 25 and 50. See *S v N* 1979 4 SA 632 (O). See also *R v K* 1951 4 SA 49 (O). See also Snyman, C.R. "Criminal Law" (1995) on 350. In *S v N* 1979 4 SA 632 (O) at 638-639 the court mentions that there is no uniform method of distinguishing between the two categories, but that persons who fall within these categories, have an inability to make decisions regarding sexual intercourse and related acts. See also "SALC Discussion Paper 85 of 1999" on 216. The legislature thus presumes that a person who falls within the categories of idiot and imbecile do not possess the mental faculties to give valid consent.

²⁰⁶ With regard to mentally impaired persons, consent to acts of sexual intercourse or immoral activities may be present but the consent is negated due to a lack of capacity to give valid consent.

2.3.4. CRITICISM AGAINST STATUTORY RAPE

It is submitted that the crime of statutory rape is insufficient. The author, Snyman, criticises the formulation of the offences in section 14.²⁰⁷ Firstly, before 1988, the Act provided that it would be a defence if the accused was under the age of 16 years at the time of committing the offence.²⁰⁸ The problem thus arose that a boy of 12 or 13 years of age could be found guilty of the offence if committed with a girl, who was almost 16 years old *even if the latter initiated the act*.

Secondly, according to the interpretation applied by the courts, the accused cannot rely on his *bona fide* mistake, as regards the girl's age, especially if the girl is almost 16 years old and is more physically developed than others in the same age category. Therefore, the accused's lack of knowledge of unlawfulness, and consequently intent, cannot prevent the latter from being convicted. Section 14 thus contains a *strict liability offence* where culpability is not required²⁰⁹ and consequently the aforementioned author believes that the general fault principle should rather apply.²¹⁰

Thirdly, as regards the prohibition on immoral and indecent acts with girls under the age of 19 years, it tends to proscribe certain lesbian forms of sexual activity. Snyman submits that he is unsure, as to whether the offence is committed by both parties, or by the active party who is above 19 years of age.²¹¹ He feels that the legislature aims to protect women under the age of 19 years and the latter

²⁰⁷ Snyman, C.R. "Criminal Law" (1995) on 346 *et seq.*

²⁰⁸ This defence was abolished by Section 5 of the Immorality Amendment Act 1988. See also Milton, J.R.L. "The Young Man's Defence" (1991) on 172 for the history of the defence. The crime was placed on the statute books in the Criminal Law Amendment Act 25 of 1893. During the Victorian Era, extra-marital sex was viewed as being unacceptable, but transgressions for young men were pardoned in a hypocritical society and defences were created as escape mechanisms. See also Snyman, C.R. "Criminal Law" (1995) on 348. See also **S v M** 1992 1 SACR 124 (N).

²⁰⁹ See **R v V** 1957 2 SA 10 (O); **R v V** 1957 3 SA 633 (O).

²¹⁰ Snyman, C.R. "Criminal Law" (1995) on 348.

²¹¹ Snyman, C.R. "Criminal Law" (1995) on 349.

should be regarded as the victim and be found not guilty of committing the offence.

Milton also offers criticism against section 14 and his arguments are as follows: Firstly, the section aims to prohibit sexual intercourse with a person under the age of 16 years.²¹² Secondly, it further aims to prohibit any form of sexual activity with a person under the requisite age and incorporates both heterosexual and homosexual acts.²¹³ He states that the definition is deficient because:

1. It does not adequately identify the offender, as it refers to any male or female person and either offender could be the same age or younger than the consenting victim.
2. It discriminates as it prescribes different ages of consent for heterosexual and homosexual persons in that the age for engaging in homosexual acts is higher.
3. He further submits that a reformulation of the offence is required so that it provides for punishment of child sexual abuse with two forms namely physical contact with the child being psychologically or physically damaging and also the misuse of a position of authority to induce the child to participate in sexual activity (whether directly or indirectly).

There is thus no justification in requiring a higher age of consent as regards indecent or immoral acts, in comparison with lawful sexual intercourse. The defences should be retained, although the defence as to the accused being deceived as regards the victim's age is problematic as the latter could be unconstitutional based on the accused's right to be presumed innocent. The

²¹² See Milton, J.R.L. "Unfair Discrimination on the Grounds of Gender, Sex...[or] Sexual Orientation. How the Sexual Offences Act 1957 does It All" (1997) on 297. See also Cameron, E. "Sexual Orientation and the Constitution: A Test Case for Human Rights" (1993) on 450. See also "SALC Discussion Paper 85 of 1999" on 203-207 for detailed criticism and also for the proposed amended definition by Milton.

²¹³ For instance any indecent or immoral act.



Sexual Offences Act is in need of review due to discrepancies in age and changing norms in society. The present author is of the view that the existence of such an offence is essential to protect the category of child victim of penetrative sexual assault either *per vaginam* or *per anum*. The provisions as they stand do not adequately address all the child victims of sexual assault but related provisions could be incorporated into a broader definition in any event for purposes of expediency and in order to accord seriousness to the problem of sexual offences against children thereby affording protection to the latter.²¹⁴

2.4. NON-CONSENSUAL SODOMY

If rape is compared with the crime of non-consensual sodomy the essential features are the same, except for gender and the orifice involved.

²¹⁴ With regard to mentally impaired persons, it is present author's view that the crime created by the Sexual Offences Act regulating relations with mentally impaired persons is insufficient and should be abolished. Relevant provisions could be incorporated in a broader definition for purposes of expediency and to protect mentally impaired persons from sexual abuse. Various constitutional rights are infringed by Section 15 of Act 23 of 1957, namely:²¹⁴

- * The right to equality – the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including...disability. (Section 9(3) of Act 108 of 1996).
- * Right to dignity. (Section 10 of Act 108 of 1996).
- * Right to freedom and security and to reproduction. (Sections 12(1)(a) and (2)(a) and (b) of Act 108 of 1996).
- * Right to privacy (Section 14 of Act 108 of 1996).

To limit these rights, as in the plight of two mentally impaired persons who consent to sexual intercourse with one another, it is present author's view that the limitation of the *right is not justifiable as the nature of the right exceeds the importance of the purpose in this specific case*, of consensual relations between two mentally impaired persons, or if they should wish to marry, they would not be able to consummate the marriage without committing an offence. A problem arising from this is the aspect of procreation, as it may be argued that they would be incapable of caring for the child and that measures such as sterilization should be implemented. This too would be an infringement of their rights, but would again have to be measured in terms of section 36 of the Constitution Act 108 of 1996. The present author is of the opinion that only exploitive relationships should be regulated. In *S v N* 1979 4 SA 632 (O) at 638 – 639, the court states that idiots or imbeciles do not have the ability to make decisions regarding their sexual life and that they have normal sexual desires, but lack mental capacity to express these desired.

The elements of the crime of sodomy prior to 1994 were:²¹⁵

- * Unlawfulness
- * Intention
- * Sexual intercourse *per anum*
- * Between males
- * Irrespective of whether or not the passive party had consented.²¹⁶

The word sodomy has two meanings; a general meaning and a more restricted meaning.²¹⁷ In the general sense it was a species of the generic crime known as 'unnatural sexual offence'.²¹⁸ In the narrow sense it was described as unlawful, intentional sexual relations between two males *per anum*.

Under the Roman law it was considered as another form of *stuprum*.²¹⁹ Christian theology condemned it as a sin and as being morally incorrect.²²⁰ Roman Dutch writers regarded it as 'contrary to nature' and criminal and it was characterised under the generic terms *venus monstrosa* or *onkuysheyd tegens de natuur* which was punishable by death, by burning to death.²²¹ In English law, sodomy is termed 'buggery' and this offence was also punishable by death after 1553.²²²

²¹⁵ This was prior to the implementation of the provisional constitution in 1994 and which is now known as the Constitution Act 108 of 1996. See Snyman, C.R. "Criminal Law" (1995) on 340; Burchell, J. & Milton, J.R.L. "Principles of Criminal Law" (1997) on 632. Verschoor, T. "Misdad, Verweer en Straf" (1986) on 166.

²¹⁶ The crime of sodomy came under scrutiny with the advent of the provisional Constitution Act 200 of 1993. Section 9(3) of the Constitution of 1996, which provides that, nobody may be discriminated against, on the grounds of gender or sexual orientation and thereby, by implication, incorporates anal intercourse, which takes place voluntarily.

²¹⁷ Joubert, W.A. *LAWSA* vol 6 (1981) on 213.

²¹⁸ Snyman, C.R. "Criminal Law" (1995) on 340.

²¹⁹ Watson, A. "The Digest of Justinian Vol IV" (1985) on xxii.

²²⁰ Burchell, J. & Milton, J.R.L. "Principles of Criminal Law" (1997) on 633.

²²¹ Snyman, C.R. "Criminal Law" (1995) on 340; Burchell, J. & Milton, J.R.L. "Principles of Criminal Law" (1997) on 633.

²²² *Ibid.*

The reasons advanced and mentioned in 1999 by the South African Law Commission for the probable criminalization of sodomy are the following:²²³

- * It denies the basic purpose of the sexual relationship which is procreation;
- * It subverts the institution of the family;
- * Homosexuals corrupt and pervert young people.

Criticism of the above, as reiterated by Milton is that contraception, sterility and abstinence also preclude procreation, but sexual intercourse in these circumstances are not criminalized.²²⁴ As regards the subversion of the family institution, he states that adultery has the same effect, but is no longer criminalized. The third argument cannot be regarded as being persuasive as there is no basis that this generalisation can be rationalised nor justified.

Both consensual and non-consensual acts were punished under the same crime of sodomy. However the crime of consensual sodomy was declared unconstitutional in the case of the **National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others**.²²⁵

The elements of sodomy will now be examined to establish which category of sexual assault victim is covered and whether the definition is sufficient or not.

2.4.1. THE ELEMENTS OF SODOMY

With the enactment of the Constitution of 1996, Burchell and Milton define sodomy as the:²²⁶

²²³ "SALC Discussion Paper 85 of 1999" on 127 - 128.

²²⁴ "South African Law and Procedure: Volume II" (1996) on 249.

²²⁵ 1999 1 SA 6 (CC).

²²⁶ "South African Law and Procedure: Volume II" (1996) on 632.



[unlawful] and intentional sexual intercourse per anum between human males.

Snyman defines sodomy, as it applies after 1994 (in which year the Interim Consitution of 1994 came into operation), as follows:

A male person commits sodomy if he unlawfully and intentionally is an active or a passive party to anal sexual intercourse with another male person, in circumstances in which the latter has not consented to the act.

The common-law offence of sodomy in so far as consensual homosexual acts were concerned, was declared invalid and unconstitutional by the Constitutional Court.²²⁷ Uncertainty arises as to whether non-consensual sodomy is still a crime.²²⁸ The present author is of the opinion that acts of non-consensual anal intercourse should be covered by a redefined expanded definition of rape.

For purposes of this study sodomy is defined and committed *if a male person unlawfully and intentionally is an active or a passive party to anal sexual intercourse with another male person, in circumstances in which the party has not consented to the act.*

2.4.1.1. DEED

The act consisted of the anal penetration of the passive party by the male organ of the active party.²²⁹ Other forms of penetration were excluded. The slightest penetration was sufficient and no emission of semen was necessary.²³⁰

²²⁷ **National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others** 1999 1 SA 6 (CC). See commentary in "SALC Discussion Paper 85 of 1999" on 127-135. The reason for this is that similar consensual acts if committed between women, or a man and a woman, were not considered a crime and to penalise certain persons for consensual acts is discriminatory.

²²⁸ The detail will be discussed in paragraph 2.4.1.2.

²²⁹ Joubert, W.A. **LAWSA** vol 6 (1981) on 213.

2.4.1.2. UNLAWFULNESS

Two positions have to be distinguished: (1) Prior to 1994

(2) After 1994

- * *Prior to 1994*: If unlawful, intentional relations occurred between two males *per anum*, it was irrelevant whether the passive party consented to the act or not.²³¹ If there was no consent, the act could be punished under the lesser offence of indecent assault.²³² If there was consent, the passive party was equally guilty as the active party of committing sodomy.

- * *After 1994*: The Constitution of 1994²³³ provides that nobody may be discriminated against on the grounds of sexual orientation. This was incorporated into the Constitution of 1996²³⁴ as stated in section 9(3) of the Bill of Rights which provides that the state may not unfairly discriminate directly or indirectly against any person on the grounds of amongst others 'sexual orientation'. Homosexual intercourse and heterosexual intercourse between consenting adults, which takes place in private, are therefore treated equally. It is unconstitutional to punish consenting adults under the crime of sodomy. As with heterosexual intercourse, which is punishable if it is (1) not in private or (2) non-consensual or (3) committed with a person under the age of consent, so is the case for homosexual sexual intercourse.²³⁵

²³⁰ Snyman, C.R. "**Criminal Law**" (1995) on 341; Burchell, J. & Milton, J.R.L. "**Principles of Criminal Law**" (1997) on 634.

²³¹ Snyman, C.R. "**Criminal Law**" (1995) on 340.

²³² Joubert, W.A. **LAWSA** vol 6 (1981) on 314.

²³³ Section 8(2) of Act 200 of 1994. See **S v H** 1993 2 SACR 545 (C) at 552F; **S v A** 1995 2 BCLR 153 (C) in this regard.

²³⁴ Act 108 of 1996.

²³⁵ Burchell, J. & Milton, J.R.L. "**Principles of Criminal Law**" (1997) on 634. There does however exist discrimination as regards age of consent under the Sexual Offences Act 23 of 1957.

The crime of consensual sodomy was declared unconstitutional in the case of the **National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others**.²³⁶ The Constitutional Court confirmed the decision of the Witwatersrand High Court in declaring the common law offence of sodomy unconstitutional and consequently invalid to the extent that it criminalized acts committed between men, which if committed between women or between a man and a woman would not be an offence. The Constitutional Court findings were that the crime of sodomy was not consistent with the following rights in the Constitution:

- * *The right to equality*, as it differentiated on the grounds of sexual orientation.²³⁷
- * *The right to dignity*, as it unfairly discriminated in the sense that it criminalized all sexual intercourse *per anum* between men, regardless of the relationship involved and the age of the persons involved.²³⁸ The consequences were such that homosexual men were subject to the risk of arrest, prosecution and conviction.²³⁹
- * *The right to privacy*,²⁴⁰ as these were consensual acts not harming any other person and was found to be an unfair limitation on this right.²⁴¹

Uncertainty arises as to whether a crime of non-consensual sodomy still prevails. The South African Law Commission mentions that *[c]onsensual homosexual acts are no longer a crime*.²⁴²

²³⁶ 1999 1 SA 6 (CC). See also 1998 12 BCLR 1517 (CC).

²³⁷ 1998 12 BCLR 1517 (CC) on 1528 C-E and 1530 F-1536 A. See also section 9 of Act 108 of 1996.

²³⁸ 1998 12 BCLR 1517 (CC) on 1536 E-1537 A and also section 10 of Act 108 of 1996.

²³⁹ See "SALC Discussion Paper 85 of 1999" on 131.

²⁴⁰ Section 1998 12 BCLR 1517 (CC) on 1537 B - 1538 E and section 14 of Act 108 of 1996.

²⁴¹ See "SALC Discussion Paper 85 of 1999" on 132 where it discusses the courts *in casu* opinion that acts of male rape constitute crimes in term of common law as either indecent assault or assault with intent to do grievous bodily harm.

The implication is that non-consensual sodomy is still a crime. In a contradictory statement the South African Law Commission further state that: *[t]his judgment therefore brought an end to the common law crime of sodomy.*²⁴³

These conflicting statements create confusion which can only be clarified upon closer examination of the Constitutional Court case.²⁴⁴ Ackermann, J mentions that the common law definition of sodomy is not limited to private consensual sexual intercourse *per anum* between adult males but also applies where one male has not consented or is below the age of consent and refers to them as cases of so-called 'anal rape' or 'male rape.'²⁴⁵

He further mentions that the objective of the common law offence was not the punishing of male rape but rather the perceived need to criminalize a specific form of sexual expression and was accordingly inconsistent with the Constitution.²⁴⁶ Accordingly it could not be said that the offence of sodomy was purely created to criminalize male rape.²⁴⁷ He concludes that there is no reason for interfering with the High Court decision which declared the offence of sodomy constitutionally invalid in its entirety.²⁴⁸

It therefore appears that the offence of sodomy has been abolished *in toto* subject to the proviso that the retrospective effect of the order is limited to cases of consensual sodomy only.²⁴⁹

²⁴² "SALC Discussion Paper 85 of 1999" on 131.

²⁴³ "SALC Discussion Paper 85 of 1999" on 133. They were referring to the case of the **National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others** 1998 12 BCLR 1517 (CC).

²⁴⁴ *Ibid.*

²⁴⁵ 1998 12 BCLR 1517 (CC) on 1548 D.

²⁴⁶ Act 108 of 1996. See 1998 12 BCLR 1517 (CC) 1550 B.

²⁴⁷ 1998 12 BCLR 1517 (CC) on 1550 C.

²⁴⁸ 1998 12 BCLR 1517 (CC) on 1550 I-1551 A.

²⁴⁹ 1998 12 BCLR 1517 (CC) on 1559 F-G. This underlying reason for this is to avoid having convictions set aside where cases of male rape were prosecuted as instances of non-consensual sodomy.

2.4.1.3. FAULT

- * *Prior to 1994:* If a passive party voluntarily consented to sexual penetration, he was also guilty of sodomy. If he did not consent, the other party was guilty of sodomy and/ or indecent assault.²⁵⁰
- * *After 1994:* For a conviction of non-consensual sodomy, the accused must have had the intention to have intercourse *per anum* and must have foreseen that the other party was perhaps under age or did not give consent.²⁵¹

2.4.2. VICTIMS

The crime could only be committed between human males.²⁵² Sodomy was thus a status crime. Boys below the age of 14 years could also commit the crime.²⁵³ Sexual relations *per anum* between a consenting male and female was not considered a crime, provided the conduct took place in private.²⁵⁴

This means that only one category of sexual assault victim is recognised. The victim who is protected is a male victim of penetrative sexual assault. The common law definition of rape does not cover this category of victim. Present author is of the view that the crime of non-consensual sodomy is inadequate and stigmatising. It only provides for one category of victim whose interests would be able to be protected in a more efficient way by being incorporated into a broader definition of rape.

²⁵⁰ Burchell, J. & Milton, J.L.R. "Principles of Criminal Law" (1997) on 634.

²⁵¹ *Ibid.*

²⁵² Joubert, W.A. *LAWSA* vol 6 (1981) on 213.

²⁵³ Burchell, J. & Milton, J.L.R. "Principles of Criminal Law" (1997) on 634.

²⁵⁴ Snyman, C.R. "Criminal Law" (1995) on 341.

2.4.3. CONSENT

- * *Prior to 1994:* Where unlawful, intentional relations occurred between two males *per anum*, the crime of sodomy was committed. It was irrelevant whether the passive party consented to the act or not.²⁵⁵ Where no consent was present, a charge could be laid under the offence of indecent assault.²⁵⁶ If there was consent, the passive party was equally guilty as the active party of committing sodomy.
- * *After 1994:* As mentioned earlier the Constitution of 1994 had an impact on this crime and provided that nobody may be discriminated against on the grounds of sexual orientation.²⁵⁷ This was incorporated into the Constitution of 1996 as stated in section 9(3) of the Bill of Rights which provides that the state may not unfairly discriminate directly or indirectly against any person on the grounds of amongst others 'sexual orientation'.²⁵⁸ Homosexual intercourse and heterosexual intercourse between consenting adults, which takes place in private, are therefore treated equally. Non-consensual sodomy will still be punishable under this category.

2.4.4. CRITICISM OF NON-CONSENSUAL SODOMY

The crime of sodomy previously covered voluntary acts by consenting parties, and the same term was also used to indicate non-consensual sexual conduct. The term sodomy has had a long history and has had a stigma attached to it as being a sin and punishable by death.

²⁵⁵ Snyman, C.R. "Criminal Law" (1995) on 340.

²⁵⁶ Joubert, W.A. *LAWSA* vol 6 (1981) on 314.

²⁵⁷ Section 8(2) of Act 200 of 1994. See *S v H* 1993 2 SACR 545 (C) at 552F; *S v A* 1995 2 BCLR 153 (C) in this regard.

²⁵⁸ Act 108 of 1996.

Burchell and Milton state that:²⁵⁹

[h]omosexual intercourse which is not in private, or is without consent of one of the parties or with a person who is under the age of consent may be punished as sodomy.

The words 'not in private' by implication incorporates a voluntary act whereas 'without the consent of' indicates a lack of consent. By implication then, the term sodomy incorporates both a voluntary and an involuntary act, whereas the crime of rape is involuntary and indicates a lack of consent, whether committed in private or not.

With regard to non-consensual sexual assault *per anum*, the crime of sodomy as it stood prior to the Constitutional Court case was unsatisfactory.²⁶⁰ Firstly, it did not cover the violation of a male by a female, as the crime of non-consensual sodomy could only be committed by males. A male victim of penetrative sexual assault *per anum* would in South African law, have had to rely on the lesser offence of indecent assault which also covers non-penetrative sexual acts. This is discriminatory in the sense that everyone is entitled to equal protection of the law.²⁶¹

Secondly, the stigma attached to the word sodomy had a double negative. It has a negative history as it was viewed as being contrary to nature yet a form of it also had the reprehensible features of rape. This could in all likelihood affect the reporting of the penetrative sexual assault due to the inherent stigmas that was attached to this crime.

Thirdly, sodomy covered both voluntary and involuntary elements and the male victim of forced penetrative sexual assault may not have been viewed in the same serious light as that of the female victim.

²⁵⁹ *Ibid.*

²⁶⁰ 1998 12 BCLR 1517 (CC).

²⁶¹ Section 9(1) of Act 108 of 1996.

If non-consensual sodomy is compared with rape, the common elements in the crimes of rape and sodomy are: (1) unlawfulness (2) sexual intercourse (penetration) (3) intent (4) absence of consent. The only differences relate to gender and the orifices penetrated, although the terms sexual intercourse and penetration are applicable to both.

The nature of rape by implication, has two components according to Labuschagne, who identifies a sexual component as well as a violent component. He states:²⁶²

‘n man wat gewelddadig met ‘n ander man of ‘n vrou per anum geslagsomgang het, voldoen myns insiens ook aan die vereistes: daar is beide ‘n geweldselement en ‘n sekselement teenwoordig.

Both the crimes of non-consensual sodomy and rape could be viewed as acts of violence expressed in a sexual manner. Once again it must be remembered that violence should be distinguished with regard to the *nature* of the act and as a means of *inducing consent*. The factors excluding consent in rape would have been applicable to non-consensual sodomy.

As previously mentioned by Burchell and Milton:²⁶³

[forcible] anal intercourse has all the reprehensible features of a heterosexual rape.

Nevertheless our law failed to recognize this phenomenon under the common law crime of rape.²⁶⁴ In light of the fact that the crime of sodomy has been abolished in its entirety, subject to limited retrospective effect where convictions

²⁶² Labuschagne, J.M.T. “Die Penetrasievereiste by Verkragting Heroorweeg”(1991) on 156.

²⁶³ Burchell, J. & Milton, J.R.L. “Principles of Criminal Law” (1997) on 492 fn 55.

²⁶⁴ The position of the male victim is perceived in much the same light of that of females, in the sense that society perceives males as being less at risk and consequently place such situations out of context, being depicted as far removed and rare occurrences. It is no wonder that the stigma attached to such crimes can be seen as a major deterrent in reporting.

of instances of 'male rape' were obtained, it is present authors view that the crime of non-consensual sodomy was unsatisfactory in any event. It only offered protection to one category of victim of penetrative sexual assault, being a male victim who was sexually assaulted *per anum*. These victims of penetrative sexual assault were consequently not afforded the same recognition and protection as the victims of common law rape and the definition was more exclusive than inclusive of sexual assault victims.

