

THE CONUNDRUM OF CAUSALITY AND THE CRIMINAL LAW
(SEXUAL OFFENCES AND RELATED MATTERS) AMENDMENT ACT 32
OF 2007:
A CRITICAL ANALYSIS

By

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ABSTRACT

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South Africa is a country plagued by sexual abuse, and particularly sexual violence. In every local newspaper, everyday, there are numerous articles detailing the egregious humiliation suffered by victims of sexual violence at the hands of their attackers. Whilst the social causes of such ills remain an illusive hypothesis buried deep within the reams of academic literature, the unresponsive and patriarchal laws criminalising such conduct have not. On 16 December 2007, the President signed into law the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. The Act sought to provide an enabling environment that reconciled the criminal justice system with the experiences of the victims by introducing a plethora of devices to prevent secondary victimisation and to acknowledge and appropriately criminalise various forms of sexual violence. Unfortunately the transition to this modernised sexual offences system has not proved to be a smooth one, with the Act having to overcome many an obstacle in achieving its aims and objects.

The study undertaken focused on two particular aspects of import in the Act, namely whether the Act had abolished the formal nature of the offence of rape and the scope and application of the new statutory offence of compelled rape. The latter was particularly relevant in order to ascertain whether the legislature had provided a panacea for scenarios where the perpetrator procured an unwilling and innocent agent to commit the rape. In order to provide a palpable understanding of what the legislature envisaged through the enactment of these two independent offences the study mapped the development of the interests sought to be protected through the introduction of criminal sanctions for sexual offences. This mapping culminated in an understanding, from which the study of the statutory offences departs, that sexual offences must be balanced and weighed against the precepts of rights.

Moreover that any interpretation of such statutory offences must promote and uphold the rights violated in order for the Act to meet its aims.

The focus of the study was thereafter shifted to a deconstructive analysis of the statutory offence of rape and compelled rape. Through such focused analysis, the study sought to ascertain whether the formal nature of rape - which existed at common law - had been abolished by the legislature. It proposed that should such interpretation prove to be correct, that the offence of compelled rape had been inserted by the legislature either superfluously alternatively *ex major cautela*. The study thereafter turned to the offence of compelled rape, with particular attention being paid to whether the offence effectively criminalises the conduct identified throughout the study as the 'innocent perpetrator' to rape, and whether the offence effectively upholds the rights of the victims.

Through such exercise the study concludes in constitutionally compliant interpretations which provide solutions for much of the intellectual discomfort that has plagued the creation of the two independent statutory offences.

DEDICATIONS

FOR ALL THE VICTIMS OF SEXUAL ABUSE AND SEXUAL VIOLENCE.

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CHAPTER 1: GENERAL INTRODUCTION

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1.1 BACKGROUND INFORMATION

“It is estimated that a woman born in South Africa has a greater chance of being raped than learning how to read.”¹

Little doubt exists that South Africa has by global standards an extraordinarily high incidence of sexual offences² and more particularly sexual violence³. This has led to South Africa being often dubbed “the rape capital of the world”⁴. The prevalence of sexual violence is further exacerbated by the

¹ <http://www.rape.co.za/index.php?option=com_content&task=view&id=875&Itemid=64> (accessed 4 April 2011).

² The term ‘sexual offences’ is used here as a collective term for all criminal offences of a sexual nature recognised in the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (‘Sexual Offences Act 2007’), the Sexual Offences Act 23 of 1957 and *crimen inuria*. See Snyman (2008) 353 – 400 and 469 – 474 for a definition and discussion of these respective offences. The term used is also in keeping with the terminology employed by the South African Police Service in the production of the annual crime statistics. See <https://www.saps.gov.za/statistics/reports/crimestats/2010/categories/total_sexual_offences.pdf> (accessed 2 April 2011).

³ The term ‘sexual violence’ is used here as a collective term for the criminal offences of rape, compelled rape, sexual assault, compelled sexual assault, compelled self-sexual assault as defined in the Sexual Offences Act 2007.

⁴ *Global Post* (2010-10-07) <<http://www.globalpost.com/dispatch/study-abroad/100326/south-africa-rape-axe>> (accessed 7 April 2011).

failure to create an environment that is conducive and responsive to the trauma suffered by victims. One such environmental impediment was the narrowness of the definition of rape which effectively excluded a number of acts that - although did not fit within the remit of the definition - were nevertheless experienced as 'rape' by the victim.⁵ Recognising such pitfall the South African Law Reform Commission throughout the extensive rape law reform process⁶ had as a common objective the creation of new offences that were aligned to the experiences of the victim.⁷

On 16 December 2007, the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (hereafter 'Sexual Offences Act 2007') was signed into law. The Sexual Offences Act 2007 introduced a plethora of devices to provide greater protection to victims of sexual offences. A cursory glance of the Sexual Offences Act 2007 shows that it is divided into seven chapters. The first chapter defines some of the terminology used throughout the Act. Moreover it contains a restatement of the objects and purpose of the Act. The next three chapters set out the new statutory offences created by the Sexual Offences Act 2007. The fifth chapter details the services to be afforded to victims of sexual offences and further provides for mechanisms of compulsory HIV/AIDS testing for alleged sexual offenders. The sixth chapter brings about the establishment of a national sex offender register, whilst the last chapter provides for a host of more general provisions. Within this framework the Sexual Offences Act 2007 intends to "afford complainants of sexual offences the maximum and least traumatising protection that the law can provide . . . and to combat and, ultimately, eradicate the relatively high incidence of sexual offences committed in the Republic".⁸ The Sexual Offences Act 2007 goes further, providing that it shall achieve such laudable goals through - amongst others - the "[e]nacting of all matters related to sexual offences in a single statute"⁹; "protecting complainants of sexual offences and their families from secondary victimisation¹⁰ and trauma"¹¹; "ensuring more effective and efficient investigation and prosecution of perpetrators of sexual offences by clearly

⁵ Pithey, Artz, Combrink & Naylor (1998) 1 - 3.

⁶ The process started in 1996 by the then Minister of Justice - Mr Dullah Omar - who established a project committee to interrogate the laws governing sexual offences against children. The mandate was thereafter broadened to include the interrogation of the laws governing sexual offences against adults. See generally Vetten (2007) 22 *SA Crime Quarterly* 21.

⁷ Artz & Smythe (eds) (2008) 1 - 2.

⁸ Sexual Offences Act 2007, s2.

⁹ Sexual Offences Act 2007, s2(a).