2.5. INDECENT ASSAULT

This generic term is used to describe *unlawful sexual acts, other than rape such as anal, oral, digital and object 'rape'* as well as indecent touching or fondling. Both males and females victims of penetrative sexual assault *per vaginam* or *per anum*, who are not covered under the existing definition of rape, have a remedy under this crime. It is a gender-neutral crime.²⁶⁵ Acts, which are classified under the crime of indecent assault, may be viewed as serious as rape, but do not comply with the current narrow common law definition of rape. The question is whether this crime is sufficient to cover all the acts of penetrative sexual assault or whether the acts covered by this crime should be incorporated into a broader definition of rape. The elements of indecent assault are:²⁶⁶

- * Unlawfulness
- * Assault
- * Indecent
- * Fault.²⁶⁷

²⁶⁵ "SALC Discussion Paper 85 of 1999" on 195 for comprehensive discussion.

²⁶⁶ See also "SALC Discussion Paper 85 of 1999" on 194 – 200. They recommend that the crime of indecent assault not be codified as it forms a competent verdict on numerous offences and is gender-neutral; See further *R v Abrahams* 1918 CPD 590; *S v F* 1982 2 SA 580 (T) for the different approaches followed regarding the act and intention.

²⁶⁷ Burchell, J. & Milton, J.R.L. "Principles of Criminal Law" (1997) on 502.

A woman who has been violated *per anum*, and persons who have been orally, digitally or object penetrated without their consent, must necessarily resort to this crime, even though the acts committed may be classified as rape in terms of common parlance which is clearly unsatisfactory. The present author feels that if the crime of rape cannot be proved, the state can perhaps as a last resort, attempt to fulfil the requirements of the offence of indecent assault as a secondary remedy to the crime of rape.²⁶⁸

2.5.1. THE ELEMENTS OF INDECENT ASSAULT

Burchell and Milton define the crime of indecent assault as follows:²⁶⁹

Indecent assault consists in an assault which by nature or design is of an indecent character.

Milton defines indecent assault as an:²⁷⁰

[u]nlawful and intentional assault which is or is intended to be indecent.

Snyman defines the crime of indecent assault as follows:²⁷¹

Indecent assault consists in unlawfully and intentionally assaulting another with the object of committing an indecency.

The focus is thus rather on the intention which must be indecent. This view is also supported by case law.²⁷²

²⁶⁸ The Criminal Procedure Act 57 of 1977 as in section 261 and section 269.

²⁶⁹ "Principles of Criminal Law" (1997) on 501.

²⁷⁰ "South African Criminal Law and Procedure: Volume II" (1996) on 467.

²⁷¹ "Criminal Law" (1995) on 419

²⁷² See Burchell, J. & Milton, J.R.L. "Principles Of Criminal Law" (1997) on 504; Snyman, C.R. "Criminal Law" (1995) on 419. *S v F* 1982 2 SA 580 (T).

For purposes of this study *indecent assault may be defined as the unlawful and intentional assault of another with the intention of committing an indecent act.*

2.5.1.1. DEED

Indecent assault consists in unlawfully and intentionally assaulting another with the object of committing an indecent act.²⁷³ Indecent assault comprises most forms of unlawful sexual encounters, other than rape. The following categories are included:

- * failed rapes;
- * quasi rapes (have the characteristics of rape which include something other than the penis being inserted as well as where a different orifice is involved);
- * molestation (touching and fondling).²⁷⁴

The crime can incorporate the touching of parts of the body which become sexually aroused and can also contemplate some form of sexual activity, which includes external intercourse, masturbation and oral-genital intercourse, kissing and touching of erogenous parts of the body, although this is not necessarily a decisive factor.²⁷⁵

²⁷³ Snyman, C.R. "**Criminal Law**" (1995) on 419; Milton, J.R.L. "**South African Criminal Law and Procedure: Volume II**" (1996) on 467 defines indecent assault as:

- * *The unlawful and intentional assault*
- * *Which is or is intended to be indecent.*

²⁷⁴ Burchell, J. & Milton, J.R.L. "**Principles of Criminal Law**" (1997) on 501.

²⁷⁵ Burchell, J. & Milton, J.R.L. "**Principles of Criminal Law**" (1997) on 502.

No actual violence need be used nor harm caused. Mere touching or a threat is sufficient. The assault may take the form of force which includes touching, or the threat of immediate force.²⁷⁶

2.5.1.2. UNLAWFULNESS

There must be an absence of consent for the conduct to be rendered unlawful. A girl and boy below the age of 16 are presumed incapable of valid consent.²⁷⁷ Fraud and duress also exclude valid consent. In cases where consent is *contra bonos mores* it is also not regarded as valid consent.

2.5.1.3. FAULT

The accused must have the intention to assault indecently and his intention can be manifested by means of words or conduct.²⁷⁸ The emphasis is therefore placed on the *intention* which must be indecent and therefore there *need not be sexual activity* to constitute this crime.²⁷⁹ There is controversy as to the meaning of the word 'indecent'²⁸⁰ and whether it includes only acts, words or gestures, which are indecent by nature.²⁸¹ There are two contrasting views on the nature of the crime. In *R v Abrahams* it was said that indecent assault is qualified by the *nature* of the act, which itself must be indecent, and not the motive or the purpose of the offender.²⁸² Therefore it is not indecent if there is no contact with the erogenous parts of the body. In terms of the second view the person's

²⁷⁶ See *S v Mngomezulu* 1968 2 PHH 96 (N) regarding threats. See in general *S v F* 1982 2 SA 580 (T).

²⁷⁷ *Ibid.*

²⁷⁸ See Burchell, J. & Milton, J.R.L. "Principles of Criminal Law" (1997) on 504 and 505.

²⁷⁹ Burchell, J. & Milton, J.R.L. "Principles of Criminal Law" (1997) on 503.

²⁸⁰ See in this regard the commentary in "SALC Discussion Paper 85 of 1999" on 198 where the Johannesburg Welfare Society's view is that it [indecent assault] is an invasion of the person or privacy of the individual. A contrasting viewpoint is offered by the South African Police Service: Serious Violent Crime Component, where they feel that there should be direct physical sexual contact on another person's body by any object, excluding a penis.

²⁸¹ See Snyman, C.R. "Criminal Law" (1995) on 419 and fn 7 for discussion.

²⁸² See *ibid.* See also 1918 CPD 590 on 593.

expresses indecent *intention* and not an indecent *act* itself renders conduct indecent.²⁸³

This view was supported in the preferred case of **S v F** which advocates that if the accused has the *intention to touch the victim indecently* and conveys his intention, either by words or conduct, he can be found guilty of indecent assault.²⁸⁴

As Burchell and Milton state:²⁸⁵

[merely] to touch a person on the hand or arm will constitute indecent assault. The test being whether the message conveyed to the victim, by an act or gesture, is indecent.

In other words, the *intention* and not the *nature* of the act qualifies the act. Intercourse *per anum* with a non-consenting woman is also classified as indecent assault. The requirement of force has a technical meaning, as the person need not be injured and touch is sufficient.²⁸⁶

2.5.2. VICTIMS

Indecent assault is a gender-neutral crime, which means that the perpetrator and victim may be of the same or a different sex. An assault can therefore be perpetrated by a male or a female, on a male or a female victim.

A number of the categories of sexual assault victim identified in this study are covered by this offence namely:

²⁸³ Burchell, J. & Milton, J.R.L. "Principles of Criminal Law" (1997) on 504; Snyman, C.R. "Criminal Law" (1995) on 419.

²⁸⁴ 1982 2 SA 580 (T). See also **S v Muvhaki** 1985 4 SA 317 (ZH) and **S v M** 1984 4 SA 111 (T).

²⁸⁵ Burchell, J. & Milton, J.R.L. "Principles of Criminal Law" (1997) on 504 and 505.

²⁸⁶ Snyman, C.R. "Criminal Law" (1995) on 420.

1. Penetrative sexual assault by a male perpetrator on a female victim *per anum* or *per vaginam* outside of marriage;
2. Penetrative sexual assault by a male perpetrator on a female victim *per anum* or *per vaginam* inside of marriage;
3. Penetrative sexual assault by a male perpetrator on a male victim;
4. Penetrative sexual assault by a male perpetrator on a female child victim;
5. Penetrative sexual assault by a male perpetrator on a male child victim;
6. Penetrative sexual assault by a female perpetrator on a male victim;
7. Penetrative sexual assault with the use of an object, orally or digitally on a male or female victim.

The reason why this crime is not favoured is that it serves as a remedy for less serious non-penetrative sexual assaults such as kissing or touching. To classify serious penetrative sexual assaults together with non-penetrative sexual assaults demeans the experience of the victim in a sense. It is recommended that the crime of indecent assault should therefore be used as a primary remedy for non-penetrative sexual assaults and the crime of rape for penetrative sexual assaults.

The present author is of the view that one category of penetrative sexual assault victim is not completely covered by the definition of indecent assault. The reason being that persons who engage in unprotected consensual intercourse and are deliberately exposed to the HIV virus by their partner cannot technically be included in this crime.

2.5.3. CONSENT

As mentioned above there must be an absence of consent for this crime to be committed. Children below the age of 16 are presumed incapable of valid consent.²⁸⁷ Consent is excluded by fraud, duress and where the rendering of consent would be contrary to public policy.

2.5.4. CRITICISM OF INDECENT ASSAULT

The present author submits that indecent assault is insufficient as a main charge to the crime of rape. If it is upheld as a main charge for a crime of penetrative sexual assault, it means that there is one less competent verdict for victims to claim redress under. Indecent assault also covers lesser offences, such as touching or fondling, and it is submitted that a penetrative sexual assault should not be equated with a crime which is non-penetrative by nature. It is therefore felt that it perhaps denies victims of penetrative sexual assault the same recognition and protection as the crime of rape, thus undermining their experience of the crime. In chapter two it was found that all victims of penetrative sexual assault may experience Rape Trauma Syndrome which is indicative of the fact that they feel that their violation is more in line with a rape as opposed to indecent assault.

Various criticisms have been offered both for and against incorporating certain sexual assaults entailing penetration within the crime of indecent assault. These criticisms will be individually examined.

2.5.4.1. ARGUMENTS AGAINST THE CRIME OF INDECENT ASSAULT BEING UTILISED AS A PRIMARY REMEDY FOR PENETRATIVE SEXUAL ASSAULTS

The only similarities between the elements of rape and indecent assault are (1) unlawfulness (2) intention. Sexual intercourse and penetration are not

²⁸⁷ *Ibid.*

requirements as is the case with rape. What makes indecent assault unsatisfactory is the fact that grave and heinous crimes, for example anal intercourse with a woman without her consent and serious sexually penetrative acts, as well as acts of rape, which cannot be proved as such, constitute the same crime as the violation of a person by mere touching.

A woman who has been violently and traumatically penetrated *per anum*, as well as a man who is 'raped' by a woman, have to be satisfied with the crime of indecent assault, which is not always perceived with as much seriousness as rape. The victim who falls under the current definition of indecent assault may suffer more physical and psychological trauma than a victim of rape, but has to be satisfied with a crime, which incorporates mere touching. How, then, can this be equal protection of the law as envisaged in the Constitution?

The South African Law Commission states that the purpose of the offence of indecent assault is primarily to protect sexual autonomy, bodily integrity and the *dignitas* of a person, regardless of gender.²⁸⁸

2.5.4.2. ARGUMENTS IN FAVOUR OF THE CRIME OF INDECENT ASSAULT BEING UTILISED AS A PRIMARY REMEDY FOR PENETRATIVE SEXUAL ASSAULTS²⁸⁹

Firstly, the offence covers a wide variety of acts and is consequently broad. Secondly, it is a competent verdict on a charge of assault with the intent to cause grievous bodily harm and statutory unlawful carnal intercourse in terms of the Criminal Procedure Act.²⁹⁰ Thirdly, codification may lead to *lacunae* with regard to interpretation.

²⁸⁸ "SALC Discussion Paper 85 of 1999" on 195.

²⁸⁹ See "SALC Discussion Paper 85 of 1999" on 197 for supporters of the offence being retained including the Attorney-General; Transvaal, South African Police Service: Serious Violent Crime Component, South African National Council for Child and Family Welfare.

²⁹⁰ Sections 266 and 268 of Act 51 of 1977.

Various countries have however codified the crime of indecent assault such as New Zealand, Australia and Hong Kong. The present author is of the view that the current definition is broad enough to cover lesser sexual acts and with the common law crime of indecent assault not being specific, less serious acts may fall under this crime.

The view that the *intention* should be decisive is also supported here as well as that the definition should be retained, as it will be broad enough to cover *non-penetrative acts*, not falling under the definition of rape.

Furthermore, to continue classifying serious sexual crimes that are viewed as rape by the common man on the street, such as anal, oral or object rape, under the crime of indecent assault does not do justice to a victim's *dignitas*, nor offer adequate protection towards sexual autonomy and bodily integrity. One cannot compare mere indecent fondling or touching with the seriousness of actual penetration. Furthermore, indecent assault is broad enough to cover threats, or the apprehension that force is to be immediately applied.

In conclusion, it is submitted that the offence of indecent assault be retained as a competent verdict for rape but that it be primarily upheld in cases of non-penetrative sexual assault. Acts of penetrative sexual assault *per anum* or *per vaginam* and other forced penetrative sexual acts, currently falling under the crime of indecent assault should rather be incorporated under a broad definition of rape, with absence of consent, intent, unlawfulness and penetration being the decisive requirements.²⁹¹ In this way *every person*, may be equally protected in terms of the law with no discrimination in terms of gender.²⁹²

3. CONCLUSION

Redefining the crime of rape in South Africa is essential, as the law at present makes no visible distinction between males and females, both as offender and as

²⁹¹ Acts which fell under the old crime of sodomy.

²⁹² Sections 9(1) and 9(3) of Act 108 of 1996.

the victim and the current narrow definition thus excludes many categories of victim who could have gained redress in another country.²⁹³

In this chapter it was shown that the common law definition of rape is gender-specific and anatomically exclusive. A number of possible categories of penetrative sexual assault were identified in this study yet the common law definition of rape only partially covers one category of sexual assault victim. The common law definition of rape is by its nature more exclusive than inclusive of penetrative sexual assault victims. The categories which are excluded are penetrative sexual assault by a male perpetrator on a female victim *per anum* outside of marriage; penetrative sexual assault by a male perpetrator on a female victim *per anum* inside of marriage; penetrative sexual assault by a male perpetrator on a male victim; penetrative sexual assault by a male perpetrator on a female child victim *per anum*; penetrative sexual assault by a male perpetrator on a male child victim; penetrative sexual assault by a female perpetrator on a male victim; penetrative sexual assault with the use of an object or digitally on a male or female victim and the victim of consensual sexual intercourse where the HIV/ AIDS status of the perpetrator is withheld. The exclusivity with regard to one category of penetrative sexual assault victim cannot be justified.

Extensive research has been undertaken for purposes of this study and no reasoning can be deduced as to why the rights of certain female sexual assault victims are more important than the rights of any other identified sexual assault victim. Furthermore no logical conclusion can be reached that a gender-neutral offence would prejudice the protection offered to current victims covered by the common law offence of rape. The constitutionality of the common law crime is questionable.

It was also submitted that a broader definition of rape could cover the other possible categories of sexual assault victim identified in this study but that it be limited to cases of penetrative sexual assault. Non-penetrative sexual assault could of course be incorporated within the crime of indecent assault. The

²⁹³ Mezey, G.C. & King, M.P. "Male Victims of Sexual Assault" (1992) on 116.

position with regard to marital rape was critically examined. It was held that although a man can be found guilty of raping his wife, it is questionable as to whether the converse is true. It is submitted that husbands who are victims of sexual assault should be recognised and included within the spectrum of marital rape and the scope of marital rape is therefore currently exclusive and deficient.

The crime of incest was also examined and held to be in conflict with a number of constitutional rights. It was further established that the crime is difficult to implement and apply consistently in practical situations. This is especially the case with the prohibition relating to affinity. It is submitted that the crime of incest is discriminatory in terms of a number of constitutional rights with no justification for limiting these rights and should accordingly be rejected. Where child victims consent to acts of incest they would be covered by the current statutory offence pertaining to sexual offences.²⁹⁴

The crime of statutory rape was critically examined and found to be insufficient and limited as only certain categories of sexual assault victim are covered. It can also be criticised on the basis that certain lesbian forms of sexual activity is proscribed. Furthermore, the offender is not adequately identified and different ages of consent are prescribed for various sexual acts.

The history of, elements and groundbreaking case law pertaining to the crime of non-consensual sodomy was addressed. A number of typical 'male rape' cases have been convicted under the crime of non-consensual sodomy which posed a problem in light of the well-known Constitutional Court case.²⁹⁵ On a closer examination of case law it was established that the crime of sodomy was never designed to protect cases of 'male rape', but rather to proscribe certain forms of homosexual sexual activity. It is submitted that the crime of sodomy has in fact been abolished in its entirety but with limited retrospective effect to cater for

²⁹⁴ Section 14 of Act 23 of 1957. The new proposed Sexual Offences Bill in "SALC Discussion Paper 102 of 2002" also makes provision for these victims should the current statutory offence be repealed.

²⁹⁵ **National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others** 1998 12 BCLR 1517 (CC).

cases of 'male rape' prosecuted under the offence. Redress can consequently not be afforded to any category of possible sexual assault victim identified in this study.

The crime of indecent assault was analysed to establish whether the possible categories of identified sexual assault victim could be effectively protected under this crime. Although indecent assault is a gender-neutral crime, it was held that the crime is insufficient as a main charge to the crime of rape. Firstly, the crime of indecent assault incorporates lesser offences such as non-penetrative sexual assaults which could demean the experiences of victims of penetrative sexual assault. Secondly, if indecent assault was upheld as a main charge to penetrative sexual offences it would entail one less competent verdict for victims to claim redress under. It is suggested that the crime of indecent assault be retained as a competent verdict for rape but offer a remedy primarily for non-penetrative sexual acts.

Internal consistency is therefore lacking. No coherency is reflected with regard to the nature of the wrong committed to a male victim as opposed to a female victim and discrimination is therefore evident. The laws that apply to rape are closely linked to societal attitudes about what is perceived to be appropriate sexual behaviour or not. If sexual intercourse and the crime of rape are approached and viewed in a traditional manner, it is probable that that a female or male victim of rape will be at the mercy of the legal system's interpretation of whether a crime has in fact been committed or not.

Reform has been materializing for decades in countries such as Australia, Britain and the United States and consequently changing attitudes require a reformed definition of the term rape as well as a changed attitude towards victims by eradicating misconceptions, as these types of views hinder progress and could be extremely problematic as regards male victims of rape.

Various aspects will be discussed in the ensuing chapters to postulate a solution on how best to protect the possible categories of sexual assault victim. This will entail criticism of the current narrow definition of rape in terms of foreign



comparative law and an examination of the proposed new Sexual Offences Draft Bill introduced by the South African Law Commission. Shortcomings in the proposed bill will also be highlighted. The purpose will be to unify acts of penetrative sexual assault that are currently only given limited redress in terms of certain existing crimes, under the crime of rape, to reflect a coherent whole.

CHAPTER FOUR

CRITICISM OF THE DEFINITION OF RAPE: A COMPARATIVE PERSPECTIVE

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|------|---------------------------------|
| 1. | Introduction |
| 2. | A comparative perspective |
| 2.1. | <i>Australia</i> |
| 2.2. | <i>Britain</i> |
| 2.3. | <i>United States of America</i> |
| 3. | Conclusion |

1. INTRODUCTION

In the previous chapter the current legal measures applied in South Africa pertaining to the categories of penetrative sexual assault victim identified in this study, were critically examined to establish whether the penetrative sexual assault victims are adequately protected in terms of South African law. The conclusion deduced was that no single legal measure exists which can effectively protect all the possible categories of sexual assault victim identified in this study. A comparative and analytical examination of the legal provisions adopted in other countries, provides a useful and essential framework in order to deduce a legal definition, that most aptly offers the best protection to all victims of forced penetrative sexual assault identified in this study. An examination of the history of the United States and Britain reveals that there has been much legislative activity in redefining rape. Various approaches to the crime of rape are currently followed in other countries.¹ Wider approaches to

¹ See discussion in Labuschagne, J.M.T. "Die Penetrasie Vereiste by Verkragting Heroorweeg" (1991) on 150-151. In terms of section 242 of the Netherlands Criminal Code, it is a punishable

the crime of rape are adopted in Australia,² Canada,³ Norway⁴ and the Netherlands⁵ and in certain states, such as Rhode Island⁶ and Connecticut.⁷

To establish whether the categories of sexual assault victim identified in this study can be incorporated into one broad spectrum definition of rape, the legal position with regard to the crime of rape will be critically examined in the following three countries, namely: Australia, Britain and the United States of America.

offence to compel a woman, with violence or threat of violence, to have sexual intercourse. The English definition is based on statute and is focused on statute and entails that intercourse is deemed complete only on proof of the slightest penetration, whereas in contrast, the German and Swiss laws demand penetration and the slightest contact is insufficient.

² In *Australia*, rape includes penetration of the mouth or anus of another, including penetration with objects.

³ In *Canada*, the focus is on severe violations of integrity and extends to all acts of penetration, including vaginal, oral or anal penetration and an objective test is followed.

⁴ In terms of *Norwegian law*, both a man and a woman can be a perpetrator or a victim.

⁵ In the *Netherlands*, in the *Hoge Raad Case (Hoge Raad 22 Feb 1994 NJ 1994 379* (also discussed in the article by Labuschagne, J.M.T. of the same name in 1995 *De Jure* 28 on 241), the perpetrator was accused of digital rape (placed his hands inside a girl of 12 years old). The term '*seksueel binnendringen van het lichaam*' had replaced that of the term '*vleselijke gemmenschap hepbem*' and the court submitted that it was not limited to genital penetration and that digital rape as indeed covered by the definition.

⁶ See discussion in Labuschagne, J.M.T. "**Die Opkoms van 'n Abstrakte Penetrasiebegrif by Geslagsmisdade**" (1997) on 461. The author discusses the *Rhode Island* case of *State v Beaulieu* 1996 (Supr. Ct of Rhode Island) 674 A 2d 377 wherein the following facts come to the fore: A man was accused of committing cunnilingus on his 7 year old stepdaughter and the question was asked whether B's actions amounted to penetration. The court found that sexual penetration is required, but not actual penetration, such as penetration of the vagina and this would consequently include cunnilingus. One would thus be guilty of first-degree sexual assault.

⁷ In *Connecticut*, the General Statutes, already in 1997, distinguished between sexual intercourse and sexual contact. The former includes vaginal and anal intercourse, fellatio or cunnilingus, between persons regardless of gender, including object penetration and the slightest penetration is sufficient. The latter involves any contact with intimate parts of a person for sexual gratification, or degradation of another person. See Labuschagne, J.M.T. "**Die Opkoms van 'n Abstrakte Penetrasiebegrif by Geslagsmisdade**" (1997) on 462 - 463.

2. A COMPARATIVE PERSPECTIVE

This chapter will be devoted to a comparative study of the definitional elements of three countries in order to establish which definition can be utilised to deduce an effective definition of rape that can be applied in South Africa. Firstly, a brief overview of the rape measures adopted in Australia will be analysed with specific reference to the provisions applied in the state of Victoria. Of particular interest is the approach adopted with regard to the element of consent which has relevance in formulating a broader definition of rape. Secondly, the position followed in Britain will be referred to in light of the fact that the South African common law is largely based on British law. The clinical definition of rape as well as the legal definition of rape will be critically examined. Groundbreaking case law will be referred to in order to establish which category of sexual assault victim identified in this study is protected. Lastly, the rape provisions applied in certain federal states in the United States of America will be analysed.

2.1. THE POSITION IN AUSTRALIA

A comparison of the legal provisions adopted in certain states in Australia and more specifically, the state of Victoria, provides extremely useful insight into how victims of penetrative sexual assault can be protected. The manner in which the element of consent is dealt with under the term 'free agreement' is of special importance and provides a useful framework of comparison with regard to the definitional elements of rape.