¹⁰ 'Secondary victimisation' may be defined as "the victimisation that occurs not as a direct result of a criminal act, but through responses of institutions and individuals to the victim". Declaration of Basic Principles of Justice for Victims of Crime and Abuse, UNGA RES/40/34 (29 Nov 1985).

¹¹ Sexual Offences Act 2007, s2(d).

defining existing offences, and creating new offences”¹²; and “giving proper recognition to the needs of victims of sexual offences through timeous, effective and non-discriminatory investigation and prosecution”¹³.

One of the many new offence brought about through the advent of the Sexual Offences Act 2007 is the offence of compelled rape. Compelled rape is defined in the Act as “[a]ny person (‘A’) who unlawfully and intentionally compels a third person (‘C’), without the consent of C, to commit an act of sexual penetration with a complainant (‘B’), without the consent of B”.¹⁴ The offence itself brings about a much needed change in the manner that offenders who do not penetrate the complainant personally are dealt with. This occurrence is referred to throughout this dissertation as the ‘innocent perpetrator’¹⁵ rape. However, the introduction of the offence does present potential problems. More particularly critical provisions of the offence may be open to misinterpretation, leading to illogical and absurd results and possibly *lacunae* in the law governing such conduct, thus derogating from the objectives that the offence sought to achieve.

1.2 PROBLEM STATEMENT AND RESEARCH OBJECTIVES

The inclusion of the offence of compelled rape as an independent crime was necessary in order to criminalise the conduct of an offender who does not him/herself sexually penetrate the ‘complainant’. This is so as neither the now defunct common law offence of rape nor the new statutory offence of rape appropriately criminalises such conduct. A deconstructive and critical analysis of the offence is especially relevant in determining whether the inclusion of compelled rape achieves the broader aims of the Sexual Offences Act 2007. Further whether the offence succeeds in criminalising the conduct of the innocent perpetrator.

1.2.1 SYNTHESIS: RESEARCH OBJECTIVES

In order for a palpable assessment of the research statement to be made an investigation into the following problematic aspects will be undertaken:

¹² Sexual Offences Act 2007, s2(e)(i).

¹³ Sexual Offences Act 2007, s2(e)(ii).

¹⁴ Sexual Offences Act 2007, s4.

¹⁵ See Le Roux & Courtenay (2011) 74 *THRHR* 286 for a full discussion of this anomalous situation.

- 1.2.1.1 What was the legislature's *rationale* for the inclusion of the offence of compelled rape, particularly in light of participation?
- 1.2.1.2 Subsidiary to 1.2.1.1: What rights and interests are sought to be protected by the inclusion of the offence of compelled rape?
- 1.2.1.3 Whether given the wide definition of rape¹⁶ (read with the definition of "sexual penetration"¹⁷) it was at all necessary to enact the offence of compelled rape in order to give effect to the objectives of the Sexual Offences Act 2007 and the rights sought to be protected?
- 1.2.1.4 Alternatively to 1.2.1.3. Whether compelled rape has been inserted *ex majore cautela* by the legislature?
- 1.2.1.5 Who qualifies as a perpetrator and who qualifies as a victim within the definition of compelled rape?

1.3 DELINEATION AND LIMITATIONS

As is aligned to the research objectives, this dissertation will undertake a deconstructive analysis of the definitional elements¹⁸ of the statutory offences of rape and compelled rape. Particular emphasis is placed on the elements of "sexual penetration" – within the definition of rape - and the participants – within the definition of compelled rape. However, where and as far as the other elements of rape and compelled rape may have a bearing on causality, such interrelation is considered. For the sake of completeness a cursory overview is given of all other elements not particularly related the research statement.

The major limiting factor in the formulation and construction of this dissertation was the complete dearth of academic literature and case law concerning the particular subject matter. In order to overcome such limitation the dissertation sought to align the constitutional imperatives pertinent to the

¹⁶ See Sexual Offences Act 2007, s3.

¹⁷ See Sexual Offences Act 2007, s1.

¹⁸ The term definitional element is to be understood as the concise description of what constitutes the prohibited conduct in the general sense. See also Snyman (2008) 71-94.

offences with the overall objectives of the Sexual Offences Act 2007. It furthermore sought to align the offences of rape and compelled rape within the existing framework of participation, relying on the various statutory interpretation aides.

1.4 SIGNIFICANCE OF THE STUDY

This study provides a deconstructive and critical analysis of the offences of rape and compelled rape within the context of causality and participation. It seeks to provide further a workable interpretation that may guide the positive law in a manner that accords to the constitutional rights of the victim and the overall aim of the Sexual Offences Act 2007. Moreover, it seeks to dispel the confusion that has arisen with the advent of statutory definition of rape, compelled rape and the interplay with the doctrine of participation.¹⁹

1.5 STRUCTURE OF DISSERTATION

This dissertation is structured into four chapters to meet its stated objective.

Chapter one contains the general introduction and orientation to establish a firm basis for determining the remit of the Sexual Offences Act 2007.

Chapter two is a historical overview of the origins of the offence of rape and the interests it sought to protect. This will be contrasted with the present day 'rights based' approach to sexual offences and the objectives of the Sexual Offences Act 2007. It further unpacks the common-law offence of rape and its shortcoming in relation to scenarios now governed under the definition of compelled rape.

Chapter three seeks to critically analyse the definitions of rape and compelled rape in light of the interests sought to be protected. In so doing a critical analysis of the term sexual penetration is undertaken in order to determine whether the statutory definition of rape is a formally or materially defined offence. The effect of the former would not only render the offence of compelled rape nugatory but would also lead to the statutory restatement of inchoate and participatory offences inapplicable.²⁰ It

¹⁹ See generally Snyman (2008) 353-371.

²⁰ See Sexual Offences Act, s55.

therefore needs to be critically investigated. The chapter further seeks to evaluate whether the offence accords with aims of the Sexual Offences Act 2007.

The fourth and final chapter contains general conclusions and recommendations.

CHAPTER 2: THE DEVELOPMENT OF THE NATURE OF RAPE AND THE 'INNOCENT PERPETRATOR'

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2.1 INTRODUCTION

Prior to 16 December 2007,²¹ the offence of rape was governed by the South African common law. Under the common law rape was defined as the unlawful and intentional sexual intercourse - which included anal penetration - with a female without her consent.²² This definition had - amongst others - been lambasted as being inadequate²³, too narrow²⁴ and archaic²⁵. These criticisms - for purposes of the analysis undertaken in this dissertation - in essence dealt with two central themes. Firstly, the offence itself did not accord with the evolution of the understanding of the interests sought to be protected. Secondly, the offence in its specificity purportedly excluded a number of acts of sexual violence which involved penetration.²⁶ In particular, where the 'offender'²⁷ him/herself does not penetrate the complainant personally but compels another to do so without either parties consent. This anomalous situation will throughout this work be dubbed the 'innocent perpetrator rape'.²⁸

Accordingly, for a truly analytical and palpable assessment of the statutory offence of rape and compelled rape²⁹ to be conducted, it is vital to understand: the evolution of the interests sought to be

²¹ The official date of commencement (except insofar as the establishment of a national sex registry was concerned) of the Sexual Offences Act 2007 which through s 68 (2) expressly repealed the common law offence of rape.

²² The inclusion of anal penetration - which on and before 9 May 2007 was not punishable as rape at common law but rather as indecent assault - was the result of the majority decision of the Constitutional Court in *Masiya v Director of Public Prosecution, Pretoria & Another (Centre for Applied Legal Studies & Another, Amici Curiae)* 2007 (2) SACR 435 (CC) [45]. *Contra* Snyman (2007) 124 SALJ 677. Barring the inclusion of anal penetration within the definition of rape, the elements thereof are well crystallised. See in general the similarity of the definitions in Snyman (2006) 445; Burchell (2006) 705; *S v Zuma* 2006 (7) BCLR 790 (W) 828; *S v Ncanywa* 1992 (2) SA (Ck) 185.

²³ Vogelman (1990) 3. Similarly Artz & Combrinck [2003] *Acta Juridica* 72.

²⁴ Hall (1988) 105 SALJ 67.

²⁵ Burchell (2006) 716.

²⁶ This dissertation departs from the understanding that penetration is not simply the insertion of a penis, digit or object into or beyond the vagina or anus of a female or in the latter case a male. Rather that in addition to these 'ordinary' acts of penetration a female may 'penetrate' a male by causing such penetration to occur. This concept is elaborated upon further at ch3.

²⁷ The term "offender" is used throughout this dissertation as the term for the person who exacts the nuanced form of sexual violence known as the 'innocent perpetrator rape'. It must not be construed in its ordinary sense as the *actus reus* offender.

²⁸ See Le Roux & Courtenay (2011) 74 *THRHR* 286.

²⁹ Compelled rape being defined in the Sexual Offences Act 2007, s 4 as '[a]ny person ('A') who unlawfully and intentionally compels a third person ('C'), without the consent of C, to commit an act of sexual penetration with a complainant ('B'), without the consent of B'.

protected and whether a *lacunae* existed at common law prior to the advent of the Sexual Offences Act 2007. The latter is especially relevant in order to evaluate whether the inclusion of the new offence of compelled rape caters for a need or is merely a restatement of the existing substantive law. A disclaimer to such analysis being that - given the scope of the dissertation - it shall seek to engage only with those definitional elements which can be construed as speaking directly to the notion of causality and participation within the context of rape. However, for the sake of completeness a cursory overview of the other elements of the offence will be provided.

2.2 THE DEVELOPMENT OF THE OFFENCE OF RAPE: A SOCIO-LEGAL EVOLUTION

The decision whether or not to criminalise certain conduct is shaped by the ruling political forces' desire to protect certain core values which they perceive as being prized amongst their constituents.³⁰ Whilst these core values may 'ebb and flow' over time, *Burchell* identifies the following principal interests that motivate criminalisation: (1) maintaining or retaining human and civil rights;³¹ (2) promoting individual autonomy and responsibility; (3) collective welfare; (4) maintenance of the government of the state and (4) public sensibility.³² It will be argued that given the evolution of the South African society's understanding of interests which need protection – contained within the Constitution³³ - that the criminalisation of acts of sexual violence must be evaluated in light of a rights based approach.

2.2.1 HISTORICAL INTERESTS: PRE - 1987

Historically³⁴ the *rationale* for the criminalisation of rape was unrelated to the notion of the rights or interests of the victim.³⁵ Its creation - which stemmed from the abhorrent patriarchal assumptions that

³⁰ Burchell (2006) 49.

³¹ These rights include - amongst others - the right to life, the right to dignity, the right to equality, the right to freedom and security of the person, the right to privacy. See Currie & de Waal (2005) 229 – 336; Universal Declaration of Human Rights, UNGA RES/217/A(III) (10 Dec 1948).

³² Burchell (2006) 49 – 53.

³³ Constitution of the Republic of South Africa, 1996 ('Constitution'), s2.

³⁴ An expansive discussion of the historical development of the offence of rape falls outside the scope of this dissertation but has been thoroughly documented in *Masiya* (*supra* n22) at [20] – [24]; Artz & Combrinck [2003] *Acta Juridica* 72 at 78 – 80; Van der Bijl *Defining the crime of rape under South African law: A Reconsideration* (LLD dissertation 2002 UP) 93 – 99 and the authority cited therein; Fryer (1994) 7 *SACJ* 60 – 77; Labuschagne (1991) 108 *SALJ* 148.

³⁵ Artz & Combrinck [2003] *Acta Juridica* 72 at 78.

woman fell under the power of their father, husband or guardian - was solely directed at the protection of the economic interests of the *paterfamilias*.³⁶ The offence was therefore aimed at protecting the interests and the preservation of male 'control and power'³⁷ and hence could be construed as nothing more than a legal remedy in relation to the damage of property.³⁸

2.2.2 THE EVOLUTION OF INTERESTS: 1987 - 1993

In 1987 the legislature promulgated the Law of Evidence and the Criminal Procedure Act Amendment Act³⁹ ('LECPA'). The LECPA effectively abolished the irrebuttable presumption that a boy under the age of fourteen was incapable of having sexual intercourse and thus committing the offence of rape.⁴⁰ Six years thereafter the legislature enacted the Prevention of Family Violence Act⁴¹ ('PFVA'). The PFVA brought about a much needed change to the law governing rape. It effectively abolished the marital rape exemption by expressly providing that "a husband may be convicted of the rape of his wife".⁴² These legislative interventions - on the continuum of rape law reform - represented a substantial shift from the original patriarchal ideology that had categorised the traditional understanding of rape. The interventions were an embodiment of the evolution of society's' desire to protect certain core values and interests in relation to the offence of rape.