2.1.1. HISTORICAL PERSPECTIVE

In the 18th and 19th centuries under English common law, which was the direct source of Australian common law, rape was an offence against the owner of the

woman.⁸ In as early as 1976 in Australia, the Law Reform Commissioner published a report in which it recommended reform with regard to the law of evidence and procedural law.⁹ The aim was to limit the trauma suffered by the victim by taking into consideration factors such as the giving of evidence, the extensive length of time in which trials are conducted and prior sexual history.¹⁰ Subsequently the Crimes Act (Victoria) 1958 has been amended and the definition of rape now incorporates a broader and more flexible definition which is gender-neutral and includes various forms of penetrative sexual assault.¹¹

In certain states Australia has moved away from a narrow gender-specific definition to a gender-neutral offence. In 1986 in Western Australia the crime of rape was abolished and replaced with a system of graded sexual assaults.¹² A general definition of consent was also incorporated into its Criminal Code.¹³ In Queensland the crime of rape was also based on a narrow gender-specific definition. The crime of rape was defined on much the same lines as the South African definition, namely 'sexual intercourse with a woman without her consent'.¹⁴ This definition has since been amended and has replaced 'female' with 'another person'.¹⁵ In Victoria five Acts have made substantial amendments to sexual offences since April 1959 when

⁸ Either her husband or father. See <http://www.greenleft.org.au> "Rape Laws: The Other Assault" accessed 30 August 2002.

⁹ See Law Reform Commissioner Victoria Report 1976.

¹⁰ *Ibid.*

¹¹ See Section 35(1) of the said Act. See also Crome, S. *et al* "Male Rape Victims: Fact and Fiction" (1999) on 60 *et seq* for general discussion of the position in Victoria. The maximum penalty for rape was increased to 25 years

¹² See "SALC Discussion Paper 85 of 1999" on 106.

¹³ Section 324G of the Western Australian Criminal Code. See "SALC Discussion Paper 85 of 1999" on 107.

¹⁴ See "SALC Discussion Paper 85 of 1999" on 89.

¹⁵ Section 347 of the Queensland Criminal Code. This was on the recommendation of the Criminal Code Review Committee. See also "SALC Discussion Paper 85 of 1999" on 89-90 for discussion.

the Crimes Act of 1958 was proclaimed.¹⁶ The position in Victoria is to be favoured as it applies a broad definition of rape which is not anatomically-specific nor gender-specific.

2.1.2. REFORMING RAPE LAWS

The present author supports the broad and gender-neutral definition of rape as found in the criminal statutes of the state of Victoria as it provides adequate protection to most of the categories of sexual assault victim identified in this study. The elements of rape in terms of the definition in the state of Victoria are *non-consensual penetration, of the victim's anus or vagina, by a penis, finger or object, or by the penetration of the mouth by the penis.*¹⁷

Sexual penetration is defined as:¹⁸

¹⁶ See [http://www.interpol.int/Public/Children/Sexual Abuse/National laws htm](http://www.interpol.int/Public/Children/Sexual%20Abuse/National%20laws.htm) "Sexual Offences Laws – Australia (State of Victoria)" accessed 20 February 2002.

These Acts are:

- * The Rape Offences (Proceedings) Act 1976 No 8940/1976
- * The Crimes (Sexual Offences) Act 1980 No 9509/ 1980
- * The Crimes (Sexual Offences) Act 1991 No 8/1991
- * The Crimes (Rape) Act 1994 No 81/1991
- * The Sentencing (Amendment) Act 1993 No 41/1993.

The gender-neutral and wide approach adopted in the above provisions could easily be endorsed and incorporated within the South African legal system to provide for all the categories of identified sexual assault victim.

¹⁷ The Crimes Act 1958 (Victoria) Sections 35, 37 – 38. See also *Iss v R* 1987 163 CLR 447, wherein there are various degrees of seriousness as regards the different means of penetration, in Crome, S. *et al* "Male Rape Victims: Fact and Fiction" (1999) on 60. Aggravating factors include the use of a weapon, violence and trauma caused to the victim. This definition best supports present author's view.

¹⁸ In terms of Section 35(10) of the Crimes Act 1958 (Victoria) as amended by the Crimes (Sexual Offences) Act 1991.

- (a) *The introduction (to any extent) by a person of his penis into the vagina, anus or mouth of another person, whether or not there is emission of semen; or*
- (b) *The introduction (to any extent) by a person of an object or a part of his or her body (other than the penis) into the vagina or anus of another person, other than in the course of a procedure carried out in good faith for medical or hygienic purposes.*

In terms of the Crimes Act (Victoria), rape is committed if a person:¹⁹

- (a) *intentionally sexually penetrates another person without that person's consent, while being aware that the person is not consenting or might not be consenting; or*
- (b) *if after sexual penetration he or she does not withdraw from a person who is not consenting, upon becoming aware that the person is not consenting or might not be consenting.*

¹⁹ See section 38 of The Crimes Act 1958 (Victoria) in this regard. See further http://www.interpol.int/Public/Children/Sexual_Abuse/National_laws "**Sexual Offences Laws – Australia (State of Victoria)**" accessed 20 February 2002. The legislation of Interpol member provides in section 48 of the Common Law Consolidation Act 1935 that the definition of rape is as follows: *A person who has sexual intercourse with another person without the consent of that other person –*

- (a) *knowing that that other person does not consent to sexual intercourse with him or*
- (b) *being recklessly indifferent as to whether that other person consents to sexual intercourse with him,*
shall (whether or not physical resistance is offered by that other person) be guilty of rape and liable to be imprisoned for life.

In terms of section 4 of the Common Law Consolidation Act 1935 a broad definition of sexual intercourse is also followed. It includes the penetration of the *labia majora* or anus of a person by any part of the body of another person and includes fellatio or cunnilingus. The latter incorporates acts which involve the sucking or licking of the vagina or vulva, which approach is supported here.

Furthermore consent is equated with the term 'free agreement'.²⁰ The judge at trial is required to give direction on consent.²¹ If the victim's words or actions do not indicate consent, then it is sufficient to show that his or her free agreement is absent. Free consent is not necessarily present if either the person did not physically resist or protest or the victim did not sustain physical injury.

As regards the accused's version that there was indeed consent, it must be considered as to whether the belief is reasonable.²² If the above definition were to be applied to the various possible categories of sexual assault victim identified earlier in this study, it is evident that the following categories of sexual assault victim are adequately covered:

- * Penetrative sexual assault by a male perpetrator on a female victim *per anum* or *per vaginam* outside of marriage;
- * Penetrative sexual assault by a male perpetrator on a female victim *per anum* or *per vaginam* inside of marriage;
- * Penetrative sexual assault by a male perpetrator on a male victim;
- * Penetrative sexual assault by a male perpetrator on a female child victim;
- * Penetrative sexual assault by a male perpetrator on a male child victim;
- * Penetrative sexual assault by a female perpetrator on a male victim;

²⁰ Instances of non-consent include the use of force, fear of force, harm to others, unlawful detention, unconsciousness, intoxication (drugs or alcohol), sleep, incapability of understanding the nature of the act, error as to the identity or nature of the act. See Crome, S. *et al* "Male Rape Victims: Fact and Fiction" (1999) on 61.

²¹ Section 37 of the Crimes Act 1958.

²² See *R v Laz* 1998 1 VR 453 on 460.

- * Penetrative sexual assault with the use of an object or digitally on a male or female victim.

The category of sexual assault victim where consensual penetrative sexual intercourse takes place, but the one party deliberately does not disclose their HIV/AIDS infected status, may also possibly be covered by the aforementioned definition. It may be argued that free agreement is absent, or alternatively, that free consent would be withheld if the victim knew of the HIV/AIDS infected status. The definition of Victoria is therefore to be favoured, as it is a broad definition, which does not exclude any form of sexual penetrative assault, identified in this study, from its ambit.

2.1.3. CRITICISM OF THE DEFINITION OF RAPE IN AUSTRALIA

It has been shown that the definition of rape followed in Victoria could be effectively utilised to incorporate all the possible categories of sexual assault victim identified in this study.²³ Although consent forms part of the definitional elements of rape, the present author is of the view that this does not detract from the utility of the definition. The term 'free agreement' is broad enough to ensure that instances of non-consent are covered as well as instances whereby the HIV status of one party is not disclosed during consensual penetrative sexual intercourse. The element of consent will always play a role in the crime of rape in some form or another as it forms the crux of whether a rape has been committed or not.²⁴ The element of intention and more specifically, *dolus eventualis*, is also a criterion in establishing whether consent was present or absent.

²³ The only category excluded due to the penetration requirement are male victims of digital sexual assault where the man is manually stimulated but no penetration takes place.

²⁴ A number of instances cater for instances where consent is negated. Examples are *inter alia* cases of submission due to duress or fear, illness, drunkenness (so-called passive consent).

Crome, McCabe and Ford comment on the position of male rape in Australia as a whole and feel that there is limited legal consensus on definitions of male sexual assault which is due to a failure to think through and link the types of conduct involved into a consistent area of law. They state as follows:²⁵

Even though most legal definitions involve concepts of sexual penetration, force or intimidation and lack of consent, there remain many unresolved issues: These require an examination of gender relationships and of the boundaries between individuals, and acknowledgement of the enactment of sexually abusive behaviour by abused individuals. It is clear that the broader the legal definition of sexual assault, the more cases will be identified as victims.

It is thus difficult for victims, especially male victims, to report a crime that is not properly acknowledged. As mentioned above, a broad definition is favoured in Victoria which is gender-neutral and not anatomically or object specific.²⁶ The maximum penalty for rape is 25 years imprisonment. The state of Victoria therefore offers more flexibility than Western Australia and New South Wales, as it is more generally worded. The latter states tend to leave definition of certain components to common law. In the past, Queensland's rape laws were focused on females which position is mirrored in current South African law. The crimes on male victims were

²⁵ Crome, S. *et al.* "Male Rape Victims: Fact and Fiction" (1999) on 60. See also comparison with the Swedish Penal Code (chapter 6 section 1) which provided as early as 1984 that: *[i]f a person by violence or by threat involving, or appearing to the threatened person as imminent danger, forces the latter to copulate or have comparable sexual intercourse, he or she shall be sentenced for rape.*

²⁶ The definition of sexual penetration is:

- * the introduction (to any extent) by a person of his penis into the vagina, anus or mouth of another person, whether or not there is emission of semen; or
- * the introduction (to any extent) by a person of an object or a part of his/ her body (other than the penis) into the vagina or anus of a person, other than in the course of a procedure carried out in good faith, for medical or hygienic purposes.

treated as lesser offences, which resulted in low reporting in Queensland and other states.²⁷

Statistics of the state of Victoria reveal that the numbers of reported rape cases are relatively low for male victims, but seem to be on the incline. In 1991, the total rape offences reported were 729 of which only 42 were reported by men, whereas in 1992, 29 rapes and 459 assaults on men were reported.²⁸ An explanation for the significant difference in numbers could be that there were a number of actual rape acts committed, but were classified under assaults because the victims did not perceive themselves as having been raped.²⁹ In 1993, the total rapes reported on males were 93 and assaults on males were 758 whereas in 1994/1995, the total rapes on males reported were 89 while 881 assaults were reported.³⁰ As regards the gender of offenders, in 1991/1992 there were 399 male assailants committing crimes on females, with four female on female attacks. As regards male rape, 39 were male assailants and there was one case which involved a female offender.³¹

From the above statistics it would appear yet again that the crime of rape, as defined, occurs predominantly against women. It has to be considered that perhaps

²⁷ See **“SALC Discussion Paper 85 of 1999”** on 89 - 91; See also Queensland’s Criminal Code and in specific sections 347 and 348, wherein it refers to the perpetrator and victim as ‘person’ thereby making the definition gender-neutral. Crome, S. *et al.* **“Male Rape Victims: Fact and Fiction”** (1999) on 61.

²⁸ Crome, S. *et al.* **“Male Rape Victims: Fact and Fiction”** (1999) on 62. See further <http://www.greenleft.org.au> **“Rape Laws: the other Assault”** accessed 30 August 2002. It is mentioned that in Australia less than one in four rapes are reported, of which only one in three rape cases result in a conviction.

²⁹ *Ibid.*

³⁰ Crome, S. *et al.* **“Male Rape Victims: Fact and Fiction”** (1999) on 62.

³¹ *Ibid.*

male victims have been neglected or that they do not report, as they do not perceive themselves to be the victim of a recognised crime.³²

It can be deduced that the approach in Victoria can be utilised from a South African perspective.³³ Although the state of Victoria offers the most comprehensive definition of the crime of rape, the remainder of the states in Australia are limited as regards penetration and consent. It is evident that occurrences of male rape are still underreported and with development of further law reform, the position will probably change.

2.2. THE POSITION IN BRITAIN

Initially, South African law closely followed the position of Britain with regard to rape law. However, British law has undergone extensive reform and has revised its definition from 'unlawful and intentional sexual intercourse with a woman without her consent'³⁴ to 'it is an offence for a man to commit rape' and is further limited to only include penile penetration of the vagina or anus.³⁵ The British position will therefore be critically examined with regard to the crime of rape to establish whether its reforms are extensive enough to incorporate all victims of forced penetrative sexual assault. Attention will be expended upon the clinical and legal definition of rape and

³² See "Rape Law Reform Evaluation Project Report no 1: The Police Code of Practice for Sexual Assault Cases: An evaluation report by Heenan and Ross" (1995) in Crome, S. *et al.* "Male Rape Victims: Fact and Fiction" (1999) on 63 for criticism of findings.

³³ It is broad enough to incorporate oral and digital rape. The present author supports this viewpoint as the crime of rape is not committed if any object other than a male sex organ is forced into a victim's mouth. For example, if the assailant forced confectionary such as a candy stick into the victim's mouth, this act would be assault, or indecent assault, depending on the formers intention.

³⁴ Temkin, J. "Rape and The Legal Process" (1987) on 25.

³⁵ Section 142(2)(a) of the Criminal Justice and Public Order Act 1994. See also Rumney, P. & Morgan-Taylor, M. "Recognizing the Male Victim: Gender Neutrality and the Law of Rape: Part One" (1997) on 199.

related issues in order to establish whether the British definition of rape could be transposed into South African law.

2.2.1. HISTORICAL PERSPECTIVE

At common law, the initial narrow definition of rape can be attributed to the origin of the crime. In the 12th century the law was concerned with the protection of virgins and in some cases, a widow could not lay a charge for rape, as she was not a virgin.³⁶ In 1285 rape was extended to include any woman.³⁷ Rape was defined as the unlawful and intentional sexual intercourse with a woman without her consent.³⁸

In 1980 and 1984, the Criminal Law Revision Committee examined the definition of rape.³⁹ The Criminal Law Revision Committee England Report 1984 was drafted by the Criminal Law Revision Committee, who recommended that the offence of rape should be retained as is, together with the maximum penalty of life.⁴⁰ They commented that the definition of rape should not be reformed as it is a distinctive form of wrongdoing, as well as the fact that rape can cause pregnancy.⁴¹ Their argument failed to consider the implications for infertile, sterile, menopausal and pre-pubertal females. Furthermore, as emission of semen was unnecessary as a requirement, that contention served no purpose.⁴² The Committee was also in favour of retaining buggery as a crime, which covered anal intercourse. It was only

³⁶ Temkin, J. "Rape and the Legal Process" (1987) on 27. See also Hall, C. "Rape: The Politics of Definition" (1988) on 79 – 80.

³⁷ Temkin, J. "Rape and the Legal Process" (1987) on 27.

³⁸ Huckle, P.L. "Male Victims Referred to a Forensic Psychiatric Service" (1995) on 187. Rogers, P. "Male rape: The Impact of a Legal Definition on the Clinical Area" (1995) on 303.

³⁹ Temkin, J. "Rape and the Legal Process" (1987) on 30 fn42 and fn43.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² Temkin, J. "Rape and the Legal Process" (1987) on 178.

in the nineties that the position was somewhat changed and it was established by legislation and case law that a man could in fact be raped.⁴³

Buggery was defined as non-consensual anal intercourse between males, as well as between men and women. It also covered consensual acts committed in public (committed by males only).⁴⁴ Therefore violent anal intercourse was equated under the same heading as consensual 'buggery' between a man and a woman.⁴⁵ The position with regard to buggery is congruous with what the South African definition of sodomy used to be.

With regard to the crime of indecent assault, the English case of **R v Willis** illustrated the important principles of this crime.⁴⁶ The *nature of the act* is the determinant as to whether it is indecent or not. It may relate to less serious acts, such as placing a hand under clothing or on erogenous zones of the body, or it may take the form of fellatio.

The Committee was in favour of keeping the three crimes separate, as buggery and rape were thought to be substantially more humiliating than the crime of indecent assault *per se*. Temkin argues that object penetration, or oral sex, may be far worse and traumatic than the offences of rape or buggery.⁴⁷ The Commission also studied the position in Victoria in Australia.⁴⁸ The Commission then left the matter open.

⁴³ The Criminal Justice and Public Order Act 1994. See also **R v Richards** 1996 2 Cr App. R (S) 167.

⁴⁴ Before the new definition of 1994, non-consensual anal intercourse was viewed as a lesser offence with a maximum of 10 years imprisonment, as opposed to a life sentence for rape.

⁴⁵ Temkin, J. "**Rape and the Legal Process**" (1987) on 31.

⁴⁶ 1974 60 Cr App R(S) 149 as in Mezey, G.C. & King, M.B (ed). "**Male Victims of Sexual Assault**" (1992) on 118.

⁴⁷ Temkin, J. "**Rape and the Legal Process**" (1987) on 32.

⁴⁸ Temkin, J. "**Rape and the Legal Process**" (1987) on 30. In terms of the Crimes Act 1958 section 2A(2) of Victoria, rape has been redefined to include the penetration of the penis into the mouth or anus or vagina of any *person*, as well as the insertion of objects into the vagina or anus.

It is evident thus far that the legal position with regard to rape, buggery and indecent assault are analogous to the South African definitions of rape, non-consensual sodomy and indecent assault. The reforming rape laws will now be appraised to establish which category of possible penetrative sexual assault victim has since been incorporated into the definition of rape.

2.2.2. REFORMING RAPE LAWS

In Britain, male rape was recognized clinically before legally. In 1995, the clinical definition was used to incorporate forced, non-consensual penetrative acts.⁴⁹ In terms of the clinical definition, male rape is described as:

*[n]on-consensual forced penetrative sexual assault upon a person.*⁵⁰

The position prior to 1995 was that a narrow definition of rape prevailed as contained in the British Sexual Offences Amendment Act of 1976.⁵¹ Forced anal penetration was classified as non-consensual buggery with a lesser penalty. In 1987 in Britain, male rape did not fall within the strict definition of rape which was the forced penile-penetration of the vagina (the man could be the assailant only) and men were only covered by the crimes of indecent assault and buggery, which position is similar to that of the current position in South Africa.⁵² A comparison with a clinical definition is useful as it provides a useful basis for a broader definition of the crime of rape. It is also indicative of the fact that the medical profession also recognises the possibility of an extended definition of the crime of rape and if an

⁴⁹ Huckle, P.L. "Male Rape Victims Referred to a Forensic Psychiatric Service" (1995) on 187.

⁵⁰ Huckle, P.L. "Male Rape Victims Referred to a Forensic Psychiatric Service" (1995) on 191.

⁵¹ This entailed the forced penile penetration of the vagina. As mentioned elsewhere forced anal penetration was defined as non-consensual buggery and a lighter sentence than that imposed for the crime of rape prevailed. It is evident from the above that discrimination between male and female victims in Britain also caused underreporting and a tremendous disparity in sentencing.

⁵² Mezey, G.C. & King, M.B. "Male Victims of Sexual Assault" (1987) on 123.

extended definition of the crime of rape is recognised medically it can serve as a proponent to a broader legal definition.

In terms of the clinical definition, male rape is described as:

*[n]on-consensual forced penetrative sexual assault upon a person.*⁵³

In November 1994 an amendment to the definition of rape was introduced and the notion of gender-neutrality was accepted by the House of Lords and was incorporated into section 142 and section 143 of the Criminal Justice and Public Order Act 1994.⁵⁴ The new crime was introduced by section 142(2)(a) of the Criminal Justice and Public Order Bill 1994 as:⁵⁵

[a] man commits rape if he has sexual intercourse with a person (whether vaginal or anal) who at the time of intercourse, does not consent to it.

Morgan and Rumney-Taylor state that the amended definition more *accurately reflects the modern understanding of sexual violence, its nature and consequences.*

⁵⁶ This supports the view that the law should reflect the *mores* of society in terms of which the common man on the street views rape as a gender-neutral offence. The expanded definition has closed the *lacunae* in the law where males and transsexuals were excluded.

The legal and clinical view of male rape, nevertheless, do not coincide. The lack of definitions of male rape in clinical papers are prevalent, with the focus being on

⁵³ Huckle, P.L. “Male Rape Victims Referred to a Forensic Psychiatric Service” (1995) on 191.

⁵⁴ Gender-neutrality means that the law is applicable to both men and women, as assailants, or victims.

⁵⁵ See also Edwards, S.S.M. “Sex and Gender in the Legal Process” (1996) on 335.

⁵⁶ Morgan-Taylor, M. & Rumney, P. “A Male Perspective on Rape” (1994) on 1490. See also *Cossey v UK* 1991 2 FLR 492 as referred to in which it was stated that it is not legally possible to change ones sex with the consequence that if born male, a hermaphrodite cannot be raped.

sexual assault, entailing a wide variety of penetrative sexual acts perceived as rape.⁵⁷ In a survey in Britain, 130 male victims were subjected to acts of forced oral penetration and object penetration with knives and were found to have been as traumatised as victims of rape.⁵⁸ A distinction is therefore drawn between penetrative and non-penetrative acts, the former being regarded as having experienced more trauma than the latter. How does this affect male sexual assault victims who are forced to penetrate the assailant, being either a male or a female? It is present author's view that the concept of penetration envisaged in the clinical definition is broad enough to incorporate this type of penetration so that any form of penetration would be included.

The question arises as to the reason for the lack of a clear clinical definition of rape. Many researchers classify oral, object and digital sexual assault as a species of rape and a reason furnished is that it is viewed from a *psychological* and *physical* perspective. Various advantages on the clinical issues, arising from the legal definition are cited namely: greater legal redress for male victims, the quality of research into prevalence will improve and services will be developed to assist and treat victims.⁵⁹

Prior to the amendment males could merely be victims of non-consensual buggery, which held a penalty of a maximum of only ten years as opposed to rape which carries a maximum penalty of life imprisonment. The first case of male rape to appear in British case law is the case of **R v Richards**.⁶⁰ This case was a landmark decision as it was the first case to be decided in Britain after the amendment to the

⁵⁷ See in general Rogers, P. "Male Rape: The Impact of a Legal Definition on the Clinical Area" (1995) on 303 *et seq.*

⁵⁸ Rumney, P. & Morgan-Taylor, M. "Recognizing the Male Victim: Gender Neutrality and the Law of Rape: Part Two" (1997) on 344.

⁵⁹ Rogers, P. "Male Rape: The Impact of a Legal Definition on the Clinical Area" (1995) on 304 - 305.

⁶⁰ 1996 2 Cr. App. R (S) 167. See also Rumney, P. & Morgan-Taylor, M. "Sentencing for Male Rape" (1996) on 262.

rape laws as introduced in Section 142(1) and (2) of the Criminal Justice and Public Order Act of 1994. The amendment sought to include penile penetration *per anum* and *per vaginam*.

The facts if the **Richard** case was as follows: The victim was an 18 year old male who was led by R, the defendant who was 25 years old at the time, to a park. The latter grabbed the former around the throat who was then forced to perform fellatio on the defendant who also attempted to rape the victim. R orally penetrated the victim's mouth and ejaculated. The defendant pleaded not guilty.