2.2.3 THE CONSTITUTIONAL ERA: 1996 -

On 10 December 1996 the Constitution of the Republic of South Africa⁴³ was signed into law by President Nelson Mandela. The Constitution took effect from 4 February 1997, bringing with it the dawn of a new era predicated upon the democratic values of human dignity, equality and freedom.⁴⁴ The advent of this new order provided a crystallised framework of human rights against which all laws and

³⁶ *Ibid.*

³⁷ See generally McGlynn & Munro (eds) (2010) 143 – 180; Artz & Smythe (eds) (2008) 22 -51; Dobash & Dobash (1992) 80 – 132; Hall (1988) 105 *SALJ* 67 at 67.

³⁸ *Masiya* (*supra* n22) at [24].

³⁹ Law of Evidence and the Criminal Procedure Act Amendment Act 103 of 1988 ('LECPA').

⁴⁰ LECPA 1988, s1. See also Milton (1988) 1 *SACJ* 123.

⁴¹ Prevention of Family Violence Act 133 of 1993 ('PFVA').

⁴² PFVA, s5.

⁴³ Constitution.

⁴⁴ Currie & de Waal (2005) 6 – 7.

conduct are to be judged by.⁴⁵ The rights enshrined herein are the epitome of the South African society's evolutionary understanding of the interests in need of protection. Moreover, the introduction hereof effectively abolishes the antiquated ideological underpinnings of the traditional definition of rape and replaces it with the notion of a specific breach of the rights of the survivor.⁴⁶ This constitutional paradigmatic approach is no better illustrated than in the early case of *S v Chapman*⁴⁷ where the Supreme Court of Appeal for the first time dealt with rape within the confines of the Constitution.⁴⁸ The Court correctly contextualised rape as:

... [A] very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilisation. Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives. The appellant showed no respect for their rights.⁴⁹

This constitutional ideology regarding the impact of sexual violence against woman was similarly confirmed by the Constitutional Court in the matter of *Carmichelle v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)*⁵⁰ where the Court accepted the *amicus curiae* submission that "[s]exual violence and the threat of sexual violence goes to the core of women's subordination in society. It is the single greatest threat to the self-determination of South African women."

⁴⁵ Constitution, s34.

⁴⁶ *Masiya* (*supra* n22) at [26]. See also *Carmichelle v Minister of Safety and Security & Another (Centre for Applied Legal Studies Intervening)* 2002 (1) SACR 79 (CC) [56] where Ackerman *et* Goldstone JJ find *albeit* in a different context that "concepts such as 'policy decisions and value judgments' reflecting 'the wishes . . . and the perceptions . . . of the people' and 'society's notions of what justice demands' might well have to be replaced, or supplemented and enriched by the appropriate norms of the objective value system embodied in the Constitution".

⁴⁷ *S v Chapman* 1997 (2) SACR 3.

⁴⁸ Artz & Smythe (eds) (2008) 42.

⁴⁹ *Chapman* (*supra* n47) at 5a-d. Own emphasis added. See *Carmichelle* (*supra* n46) at [29] where the *dictum* of *Chapman* was cited with approval..

⁵⁰ *Carmichelle* (*supra* n46) at [62].

Although the rights of 'rape victims' are not expressly dealt with in the Constitution,⁵¹ from the foregoing one can deduce that there are in essence three intersectional rights that are infringed by the act of rape, namely: (1) the right privacy;⁵² (2) the right to dignity⁵³ and (3) the right to freedom and security of a person^{54,55}. These specific rights represent society's 'evolved' ideology, and thus form the cornerstone for the criminalisation of acts of sexual violence.⁵⁶ Viewed in this light, it is argued that criminal offences - especially those of a sexual nature - can only be justified in relation to these notions.⁵⁷ Moreover, that criminalisation must be directed at effectively and adequately protecting such rights. Against this backdrop, the common law definition of rape could no longer be justified and hence the Sexual Offences Act 2007 was introduced and must be interpreted to give sustenance to the developed understanding of society.

2.3 THE 'INNOCENT PERPETRATOR' AND THE COMMON LAW OFFENCE OF RAPE

"Woman testifies how she was forced to have sex."⁵⁸ "Ambulance hijacker gets life for paramedic rape."⁵⁹ "Hijacked paramedic raped."⁶⁰ Unfortunately these and other such news headlines are common

⁵¹ *cf* Constitution, s35 which clearly articulates the rights of arrested detained and accused persons.

⁵² Constitution, s14 provides that "[e]veryone has the right to privacy".

⁵³ Constitution 1996, s10 provides that "[e]veryone has inherent dignity and the right to have their dignity respected and protected".

⁵⁴ Constitution, s12(1)(c) provides that "[e]veryone has the right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources". s12(2)(b) provides further that "[e]veryone has the right to bodily and psychological integrity".

⁵⁵ A fourth right that has being emphasised within the context of rape law reform, but which is not expressly dealt with here is the right to equality. See Pithey, Artz, Combrinck & Naylor (1998) 10 -11. See also, Sexual Offences Act 2007, s2. *Contra* Snyman (2006) 356 – 357 where the learned author incorrectly argues that the identical treatment of male and female victims and equating penetration *per vaginam* with penetration *per anum* would be tantamount to putting 'God in the dock'.

⁵⁶ See also in this regard *Masiya (supra n22)* at [28] where Nkabinde J finds that "there is a wider acceptance that rape is criminal because it affects the dignity and personal integrity of women. The evolution of our understanding of rape has gone hand in hand with women's agitation for the recognition of their legal personhood and the right to equal protection". Moreover that "[i]t is now widely accepted that sexual violence and rape not only offend the privacy and dignity of woman but also reflect the unequal power relations between men and woman in our society".

⁵⁷ See generally *National Coalition for Gay and Lesbian Equality & Another v Minister of Justice and Others* 1999 (1) SA 6 (CC).

⁵⁸ *Daily News* (2009-01-28) 2.

⁵⁹ *Natal Witness* (2005-05-04) 1.

place in South Africa. However, each of these headlines documented a 'new' form of sexual violence which is seemingly gaining momentum amongst rapists. This 'new' form of sexual violence entails the forcing of an innocent male and female to engage in sexual conduct without either party's consent in front of the perpetrator (hereinafter referred to as the 'innocent perpetrator rape')⁶¹.

The rise of such incidences has caused much uncertainty amongst many jurists and legal academics. The root cause of such uncertainty emanated from the question of whether the common law definition of rape - read with the applicable rules of participation - sufficiently criminalised such scenarios.

Whilst it will be argued that this uncertainty has been cured by the introduction of the statutory offence of compelled rape, it is nevertheless pivotal that an overview and an analysis of the criminal elements of the common law definition of rape is provided. In so doing it will be determined whether - given the common law elements of rape - the conduct⁶² of the innocent perpetrator attracted liability. The importance of such determination aids the interpretation of the definition of compelled rape in that should the common law offence of rape cater for such a scenario it may be deduced that the offence of compelled rape is simply a gender-, orifice-, and instrument neutral restatement of the common law formulation and must be applied in accordance therewith.

2.3.1 AN OVERVIEW OF THE COMMON LAW OFFENCE OF RAPE

An analysis of the common law definition of rape is a useful starting point in determining whether the offence of compelled rape is simply a restatement of the previous positive law. As will be evidenced below the common law definition of rape was highly specific, excluding more than it included.⁶³ This becomes especially relevant when considering the definition in light of the notions of participation.

The offence of rape was defined under common law as the unlawful and intentional sexual intercourse - which included anal penetration - with a female without her consent. Consequently, this definition may be reduced to five essential elements that the prosecution need prove existed beyond

⁶⁰ *Natal Witness* (2004-02-18) 1.

⁶¹ See Le Roux & Courtenay (2011) 74 *THRHR* 286.

⁶² The term 'conduct' in this instance should be understood liberally and not as a *species* of the elements needed to found criminal liability.

⁶³ Hall (1988) 105 *SALJ* 67 at 67 - 71.

reasonable doubt⁶⁴ in order for criminal liability to result.⁶⁵ These essential elements may be restated as: (1) sexual penetration *per vaginam* or *per anum*; (2) with a woman; (3) without consent; (4) unlawfully; and (5) intentionally.

2.3.1.1 SEXUAL INTERCOURSE PER VAGINAM OR PER ANUM

The first of element that needed to be proven was whether the accused had sexual intercourse *per vaginam* or *per anum*. This element - also referred to as the *actus reus*⁶⁶ - consisted of the penetration of the female's vulva or anus by the male's penis.⁶⁷ Paradoxically, the penetration of either of these orifices by a finger, object or tongue did not constitute rape but was rather seen as a *species* of assault, namely indecent assault.⁶⁸ The slightest penetration, "that is entry (in the sense of *res in re*) into the labia (the anterior of the female genital organ)"⁶⁹ was sufficient to constitute the prohibited conduct.⁷⁰ It was therefore irrelevant whether or not pregnancy resulted,⁷¹ or whether the woman's hymen had been ruptured (in cases of penetration *per vaginam*),⁷² or whether the emission of semen had occurred.⁷³

⁶⁴ See the discussion of consent hereunder at 2.3.1.3.

⁶⁵ See generally Burchell (2006) 138.

⁶⁶ '*Actus reus*' loosely translated means the wrongful deed, guilty act or deed of the crime.

⁶⁷ See generally, Joubert (2004) 254; Snyman (2006) 445; Burchell (2006) 700. These sources should be read in light with the decision in *Masiya* (*supra* n22). See *S v M*(2) 1990 (1) 456 (N) with regards to penile penetration of the oral cavity.

⁶⁸ 'Indecent assault' being defined as the unlawful and intentional assaulting, touching or handling of another in circumstances in which either the act itself or the intention with which it was committed was indecent. See *R v V* 1960 (1) SA 117 (T) at 118; Burchell (2006) 691. See further Hall (1988) 105 *SALJ* 67 at 68; Artz & Combrinck (2003) *Acta Juridica* 72 at 83; Artz & Smythe (eds) 23 - 25 for a criticism of this narrow formulation.

⁶⁹ Milton (1996) 448. It is propositioned that the term 'slightest penetration' finds equal application in instances of sexual intercourse *per anum*.

⁷⁰ Burchell (2006) 706.

⁷¹ See *R v Theron* 1924 EDL 204 at 205 where the court found that "notwithstanding that the complainant had conceived as a consequence of the assault, as there was no satisfactory evidence of the degree of penetration whatever, the accused was only guilty of assault with the intent to commit rape and not of rape".

⁷² See *S v K* 1972 (2) SA 898 (A) at 900 where Wessels AR mentions that "... hoewel daar penetrasie verby die skaamlippe was, die maagdevlies nie beskadig was nie".

⁷³ See *R v Giles* 1926 WLD 211 at 213 where Tindall J cited with approval the *dictum* in *The Queen v Marsden* (1891, 2 Q.B.D., p 149) "that it was not necessary for the Crown, in order to prove an offence under that Act, to establish emission on the part of the accused".

2.3.1.2 WITH A WOMAN

The second element - which may be seen as a qualification to the first - was that the victim of the offence could only be a woman.⁷⁴ Consequently it was legally impossible for the offence to be perpetrated against a man.⁷⁵ The forced anal penetration of a man was dealt with by the broadly defined offence of indecent assault.⁷⁶ Moreover, owing to the particularity of the definitional elements a woman could never qualify as a perpetrator to rape, whether she caused the man to penetrate her - *per vaginam* or *per anum* - against his will or inserted a digit or object into the anus of a man.⁷⁷

2.3.1.3 WITHOUT CONSENT⁷⁸

The third element that needed to be proven was that the sexual penetration had taken place without the consent of the woman.⁷⁹ This element conferred a peculiar and unique quality to the offence of rape. Unlike other crimes against bodily integrity⁸⁰, consent formed part of the definitional elements and not a ground justification.⁸¹ The effect of this was that it shifted the enquiry away from the accused and onto the victim.

Consent could be defined as:

⁷⁴ Burchell (2006) 707; Snyman (2006) 446. The rationale for such antiquated distinction is historical. It originated in terms of "the regulation of the chastity and virginity of women as property of men and hence evolved as a crime committed only in respect of woman". See Artz & Smythe (eds) (2008) 25.

⁷⁵ Burchell (2006) 707.

⁷⁶ Artz & Smythe (eds) (2008) 25 – 26.

⁷⁷ See *S v Jonathan* 1987 (1) SA 633 at 643H – I where Jansen AR correctly finds that "[w]at die tweede punt van kritiek teen *Gani* se saak betref, kan daarop gewys word dat in beginsel dit nie onmoontlik is dat iemand wel medepligtig kan wees tot 'n misdaad wat hy nie as dader kan verrig nie. 'n Markante voorbeeld is die vrou wat wel as medepligtig aan verkragting skuldig bevind kan word".