Lowry J looked at various factors in convicting and sentencing the defendant and R was convicted of indecent assault. He was sentenced to 6 years imprisonment for each count as well as life imprisonment for the *attempted rape* and attempted buggery of a male person. He looked at the defendant's prior convictions, as the latter had previously also committed an offence on a young girl, the fact that more violence was used than was needed to commit the offence and also the fact that he also pleaded not guilty, resulting in the victim having to give evidence. He also decided that the main concern was the protection of the public, as there was a high possibility that the defendant would commit further offences in the future if not confined for an indefinite period, as he was also diagnosed with a psychopathic personality disorder. Consequently Judge Lowry decided that a determinate sentence was inappropriate and that the appropriate sentence for attempted rape was life imprisonment.⁶¹

⁶¹ The court took into account the case of **R v Billam** 1986 8 Cr App R (S) 48. In this case the court mentions that attempted rape would normally have a lesser penalty than a complete rape. However aggravating factors may be so severe as to make the attempt more serious than the completed offence. It is further stated that where there is a severe personality disorder, that the public is at risk, a life sentence may be imposed. In other cases such as **R v Fenton** 1992 13 Cr App R (S) 85 and **R v Hodgson** 1968 52 Cr App (R) 113, various factors were mentioned such as, a long sentence may be imposed where the offences are severe enough; where it is apparent from the nature of the offences that the defendant has a history of an unstable characteristics and personality disorders and where the offences are particularly grave causing severe injury.

Criticism that may be offered with regard to the **Richard** case is: What happens in cases where the facts are analogous to the aforementioned case but the defendant does not have a personality disorder? It would appear that a lesser penalty would then be applicable. A second point of criticism that is relevant is that the judge does not refer to the crime solely as rape *per se* but associates the sexual assault with the crime of buggery. Nevertheless it is evident that Britain has afforded recognition to the male victims of rape with this groundbreaking case.

As males can now also be victims of rape, the limited bar to cross-examination would also be applicable.⁶² Shortcomings of the legislation entail that questions regarding previous sexual history are not prohibited. Consequently allegations of previous homosexual behaviour could be damaging to the credibility of a heterosexual person. The other stigma that male victims are homosexual, could also possibly affect the complainant's credibility should he be examined. Temkin suggests that it would be counterproductive to extend rape views to include male victims, as the latter would suffer the same poor treatment as females.⁶³

This view is not supported by the present author. Although it may be true that female victims might have been treated shoddily initially by police officials and the legal process, the position has dramatically changed with rape reforms. It is furthermore submitted that failure to recognise male victims of rape could cause more harm if the crimes were not recognized. The criminal would have a double victory and it would give leeway to continue unabated in a spate of crimes should the latter so wish. With recognition, the position is bound to change, which would

See also Rumney, P. & Morgan-Taylor, M. "**Sentencing for Male Rape**" (1996) on 262.

⁶² Section 2(1) Sexual Offences Amendment Act 1976.

⁶³ Temkin, J. "**Rape and the Legal Process**" (1987) on 39. See also Morgan-Taylor, M. & Rumney, P. "**A Male Perspective on Rape**" (1994) on 1490.

diminish any poor treatment that might be received by the police officials and the courts.⁶⁴

As regards the offence of buggery, it is still partly retained and has the following consequences:⁶⁵

- * If committed against a person under 16 years of age or with an animal, the penalty is life imprisonment;
- * If committed against a person under the age of 18 years with the accused being over 21 years of age, the penalty is 5 years imprisonment;
- * In the remainder of cases, the penalty is 2 years imprisonment.

The retention of buggery is not favoured by present author who feels that the protection offered to sexual assault victim is both limited and stigmatising. The crime of indecent assault is also being viewed with growing seriousness. In the case of **R v Wilson**, a 53 year old woman was forced off her bicycle by the appellant, and forced to touch the latter's genitalia before he ejaculated in her mouth and face.⁶⁶ He was awarded a nine-year prison sentence as the judge regarded this type of invasion as serious as vaginal rape.⁶⁷ The crime of indecent assault could therefore be utilised for non-penetrative acts. Victims of sexual assault could be covered under the crime of indecent assault which could serve as a competent verdict to a case of rape.

⁶⁴ A solution suggested, has been increased education, and already there have been trained officers who assist male victims through medical examinations and the legal process.

⁶⁵ Rumney, P. & Morgan-Taylor, M. "Recognizing the Male Victim: Gender Neutrality and the Law of Rape: Part One" (1997) on 199.

⁶⁶ 1993 14 Cr App R (S) 627; 630-631.

⁶⁷ See also the case of **R v Hiscock** 1992 13 Cr App R (S) on 24-26 where a 5 years imprisonment sentence was imposed where a 15 year old girl was orally raped, as the court found the act to be in some ways *more nauseating and repellent than a vaginal rape*.

Criticism against the British definition is that it is still too narrow. The recent rape law reforms recognize male victimization and is partially gender-neutral in that it is an offence for men to commit rape.⁶⁸ Despite the reform, the definition still excludes oral rape, digital and object rape, which crimes would only be afforded redress under the crime of indecent assault.⁶⁹ It also excludes female perpetrators of sexual assault on a male or female victim.⁷⁰

The criticism of the British definition will now be addressed in detail, in order to establish whether the British definition is suited to the categories of sexual assault victim identified earlier in the Study and which are deserving of protection in the South African law.

2.1.3 CRITICISM OF THE DEFINITION OF RAPE IN BRITAIN

A question may be asked whether the new law in Britain is justifiable and whether the British definition of rape can be transposed into our South African law to offer adequate protection to the various identified categories of sexual assault victim postulated in this study? The following factors may play a role.

⁶⁸ Section 142(2)(a) Criminal Justice & Public Order Act 1994.

⁶⁹ See **R v Wilson** 1993 Cr App R (S) 627 on the position regarding oral rape.

⁷⁰ See Rogers, P. "**Male Rape: The Impact of the Clinical Definition on the Clinical Area**" (1995) on 305 where criticism of the phenomena of male rape offered is as follows:

- * The lack of literature on the topic which is related to a lack of interest, and awareness, on the subject of male rape and other types of rape.
- * The legal definition only protects some male victims, which is of concern as those who do not meet the criterion will be ignored in epidemiological studies.
- * Only one conviction for male rape occurred in the six months after the enactment of the new definition.

1. *Acts of vaginal and anal penetration are similar and equitable.*

Initially male victims of forced penetrative sexual assault were not afforded equitable protection which was not the case with their female counterparts. Non-consensual buggery was regarded as a less serious crime than the crime of rape.⁷¹ Three cases illustrate this:

- * In the case of **Jackson** a retarded man was sodomised by an HIV-positive assailant. The accused was sentenced to a mere 6 years imprisonment.⁷²
- * In the case of **Payne** a quadriplegic was totally unable to defend himself and was sodomised.⁷³ His assailant was sentenced to 4 years imprisonment.
- * In **R v Wall** a male was threatened with a razor blade and sodomised in prison.⁷⁴ The accused was sentenced to 6 years imprisonment. It was mentioned in the case that buggery should not be equated with rape, as the latter is regarded as the most serious sexual offence, and carries a higher maximum sentence.

It was only in the case of **R v Mendez** that forced sexual assault *per anum* was equated with growing seriousness and Glidewell J states that:⁷⁵

⁷¹ Rumney, P. & Morgan-Taylor, M. "Recognizing the Male Victim: Gender Neutrality and the Law of Rape: Part One" (1997) on 220.

⁷² 1988 10 Cr App. R (S) 297; Also referred to by Rumney, P. & Morgan-Taylor, M. "Recognizing the Male Victim: Gender Neutrality and the Law of Rape: Part One" (1997) on 222.

⁷³ 1994 15 Cr. App. R (S) 395.

⁷⁴ 1989 11 Cr. App. R (S) 111.

⁷⁵ 1992 13 Cr. App. R (S) 95.

[f]orcible buggery of a woman is equitable to rape, but worse than normal vaginal rape...one might regard this as an aggravated rather than a standard rape.

In other words, forced penetrative sexual assault *per anum* is viewed as an aggravated form of rape. Based on this the British definition of rape would offer equitable protection to the following identified categories of sexual assault victim. It would cover the victimisation of a female victim of penetrative sexual assault *per anum* or *per vaginam*, both inside and outside of marriage by a male perpetrator and would also offer protection to a male victim of sexual assault *per anum* by a male perpetrator. A number of the possible categories of sexual assault victim identified in this study would not be covered and the definition is therefore deficient for this reason.

2. *The motives of the assailants are similar, irrespective of the sex of the victim.*

As mentioned earlier in this study, the motivation for the sexual assault is the assertion of power, rather than sexual motivation.⁷⁶ Children and elderly men are also victims of rape which is attestation to the fact that sexual gratification is not the primary motive. Accordingly the British definition falls short on this aspect as it fails to consider other categories of sexual assault victims who are also deserving of protection.

⁷⁶ See chapter two. Groth, A.N. "Men who Rape" (1979) on 124 - 133. As mentioned elsewhere the psychological motives advocated are conquest and control, revenge and retaliation, sadism and degradation, conflict and counteraction and status and affiliation.

3. *The trauma and consequences of rape are similar for both men and women.*⁷⁷

It has been shown in this study, that victims of penetrative sexual assaults may all suffer similar physical injury and psychological trauma such as Rape Trauma Syndrome.⁷⁸ Post-traumatic stress disorder is also a classification of trauma from which victims suffer.⁷⁹ The British definition is deficient in this regard as it neglects a number of categories of penetrative sexual assault victim which have been identified. The British definition therefore still needs to broaden the rape definition, especially as regards other forms of rape, but nevertheless the case of **R v Richards** has been a breakthrough in that it has recognised the seriousness of crimes committed on male victims.⁸⁰ However, it has the shortfall in that object and oral sexual assaults as well as female assailants are not recognised. The female perpetrator of a penetrative sexual assault on a male or female victim can only held liable under the crime of indecent assault.⁸¹

This exclusion may be attributed to the same common misconceptions experienced in South African law and globally which were expounded upon earlier.⁸² As

⁷⁷ Rumney, P. & Morgan-Taylor, M. "Recognizing the Male Victim: Gender Neutrality and the Law of Rape: Part One" (1997) on 228.

⁷⁸ See chapter two in this regard.

⁷⁹ See discussion elsewhere in chapter two on psychological consequences.

⁸⁰ 1996 2 Cr. App. R (S) 167. As mentioned elsewhere, male victimization previously constituted the offence of buggery, which included vaginal and anal intercourse with an animal. The principle of gender-neutrality is now incorporated within their domestic rape legislation. It recognizes that a male too can be raped.

⁸¹ For acts of forced oral, object, digital or penile-vaginal sexual intercourse.

Note: The maximum penalty for indecent assault is 10 years imprisonment in comparison with life imprisonment for rape as found in section 37 of the Sexual Offences Act 1956 (as amended).

⁸² See chapter two of this Study. This relates to the belief that men could actively commit a sexual offence, whereas the woman could only passively acquiesce and allow the offence to be committed against her. The converse of this situation was not seen to be possible. Hence the belief arises that a man cannot be raped by a woman.

mentioned elsewhere, it is often thought that it is biologically and physically impossible for a man to be raped. Surely, it is asked, it would only be possible if he were willing? It has been suggested that what the male does he does on purpose and consequently the act must be a voluntary act.⁸³ Research referred to in chapter two of this study has shown that men can obtain erections in violent circumstances and can even ejaculate with consequential trauma of humiliation, anxiety and terror.⁸⁴ A further misconception accounting for the narrow British definition is that a woman does not have the physical strength to rape a man.⁸⁵ Why then is male rape regarded, even in Britain, as a hypothetical event? The fact of the matter is that there is only limited evidence involving representative samples of rape of men by women. The crime of male rape is consequently underestimated. Limited reporting also affects available data as regards female assailants. The same reasons identified in chapter two of this study which account for the limited data are applicable here.⁸⁶ A reason suggested for the narrow definition surrounds the question as to why females would be motivated to rape? The same reasons are

⁸³ See in this regard **Willan v Willan** 1960 2 All ER 463: A husband alleged that he was physically assaulted by his wife. If he did not oblige and conform to sexual intercourse when his wife required it, she resorted to violence. The court was concerned about whether the act of sexual intercourse after the violence, condoned the wife's behaviour, thus barring the divorce. The court found that it did condone the act as the sexual intercourse was viewed as a voluntary act.

⁸⁴ Rumney, P. & Morgan-Taylor, M. "**Recognizing the Male Victim: Gender Neutrality and the Law of Rape: Part One**" (1997) on 231 and fn167. See chapter two for more detail.

⁸⁵ These misconceptions are that the woman may be armed; the woman may in fact be stronger than the male victim; there might be a gang of women who overpower the man and the victim may be drugged. As regards this, section 4 of the Sexual Offences Act 1956 excludes males as victims, in its provisions which make it an offence to administer drugs to a woman, to enable a man to have sexual intercourse with the former.

⁸⁶ The notion that men are not encouraged to show emotion or vulnerability, may also discourage the latter from reporting the crime, as well as the phenomenon where male victims minimize or normalise their experiences of sexual violence is also blamed for the lack of reporting in Britain. See Rumney & Rumney, P. & Morgan-Taylor, M. "**Recognizing the Male Victim: Gender Neutrality and the Law of Rape: Part Two**" (1997) fn174-176.

suggested as is applicable to males, such as power and control and possible past sexual abuse.⁸⁷

Although the British definition is one step further in treating male and female victims similarly and recognises anal penetration as an aggravated form of rape it is to be rejected because victims of both genders are excluded from the ambit of the new legislation.⁸⁸ The following categories of sexual assault victim which have been identified in this study are not covered by the legislation:

- * Penetrative sexual assault by a female perpetrator on a male victim;
- * Penetrative sexual assault with the use of an object or digitally on a male or female victim;
- * Consensual sexual intercourse where the one party fails to disclose their HIV/AIDS infected status to the victim.

A better definition of rape as suggested by the British authors Morgan-Taylor and Rumney would have been:⁸⁹

⁸⁷ See Parrot, A. & Bechhofer, L. "Acquaintance Rape: The Hidden Crime" (1991) on 207-208; See also Rumney, P. & Morgan-Taylor, M. "Recognizing the Male Victim: Gender Neutrality and the Law of Rape: Part Two" (1997) on 343.

⁸⁸ **R v Mendez** 1992 13 Cr. App. R (S) 94 on 95.

⁸⁹ Morgan-Taylor, M. & Rumney, P. "A Male Perspective on Rape" (1994) on 1490. The original amendment suggested to the definition of rape was debated in the House of Commons. The definition of "sexual intercourse" was to have included vaginal or anal penetration to any degree, by any part of the assailant's body, or any object, and would have also incorporated non-consensual oral sex. This definition was consequently withdrawn in favour of the current more narrow definition. See also Huckle, P.L. "Male Victims Referred to a Forensic Psychiatric Service" (1995) on 191 where he states: *Rape should not be defined by gender but by recognizing it for what it is: non-consensual forced, penetrative sexual assault upon a person.*

[vaginal] or oral penetration to any degree by any part of the assailants body or any object and shall include non-consensual oral sex.

The *lacunae* would therefore be closed and all possible categories of sexual assault victim would be equitably protected.⁹⁰ The conclusion that may be deduced is that some aspects of the British definition could be transposed into the South African law, but the overall effect would be inequitable for the excluded categories of sexual assault victim's which has been identified. Change will only take place with increased knowledge and case studies performed on the topic to increase awareness of the prevalence of this type of rape. Again, if a definition only protects some rights, how does one justify the lack of protection afforded to other victims, whose rights are not of lesser importance than those who are protected. Although only one conviction occurred within 6 months after the amended definition, it is a breakthrough in the legal definition and provides material for more convictions to follow.

2.3. THE POSITION IN THE UNITED STATES OF AMERICA

A comparative analysis would not be complete without reference to the United States due to the difference between legislative measures adopted in its numerous states. The various states have their own legal provisions pertaining to the crime of rape. Many states in the United States of America have realized that more legal research is required and that the justice system needs to be extended to incorporate more victims of sexual assault. This was largely due to the fact that rape was an extremely difficult crime to prove and consequently rape victims were questioned extensively about their sexual history. Should the victim have had a sexual history, he or she was regarded with suspicion, as it was thought the person was more likely to consent to sexual intercourse.

⁹⁰ Vaginal, anal, oral and digital rape.

The feminist movement questioned the laws regarding rape and placed pressure on the legislature to limit evidence of a victim's prior sexual history at trial. Consequently statutes termed the 'Rape Shield Laws' were adopted.⁹¹

Although female victims have suffered mistreatment due to the justice system, the situation has improved and trained officials have been recruited to assist victims.⁹² There is no reason why male rape victims will not also be afforded the same protection if mechanisms are improved and research increased. This will eliminate judicial misconceptions of the dynamics of male victim abuse and change perceptions and attitudes.

Many American states have therefore broken away from the shackles of the traditional definition of rape and offer protection to all victims alike.⁹³ Substantial research has been conducted on prison rape in the United States. Rape Trauma Syndrome has even been extended to men as a result of research conducted, which

⁹¹ Michigan was the first state to pass their rape shield laws in 1974. All statutes have a feature in common as the automatic admissibility of proof of unchastity is rejected. See Kramer, E.J. **"When Men are Victims: Applying Rape Shield Laws to Male Same-Sex Rape"** (1998) on 300. In South Africa it has been held that the complaint should be lodged at the earliest opportunity as is reasonably expected, without undue delay. See *R v C* 1955 4 SA 40 (N). See also Labuschagne, J.M.T. **"Die Klagte by Seksmisdade"** (1978) at 19 – 20. See further *R v Osborne* 1905 1 KB 551 on 559 for comments by Ridley J as regards the accused's defence that the complainant never raised a "hue and cry" also in **"SALC Issue Paper 10 of 1997"** on 25. Certain case law indicates that to report a crime a few years after the crime has been committed may be accepted. In *R v P* 1967 2 SA 497 (R), several years had passed since the first act of intercourse. In *R v Gannon* 1906 TS 114 – 10 days had passed and in *R v T* 1937 TPD 389 – 6 weeks had elapsed. The complainant needs to show consistency and rebut a defence of consent. Consent, however is not always an issue (for example if the child is less than 16 years of age as in the case of statutory rape).

⁹² Odem, M.E. & Clay-Warner, J. **"Confronting Rape and Sexual Assault"** (1998) on 254. See further Bohmer, C. **"Rape and the Law"** in Parrot, A. & Bechhofer, L (ed). **"Acquaintance Rape: The Hidden Crime"** (1991) on 317 - 327 and 329 - 333.

⁹³ Odem, M.E. & Clay-Warner, J. **"Confronting Rape and Sexual Assault"** (1998) on 44 - 45.

indicated that men and women experienced the same trauma.⁹⁴ The approach followed in Nebraska seems to be the best approach which could be applied to South African law, so that there could be a distinction between serious penetrative sexual crimes as opposed to less serious non-penetrative crimes.

In order to understand how the definitions presently adopted in a number of states were formulated, the history of the crime of rape will be discussed followed by an analysis of the reforming rape laws. Specific attention will be given to the aims of the rape law reform, the common law approach adopted in various states and the different crimes formulated to cater for possible victims of sexual assault. Lastly, the position with regard to rape laws adopted in various states will be critically examined and a conclusion deduced as to whether any provisions pertaining to the crime of rape can be effectively transposed into South African rape legislation.

2.3.1. HISTORICAL PERSPECTIVE

In the United States the crime of rape was derived from the British common law. The British common law definition of rape was transferred to the colonies and was described as the carnal knowledge of a woman by force and against her will and was distinguished by the element of *non-consent*, although the various states later codified their common law.⁹⁵

Earlier the definition focused on the sexual element of rape rather than that of violence, and various safeguards were imposed to avoid false accusations. For this purpose certain requirements were focused upon. These requirements entailed victim credibility and corroborating evidence was required. In addition, a resistance

⁹⁴ **People v Yates** 1995 637 NYS 2d 625. Rumney, P. & Morgan-Taylor, M. “**Recognizing the Male Victim: Gender Neutrality and the Law Of Rape: Part One**” (1997) on 230.

⁹⁵ See Donat, P.L.N & Emilio, J.D. “**A Feminist Redefinition of Rape and Sexual Assault: Historical Foundations and Change**” (1992) on 9 - 22.

standard was imposed and was an indicator of non-consent.⁹⁶ Previous sexual conduct and history were considered. The reform began when problems were experienced with the interpretation of the law. The crime was moreover increasing at an alarming rate.⁹⁷

During the colonial period, sexuality was directed towards marriage and the creation of lawful heirs. The English colonies were influenced by the Church, and the focus was on the family unit which was regarded as the central unit, with *males being dominant and females submissive*. In order to regulate deviance, the Church, Courts and community formed an alliance so to speak, in order to monitor private sexual behaviour and to limit sexual expression to marriage. Women had the heaviest responsibility as regards premarital sexual intercourse as a woman's value was equated with whom she married and her ability to produce an heirs who were not illegitimate.⁹⁸ Colonial Society held the entire community responsible for upholding morality and sexual crimes were punished severely.⁹⁹

A raped woman was perceived as impure and could not expect to marry into a family of good repute. Most of the cases reported were where assailants came from a lower social class than that of the victim or if the victim was a married woman who had physically resisted. Non-consent was proved by means of physical resistance, verbal resistance and immediate disclosure of the rape to both family and neighbours.¹⁰⁰

By the 19th Century the focus was more on *individual choice*. Women became more empowered as they could be employed. Morality and purity still played a role as

⁹⁶ Odem, M.E. & Clay-Warner, J. "Confronting Rape and Sexual Assault" (1998) on 253.

⁹⁷ See discussion in Burgess, A.W. "Rape and Sexual Assault II" (1988) on 271 *et seq.*

⁹⁸ See Odem, M.E. & Clay-Warner, J. "Confronting Rape and Sexual Assault" (1998) on 36.

⁹⁹ See Donat, L.N & Emilio, J.D. "A Feminist Redefinition of Rape and Sexual Assault: Historical Foundations and Change" (1992) on 9 – 22.

¹⁰⁰ Odem, M.E. & Clay-Warner, J. "Confronting Rape and Sexual Assault" (1998) on 36.

regarded the obtaining of a spouse. If a woman was raped she was sometimes blamed for the rape and ostracized.¹⁰¹

During the course of the 20th Century, psychologists started analysing deviant sexual behaviour towards understanding the cause thereof and eventually the focus was on the rapist and the latter was believed to be mentally ill or to have a character disorder, with the focus being on the act of rape being *sexual as opposed to violence*. Sexual psychopath laws were implemented and offenders were sent to mental institutions as opposed to receiving sentences of imprisonment. Some perceptions were that the woman contributed to the attack and laws were passed which required evidence of penetration, corroborative evidence and testimony regarding prior sexual history.¹⁰²

Within the formation of the feminist movement, reform began and a changing consciousness arose.¹⁰³ The movement formulated a new definition from the victim's perspective and challenged the notion that rapists were predominantly controlled by sexual urges. The focus was more on domination and control. A need was seen for greater measures to be implemented to assist traumatized victims and consequently rape crisis centres, victim units at hospitals and properly trained police as regards rape victims, were provided to assist victims.¹⁰⁴

By the seventies, the reform started to peak in the United States and by 1980 almost every state was contemplating some form of reform to the law relating to rape.¹⁰⁵

¹⁰¹ Odem, M.E. & Clay-Warner, J. "Confronting Rape and Sexual Assault" (1998) on 37.

¹⁰² Donat, P.L.N & Emilio, J.D. "A Feminist Redefinition of Rape and Sexual Assault: Historical Foundations and Change" (1992) on 9-22.

¹⁰³ See Odem, M.E. & Clay-Warner, J. "Confronting Rape and Sexual Assault" (1998) on 40-42.

¹⁰⁴ See in general Deckard, B.S. "The Woman's Movement: Political, Socioeconomic and Psychological Issues" (1983).

¹⁰⁵ Andenaes, J. "The General Prevention Effects of Punishment" (1966) on 970. See further Donat, P.L.N. & Emilio, J.D. "A Feminist Redefinition of Rape and Sexual Assault: Historical

Michigan was one of the first states to introduce reform by way of the Michigan Criminal Sexual Conduct Statute of 1975. In terms of this legislation four degrees of sexual conduct were introduced, with the definition favouring gender neutrality. Various factors such as the following were used to distinguish between the various degrees of criminal conduct:

- * The presence or absence of penetration or sexual contact.
- * The use of a weapon.
- * The age of the victim.
- * Infliction of physical injuries.

The United States offers the most probable solution to the issue of providing a definition best suited to the categories of sexual assault victims identified in this study merely because of its composition of a vast number of states with different legal systems. A number of states have had vast and far-reaching legislative reforms. The reforming rape laws will now be appraised to establish whether a suitable and comprehensive definition exists which incorporates all the categories of penetrative sexual assault victim identified in this study.

2.3.2. REFORMING RAPE LAWS

Previously there were low conviction rates for the crime of rape and this was attributed to jury mistrust of the rape complainant. The reforms were aimed at protecting privacy during trials and were intended to encourage victims to report the crime. With the reform, evidentiary characteristics such as lack of eyewitnesses, delayed reports, absence of injury and incomplete penetration were not seen as

Foundations and Change" (1992) on 9-22. Odem, M.E & Clay-Warner, J. "**Confronting Rape and Sexual Assault**" (1998) on 39.

major obstacles as in the pre-reform era. Rape shield provisions were implemented with a view to protecting complainants and witnesses and focusing on the relevance of evidence by lowering the evidentiary standards.¹⁰⁶ The use of expert evidence was also introduced.¹⁰⁷ The criteria utilised for the admissibility of expert evidence are relevance,¹⁰⁸ expertise¹⁰⁹ and knowledge.¹¹⁰

The aims of the rape law reform were:¹¹¹

- * To end the additional unnecessary trauma faced by complainants when exposed to the legal process.
- * To recognize the crime as one of violence.
- * More effective administration of criminal justice.

¹⁰⁶ See Kramer, E.J. “When Men are Victims: Applying Rape Shield Laws to Male Same-Sex Rape” (1998) on 296.

¹⁰⁷ See Burgess, A.W. “Rape and Sexual Assault” (1985) on 333.

¹⁰⁸ The probative value must be of more value than the prejudice caused to the defendant, or the misleading of the jury; nor cause undue delays or waste time.

¹⁰⁹ The expert must have expertise with specific regard to facets of knowledge, skill, experience, training or education. In various cases such as **State v Saldanha** 1982 Minn. 324 NW 2d 227, the evidence was not accepted as being reliable, as the expert testified on the basis of her opinion that a rape had occurred. See **State v McGee** 1982 Minn.324 NW 2d 232. See further Burgess, A.W. “Rape and Sexual Assault I” (1985) on 334 where Burgess concurs with case law which reveals that such evidence is indeed reliable and acceptable, as it does not fall within the jurors basic knowledge. Furthermore, findings were that the potential prejudice does not outweigh the probative value and at trial the focus is on the victim and not the defendant. The jury is thus offered this type of evidence to assess the case in addition to other evidence. This is especially the case should the defendant allege consent.

¹¹⁰ The expert testimony must not relate to facets which fall within the knowledge of the average person or jury.

¹¹¹ Burgess, A.W. “Rape and Sexual Assault II” (1988) on 277.

- * To permit prosecution of a broader range of offences.
- * To effect this, new offences were created with a broader definition which were gender-neutral with a focus on assault and battery, with degrees of the offence being determined by the following factors such as the nature of the act; the type of force; the age of the victim; the relationship between the victim and offender.

Rape was traditionally defined as the unlawful carnal knowledge of a woman by a man, forcibly, and without her consent.¹¹² Vaginal penetration by the male sex organ was required. Forcible anal intercourse constituted sodomy. Traditionally the crime of sodomy covered every unnatural act of intercourse between males and included voluntary or involuntary acts of anal or oral intercourse as well as acts with a beast. The slightest degree of penetration was needed and no emission of semen was necessary.¹¹³ The legislature repealed the sodomy statute with the adoption of the new Criminal Code.¹¹⁴

Section 213.0 of the Model Penal Code now includes forced anal intercourse as a form of rape.¹¹⁵ Lack of consent thus distinguished rape from other crimes of illicit sex.¹¹⁶ Force indicated non-consent. Rape law reform was needed, as male victimization was thought to be less serious and marital rape was not recognized as a crime.¹¹⁷ By 1988, 24 states had repealed the common law statutes. Some states' statutes were gender neutralized and others broadened the concept to

¹¹² See Odem, M.E & Clay-Warner, J. "Confronting Rape and Sexual Assault" (1998) on 248.

¹¹³ Bailey, F.L. & Rothblatt, H.B. "Crimes Of Violence: Rape and Other Sex Crimes" (1991) on 344 and 345.

¹¹⁴ Section 213.0 of the Model Penal Code.

¹¹⁵ Rape Statute-Non-Genital Intercourse 3 ALR 4th 1009 on 1010.

¹¹⁶ Odem, M.E. & Clay-Warner, J. "Confronting Rape and Sexual Assault" (1998) on 249-254. See further Bohmer, C. "Rape and The Law" in Parrot, A. & Bechhofer, L (ed). "Acquaintance Rape: The Hidden Crime" (1991). Also Burgess, A.W. "Rape and Sexual Assault II" (1988) on 271.

¹¹⁷ Burgess, A.W. "Rape and Sexual Assault II" (1988) on 273.

include object penetration.¹¹⁸ A number of states created new offences with non-consensual sexual contact as a basis.

Michigan departed from the common law and introduced reform in the form of the Michigan Criminal Sexual Conduct Statute of 1975.¹¹⁹ Its concept of rape entails elements of sexual penetration, criminal intent and lack of consent. It delineated the crime into four degrees of sexual criminal conduct depending on age, danger to the victim and injuries caused.¹²⁰ The reform recognised rape as being violent and offered more protection to victims in the aftermath of the crime.

The phenomena of prison rape, however, brought male rape to the attention of the United States judiciary system. In an enquiry into the Philadelphia prison system in 1968, the consequent report described male rape as akin to an epidemic.¹²¹ The investigation ascertained that 156 acts of sexual assault occurred (of which 19 were oral penetrative sexual acts), but came to the conclusion that over a two year period, the figure was estimated at 2 000 cases, of which merely 94 incidents were reported. Reasons given include a fear of retaliation and lack of interest on the part of the prison authorities.¹²²

¹¹⁸ Burgess, A.W. "Rape and Sexual Assault II" (1988) on 276 and 277.

¹¹⁹ Odem, M.E & Clay-Warner, J. "Confronting Rape and Sexual Assault" (1998) on 45. See Donat, P.L.N. & Emilio, J.D. "A Feminist Redefinition of Rape and Sexual Assault: Historical Foundations and Change" (1992) on 9 - 22. Burgess, A.W. "Rape and Sexual Assault II" on 285. See also "SALC Discussion Paper 85 of 1999" on 95 - 99.

¹²⁰ Burgess, A.W. "Rape and Sexual Assault II" on 285. See also "SALC Discussion Paper 85 of 1999" on 95 - 99.

¹²¹ Rumney, P. & Morgan-Taylor, M. "Recognizing the Male Victim: Gender Neutrality and the Law of Rape: Part Two" (1997) on 348.

¹²² *Ibid.*

An estimate by Weiss and Friar suggest that one in four Americans can be expected to be raped whilst in prison.¹²³ A judge even mentions that:¹²⁴

[a] new inmate can expect to be subjected to homosexual (the present author prefers the term same-sex as victims, or those who rape the former may not in fact be homosexual) gang-rape his first night in jail, or it has been said, even in the van on the way to the jail.

The fact that incidents such as these occurred, compounded by the feminist movement, resulted in many states in America reformulating and broadening their definitions of rape to incorporate male victimization.

In a survey of 623 students (of which 43% were male) at the University of South Dakota, it was found that 22% of females and 16% of men reported at least one incident of forced sex in their lifetime.¹²⁵

States such as Michigan¹²⁶ and New York¹²⁷ have also featured a gender-neutral approach. Michigan has a statutory crime known as criminal sexual conduct. This has replaced the previous narrow definition, whereby it currently focuses on sexual

¹²³ "Terror in the Prisons" (1975) on 61 as referred to in Rumney, P. & Morgan-Taylor, M. "Recognizing the Male Victim: Gender Neutrality and the Law of Rape: Part Two" (1997) on 348.

¹²⁴ Blackman J in **United States v Bailey** 1980 444 US 394 on 421. In another case of **Hutto v Finney** 1978 437 US 678 on 681, Judge Stevens said that: *[s]ome potential victims dare not sleep; instead they would leave their beds and spend the night clinging to the bars nearest the guards station.*

¹²⁵ See Rumney, P. & Morgan-Taylor, M. "Recognizing the Male Victim: Gender Neutrality and the Law of Rape: Part Two" (1997) on 366.

¹²⁶ **State v Stevens** 1986 510 A 2d 1070, 67 ALR 4th 1123.

¹²⁷ **People v Liberta** 1984 64 NY 2d 485, NYS 2d 567.

penetration, or other sexual contact, under coercive circumstances. Lack of consent on the part of the victim need not be proved, although it may be a valid defence.¹²⁸

The crime of criminal sexual conduct exists in four degrees and covers rape, assault and indecent assault.¹²⁹ The most serious crime being first-degree criminal sexual conduct, which has application where the accused is armed, or is used in connection with other crimes, or where force is used and it resulted in injury. The maximum penalty is life imprisonment.¹³⁰

Second and third degree sexual assault covers non-penetrative sexual assault and penetration obtained by force, where no personal injury is involved. The maximum penalty is 15 years imprisonment. The fourth degree is a non-penetrative sexual assault where no personal injury results. The maximum penalty is 2 years imprisonment or a monetary penalty.¹³¹

¹²⁸ See Temkin, J. "Rape and the Legal Process" (1987) on 115 - 116; See also "SALC Discussion Paper 85 of 1999" on 96 - 98; Marsch, C. *et al.* "Rape and the Limits of Law Reform" (1982) on 50-52 as well as Estrich, S. "Rape" (1986) on 1155.

¹²⁹ See "SALC Discussion Paper 85 of 1999" on 96 - 97 for detail.

¹³⁰ These provisions can be compared with section 51 of the Criminal Law Amendment Act 105 of 1997 which provides for different minimum sentences applicable to rape where certain aggravating factors are present.

¹³¹ See Labuschagne, J.M.T. "Geslagsmisdade" (1981) on 28 for discussion on the position in Norway. Where any use is made of violence or threat of violence to induce sexual intercourse, it is an offence for both men and women who can be either victims or perpetrators. The key elements are violence, or the threat of violence, and unlawful sexual intercourse. It is also stated that sentences ranged from three months to 6 years. See "SALC Discussion Paper 85 of 1999" on 91 - 92 for discussion on Yugoslavia. This country has a broad definition and focuses on forced physical penetration and is defined as *the sexual penetration, however slight, of the vagina or anus of the victim, by the penis of the perpetrator or any object used by the perpetrator or of the mouth of the victim, by the penis of the perpetrator, by coercion or threat or force against the victim or a third person.*

The definition of rape in Washington is a broad definition which would cover all the categories of identified sexual assault victim except the category of sexual assault victim where the HIV/AIDS status of the perpetrator is deliberately withheld. The definition provides that:¹³²

A person is guilty of rape in the first degree when such a person engages in sexual intercourse with another person by forcible compulsion.

“Sexual intercourse” is defined as:¹³³

[a]ny penetration of the vagina or anus, however slight, by an object, when committed on one person by another, whether such persons are of the same or opposite sex and also includes any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another.

In a Florida Statute of rape ‘female’ has been changed to ‘person’ and a male can be convicted of anal rape.¹³⁴ In Massachusetts, penetration encompasses penetration of a genital or anal opening, or penetration by a sexual organ (however slight) including inanimate objects.¹³⁵ Rape incorporates lack of consent, consent induced by fear or fraud and being under the age of consent.¹³⁶

¹³² Revised Code Washington (ARCW) 1994 S9A.44.010.

¹³³ See Revised Code Washington (ARCW) 1994 section 9.79.140 and 170 (1977) as incorporated by the Assimilative Crimes Act 18 U.S.C. 13. Also in Rumney, P. & Morgan-Taylor, M. **“Recognizing the Male Victim: Gender Neutrality and the Law of Rape: Part Two”** (1997) on 350. See also **United States v Smith, William & Komak** 1978 574 F 2d 988.

¹³⁴ Bailey, F.L. & Rothblatt, H.B. **“Crimes of Violence: Rape and other Sex Crimes”** (1991) on 130.

¹³⁵ Bailey, F.L. & Rothblatt, H.B. **“Crimes of Violence: Rape and other Sex Crimes”** (1991) on 131.

¹³⁶ Bailey, F.L. & Rothblatt, H.B. **“Crimes of Violence: Rape and Other Sex Crimes”** (1991) on 133, 134 and 202.

In Connecticut, an offence of sexual assault exists which distinguishes between sexual intercourse and sexual contact. Sexual intercourse is described as:¹³⁷

[a]nal intercourse, fellatio or cunnilingus between persons regardless of sex. Penetration, however slight is sufficient ...and does not require emission of semen. Penetration may be committed by an object.

It has been recognised that some assaults are far worse than completed rapes. The state of Nebraska bases its sex laws on sexual penetration, which includes anal intercourse, fellatio, cunnilingus or any intrusion, however slight, or any intrusion into any part of the victim's body. It includes objects inserted into genital or anal openings. Sexual assault is involved where there is forced sexual contact which does not involve penetration.¹³⁸

This is perhaps a best possible option for South African rape law where a distinction is drawn between acts of penetration and non-penetrative acts. The possible categories of identified sexual assault being: penetrative sexual assault by a male perpetrator on a female victim *per anum* or *per vaginam* outside of marriage; penetrative sexual assault by a male perpetrator on a female victim *per anum* or *per vaginam* inside of marriage; penetrative sexual assault by a male perpetrator on a male victim; penetrative sexual assault by a male perpetrator on a female child victim; penetrative sexual assault by a male perpetrator on a male child victim; penetrative sexual assault by a female perpetrator on a male victim; penetrative sexual assault with the use of an object or digitally on a male or female victim including victims of consensual intercourse where the HIV/AIDS status of the perpetrator is not disclosed, could fall under the definition of rape. Acts which are not classified as penetrative sexual assaults such as kissing and fondling could be classified under the crime of indecent assault. It is a realistic distinction and does

¹³⁷ Labuschagne, J.M.T. "Die Opkoms van 'n Abstrakte Penetrasiebegrip by Geslagsmisdade" (1997) on 462 as found in the General Statutes par 53a-65(2).

¹³⁸ Hopkins, J. (ed). "Perspectives on Rape and Sexual Assault" (1984) on 14.

not discriminate on the grounds of forced oral, digital, anal, genital or object intercourse and is gender-neutral.

The approach followed in American case law indicates a support for a gender-neutral approach more than 25 years ago.

- * In the case of **Brinson v State** a state rape statute was held unconstitutional as it did not extend the same protection to males as it did to females.¹³⁹
- * In **Meloon v Helgemoe** a statutory rape law was found to be unconstitutional as it did not extend the same protection, which females under the age of consent enjoyed, to males.¹⁴⁰
- * In **State v Levier** a rape statute defined sexual intercourse as including any act between **persons** involving sex organs, mouth or anus (therefore regardless of gender).¹⁴¹
- * In **People v Liberta** it was held that the gender-specific rape statute was unconstitutional on the grounds of equal protection and found that men can be raped by women.¹⁴²

As mentioned earlier, a further reform which assisted the victim's plight was the introduction of the rape shield laws. The rape shield laws were implemented due to the following considerations:¹⁴³

¹³⁹ 1973 Fla. App. D1 278 So 2d 317 as discussed in 99 ALR 3d 129 on 135.

¹⁴⁰ 1977 CA1 NH 564 F 2d 602 as in 99 ALR 3d 129 on 141.

¹⁴¹ 1976 16 Wash App. 332, 555 P 2d 1003 in 3 ALR 4th 1009 on 1011. The definition corresponds with that of Connecticut.

¹⁴² 64 NY 2d 152, 485 NYS 2s 207 (1984).

¹⁴³ Kramer, E.J. "**When Men are Victims: Applying Rape Shield Laws to Male Same-Sex Rape**" (1998) on 303.

- * The need to increase the reporting of rape.¹⁴⁴

- * To reduce acquittals of guilty defendants.¹⁴⁵

¹⁴⁴ The feminist movement believed that victims were deterred from reporting rape due to the fact that during the court hearing, evidence of the latter's prior sexual history was admissible. Consequently many victims were discouraged from pressing charges. This is attributed to the fact that intimate details of their personal lives would be a focus point during the trial and victims would be subjected to additional trauma. Rape shield laws are especially needed to protect male victims of sexual assault as various reasons are attributed to males' reluctance to report their crime. Society perceives males as strong and consequently able to defend themselves and should they not be able to, then they fear that their act will not be regarded as involuntary and forced. This consideration correlates with the findings made earlier by psychiatrists and psychologists. See in general **People v Yates** 1995 637 NYS 2d 625 - 629. Also Kramer, E.J. "**When Men are Victims: Applying Rape Shield Laws to Male Same-Sex Rape**" (1998) on 304 - 305. A further factor that prevents reporting of the crime is the fact that their prior sexual history will be examined and scrutinized during the trial. By allowing this evidence to be inadmissible, it has been found that rape shield laws have increased convictions for rape. See Spohn, C.C. & Horney, J. "**The Impact of Rape Law Reform on the Processing of Simple and Aggravated Rape Cases**" (1996) on 882 where they analysed data in Detroit on rape cases where the simpler cases of rape have gone to trial since the rape law reform. They also hypothesise that either victims report their crimes more frequently, alternatively, that police and prosecutors have changed their criteria on which rape cases to proceed with. This is an indication that the rape shield laws have changed attitudes towards crime. In addition the rape law reform has helped change societies' attitudes towards rape. The only place where rape shield laws have had no real effect are in prisons, as inmates who report and identify rapists often become victims of violence and murder.

¹⁴⁵ An unfortunate consequence of allowing evidence of prior sexual history was the fact that the defendant, who was in fact guilty, was often acquitted. It has been found that jurors have acquitted men where the victim has been seriously injured as a result of the admissibility of the sexual history of the victim. See LaFree, G.D. "**Rape and Criminal Justice: The Social Construction of Sexual Assault**" (1989) on 217 - 218 where he states that: *[[j]urors were less likely to believe in a defendant's guilt, where the victim had reportedly engaged in sex outside of marriage... whereas the number of charges, injury and weapons did not have a noticeable effect on verdicts. Again, this type of evidence, if applied to male rape cases, can also lead to unjust acquittals. The same would apply to males who have had some form of prior homosexual activities. See Kramer, E.J. "**When Men are Victims: Applying Rape Shield Laws to Male Same-Sex Rape**" (1998) on 310 wherein she states: *[o]n the other hand, if the prosecution sought to introduce evidence that the victim is not gay, the**

- * The recognition of the lack of probative value of prior consensual sexual acts.¹⁴⁶

- * The lack of connection between chastity and truthfulness.¹⁴⁷

defendant could be unjustly convicted. In **People v Hackett** 1984 Mich. 365 NW 2d 120 on 126 a defendant introduced evidence of the victims homosexuality to affect his credibility as a witness.

¹⁴⁶ The historical foundation is based on the notion that women who have had a sexual history are more likely to consent to sexual acts than otherwise. However, in this day and age, it is argued that there are many young people who engage in premarital sexual intercourse. But this is not indicative that they would select any person indiscriminately with which to indulge in sexual relations. Consequently, both genders select certain partners and reject others. This invalidates the concept that if a person has sexual intercourse previously with a selected partner, they are more likely to consent again to any person.

¹⁴⁷ Another misconception that existed is that women who were regarded as being without virtue were regarded as more likely to be untruthful. This was not held to bear the same weight for men. Men, unlike women, have not been discredited or perceived in a bad light, should they have had a sexual history. See Galvin, H.R. “**Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade**” (1986) on 787 where it is stated that: *What destroys the standing of females in all the walks of life has no effect whatsoever on the standing for truth of males.* See also **State v Sibley** 1895 Mo. 33 SW 167 on 171. See further Kramer, E.J. “**When Men are Victims: Applying Rape Shield Laws to Male Same-Sex Rape**” (1998) on 308 fn 74. This same consideration could have a negative impact on female and homosexual victims of sexual assault. This is another reason why rape shield laws need to form an integral part of a legal system. The effect of the rape shield laws is that the onus of proof is shifted to the defence, as evidence of the victim's prior sexual history is prohibited. The resistance of consent standards are thus eliminated. It has been suggested that expert evidence presented earlier on in the case, which relates specifically to the case at hand, will be beneficial to the state's case. Therefore, scientific expert testimony on Rape Trauma Syndrome has been introduced as part of the rape shield law measures. If the findings of the expert indicated that the victim experienced the symptoms of Rape Trauma Syndrome then this would be an indication that the victim had been raped. See Burgess, A.W. “**Rape and Sexual Assault**” (1985) on 332. The emphasis has therefore shifted to the defendant's state of mind, in the sense that the jury had to decide as to whether the defendant's belief that the victim consented, was reasonable and in good faith. See discussion on **State v Saldana** 1982 Minn.324 NW 2d 227 on 333, in which the appellant was charged with first - degree criminal sexual conduct and in which it was alleged that the victim had consented. An expert, being a rape victim counsellor was used to rebut the evidence. Findings by the expert were that the typical behaviour of rape victims was displayed, it

Prior to the rape shield laws, the sexual history of female rape victims was highly probative evidence as regards the issue of consent.¹⁴⁸ With regard to male victims of penetrative sexual assault, prior sexual history evidence can be as damaging. This is especially the case if the male victim previously had sexual intercourse with other men. Such evidence has no real bearing as to whether the victim in fact consented to sexual intercourse with that particular defendant.¹⁴⁹ The damaging nature of the evidence¹⁵⁰ as well as reliving the entire crime again, coupled with a

was stated that the victim was definitely raped and that it was not believed that the rape had been fantasized (it had actually happened).

¹⁴⁸ Case law however seems to belie this idea of protection in that it has shown that there can indeed be probative value in evidence of prior sexual history of a male same-sex rape victim. In **State v Rogers** (No.01-C-01-9011-CR-00312) 1991 Tenn.Crim.App.LEXIS 648 (Aug 16, 1991), the Tennessee Criminal Appeals Court reversed a conviction because the court *a quo* had not permitted the defendant to introduce evidence that the victim had in fact had sexual relationships with two prisoners at the prison where both the defendant and victim were incarcerated. It is clear that although a victim previously engaged in sexual relations with other men, it does not *per se* mean that he consented to that particular defendant's advances. See Kramer, E.J. "**When Men are Victims: Applying Rape Shield Laws to Male Same-Sex Rape**" (1998) on 320 for a discussion where the court rejects the idea that the evidence of the victim's sexual history may be relevant where the defendant presents evidence that the victim consented due to incompetent witnesses and inconsistencies in the victim's statements.

¹⁴⁹ The exclusion being, if the prior sexual acts were in fact with the defendant. Again one could argue that it is irrelevant as to whether there was consent on that specific occasion. This is a similar situation that applies to the question of marital rape. See also Kramer, E.J. "**When Men are Victims: Applying Rape Shield Laws to Male Same-Sex Rape**" (1998) on 320 for a supporting view which states that: *The fact that someone has consented to homosexual acts on a previous occasion is no more proof that he or she consented at the time of an alleged single (same) sex rape than prior consensual heterosexual relations would be in the case of male/female rape* (own emphasis).