⁷⁸ cf the statutory reformulation and restatement of the concept of consent in the Sexual Offences Act 2007, s1.

⁷⁹ See *S v Zuma* (*supra* n22).

⁸⁰ Other crimes against bodily integrity include assault, intimidation, pointing of a firearm and so forth.

⁸¹ See *S v Zuma* (*supra* n22).

[A]n act of reason accompanied with deliberation, the mind weighting, as in a balance, the good or evil on either side. Consent supposes three things – a physical power, a mental power, and a free and serious use of them.⁸²

The determination of whether consent was absent was largely a question of fact.⁸³ The benchmark for such adjudication of fact was whether the consent was real. Whether the consent was real or not depended largely upon the circumstances in which it had been given.⁸⁴ Factors which may have affected the reality of the consent included the following: (1) fear induced by violence or threats;⁸⁵ (2) where the woman is asleep;⁸⁶ (3) where the woman is intoxicated;⁸⁷ (4) where the woman is mentally deficient;⁸⁸ (5) where the girl is below the age of twelve;⁸⁹ (f) where the consent is obtained by fraud.

2.3.1.4 UNLAWFULNESS

Once it had been established that the accused complied with the definitional elements enumerated to hereabove the next question that would befall a court would be: Whether or not a legal ground of justification existed excusing the actions of the accused. This element is known by its misnomer as the element of unlawfulness.⁹⁰ The fact that consent forms part of the definitional elements of the offence of rape, it stands to reason that it cannot be used as a ground of justification.⁹¹ The other grounds which may excuse liability, such as necessity, could be raised as a defence to a charge of rape.⁹²

⁸² Walsh (eds) (1959) 455.

⁸³ Joubert (2004) 255.

⁸⁴ Burchell (2006) 708.

⁸⁵ See *R v Swiggelaar* 1950 (1) PH H61 (A) at 110 – 111 where the court held that, “[i]f a man so intimidates a woman as to induce her to abandon resistance and submit to intercourse to which she is unwilling, he commits the crime of rape”.

⁸⁶ See *R v C* 1952 (4) SA 117 (O) at 120 where Grobler AJ cited with approval the English case of *The Crown v Young*, 14 Cox 114 and held that a, “man wat me ‘n vrou gemeenskap het terwyl sy slaap, sonder dat sy instem daartoe skuldig is aan verkragting”. See also *S v Ryperd Boesman* 1942 1 PH H63 (SWA).

⁸⁷ See *R v K* 1958 (3) SA 420 (A).

⁸⁸ It is a question of fact in every case whether the woman's mental defect was such as to render her incapable of giving consent. See in this regard the case of *R v S* 1951 (3) SA 209 (C) where the accused was acquitted as they State failed to prove that the complainant was an ‘idiot’ or ‘imbecile’.

⁸⁹ An irrebuttable presumption exists that a girl under the age of 12 cannot consent. It is the actual age of the girl that is material. See *Scout Ally v R* 1907 TS 336 at 339.

⁹⁰ This element is a requirement for all offences whether statutory or common law in origin. A complete discussion of the general element of unlawfulness may be found in Snyman (2006) 92 – 142.

⁹¹ Snyman (2006) 450.

2.3.1.5 FAULT

The fifth and final requirement that was needed to be proven to sustain a charge of rape was that of fault. The requisite fault or *mens rea* required for the offence of rape was intention.⁹³ The intentional element denoting that the accused must have known, or have foreseen the possibility,⁹⁴ that the complainant had not consented to the act of sexual intercourse but nevertheless proceeded to have sexual intercourse *per vaginam* or *per anum* without such woman's consent.⁹⁵ The intention must out of necessity cover each and every element of the offence.

2.3.2 THE PRINCIPLES OF PARTICIPATION AND RAPE

One of the questions posed at the outset was whether the offence of compelled rape had merely been inserted by the legislature as a restatement of the existing positive law. In order to evaluate this proposition it is imperative that the essential elements enumerated hereabove are now considered in light of the principles of participation.

2.3.2.1 PERPETRATORS

The first class of participants are termed perpetrators. According to the principles of participation a person may qualify as a perpetrator in one of three ways.⁹⁶ Firstly, where through the actors own conduct and fault he/she personally satisfies all the essential elements of the particular offence in question.⁹⁷ Secondly, where the actor - although possessing the requisite fault - does not satisfy the element of unlawful conduct; and such conduct is attributed or imputed to him/her by virtue of his/her prior agreement or active association in a common purpose with one or more persons to commit the

⁹² See Burchell (2006) 705.

⁹³ See *S v Zuma* (*supra* n22) at 205.

⁹⁴ In the matter of *S v J* 1989 (1) SA 525 (A), Smalberger AJ held that, "[t]ensy die Staat bewys of dat die appellant subjektief besef het dat die klagster nie in staat was om tot gemeenskap toe te stem nie, of die moontlikheid daarvan te besef het maar desondanks voortgegaan het met die pleging van die daad, is die vereiste opset nie bewys nie. See also, *R v K* (n87) 425H; *R v Z* 1960 (1) SA 739 (AD) 743A; *S v S* 1971 (2) SA 591 (A). 597B – D.

⁹⁵ See *S v Zuma* (n22) at 205 and the authorities cited therein with approval.

⁹⁶ See *S v Williams & Another* 1980 (1) SA 60 (A) at 63a – b. See also Burchell (2006) 572; Snyman (2008) 260.

⁹⁷ See Burchell (2006) 572; Snyman (2008) 260.

crime in question.⁹⁸ Lastly, where an actor procures another to commit an offence and the unlawful conduct is attributed to him/her through the operation of the maxim *qui facit per alium facit per se*.⁹⁹

The common law definition of rape was what could be called a personal or autographic offence. That is an offence that could only be perpetrated through the instrumentality of one's own body.¹⁰⁰ Neppen J in the matter of *S v Saffier* succinctly confirmed this principle after undertaking a rigorous deconstructive analysis of the offence of rape as:

*[D]it [is] 'n logiese uitvloeisel hiervan dat verkragting slegs gepleeg kan word deur 'n person wat self met 'n vrou sonder haar toestemming geslagsgeemenskap hou.*¹⁰¹

Consequently, rape may only be perpetrated by a man who personally has sexual intercourse with a woman without her consent. Thus, owing to the personal nature the offence it cannot be perpetrated through the instrumentality of another.¹⁰² Neither can the conduct of the '*actus reus* perpetrator' be imputed or attributed to the 'offender' in accordance with the doctrine of common purpose.¹⁰³ It therefore stands to reason that given the scenario of the 'innocent rape perpetrator' alluded to early that the 'offender' cannot be found guilty as a perpetrator to rape according to either one of the 'formulas' needed to found liability as a perpetrator. This unsatisfactory result is no better echoed than in the words of Neppen J who correctly came to the same conclusion in the matter of *S v Saffier* when confronted with the innocent perpetrator:¹⁰⁴

[D]it uiters onbevredigend is dat die beskuldigde onder sulke omstandighede 'n skuldigbevinding aan verkragting kan vryspring. Miskien is dit iets waaraan die

⁹⁸ Burchell (2006) 572; Snyman (2008) 260. See generally Rabie (1988) 1 *SACJ* 234; Whiting (1986) 103 *SALJ* 38 for a complete discussion of the doctrine of common purpose.

⁹⁹ One who does a thing by another does it himself – Stone (2005) 95. See *S v Cupido* 1975 (1) SA 537 (C) for judicial acknowledgement of this maxim.

¹⁰⁰ See *S v Gaseb and Others* 2001 (1) SACR 438 (NmS); *S v Kimberley & Another* 2004 2 SACR 38 (E); *S v Saffier* 2003 (2) SACR 141 (SE).

¹⁰¹ *Saffier* (*supra* n100) at [8] – [14]. Own emphasis added.

¹⁰² *Saffier* (*supra* n100) at [19]; Rabie (1969) 32 *THRHR* 308 at 310; Snyman (2008) 261; Burchell (2006) 573.

¹⁰³ *S v Kimberley* (*supra* n100) at [13]. See also, *S v Gaseb & Others* (*supra* n100) at 452 h-l and 466 g-l; *Thebe & Two Others v The State* 1961 1 PH H 247 (A).

¹⁰⁴ *Saffier* (*supra* n100) at [19]. Own emphasis added.

Wetgewer aandag moet gee; veral in die lig daarvan dat dit blykbaar reeds aanbeveel is om die omskrywing van verkragting uit te brei.

2.3.2.2 ACCOMPLICES

The second class of participants are known as accomplices. The definition of an accomplice and the distinction from a perpetrator was tersely set out by Joubert JA in the matter of *S v Williams & Another* as follows:

'n Medepligtige se aanspreeklikheid is aksessories van aard sodat daar geen sprake van 'n medepligtige kan wees sonder 'n dader of mededaders wat die misdaad pleeg nie. 'n Dader voldoen aan al die vereistes van die betrokke misdadoomskrywing. Waar mededaders saam die misdaad pleeg, voldoen elke mededader aan al die vereistes van die betrokke misdadoomskrywing. Daarenteen is 'n medepligtige nie 'n dader of mededader nie aangesien die dader se actus reus by hom ontbreek. 'n Medepligtige vereenselwig hom bewustelik met die pleging van die misdaad deur die dader of mededaders deurdat hy bewustelik behulpsaam is by die pleging van die misdaad of deurdat hy bewustelik die dader of mededaders die geleentheid, die middele of die inligting verskaf wat die pleging van die misdaad bevorder.¹⁰⁵

The passage makes it clear that an accomplice's liability is accessory to that of a perpetrator.¹⁰⁶ Therefore, the starting point in the determination of whether a person may be found liable as an accomplice to an offence is whether legally there is a perpetrator.¹⁰⁷ It follows, that in the 'innocent rape perpetrator' scenario under review, there is no perpetrator who meets all the definitional elements of the offence, as the man who penetrates the woman lacks the requirement of fault. Hence, in the scenario there can be no accomplice.

¹⁰⁵ *Williams* (*supra* 96) at 63a – b.

¹⁰⁶ See also Burchell (2006) 599; Snyman (2009) 273.

¹⁰⁷ The South African positive law follows the theory of strict accessoriness. In order to be deemed an accomplice the perpetrator must in accordance with the theory comply with all the essential elements of the offence. See Burchell (2006) 604.

2.4 CONCLUSION

It was determined that the Bill of Rights provides a set of objective norms that must be adhered to when seeking to evaluate and justify the criminalisation of any conduct. Moreover, that any such criminalisation must be directed at effectively and adequately protecting all right that may be infringed by the proscribed conduct. It was established that the common law offence of rape not only fell short of adequately protecting the rights enshrined within the Constitution but also failed to address those rights infringed in the scenario of the ‘innocent rape perpetrator’.

The inclusion of the offence of compelled rape by the Sexual Offences Act 2007 can therefore not be seen as a restatement of the positive law, but rather, must be seen as a new offence which is directed at protecting the rights and interests of the victims.

CHAPTER 3: CAUSALITY AND COMPELLED RAPE

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3.1	<u>INTRODUCTION</u>	

*A definition is the enclosing of a wilderness of ideas within a wall of words.*¹⁰⁸

The introduction of the Sexual Offences Act 2007 has brought about a swift and well needed change to the antiquated legal framework governing sexual offences, with many heralding it as representing a “modernisation of the law relating to sexual offences.”¹⁰⁹ However, some if not all legislation that seeks to radically change the existing law is almost always met with what may be

¹⁰⁸ Artz & Combrinck [2003] *Acta Juridica* 72.

¹⁰⁹ Bertelsmann, Walker & Meyer (2006) 16-23.

dubbed 'teething problems'.¹¹⁰ This is no better evidenced than through the ongoing debate and confusion that has plagued the Sexual Offences Act 2007.¹¹¹ Of particular importance for purposes of this dissertation is the intellectual discomfort that has arisen as a result of the inclusion of the independent offence of compelled rape. The source of this intellectual discomfort appears to be two-fold: Firstly, whether given the statutory definition of rape it was at all necessary to include this offence;¹¹² and secondly, who is the victim(s) in this new offence.¹¹³

In order to offer a panacea for this intellectual discomfort and to fulfil the research statement, it is necessary to undertake a critical analysis of the statutory offence of rape read with the definition of sexual penetration. This will aid in the determination of the exact scope of conduct now punishable under the statutory definition of rape and whether this overlaps with the offence of compelled rape. This will, moreover, encompass an analysis of whether the statutory reformulation has abolished the formal nature of the offence which existed at common law.¹¹⁴ If this is indeed the case it is contended that the introduction of the offence of compelled rape would be superfluous as the maxim of *qui facit per alium facit per se* would - as of course - find operation. Thereafter a deconstructive analysis is undertaken of the offence of compelled rape in order to determine the scope of conduct criminalised thereby.