¹⁵⁰ Not only that, but also various factors could have an effect on the verdicts reached. Examples which can be cited where a lesser sentence might be imposed are: the attractiveness of the victim, the moral values of the victim, where prior sexual history is focused upon, the race of both the victim and defendant, the nature of the rape and if it was felt that the woman precipitated the rape. See Burgess, A.W. "**Rape and Sexual Assault**" (1985) on 323 *et seq.* See also Feild, H. & Bienan, L. "**Jurors and Rape**" (1980) in general.

fear of disbelief deterred the victim from reporting the rape.¹⁵¹ Due to the fact that this study is concerned with the substantive aspects of the law relating to a definition of rape, no further reference will be made here to rape shield provisions, which are procedural in nature, as this alone could form an entire topic of a dissertation.¹⁵² One does however have to keep in the back of one's mind that certain procedural aspects have to out of necessity be incorporated within the substantive law in order to facilitate a practical application of rape legislative provisions.¹⁵³

2.3.3. CRITICISM OF THE DEFINITION OF RAPE IN THE UNITED STATES OF AMERICA

The approaches followed in various states differ radically. Many states have replaced the rule that a woman had to resist to the utmost as a means of indicating non-consent.¹⁵⁴ Some states have also created a series of graded offences with penalties being dependant on factors such as coercion, age of the victim and the infliction of injury.¹⁵⁵ The present author does not support the Michigan definition, for the very reason that there are degrees of seriousness involved. Who is to decide in which category a particular act falls, and what about borderline cases? A further discrepancy arises between first degree and second and third degree acts as the former entails a maximum sentence of life imprisonment, whereas the latter a mere maximum of 15 years in comparison. One may find that certain sexual acts falling within these categories, may be even more reprehensible and the term 'personal injury' could lead to disparity, when applied in various cases.

¹⁵¹ Kramer, E.J. "When Men are Victims: Applying Rape Shield Laws to Male Same-Sex Rape" (1998) on 296.

¹⁵² See chapter five in this regard.

¹⁵³ Examples that can be cited are rape shield provisions relating to prior sexual history, the admissibility of expert evidence relating to psycho-social effects of the sexual offence and vulnerable witnesses.

¹⁵⁴ Odem, M.E. & Clay-Warner, J. "Confronting Rape and Sexual Assault" (1998) on 253.

The state of Alabama, however, has clung to outdated notions and retained the gender-specific offence. The reasoning is that the consequences for males do not seem as serious as it is for women. An unwanted pregnancy is,¹⁵⁶ for example, excluded and the loss of virginity for males is not equated with as much seriousness as for females.¹⁵⁷

Despite the position followed in the aforementioned states, the position in the United States as a whole is to be favoured. Many states are proponents of a gender-neutral definition and can definitely find application in the context of our South African criminal law. Although there is not a single definition which can be effectively used to offer adequate protection to all the identified categories of sexual assault victim in this study, elements of the definitions followed in Massachusetts, Florida, Nebraska, Washington and Victoria in Australia, could be utilised to formulate a comprehensive definition of rape.

3. CONCLUSION

It is evident from this chapter that each country has its own particular definitional elements pertaining to the crime of rape. Although the approaches followed in the various states of Australia differ and may be gender-specific, the measures implemented in the state of Victoria are gender-neutral and promulgates a broad definition of rape. The position in Victoria is the preferred approach for purposes of this comparative study. Logistically speaking, the definitional elements of rape in the state of Victoria could be effectively transposed into South African law. The definition adopted in Victoria caters for perpetrators of either gender and also incorporates all the possible categories of sexual assault victim identified in this

¹⁵⁵ Odem, M.E. & Clay-Warner, J. "Confronting Rape and Sexual Assault" (1998) on 256.

¹⁵⁶ One again thinks of this in relation to rape victims who are sterilised, are pre-pubital or have reached menopause.

¹⁵⁷ See discussion in Rumney, P. & Morgan-Taylor, M. "Recognizing the Male Victim: Gender Neutrality and the Law of Rape: Part Two" (1997) on 352.

study. More particularly the concept of 'free agreement' which relates directly to the element of consent could be effectively incorporated into a South African definition of rape. The term 'free agreement' is conceptually broad enough to also apply to the category of sexual assault victim who is party to consensual intercourse where their partner fails to disclose their HIV status. In such a case there is no free agreement and the victims consent is negated.

It was shown that the definition adopted in Britain remains partially gender-specific, in that certain perpetrators and sexual assault victims are excluded from its ambit, which makes the definition deficient for purposes of this study. The definition implemented in Britain is therefore unsatisfactory and problematic due to its deficiencies and cannot be transposed into South African law.

The approaches followed in certain states in the United States can be favoured as being gender-neutral. It was established that there were certain definitional elements which could be utilized from a South African perspective, but that no definition could be singled out to the exclusion of others. However, aspects of the definitions adopted in Washington and Connecticut could be utilised in reformulating a broader definition of rape in South Africa.

The next chapter of this study will deal with the proposed changes envisaged by the South African Law Commission. The proposed Sexual Offences Act will be analysed as first introduced in 1999¹⁵⁸ as well as the amendments to the proposed bill envisaged by the 2002 Discussion Paper on Sexual Offences.¹⁵⁹ The new proposed legislation will be critically examined to establish whether all the categories of sexual assault victim identified in this study will be adequately protected. Solutions will be suggested where possible *lacunae* exist in the proposed new legislation.

¹⁵⁸ See Annexure A of "SALC Discussion Paper 85 of 1999" on 265.

¹⁵⁹ See Annexure A of "SALC Discussion Paper 102 of 2002" on 105.

CHAPTER FIVE

A COMMENTARY ON THE PROPOSED DEFINITION OF RAPE AS INTRODUCED BY THE SOUTH AFRICAN LAW COMMISSION

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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

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.

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.

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

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 Act²⁷ 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.

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

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,

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?

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

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 consist 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

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

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 onus⁵⁸ 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

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 of 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

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.

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 *culpa 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

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 by 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

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.

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

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**
 - 1.1. Definition and description of HIV/AIDS**
 - 1.2. The transmission of the HIV virus**
 - 1.3. The causal nexus between penetrative sexual assault and HIV/AIDS**
- 2. Adequacy of the South African law in a context of HIV-related sexual offences**
 - 2.1. Victims who are deliberately exposed to the HIV virus during consensual intercourse**
 - 2.2. The legal provisions applicable to victims of rape who are exposed to the HIV virus**
- 3. Related procedural issues to securing a conviction for harmful HIV-related behaviour**
 - 3.1. Compulsory testing of accused persons**
 - 3.2. Isolation of individuals and the refusal of bail**
 - 3.3. The imposition of mandatory minimum sentences**
- 4. Conclusion**

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

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.

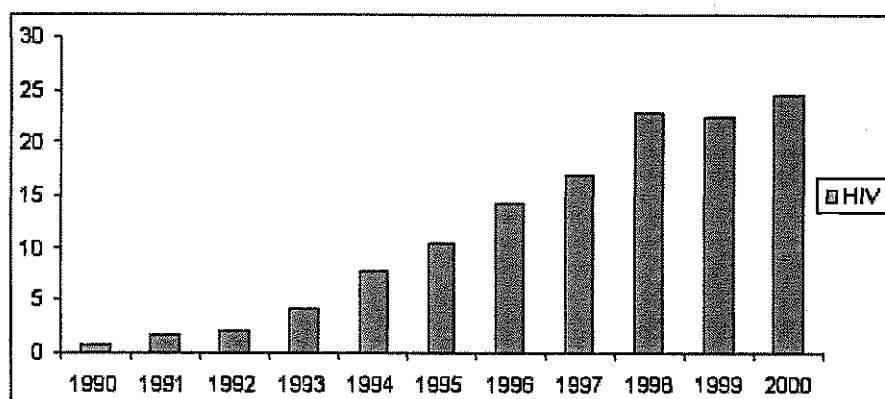
As appears from the above, the situation worsens every year and more people with HIV/AIDS will be diagnosed and AIDS deaths reported due to the fact that AIDS follows in the absence of medical treatment, after HIV infection some years after the initial infection.

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 **'Acquired Immunodeficiency Syndrome'**.¹¹ A brief paraphrased explanation of the name 'Acquired Immunodeficiency Syndrome' as provided by the authors Whiteside and Sunter is as follows:¹² 'Acquired' 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 illnesses¹⁸ 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

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 United 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

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

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 facts 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 deliberately 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

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 daarvoor 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 cause grievous bodily harm and attempt to commit these crimes, are relevant to a conviction for the

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

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

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,

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

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.

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 this 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.

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

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

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

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

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.

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

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

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.

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

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

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/

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 effect¹²⁶ 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

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

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

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 polymerase 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

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 timeously¹⁴⁴ and from previous discussions, it is evident that the test

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.

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

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

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

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

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.

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

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

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

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.

country¹⁸⁷ 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

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 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 Act¹⁹³ 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

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

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

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 principle 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

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 public's 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

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

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

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

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, 2 nd degree	21	26	30	33-35	42-46	50-58	60-70
Criminal Sexual Conduct 1 st degree.	81-91	93-103	105-	117-	129-	141-	153-
Assault – 1 st degree			115	127	139	151	163
Murder 3 rd degree							
Murder 2 nd degree (felony murder)	144- 156	159- 171	174- 186	189- 201	204- 216	219- 231	234- 246
Murder 2 nd 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

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

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

²⁴⁰In 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.

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

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|----|-----------------------------------|
| 1. | Conclusion |
| 2. | Recommendations |
| 3. | Implications for further research |
| 4. | Synthesis |

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 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 been 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 in 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 victim's 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.

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

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

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 justification. 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 Rurney, 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.

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 reformulation 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 illnesses²⁶

- 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 have 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.

BIBLIOGRAPHY

TEXTBOOKS, JOURNALS AND NEWSPAPER ARTICLES

Albert, P. *et al.* "AIDS Practice Manual" (1991) USA: National Lawyers Guild Network.

Alschuler, A.W. "Plea-Bargaining and its History" 1979 *Columbia Law Review* 1.

Alswang, J. & van Rensburg, A. "An English Usage Dictionary" (1988) Johannesburg: Educum Publishers.

Andenaes, J. "The General Prevention Effects of Punishment" (1966) 14 *Pennsylvania Law Review* 970.

Ashworth, A.J. "Criminal Justice and Deserved Sentences" (1989) 36 *Criminal Law Review* 340.

Bailey, F.L. & Rothblatt, H.B. "Crimes of Violence: Rape and other Sex Crimes" (1991) Rochester: The Lawyers Co-operative Publishing Company.

Baltimore, D. "Quarantining will Help No One" (1987) 102 *US Newsworld Report* 70.

Barkas, J.L. "Victims" (1978) New York: Charles Scribner's Publishers.

Barrie, G. "Husband and Wife: Rape" (1992) 292 *De Rebus* 237.

Bekker, J.C. **“Seymour’s Customary Law in Southern Africa”** (1989) Cape Town: Juta

Beeld **“Ondersoek Gedoen na Amerikaanse Kits–HIV/ Vigs Toets”** 26 August 1995.

Beeld **“Verkragte Student Kry Vigmiddel”** 10 March 1999.

Beeld **“Verkragte Joernalis se Aanklag Teen Polisie, Hospitale, Regering-en Samelewing: My Lewe is nie R400 Werd nie”** 24 April 1999.

Bekker, T.W. **“Plea Bargaining in the United States and South Africa”** (1996) 29 *CILSA* 168.

Bennett, T.W. **“Human rights and African Customary Law”** (1995) Cape Town: Juta.

Bennett; T.W. **“The Equality Clause and Customary Law”** (1994) *SAJHR* 122.

Bergen, R.K. **“Wife Rape: Understanding the Response of Survivors and Service Providers”** (1996) California: Thousand Oaks.

Borkowski, M. **“Marital Violence: the Community Response”** (1983) London: Tavistock Publications.

Boston Herald American **“Two Women Sent to Prison for Life for Rape”** 19 April 1978.

Brownmiller, S. **“Against our Will – Men, Women and Rape”** (1975) Harmondsworth: Penguin Books.

Buchanan, D. **“Public Health, Criminal Law and the Rights of the Individual”** in **“African Network on Ethics, Law and HIV”** Senegal: United Nations Development Programme 1995.

Burchell, J. & Milton, J.R.L. **“Principles of Criminal Law”** (1997) Cape Town: Juta.

Burchell, J. **“Principles of Delict”** (1993) Cape Town: Juta.

Burgess, A.W. **“Rape and Sexual Assault”** (1985) New York: Garland Publishing Inc.

Burgess, A.W. **“Rape and Sexual Assault II”** (1988) New York: Garland Publishing Inc.

Burgess, A.W. & Holmstrom, L.L. **“Rape Trauma Syndrome”** (1974) 131 *American Journal of Psychiatry* 981.

Cameron, E. & Swanson, E. **“Public Health and Human rights–The AIDS Crisis in South Africa”** (1992) *South African Journal of Human Rights* 202.

Cameron, E; **“Sexual Orientation and the Constitution: a Test Case for Human Rights”** (1993) 110 *South African Law Journal* 450.

CDC Morbidity and Mortality Weekly Reports **“Public Health Service Guidelines for the Management of Health Care Worker Exposures to HIV and Recommendations for Post Exposure Prophylaxis”** 15 May 1998.

Colella, U. **“HIV-Related Information and the Tension between Confidentiality and Liberal Discovery”** (1995) *The Journal of Legal Medicine* 97.

Crime Control Digest **“Female Rapists Sought in Dallas”** 25 March 1977.

Crome, S. McCabe, M. & Ford, L. **“Male Rape Victims: Fact and Fiction”** (1999) *73 Law Institute Journal* 60.

Deckard, B.S. **“The Woman’s Movement: Political, Socio-economic, and Psychological Issues”** (1983) New York: Harper and Row.

De Jager, F.J. **“Vigs: Die Rol van die Strafreg”** (1991) *Tydskrif vir Suid-Afrikaanse Reg* 212.

D’Emilio, J. & Freedman, E.B. **“Intimate Matters: A History of Sexuality in America”** (1988) New York: Harper and Row.

Department of Health Summary Report “National HIV-Sero-Prevalence Survey of Women attending Public Antenatal Clinics in South Africa 1999” March 2000.

Donat, L.N. & Emilio, J.D. **“A Feminist Redefinition of Rape and Sexual Assault: Historical Foundations and Change”** (1992) 48:1 *Journal of Social Issues* 9.

Edwards, S.S.M. **“Sex and Gender in the Legal Process”** (1996) London: Blackstone Press.

Edwards, S.S.M. **“Female Sexuality and the Law”** (1981) Oxford: Robertson.

Elias, R. **“The Politics of Victimization”** (1986) Oxford: Oxford University Press.

Elliot, R. **“Criminal Law and HIV/AIDS: Final Report”** (1997) *The Canadian HIV/AIDS Legal Network and the Canadian AIDS Society* March 19.

Estrich, S. **“Rape”** (1986) 95 *The Yale Law Journal* 1155.

Evian, C. **“Primary AIDS Care”** (2000) Johannesburg: Jacana Education.

Feild, H. & Bienan, L. **“Jurors and Rape”** (1980) Massachusetts: Lexington Books.

Fettner, A.G. **“The AIDS Scare: Answers to Frightening Questions”** (1987) 168 *Redbook* 25.

Fettner, A.G. **“Women and AIDS”** (1986) 18 *Health* 61.

Finkelhor, D. & Yllo, K. **“License to Rape: Sexual Abuse of Wives”** (1985). New York: Holt, Rinehart, & Winston.

Frase, R.S. **“Sentencing Guidelines in Minnesota and other American States: A Progress Report”** (1995) *The Politics of Sentencing Reform* 169.

Galvin, H.R. **“Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade”** (1986) 70 *Minnesota. Law Review* 767.

Geldenhuys, T. & Joubert, J.J. (ed); **“Criminal Procedure Handbook”** (1996) Kenwyn: Juta.

Gostin, L.O. *et al.* **“AIDS Screening, Confidentiality and Duty to Warn”** *American Journal of Public Health* (1987) 77 361.

Gross, H. & Von Hirsch, A. **“Sentencing”** (1981) New York: Oxford University Press.

Groth, A.N. **“Men who Rape”** (1979) New York: Plenum Press.

Groth, A.N. *et al.* **“Rape, Power, Anger and Sexuality”** (1977) 134 *American Journal of Psychiatry* 1239.

Grubb, A. & Peral, D.S. **“Bloodtesting, AIDS and DNA Profiling”** (1990) Bristol: Jordan and Sons.

Hall, C. **“Rape: The Politics of Definition”** (1988) 105 *South African Law Journal* 67.

Henham, R. **“Back to the Future on Sentencing: The 1996 White Paper”** (1996) 59 *Modern Law Review* 861.

Hoffman, L.H. & Zeffert, D. **“South African Law of Evidence”** (1988) Durban: Butterworths.

Hopkins, J. (ed). **“Perspectives on Rape and Sexual assault”** (1984) New York: Harper & Row.

Hough, M. & Mayhouse, P. **“The British Crime Survey: Home office Research Study no 76”** (1983) London.

Huckle, P.L. **“Male Victims Referred to a Forensic Psychiatric Service”** (1995) 35:3 *Medicine, Science and the Law* 191.

Hunt, P.M.A. **“South African Criminal Law and Procedure II: Common Law Crimes”** (1982).

Isakov, N.M. & Van Zyl Smit, D. **“Negotiated Justice and the Legal Context”** (1985) *De Rebus* 173.

Joubert, W.A.; **LAWSA** (1981) 6 Durban: Butterworths.

Kirby, M. **“Colloquium, AIDS, Health and Human Rights”** (1994) 6:2 *AIDS Care* 248.

Koss, M. P. *et al.* "Stranger and Acquaintance Rape: Are there Differences in Victim's Experiences?" (1988) 12 *Psychology of Women Quarterly* 1.

Kramer, E.J. "When Men are Victims: Applying Rape Shield Laws to Male Same-Sex Rape" (1998) 73 *New York University Law Review* 296.

Labuschagne, J.M.T. "Die Klage by Seksmisdade" (1978) 11 *De Jure* 18.

Labuschagne, J.M.T. "Die Opkoms van 'n Abstrakte Penetrasiëbegrip by Geslagsmisdade" (1997) 114 *South African Law Journal* 461.

Labuschagne, J.M.T. "Die Penetrasiëvereiste by Verkragting Heroorweeg" (1991) 108 *South African Law Journal* 148.

Labuschagne, J.M.T. "Die Suid-Afrikaanse Verkragtingsreg: 'n Strafrechtsvergelykende Ondersoek" (1972) Unpublished LLD thesis UPCHO.

Labuschagne, J.M.T. "Geslagsmisdade" (1981) 44 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 23.

Labuschagne, J.M.T. "Hoge Raad 22 Feb 1994, NJ 1994, 379" (1995) 28 *De Jure* 241.

Labuschagne, J.M.T. "Misdade Tussen Gades" (1980) 43 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 39.

Labuschagne, J.M.T. "Nie-konsensuele Geslagsmisdade: 'n Misdaadsistematiese Herwaardering" (1981) 44 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 30.

Labuschagne, J.M.T. **“Oningelige Geslagsomgang met ‘n Vigs-lyer en die Vraagstuk van Toestemming by Verkragting”** (1993) 126 *De Jure* 417.

Labuschagne, J.M.T. **“Onregmatigheidskriterium in die Straf-en Deliktereg: ‘n Regsevolusionere Beskouing”** (1993) 56 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 663.

Labuschagne, J.M.T. **“Ons Gemenerereg en Wetsuitleg”** (1984) 117 *De Jure* 364.

Labuschagne, J.M.T. **“Regterlike Misdaadskepping: Is die Engelsregterlike Benadering Versoenbaar met die Sekerheidseis van die Strafrege?”** (1994) 15 *Obiter* 124.

Labuschagne, J.M.T. **“Deliktuele Aanspreeklikheid weens Verkragting”** (1994) 15 *Obiter* 242.

Labuschagne, J.M.T. **“Verkragting binne Huweliksverband”** (1991) 24 *De Jure* 402.

Labuschagne, J.M.T. **“Verkragting in die Inheemse Reg”** 1994 (15) *Obiter* 85.

Labuschagne, J.M.T. **“Vigs, Gevolgsaanspreeklikheid, Bedrieglike Weerhouding Van Inligting en Die Vraagstuk van Toestemming by Gewelds-en Gesladgsmisdade”** (2001) 3 *TSAR* 558.

Labuschagne, J.M.T. **“Voltooingsaanspreeklikheid, Verkragting en Vigs: ‘n Rigtingwyser van die Natuur”** (1993) 56 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 129.

Lachman, S.J. **“Heterosexual HIV/AIDS as a Global Problem”** (1995) South Africa TPS Drug information Centre.

LaFree, G.D. **"Rape and Criminal Justice: The Social Construction of Sexual Assault"** (1989) Belmont: Wadsworth.

Laurie, G.T. **"AIDS and Criminal Law"** (August 1991) *Journal of the Law Society Scotland* 317.

Lee, R.W. **"An Introduction to Roman-Dutch Law"** (1915) Oxford: Clarendon Press.

Le Roux, J. **"Geweldsmisdade binne Huweliksverband"** (1994) unpublished LLD thesis UP.

Le Roux, J. **"Die Toepassing van Strafbeginsels op HIV Oordrag: 'n Diagnose"** (2000) 33 *De Jure* 293.

Leclerc-Madlala, S. **"Crime in an Epidemic: the Case of Rape and AIDS"** (1996) 9:2 *Acta Criminologica* 31.

Lillah, R. **"Men who Rape Men"** (July 1996) *Drum Magazine* 134.

Marsch, C. *et al.* **"Rape and the Limits of Law Reform"** (1982) Boston: Auburn House

Matthews, N.A.; **"Confronting Rape"** (1994) London: Routledge.

McKendrick, B. & Hoffman, W. (ed.). **"People and Violence in South Africa"** (1990) Cape Town: Oxford University Press.

McLeod, W.T. (ed). **"The New Collins Thesaurus"** (1985) London: Collins.

Mezey, G.C. & King, M.B. **“Male victims of Sexual Assault”** (1987) 27:2 *Medical Law Journal* 123.

Mezey, G.C. & King, M.B. (ed); **“Male Victims of Sexual Assault”** (1992) Oxford: Oxford University Press.

Milton, J.R.L. **“The Sexual Offences Act”** (1988) 1 *South African Journal of Criminal Justice* 269.

Milton, J.R.L. **“South African Criminal Law and Procedure Volume II: Common Law Crimes”** (1996) Cape Town: Juta.

Milton, J.R.L. **“Unfair Discrimination on the Grounds of Gender, Sex... (or) Sexual Orientation: How the Sexual Offences Act does it all”** (1997) 10 *South African Journal of Criminal Justice* 297.

Milton, J.R.L. **“The Young Man’s Defence”** (1991) 4 *South African Journal of Criminal Justice* 172.

Milton, J.R.L. **“Redefining the Crime of Rape: The Law Commission’s Proposals”** (1999) 12 *South African Journal of Criminal Justice* 364.

Morgan-Taylor, M. & Rumney, P. **“A Male Perspective on Rape”** (1994) 144 *New Law Journal* 1490.

Mphahlele, M.S. **“From Legal Rape to a Crime. Does that Solve the Problem?”** (1993) 18:2 *Journal for Juridical Science* 165.

Naffine, N. **“Possession: Erotic Love in the Law of Rape”** (1994) 57 *Modern Law Review* 10.

Neethling, J. **“Personnelheidsreg”** (1991) Durban: Butterworths.

New York Times **“The Rape Crisis Behind Bars”** 29 December 1993.

Odem, M.E. & Clay-Warner, J. **“Confronting Rape and Sexual Assault”** (1998)
Delaware: SR Books.

Olivier, N.J.J. *et al* **“Indigenous Law”** (1995) Durban: Butterworths.

Olivier, N.J.J. *et al*. **“Privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes”**
(1989) Durban: Butterworths.

Olivier, N.J.J. **“Regspluralisme in Suider-Afrika”** (1987) unpublished LLD thesis
University of Pretoria.

Olivier, C **“Evaluating Mandatory Minimum Sentences: What will be Practical,
Fair and Effective”** (1998) 11:2 *Acta Criminologica* 88.

Orthmann, R. **“FDA Approves new HIV test”** (1996) *Law and Policy Reporter* 55.

Parrot, A. & Bechhofer, L. **“Acquaintance Rape: The Hidden Crime”** (1991)
Chichester: John Wiley.

Pieterse, M. **“Beyond the Reach of the Law? HIV, African Culture and
Customary Law”** (2000) 3 *Tydskrif vir Suid Afrikaanse Reg* 428.

Pretoria News **“Indecent Assault Gets Man 14 Years”** 1 October 1999.

Pretoria News **“Six Small Girls Share Rape Horror”** 14 January 2000.

Pretoria News “**Staggering Statistics on Child and Teenage Sex**” 9 September 1995.

Price, T.W. “**The Future of Roman-Dutch Law in South Africa**” (1947) *South African Law Journal* 494.

Quina, K. & Carlson, N.L. “**Rape, Incest and Sexual Harassment**” (1989) New York: Praeger.

Robinson, D. “**Criminal Sanctions and Quarantine**” in “**AIDS and the Law**” (1992) New York: Wiley Law Publications.

Rogers, P. “**Male Rape: The Impact of a Legal Definition on the Clinical Area**” *Medicine, Science and the Law* (1995) 35:4 303.

Rumney, P. & Morgan Taylor, M. “**Sentencing for Male Rape**” (1996) 146 *New Law Journal* 262.

Rumney, P. & Morgan-Taylor, M. “**Recognizing the Male Victim: Gender Neutrality and the Law of Rape: Part One**” (April–June 1997) 6 *Anglo-American Law Review* 198.

Rumney, P. & Morgan-Taylor, M. “**Recognizing the Male Victim: Gender Neutrality and the Law of Rape: Part Two**” (July-September 1997) 6 *Anglo-American Law Review* 330.

Russell, D.E.H. “**Rape in Marriage**” (1982) New York: Collier Books.

Russell, D. E. H. (1990). **Rape in Marriage**. New York: Macmillan Press.

“SAPS Crime Information Analysis Departmental letter 410/2000” (22 August 2000) South African Police Services.

Saturday Star **“Cops Query Baby-Rape Probe”** 19 January 2002.

Scholtemeyer, J. & Hasse, P. **“Legal Latin”** (1990) Pretoria: Academica.

Schurink, E. **“Statistics of Shame: South African Child Protection System Disintegrating”** (1996) *Focus Forum* 4.

Schwartz, M.D & DeKeseredy, W.S. **“Sexual Assault on the College Campus”** (1997) Newbury Park, CA: Sage Publications.

Seymour, S.M. **“Customary Law in South Africa”** (1982) Cape Town: Juta.

Seymour, W.M. **“Native Law and Custom”** (1911) Cape Town: Juta.

Snyman, C.R; **“Criminal law”** (1995) Durban: Butterworths.

Sorenson, S.B. & Siegel, J.M. **“Gender, Ethnicity, and Sexual Assault: Findings from a Los Angeles Study”** (1992) 48:1 *Journal of Social Issues* 93.

Spohn, C.C. & Horney, J. **“The Impact of Rape Law Reform on the Processing of Simple and Aggravated Rape Cases”** (1996) 86 *Journal of Criminal Law and Criminology* 882.

Steytler, N.C. **“Constitutional Criminal Procedure”** (1998) Durban: Butterworths.

Strauss, S.A. **“Doctor, Patient and the Law”** (1991) Pretoria: Van Schaik.

Temkin, J. **“Rape and the Legal Process”** (1987) London: Sweet & Maxwell.

Temkin, J. “Towards a Modern Law of Rape” (1982) 45 *Modern Law Review* 399.

The West Australian “HIV Sex Man Found Guilty” 4 October 2002.

Thio, A. “Deviant Behaviour” (1995) New York: Harper Collins College Publishers.

Times-Picayune “Male Rape Victims Hide in Shame” 15 June 1997.

Tollison, C.D. & Adams, HE; “Sexual Disorders, Treatment, Theory, Research” (1979) New York: Gardner Press.

Van der Linden, J. (translated by Henry, J) “Institutes of the Laws of Holland” (1828) London: Shackell and Baylis

Van Leeuwen, S. “Censura Forensis” (1741)

Leeuwen, S. (ed Decker, C.W.) “Commentaries on Roman-Dutch Law Volume II” (1923) London: Sweet & Maxwell.

Van der Merwe, D. “Marital rape, judicial inertia and the fatal attraction of the Roman-Dutch Law” (1993) 56 *Tydskrif vir Hedendaagse Romeins-Hollanse Reg* 674.

Van der Merwe, S.E. “Redefining Rape: Does The Law Commission Really Wish To Introduce A Reverse Onus?” (2001) 14 *South African Journal of Criminal Justice* 60.

Van Wyk, C. “The Need for a New Statutory Offence aimed at Harmful HIV-Related behaviour: The General Public Interest Perspective” (2000) 41 *Codicillus* 2.

Van Wyk, C.W. **“Vigs en die Reg: ‘n Verkenning”** (1988) 51 *Tydskrif vir Hedendaagse Romeins-Hollanse Reg* 317.

Verschoor, T. **“Misdad, Verweer en Straf”** (1986) Durban: Butterworths.

Verwey, ET & Louw, D.A. **“Die Verkragter: Deel I”** (1989) 2 *South African Journal of Criminal Justice* 21.

Verwey, ET & Louw, D.A. **“Die Verkragter: Deel II”** (1989) 2 *South African Journal of Criminal Justice* 309.

Verwey, ET & Louw, D.A. **“Die Verkragter—‘n Empiriese Onderzoek”** (1990) 3 *South African Journal of Criminal Justice* 150.

Viljoen, F. **“Stigmatising HIV/AIDS, Stigmatising Sex? A Reply to Professor van Wyk”** (2000) 41 *Codicillus* 11.

Voet, J. **“Commentarius ad Pandectus”** 1698.

Watson, A (ed). **“The Digest of Justinian Volume IV”** (1985) Pennsylvania: University of Pennsylvania Press.

Whiteside, A & Sunter, C **“AIDS: The Challenge for South Africa”** (2000) Cape Town: Human & Rousseau.

WEBSITES

<http://196.36.153.56/doh/facts/index.html> **"Facts and Statistics"** accessed 30 August 2002.

<http://www.crystalinks.com.stress/html> **"Stress-Post Traumatic Stress Disorder"** accessed 1 August 2002.

<http://www.cs.nsw.gov.au/facilities/ecsas/men-surv.html> **"Survivors of Child Sexual Assault"** accessed 4 January 2002.

<http://www.greenleft.org.au>. **"Rape Laws: the Other Assault"** accessed 30 August 2002.

<http://healthyplace.com.communities/abuse/survivors/male/reality.html> **"Male Survivors"** accessed 1 August 2001.

<http://www.home.intekom.com/crisis/stats.html> **"Crimes Against Children"** accessed 1 August 2002.

[http://www.interpol.int/Public/Children/Sexual Abuse/National laws](http://www.interpol.int/Public/Children/Sexual%20Abuse/National%20laws). **"Sexual Offences Laws–Australia (State of Victoria)"** accessed 20 February 2002.

<http://www.rapecrisis.org.za/dealing/trauma.htm> **"Dealing With Rape: Rape Trauma Syndrome"** accessed 1 August 2002.

<http://www.rapecrisis.org.za/statistics> **"Statistics"** accessed 4 August 2002.

<http://www.saps.co.za/index.html> **"SAPS Central Information Management Centre Website"** accessed 4 November 2001.

<http://www.saps.org.za/8crimeinfo/bulletin/942000q/rsa.html> **“SAPS Crime Information Bulletin”** accessed 4 November 2001.

<http://www.silent-no-more.org/index.html> **“The Sexual Assault Crisis & Support Center”** accessed 1 August 2002.

<http://www.survive.org.uk/PTSD.html> **“Post Traumatic Stress Disorder in Rape Survivors”** accessed 1 August 2002.

<http://www.vaw.umn.edu/1/vawnet/mrape/htm> **“Marital Rape”** accessed 30 November 2001.

<http://www.vix.com/men/rawdeal/seyer.html> **“Shane Seyer Case”** accessed 4 August 2002.

SOUTH AFRICAN CASE LAW

Castell v De Greef 1996 4 SA 408 (C)

Clarke v Hurst 1992 4 SA 630 (D)

Foster v Foster 1921 152 TLR 70

Jansen van Vuuren and Another v Kruger 1993 4 SA 842 (A)

Minister van Polisie v Ewels 1975 3 SA 590 (A)

National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others 1999 1 SA 6 (CC)

R v Abrahams 1918 CPD 590

R v C 1952 4 SA 117 (O)

R v Dumezweni 1961 2 SA 751 (A)

R v Du Plessis 1950 1 SA 297 (C)

R v Gannon 1906 TS 114

R v Giles 1926 WLD 211

R v Gumede 1946 1 PHH 68 (N)

R v H 1959 4 SA 427 (A)

R v Handcock 1925 OPD 147

R v K 1951 4 SA 49 (C)

R v K 1958 3 SA 420 (A)

R v M 1950 4 SA 101 (T)

R v M 1953 4 SA 393 (A)

R v Mazibuko 1945 NPD 276

R v Ndhlovu 1945 AD 369

R v Osborne 1905 1 KB 55

R v Peverett 1940 AD 213

R v Ryperd Boesman 1942 1 PHH 63 (SWA)

R v T 1937 TPD 389

R v V 1957 2 SA 10 (O)

R v V 1957 3 SA 633 (O)

R v Williams 1931 1 PHH 38 (E)

R v Z 1960 1 SA 739 (A)

S v A 1995 2 BCLR 153 (C)



S v Bernadus 1965 3 SA 287 (A)

S v Bhulwana 1994 2 SACR 706 (C)

S v Binta 1993 2 SACR 553 (C)

S v Blaauw 2001 [3] All SA 588 (C)

S v Chretien 1981 1 SA 1097 (A)

S v Coetzee and Others 1997 (1) SACR 379 (CC)

S v D 1969 2 SA 591 (RA)

S v D 1989 4 SA 709 (T)

S v F 1982 (2) SA 580 (T)

S v H 1988 2 SA 750 (N)

S v H 1993 (2) SACR 545 (C)

S v Hibbert 1974 (4) SA 717 (D)

S v I 1976 1 SA 781 (RA)

S v J 1989 (1) SA 525 (A)

S v Jansen 1975 1 SA 425 (A)

S v Johnson 1969 1 SA 201 (A)



S v Jonathan 1987 1 SA 633 (A)

S v K 1966 1 SA 366 (A)

S v Khumalo 1984 3 SA 327 (A)

S v M 1984 4 SA 111 (T)

S v M 1990 1 SACR 456 (N)

S v M 1990 2 SACR 509 (E)

S v M 1992 1 SACR 124 (N)

S v M 1993 1 SACR 126 (A)

S v M (2) 1990 (1) SACR 456 (N)

S v Mahlinza 1967 (1) SA 408 (A)

S v Malgas [2001] 3 All SA 220 (A)

S v Maphumulo 1996 2 BCLR 167 (N)

S v Mngomezulu 1968 2 PHH 96 (N)

S v Muvhaki 1985 4 SA 317 (ZH)

S v Myeza 1985 4 SA 30(T)

S v N 1979 4 SA 633 (C)



S v Jonathan 1987 1 SA 633 (A)

S v K 1966 1 SA 366 (A)

S v Khumalo 1984 3 SA 327 (A)

S v M 1984 4 SA 111 (T)

S v M 1990 1 SACR 456 (N)

S v M 1990 2 SACR 509 (E)

S v M 1992 1 SACR 124 (N)

S v M 1993 1 SACR 126 (A)

S v M (2) 1990 (1) SACR 456 (N)

S v Mahlinza 1967 (1) SA 408 (A)

S v Malgas [2001] 3 All SA 220 (A)

S v Maphumulo 1996 2 BCLR 167 (N)

S v Mngomezulu 1968 2 PHH 96 (N)

S v Muvhaki 1985 4 SA 317 (ZH)

S v Myeza 1985 4 SA 30 (T)

S v N 1979 4 SA 633 (C)



S v Ncanywa 1992 1 SACR 209 (Ck)

S v Ncanywa 1993 1 SACR 297 (CkA)

S v Ngubane 1985 3 SA 677 (A)

S v R and Others 2000 1 SACR 33 (WLD)

S v Rabie 1975 4 SA 855 (A)

S v Robinson 1968 1 SA 666 (A)

S v S 1971 2 SA 591 (A)

S v Steenberg 1979 (3) SA 513 (B)

S v Stellmacher 1983 2 SA 181 (SWA)

S v Toms: S v Bruce 1990 2 SA 802 (A)

S v Van den Berg 1991 1 SACR 104 (T)

S v Volschenk 1968 2 PHH 283 (D)

S v Von Mollendorff 1987 1 SA 135 (T)

Scagell v Attorney General of the Western Cape 1996 2 BCLR 1446 (CC)

Venter v Nel 1997 4 SA 1014 (D)

Waring and Gillow Ltd v Sherbourne 1904 TS 340

FOREIGN CASE LAW

Bolduc and Bird v R 1967 63 DLR 2nd 82 SCC

Brinson v The State 1973 Fla. App. D1 278 SO 2d 317

Commonwealth v Gonsalves 1986 Mass.App.Ct 499 N.E. 2d 1229

Commonwealth v Quartman 1983 Pa. Super. Ct. 458 A.2d. 994

Doe v Connell 1992 583 NYS 2d 707

Doe v University of Maryland Medical System Corporation 1995 50F 3d 1261

Hoge Raad 22 February 1994 NY 1994 379

Holborn v Holborn 1947 1 All ER 32

Hutto v Finney 1978 437 US 678

Iss v R 1987 163 CLR 447

Meloon v Helgemoe 1977 CA 1 NH 564 F 2d 602

Olden v Kentucky 1988 488 US 227

People v Hackett 1984 Mich. 365 NW 2d 120

People v Liberta 1984 NYS 485 2d 207

People v Yates 1995 637 NYS 2d 625

R v Billam 1986 8 Cr App R (S) 48

R v C 1991 1 All ER 755

R v Cuerrier 1999 127 CCC (3d) 1 (SCC)

R v Diana Richardson 1998 2 CR R 2d

R v Fenton 1992 13 Cr App R (S) 85

R v Hiscock 1992 13 Cr App R (S) 24

R v Hodgson 1968 52 Cr App R (S) 113

R v Jackson 1988 10 Cr App R (S) 297

R v Kaitamaki 1980 NZLR 60

R v Laz 1998 1 VR 453

R v Mendez 1992 13 Cr App R (S) 94

R v Payne 1994 15 Cr. App. R (S) 395

R v R 1991 4 All ER 481

R v Richards 1996 2 Cr App R (S) 167

R v Wall 1989 11 Cr App R (S) 111

Willan v Willan 1960 2 All ER 463

R v Wilson 1993 Cr App R (S) 627

State v Bealieu 1996 Supr. Ct. Rhode Island 674 A 2d 377

State v Lankford 1917 Del Ct Sess 102 A 63

State v Levier 1976 16 Wash. App. 332 555P 2d 1003

State v McGee 1982 Minn. 324 NW 2d 232

State v Rogers 1991 Tenn.Crim.App. LEXIS 648 (Aug 16, 1991)

State v Saldanha 1982 Minn. 324 NW 2d 227

State v Sibley 1895 Mo. 33 SW 167

State v Ssenyanga 1992 Ont. 76 CCC 3d 216

State v Stevens 1986 510 A 2d 1070; 67 ALR 4th 1123

United States v Bailey 1980 444 US 394

United States v Madkour 1991 2d Cir 930F.zd 234

United States v Smith, William and Komak 1978 574 F 2d 988

DOMESTIC LEGISLATION

Constitution of the Republic of South Africa Act 200 of 1993

Constitution of the Republic of South Africa Act 108 of 1996

Criminal Law Amendment Act 105 of 1997

Criminal Procedure Act 51 of 1977

Criminal Procedure Amendment Bill of 1999

Criminal Procedure Second Amendment Act 85 of 1997

Domestic Violence Act 116 of 1998

Government Gazette 11014, 30 November 1987

Government Gazette 3226 GN 1376, 30 July 1943

Law of Evidence Amendment Act 45 of 1988

Law of Evidence and Criminal Procedure Amendment Act 103 of 1987

Prevention of Family Violence Act 133 of 1993

Riotous Assemblies Act 17 of 1956

“SALC Discussion Paper 80 on Aspects of the Law Relating to AIDS” (1999)
South African Law Commission.

“SALC Discussion Paper 84 on Aspects of the Law Relating to AIDS” (1999)
South African Law Commission.

“SALC Discussion Paper 85 on Sexual Offences” (1999) South African Law
Commission.

“SALC Discussion Paper 91 (Appendixes) on Sentencing” (2000) South African
Law Commission.

“SALC Discussion Paper 102 on Sexual Offences” (2002) South African Law
Commission.

**“SALC Fourth Interim Report on Aspects of the Law Relating to AIDS Project
85” (2000)** South African Law Commission.

“SALC Issue paper 10 on Sexual offences against Children” (1997) South
African Law Commission.

“SALC Report on Women and Sexual offences in SA Project 45” (1985) South
African Law Commission.

FOREIGN INSTRUMENTS

African Charter on the Rights and Welfare of the Child 1990

Common Law Consolidation Act 1935 – Interpol (Victoria)

Crimes Act 1900 (Australia)

Crimes Act 1958 (Victoria)

Criminal Justice and Public Order Act 1994

Florida Statutes (USA) 1997

Law Reform Commissioner Victoria Report 1976

Queensland Criminal Code Act 1899

Rape Statute – Non-Genital Intercourse 3 ALR 4th 1009

Revised Code Washington (ARCW) 1994

Southern Australia Law and Consolidation Act

Tennessee Annotated Code (USA) 1994

The Criminal Law Amendment Bill (Zimbabwe)

The Florida Statutes 1997



The Sexual Offences Act 23 of 1957

The Sexual Offences Act 1956 (Britain)

The Sexual Offences Amendment Act 1976 (Britain)

The United States Draft HIV Prevention Bill 1997

United Kingdom Law Commission Report No 218 (1993)

United Nations Convention on the Rights of the Child 1990

Western Australia Criminal Code 1913



ANNEXURE A

THE SEXUAL OFFENCES BILL INTRODUCED BY THE SOUTH AFRICAN LAW COMMISSION IN DISCUSSION PAPER 85 OF 1999 (RELEVANT SECTIONS)

Preamble of the proposed Bill

Whereas the Bill of Rights in the Constitution of South Africa 1996 (Act 108 of 1996) enshrines the rights of all people in the Republic, including the right to equality and the right to freedom and security of the person, which incorporates the right to be free from all forms of violence from either public or private sources...

♦ Chapter 1: Definitions

“child” means –

- (a) for the purposes of Chapter 3, a person under the age of 16 years,¹ and,
- (b) for the purposes of Chapter 5, a person under the age of 18 years.²

“coercive circumstances” include any circumstances where –

- (a) there is an application of force, whether explicit or implicit, direct or indirect, physical or psychological against any person or animal;
- (b) there is any threat, whether verbal or through conduct, direct or indirect to cause any form of harm to any person or animal;

¹ Sexual offences against children.

² Commercial sexual exploitation of children.

- (c) the complainant is under the age of twelve years;
- (d) there is an abuse of power or authority, whether explicit or implicit, direct or indirect, to the extent that one person is inhibited from indicating his or her resistance to an act of sexual penetration, or his or her unwillingness to participate in such an act.
- (e) a person's mental capacity is affected by -
 - (i) sleep;
 - (ii) any drug, intoxicating liquor or other substance;
 - (iii) mental or physical disability, whether temporary or permanent, or
 - (iv) any other condition, whether temporary or permanent to the extent that he or she is unable to appreciate the nature of an act of sexual penetration, or is unable to resist the commission of such an act, or is unable to indicate his or her unwillingness to participate in such an act.
- (f) a person is unlawfully detained.
- (g) a person believes that he or she is committing an act of sexual penetration with another person, or
- (h) a person mistakes an act of sexual penetration which is being committed upon him or her for something other than an act of sexual penetration;

“mentally impaired person” means a person affected by any mental disability irrespective of its cause, whether temporary or permanent, to the extent that he or she is unable to appreciate the nature of a sexual act, or is unable to resist the commission of such an act or is unable to communicate his or her unwillingness to participate in such an act;



“sexual act” means any indecent act and includes an act which causes –

- (a) direct or indirect contact between the anus, breasts, penis or vagina of one person and any part of the body of another person, or
- (b) exposure or display of the genital organs of one person to another person, and further includes an act of sexual penetration;

“sexual penetration” means any act which causes penetration to any extent whatsoever –

- (a) by the penis of one person -
 - (i) into the anus, ear, mouth, nose or vagina of another person or
 - (ii) into any body orifice of an animal.
- (b) by any object or part of the body of one person -
 - (i) into the anus or vagina of another person, or
 - (ii) into any body orifice of another person in a manner which simulates sexual intercourse, or
- (c) by any part of the body of an animal -
 - (i) into the anus or vagina of a person, or
 - (ii) into any body orifice of a person in a manner which simulates sexual intercourse;

“vagina” means the whole of the female sexual organ and includes a surgically constructed vagina;

♦ **Chapter 2: General Sexual Offences**

Rape

- 2.(1) Any person who intentionally and unlawfully commits an act of sexual penetration with another person, or who intentionally and unlawfully causes another person to commit such an act is guilty of an offence.
- (2) For the purposes of this Act, an act of sexual penetration is prima facie unlawful if it takes place in any coercive circumstances.
- (3) No marriage or other relationship shall be a defence against a charge under this section.
- (4) No person shall be charged with or convicted of the common law offence of rape in respect of an act of sexual penetration after the commencement of this Act.
- (5) Subject to the provisions of this Act, any reference to “rape” in any law shall be construed as a reference to the offence of rape under this section, unless it is a reference to rape committed before the commencement of this Act which shall be construed to be a reference to the common law offence of rape.

Compelled Sexual Acts

- 3.(1) Any person who intentionally compels another person-
 - (a) to engage in a sexual act with that person; or
 - (b) to engage in a sexual act with a third person; or
 - (c) to engage in a sexual act with himself or herself;
is guilty of an offence.

- (2) Any person who intentionally causes another person to engage in a sexual act with an animal is guilty of an offence.

Inducement to allow sexual act

4. Any person who intentionally induces another person by false pretence or fraudulent means to allow him or her to commit a sexual act with that other person is guilty of an offence.

Incest

6. From the date of promulgation of this act the definition of sexual penetration contained in this Act shall be applied mutatis mutandi for the purposes of the common law offence of incest.

Chapter 3: Sexual offences against children

Child molestation

7. (1) Any person who intentionally commits a sexual act with a child at least two years younger than him or her, shall be guilty of an offence.
- (2) Any person who commits an act with the intent to invite or persuade a child at least two years younger than him or her, to allow any person to commit a sexual act with that child shall be guilty of an offence.
- (3) Consent by a child to any sexual act shall not be a defence to a charge under this section.

Chapter 4: Sexual Offences against mentally impaired persons

- 9.(1) Any person who intentionally commits a sexual act with, or in the presence of a mentally impaired person shall be guilty of an offence.



(2) Any person who commits any act with the intent to invite or persuade a mentally impaired person to allow any person to commit a sexual act with that mentally impaired person shall be guilty of an offence.

ANNEXURE B

SEXUAL OFFENCES BILL INTRODUCED BY THE SOUTH AFRICAN LAW COMMISSION IN DISCUSSION PAPER 102 OF 2002 (RELEVANT CLAUSES)

Preamble of the proposed bill

WHEREAS the Bill of Rights in the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996), enshrines the rights of all people in the Republic of South Africa including the right to equality and the right to freedom and security of the person which incorporates the right to be free from all forms of violence from either public or private sources....

♦ **Chapter 1: Definitions**

“genital organs” include the whole or part of male and female genital organs and further include surgically constructed genital organs;

“indecent act” includes an act which causes-

- (a) direct or indirect contact between the anus, breasts or genital organs of one person and any part of the body of another person,
- (b) unjustified exposure or display of the genital organs of one person to another person, or
- (c) exposure or display of any pornographic material to a person below the age of 18 years or to any person against his or her will

but does not include an act of sexual penetration or an act which is consistent with sound medical practices which is carried out for proper medical purposes;



"mentally impaired person" means a person affected by any mental impairment irrespective of its cause, whether temporary or permanent, to the extent that he or she is or was unable to appreciate the nature and consequences of an indecent act or an act of sexual penetration, or is or was unable to resist the commission of any such act, or is or was unable to communicate his or her unwillingness to participate in any such act;

"sexual offence" means any offence in terms of this Act, excluding the Schedule, and includes any common law sexual offence;

"sexual penetration" means any act which causes penetration to any extent whatsoever by-

- (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 but does not include an act which is consistent with sound medical practices which is carried out for proper medical purposes.

Rape

3.(1) Any person who intentionally and unlawfully commits an act of sexual penetration as defined in section 1 with another person, or who intentionally and unlawfully compels, induces or causes another person to commit such an act, is guilty of the offence of rape.

(2) For the purposes of this Act, an act of sexual penetration is prima facie unlawful if it is committed-

- (a) in any coercive circumstance;

- (b) under false pretences or by fraudulent means; or
 - (c) in respect of a person who is incapable in law to appreciate the nature of an act of sexual penetration.
- (3) Coercive circumstances, as referred to in subsection (2)(a), include any circumstances where-
- (a) there is any use of force, whether explicit or implicit, direct or indirect, physical or psychological against any person or any use of force which damages or destroys such person's movable or immovable property;
 - (b) there is any threat, whether verbal or through conduct, direct or indirect, to cause any form of harm to any person or to damage or destroy such person's movable or immovable property;
 - (c) there is an abuse of power or authority, whether explicit or implicit, direct or indirect, to the extent that the person in respect of whom an act of sexual penetration is committed is inhibited from indicating his or her resistance to such an act, or his or her unwillingness to participate in such an act; or
 - (d) a person is lawfully or unlawfully detained.
- (4) False pretences or fraudulent means, as referred to in subsection (2)(b), include circumstances where a person in respect of whom an act of sexual penetration is being committed is led to believe 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.
- (5) The circumstances in which a person is incapable in law to appreciate the nature of an act of sexual penetration as referred to in subsection (2)(c) include circumstances where such person is -
- (a) asleep;
 - (b) unconscious;
 - (c) under the influence of any medicine, drug, alcohol or other substance to the extent that the person's consciousness or judgement is adversely affected; or
 - (d) a mentally impaired person as defined in section 1.
- (6) For purposes of this Act a person is incapable in law to appreciate the nature of an act of sexual penetration if that person is below the age of 12 years.
- (7) A marital or other relationship, previous or existing, shall not be a defence to a charge of rape.
- (8) The common law relating to-
- (a) the irrebuttable presumption that a female person under the age of 12 years is incapable of consenting to sexual intercourse; and
 - (b) the offence of rape, except where a person has been charged with, but not convicted of such offence prior to the commencement of this Act, is repealed.

- (9) Subject to the provisions of this Act, any reference to "rape" in any law shall be construed as a reference to the offence of rape under this section, unless it is a reference to rape committed before the commencement of this Act which shall be construed to be a reference to the common law offence of rape.
- (10) Nothing in this section may be construed as precluding any person charged with the offence of rape from raising any defence at common law to such charge.

Compelled or induced indecent acts

4. Any person who intentionally and unlawfully compels, induces or causes another person to engage in an indecent act as defined in section 1 with -
- (a) the person compelling, inducing or causing the act;
 - (b) a third person;
 - (c) that other person himself or herself; or
 - (d) an object, including any part of the body of an animal, in circumstances where that other person-
 - (i) would otherwise not have consented to the commission of the indecent act; or
 - (ii) is incapable in law of appreciating the nature of an indecent act, including the circumstances set out in paragraphs (a) to (d) of section 3(5)

is guilty of the offence of having compelled, induced or caused a person to engage in an indecent act.

Extension of common law incest

5. From the date of promulgation of this Act the definition of sexual penetration contained in section 1 of this Act applies to the common law offence of incest.

Acts of sexual penetration or indecent acts with consenting minors

6. (1) Any person who commits an act of sexual penetration as defined in section 1 with a child who is at least 12 years of age, but not yet 16 years is, notwithstanding the consent of that child to the commission of such an act, guilty of the offence of having committed an act of sexual penetration with a minor.

- (2) It is a defence to a charge under subsection (1) if-

- (a) the accused was a person below the age of 16 years at the time of the alleged commission of the offence;
- (b) the age of the accused did not exceed the age of such child by more than three years at the time of the alleged commission of the offence; or
- (c) it is proved on a balance of probabilities that such child or the person in charge of such child deceived the accused into believing that such child was over the age of 16 years at the time of the alleged commission of the offence.

- (3) The provisions of this section do not apply if-

- (a) the accused is related to such child by blood or affinity; or
- (b) such child lacked the intellectual development to appreciate the nature of an act of sexual penetration.



- (4) Any person who commits an indecent act as defined in section 1 with a child below the age of 16 years is, notwithstanding the consent of that child to the commission of such an act, guilty of the offence of having committed an indecent act with a minor.
- (5) The provisions of subsections (2) and (3) apply, with the changes required by the context, to a person charged under subsection (4), unless the child concerned was below the age of 12 years at the time of the alleged commission of the offence.
- (6) A person may not be charged under this section if a valid or legally recognised marriage existed between that person and a child as referred to in this section, unless the child concerned was below the age of 12 years at the time when any offence in terms of this section was allegedly committed.

Indecent acts or acts of sexual penetration with mentally impaired persons

- 7.(1) Any person who intentionally commits an indecent act as defined in section 1 with a mentally impaired person, also defined in section 1, is guilty of the offence of having committed an indecent act with a mentally impaired person.
- (2) It is a defence to a charge under subsection (1) or to a charge of rape under section 2 if-
 - (a) the mentally impaired person was over the age of 16 years at the time of the alleged commission of the offence and it is proved, on a balance of probabilities, that such mentally impaired person induced the commission of an indecent act or an act of sexual penetration; and
 - (b) it is proved, on a balance of probabilities, that the accused was unaware that the mentally impaired person who induced the

commission of an indecent act or act of sexual penetration was so impaired or was below the age of 16 years at the time of the alleged commission of the offence in question.

Acts of sexual penetration or indecent acts committed in presence of minors or mentally impaired persons

8. Any person who intentionally commits an act of sexual penetration or an indecent act as defined in section 1 with another in the presence of a person below the age of 16 years or a mentally impaired person as defined in section 1, is guilty of the offence of having committed such an act in the presence of a minor or a mentally impaired person, as the case may be.

Children competent to testify in criminal proceedings involving sexual offences

- 10.(1) No child below the age of 18 years, other than a child who for any reason does not have the capacity, verbal or otherwise, to respond to simple questions, shall be precluded from giving evidence in court in criminal proceedings involving the alleged commission of a sexual offence.
- (2) The evidence given by a child referred to in subsection (1) shall be admissible in criminal proceedings contemplated in that subsection, and the court shall attach such weight to such evidence as it deems fit.

Vulnerable witnesses

- 13.(1) A court, in criminal proceedings involving the alleged commission of a sexual offence, must declare a witness, other than the accused, who is to give evidence in that proceedings a vulnerable witness if such witness is –
- (a) the complainant in the proceedings pending before the court; or

- (b) below the age of 18 years and has witnessed the offence being tried.
- (2) The court may, on its own initiative or on application by the prosecution or any witness who is to give evidence in proceedings referred to in subsection (1), and if that witness is below the age of 18 years, on application by that witness, if at least ten years of age, or his or her parent, guardian or a person in loco parentis, declare any such witness, other than the accused, a vulnerable witness if in the court's opinion he or she is likely to be vulnerable on account of –
- (a) age;
 - (b) intellectual impairment;
 - (b) trauma;
 - (d) cultural differences; or
 - (e) the possibility of intimidation.
- (3) The court may, if in doubt as to whether a witness should be declared a vulnerable witness in terms of subsection (2), summon any knowledgeable person to appear before and advise the court on the vulnerability of such witness.
- (4) Upon declaration of a witness as a vulnerable witness in terms of this section, the court must, subject to the provisions of subsection (5), direct that such witness be protected by one or more of the following measures –
- (a) allowing that witness to be accompanied by a support person as provided for in section 14;

- (b) allowing that witness to give evidence by means of closed circuit television as provided for in section 158 of the Criminal Procedure Act, 1977;
 - (c) directing that the witness must give evidence through an intermediary as provided for in section 170A of the Criminal Procedure Act, 1977;
 - (c) directing that the proceedings may not take place in open court as provided for in section 153 of the Criminal Procedure Act, 1977;
 - (e) prohibiting the publication of the identity of the complainant as provided for in section 154 of the Criminal Procedure Act, 1977, or of the complainant's family;
 - (f) allowing electronically prerecorded evidence given by that witness;
or
 - (g) any other measure which the court deems just and appropriate.
- (5) If the court has declared a person below the age of 18 years a vulnerable witness, the court must, subject to the provisions of subsection (8), direct that an intermediary as referred to in subsection (4)(c) be appointed in respect of such witness unless there are exceptional circumstances justifying the non-appointment of an intermediary, in which case the court must record the reasons for not appointing an intermediary.
- (6) The court may direct that the protective measures referred to in paragraphs (b) to (e) of subsection (4) must be applied in respect of a vulnerable witness, irrespective of any other qualifying criteria that may be prescribed by the provisions of the Criminal Procedure Act, 1977, referred to in those paragraphs.

- (7) In determining which of the protective measure or protective measures as referred to in subsection (4) should be applied to a witness, the court must be satisfied that such measure or measures is or are likely to improve the quality of evidence to be given by that witness, and must have regard to all the circumstances of the case, including –
- (a) any views expressed by the witness, if ten years of age or older;
 - (b) views expressed by a knowledgeable person who is acquainted with or has dealt with the witness;
 - (c) the need to protect the witness's dignity and sense of safety and to protect the witness from further traumatising; and
 - (d) the question whether the protective measure or protective measures is or are likely to prevent the evidence given by the witness from being effectively tested by a party to the proceedings.
- (8) The court may at any time revoke or vary a direction given in terms of subsection (4) upon the request of the prosecution or the witness concerned: Provided that where a witness is below the age of 18 years, such revocation or variation may only be effected upon the request of that witness or his or her parent, guardian or a person in loco parentis and if that witness is at least ten years of age.

Appointment of support persons

14.(1) Whenever criminal proceedings involving the commission of any sexual offence are pending before any court and a witness, including the complainant, is to give evidence in such court, the court may at any time on its own initiative or upon request by –

- (a) the prosecutor;



- (b) such witness;
- (c) the parent, guardian or person in loco parentis of such witness if that witness is below the age of 18 years;
- (d) a social worker;
- (e) a lay counsellor; or
- (f) a medical officer

direct that such witness be accompanied by a support person of the witness's choice when making statements to any person, being interviewed or giving evidence in court.

- (2) The court may, notwithstanding a request in terms of this section, refuse the appointment of a support person of the witness's choice if the court is of opinion that the appointment of such person as support person will not be in the interests of justice.
- (3) A support person appointed in terms of this section may accompany and be seated next to the relevant witness while such witness is making statements to any person, being interviewed or giving evidence in court.
- (4) The court may, if it deems it to be in the interests of justice and in the best interests of the witness, at any time revoke the appointment of a support person and may appoint another person in his or her place.
- (3) Whenever a witness in respect of whom a support person has been appointed is to give evidence in court, such person shall affirm to the court prior to giving support that he or she will –
 - (a) assist the court to the best of his or her ability; and

- (b) not in any manner interfere with the witness or the evidence being given.
- (6) The State shall pay to a support person appointed in terms of this section a prescribed transport allowance for the duration of the period that such person is required to assist a witness giving evidence in court.

Disclosure of personal records

15.(1) Subject to the provisions of subsections (3) and (5), no personal record may be adduced as evidence in criminal proceedings involving the alleged commission of a sexual offence.

(2) For purposes of subsection (1) a personal record refers to a record of communications, written or oral, made by a person against whom a sexual offence was alleged to have been committed in confidence to a registered medical practitioner or registered counsellor and includes a record that existed prior to the alleged commission of a sexual offence against that person.

(3) A court may, upon application by any interested party, order disclosure of a personal record in full or in part in any manner that the court deems fit after it has considered any potential prejudice to the dignity, privacy and security of the person to whom the record relates, including the nature and extent of any harm that would be caused to such person and if it is satisfied that -

(a) the evidence contained in such record will, on its own or in conjunction with any other evidence, have substantial probative value to a fact in issue;

(b) no other evidence that has similar probative value to the fact in issue is available; and

- (c) the public interest outweighs the protection of the dignity, privacy and security of such person.
- (4) The application referred to in subsection (3) must satisfy the court that -
 - (a) a personal record exists and is held by an identified record holder;
 - (b) such record contains information which is likely to be relevant to a fact in issue at the proceedings pending before the court or to the competence of a witness to give evidence;
 - (c) the grounds upon which the party making the application relies to establish that the contents of such record is likely to be relevant are sufficient to warrant consideration of disclosure; and
 - (d) granting the application will be in the interests of justice and in the interests of the person to whom such record relates.
- (5) A court may, notwithstanding the provisions of subsection (3), order disclosure of a personal record if the person to whom the record relates consents to such disclosure or if a personal record has been prepared for purposes of any legal proceedings arising from the commission or alleged commission of a sexual offence.
- (6) A court shall, upon receipt of a personal record after its disclosure, consider the contents of such record prior to granting access to that record to any party and may, upon furnishing reasons, grant or refuse access to that record.

Evidence of psycho-social effects of sexual offence

- 18.(1) Evidence of the psycho-social effects of any sexual offence upon a complainant may be adduced at criminal proceedings where such offence is tried in order to –

- (a) show that the sexual offence to which the charge relates is likely to have been committed
 - (i) towards or in connection with the complainant concerned;
 - (ii) under coercive circumstances as referred to in section 2;
 - (b) prove, for purposes of imposing an appropriate sentence, the extent of the harm suffered by that complainant.
- (2) In determining the weight to be attached to evidence adduced in terms of subsection (1), the court shall have due regard to -
- (a) the qualifications and practical experience of the person who has given such evidence in matters relating to sexual offences; and
 - (b) all other evidence given at the proceedings.

Evidence of period of delay between sexual offence and laying of complaint

19. In criminal proceedings at which an accused is charged with a sexual offence, the court shall not draw any inference only from the length of any delay between the alleged commission of a sexual offence and the laying of the complaint in connection with such offence.

Abolition of cautionary rule

20. Notwithstanding the provisions of the common law, any other law or any rule of practice, a court may not treat the evidence of a witness in criminal proceedings involving the alleged commission of a sexual offence pending before that court with caution merely because that witness is —
- (a) the complainant in such proceedings;
 - (b) less than 18 years of age; or

- (c) the only witness to the offence in question.

Provision of treatment

22.(1) If it has been established that a person has sustained physical or psychological injuries as the result of a sexual offence, such person shall, as soon as is practicable after the offence, receive the best possible medical care, treatment and counselling as may be required for such injuries.

- (2) The State shall bear the cost of the medical care, treatment and counselling as referred to in subsection (1).

Sex offender orders

24.(1) A court may, upon application by a person referred to in subsection (2), grant an order prohibiting a person convicted of a sexual offence, notwithstanding the fact that the convicted person has lodged an appeal or instituted review proceedings regarding his or her conviction or sentence, from –

- (a) acting in a way that is intended to cause serious harm to any particular person or members of the public;
- (b) frequenting any specified location;
- (c) establishing or attempting to establish contact with any specified person.

(2) An application referred to in subsection (1) shall be made on affidavit to the magistrate's court in whose area of jurisdiction it is alleged that the convicted person is or was acting in a way referred to in that subsection, and may be brought by –

- (a) a police official;

- (b) a police reservist;
 - (c) a director or authorised employee of a non-governmental or community based organisation;
 - (d) any member or employee of a private security institution;
 - (e) a social worker;
 - (f) a medical officer; or
 - (g) an official designated by a local authority.
- (3) Any person may request a person referred to in subsection (2) to bring an application as contemplated in this section and may, upon failure of such person to bring an application within 48 hours of the request without good reason, make such application to the court referred to in subsection (2).
- (4) The court hearing the application for an order as contemplated in this section may only grant such order if it is satisfied that the person in respect of whom the order is sought has been convicted of a sexual offence and that the order is necessary for the purpose of protecting any particular person or members of the public from serious harm by the convicted person and may, if so satisfied, direct that the convicted person is prohibited from acting in any way which the court deems fit.
- (5) An order contemplated in this section shall have effect for a period of at least five years from the date of the order or for such longer term as may be prescribed in the order, and may only be revoked by the court within a shorter period of time upon application by the person who first obtained the order or by the convicted person with the consent of the person who first obtained the order.

- (6) A convicted person in respect of whom an order has been issued by a court as contemplated in this section, and who contravenes any prohibition or direction stipulated in such order, is guilty of an offence and shall be liable, upon conviction, to a fine or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment.

Supervision of dangerous sexual offenders

25. (1) Whenever a dangerous sexual offender has been convicted of a sexual offence by a court to imprisonment without the option of a fine, the court may order, as part of the sentence, that when such offender is released either after completion of the term of imprisonment or on parole, the Department of Correctional Services shall ensure that the offender is placed under long term supervision by an appropriate person.
- (2) For purposes of subsection (1) a dangerous sexual offender includes an offender who has –
- (a) more than one conviction for a sexual offence;
 - (b) been convicted of a sexual offence which was accompanied by violence or threats of violence; or
 - (c) been convicted of a sexual offence against a minor and long term supervision means supervision of a rehabilitative nature for a period of not less than five years.
- (4) If the consent of the Director of Public Prosecutions to institute prosecution has been obtained as referred to in subsection (3), prosecution may be instituted in any appropriate court within such Director's jurisdiction.

Penalties

28. Any person who is convicted of an offence in terms of this Act, must be sentenced in accordance with the provisions of Chapter 3 of the Sentencing Framework Act, Act No. xx of 20xx.

ANNEXURE C

THE PROPOSED AMENDMENT TO SECTION 37 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977

The proposed Criminal Procedure Amendment Bill provisions reads as follows:

* **The Criminal Procedure Amendment Bill³**

Amendment of Section 37 of Act 51 of 1977, as amended by Section 1(a), (b) and (c) of Act 64 of 1982.

1. Section 37 of the Criminal Procedure Act, 1977 (hereinafter referred to as the principal act) is hereby amended by the insertion in the principal Act after Section 37 of the following section:

Compulsory testing of arrested persons for non-evidentiary purposes

37A(1) Any person who alleges that he or she has been the victim of any sexual offence in which exposure of the bodily fluids of the arrested person may have occurred, may at the earliest possible opportunity after laying a charge and before or after an arrest is effected, apply to a magistrate orally or in writing for an order that the person arrested on the charge or on suspicion of having committed the offence in question be tested for HIV or any other life-threatening sexually transmissible disease.⁴

³ As introduced by the South African Law Commission in Discussion Paper 84 on ix.

⁴ The victim's test for HIV/AIDS may be negative due to the window period and it would be more easily ascertainable as to whether the victim has been infected, by performing blood tests on the accused due the greater likelihood that the latter may have passed the window period phase.

- (2) If the alleged victim is incapacitated or is a minor, any person with legal standing may apply on his or her behalf for an order in terms of subsection (1).
- (3) The magistrate of the district in which the offence is alleged to have occurred or in which the victim resides has jurisdiction to grant the order, and shall as soon as is reasonably practicable consider the application.
- (4) The magistrate, if satisfied from information on oath that prima facie evidence exists that an offence as described in subsection (1) has been committed, shall order any designated local authority to test the person or persons arrested and to inform the magistrate of the result.
- (5) Any police officer may take such steps as may be reasonably necessary to carry out the order.
- (6) The proceedings shall be held in camera and the magistrate shall not communicate the fact that an order has been granted or the result of the test or tests to any person other than -
 - (a) the victim of the alleged offence or the person acting on his or her behalf and
 - (b) the arrested person.
- (7) No order granted under this section shall be carried out more than four months after the date upon which it is alleged that the offence in question took place.
- (8) The Minister of Health and Justice may promulgate policy on the testing methods and procedures to be used for purposes of this section.



- (8) “Test” in this section means any medically recognized test for determining the presence of HIV or any other life threatening sexually transmissible disease.

ANNEXURE D

THE CRIMINAL PROCEDURE ACT 51 OF 1977 (RELEVANT CLAUSES)

- 37(1)** Any police official may –
- (a) take the finger-prints, palm – prints or foot –prints or may cause to be taken –
 - (i) of a person arrested upon any charge;
 - (ii) of any such person released on bail or on warning under section 72;
 - (c) take such steps as he may deem necessary in order to ascertain whether the body of any person referred to in paragraphs (a)(i) or (ii) has any mark, characteristic or distinguishing feature or shows any condition or appearance: Provided that no police official shall take any blood sample of the person concerned.
- 37(2)(a)** Any medical officer of any prison or any district surgeon or, if requested thereto by any police official, any registered medical practitioner or registered nurse may take such steps, including the taking of a blood sample, as may be deemed necessary in order to ascertain whether the body of any person referred to in paragraph (a)(i) or (ii) of subsection (1) has any mark, characteristic or distinguishing feature or shows any condition or appearance.

37(3) Any court before which criminal proceedings are pending may –

- (a) in any case in which a police official is not empowered under subsection (10 to take finger-prints, palm-prints or footprints or to take steps in order to ascertain whether the body of any person has any mark, characteristic or distinguishing feature or shows any condition or appearance, order that such prints be taken of any accused at such proceedings or that the steps, including the taking of a blood sample, be taken which such court may deem necessary in order to ascertain whether the body of an accused at such proceedings has any mark, characteristic or distinguishing feature or shows any condition or appearance;
- (b) order that the steps, including the taking of a blood sample, be taken which such court may deem necessary in order to ascertain the state of health of any accused at such proceedings.

ANNEXURE E

PRE-IMPLEMENTATION: TABLE 5 OF SALC DISCUSSION PAPER

91 APPENDIX C ⁵

CRIME	POLICE JURISDICTION	AVERAGE YEARS IMPRISONMENT	NUMBER OF ACCUSED
MURDER	Western Metropole	8	16
	Boland	8	23
	Port Elizabeth	8.5	28
	Cradock	6.8	27
	Durban	10	12
	Midlands	10	20
	Johannesburg	11	26
	East Rand	10	15
RAPE	Western Metropole	7	19
	Boland	6	33
	Port Elizabeth	7	23
	Cradock	6	34
	Durban	7	27
	Midlands	8.5	12
	Johannesburg	10	25
	East Rand	8.5	34
CULPABLE HOMICIDE	Western Metropole	0	15
	Boland	2.8	14
	Port Elizabeth	1	11
	Cradock	0	10
	Durban	0	5
	Midlands	1	7
	Johannesburg	0	6
East Rand	0	9	

⁵ See on 32 in this regard.

ANNEXURE F

POST IMPLEMENTATION: SENTENCES IMPOSED EXPRESSED AS A PERCENTAGE

JURISDICTION	MURDER I	MURDER II	RAPE I	RAPE II
Western Metropole	0%	0%	-	20%
Boland	0%	26.3%	-	61.5%
Port Elizabeth	0%	80%	0%	-
Cradock	0%	36.4%	25%	72.7%
Durban	0%	0%	0%	71.4%
Midlands	-	33.3%	40%	50%
Johannesburg	-	80%	0%	85.7%
East Rand	-	50%	0%	83.3%
Minimum Sentence	40 years*	15 years	40 years	10 years

* *Equated as a life sentence.*