3.2 THE STATUTORY OFFENCE OF RAPE

In the preceding chapter it was established that at common law, rape was defined as the unlawful and intentional sexual intercourse – which included anal penetration – with a female without her consent.¹¹⁵ Moreover, that such offence was a personal or autographic crime. Consequently, it was the commission of the prohibited *actus reus*, namely sexual intercourse, and not the causing – in the

¹¹⁰ See for example the Children's Act 38 of 2005 and the judicial pronouncements on its interpretation in Davel & Skelton (eds) (2007). See also the Child Justice Act 75 of 2008 and *S v Alam* 2011 (2) SACR 553 (WCC) where the Cloete AJ held that the Child Justice Act inadvertently repealed the right of an adult to an automatic review where he/she had been sentenced to a period of life imprisonment.

¹¹¹ See *S & Another v Acting Regional Magistrate, Boksburg & Another* 2011 (2) SACR 274 (CC) in which the Constitutional Court had to decide on whether to conform the declaration of constitutional invalidity by the High Court in respect of the supposed *lacunae* contained in s 68(1)(b) of the Sexual Offences Act 2007. See also Snyman (2008) 354 – 400 and Le Roux & Courtenay (2011) 74 *THRHR* 286.

¹¹² See Snyman (2008) 356 – 362.

¹¹³ See Van Der Bijl (2010) 23 *SACJ* 224.

¹¹⁴ See (*supra*) 2.3.1.1 and 2.3.2.1 for a discussion on formally defined offences.

¹¹⁵ See (*supra*) 2.3.1.

technical legal sense – of such sexual intercourse to take place that attracted criminal liability. The question that begs an answer is: whether the *status quo* has been retained in the extended statutory reformulation of the offence of rape or whether it has been abolished. Section 3 provides: -

Any person ('A') who unlawfully and intentionally commits an act of sexual penetration with a complainant ('B'), without the consent of B, is guilty of the offence of rape.

The elements of the offence are therefore: (1) sexual penetration; (2) with a person; (3) without consent; (4) unlawfulness; and (5) intention.¹¹⁶ Pursuant to the objectives of this dissertation particular attention is placed on the element of “sexual penetration” as it is this element which has purportedly obliterated the autographic or personal nature of rape. A cursory overview of elements (2) – (5) is provided at the outset however for the sake of completeness.

3.2.1 WITH A PERSON

Unlike its common law predecessor, the statutory reformulation of the offence of rape is gender neutral. The gender neutrality of the offence may be gleaned from the legislature’s express usage of the term “[a]ny person” and “the complainant” rather than “male” and “female”. This element qualifies that of sexual penetration by providing that any person irrespective of gender may qualify as a perpetrator and a victim respectively.¹¹⁷ Thus any person, irrespective of gender, may qualify as either a perpetrator or a victim. Moreover, when read with the definition of “sexual penetration” (discussed more comprehensively below) it becomes readily apparent that the intention of the legislature was to criminalise all acts of sexual penetration – regardless of gender - which occur without the consent of the victims. This informs and is the basis from which the critical analysis of sexual penetration departs.

¹¹⁶ cfSnyman (2008) 355 where the learned author identifies only four elements for the offence.

¹¹⁷ See Snyman (2006) 445 and (*supra*) 2.3.1 for the common law usage of the word male and female.

3.2.2 WITHOUT CONSENT

An element that has by-in-large been retained in the statutory reformulation of the offence, is the need for the prosecution to prove the absence of consent.¹¹⁸ Consent is defined in section 1 of the Sexual Offences Act 2007 as follows: -

- (2) *For the purposes of sections 3, 4, . . . 'consent' means voluntary or uncoerced agreement.*
- (3) *Circumstances in subsection (2) in respect of which a person ('B') (the complainant) does not voluntarily or without coercion agree to an act of sexual penetration, as contemplated in sections 3 and 4 . . . , but are not limited to, the following:*
 - (a) *Where B (the complainant) submits or is subjected to such a sexual act as a result of-*
 - (i) *the use of force or intimidation by A (the accused person) against B, C (a third person) or D (another person) or against the property of B, C or D; or*
 - (ii) *a threat of harm by A against B, C or D or against the property of B, C or D;*
 - (b) *where there is an abuse of power or authority by A to the extent that B is inhibited from indicating his or her unwillingness or resistance to the sexual act, or unwillingness to participate in such a sexual act;*
 - (c) *where the sexual act is committed under false pretences or by fraudulent means, including where B is led to believe by A that-*
 - (i) *B is committing such a sexual act with a particular person who is in fact a different person; or*
 - (ii) *such a sexual act is something other than that act; or*
 - (d) *where B is incapable in law of appreciating the nature of the sexual act, including where B is, at the time of the commission of such sexual act-*
 - (i) *asleep;*
 - (ii) *unconscious;*

¹¹⁸ See Artz & Smythe (eds) (2008) 1 – 21 and 26 – 31 for a criticism of the patriarchal bias which often skews the rape reform process. See also Hall (1988) 105 SALJ 67 at 74 – 76 where the author criticises the inclusion of this element at common law. Her criticisms are nevertheless valid in respect of the retention of the element of 'absence of consent'.

(iii) in an altered state of consciousness, including under the influence of any medicine, drug, alcohol or other substance, to the extent that B's consciousness or judgement is adversely affected;

(iv) a child below the age of 12 years; or

(v) a person who is mentally disabled.

This statutory definition of consent neither adds nor takes away from the original definition at common law, namely whether or not the consent was real.¹¹⁹ Rather, the Sexual Offences Act 2007 seeks to codify the common law rules that found application in the determination of whether consent was absent or not.¹²⁰ Whilst the retention of the consent requirement is regrettable, the codification thereof is in keeping with the Sexual Offences Act 2007 overall purpose to “deal with all legal aspects of or relating to sexual offences in a single statute”.¹²¹

3.2.3 UNLAWFULNESS

The element of unlawfulness – although not explicitly contained within the remit of the provision – is retained as an element of the offence.¹²² Unlike at common law it is postulated that – given the expansive grounds of what constitutes “sexual penetration” – the grounds of justification advanced by this element will be of greater importance.¹²³ An example of a ground of justification not applicable at common law would be official capacity. An example being where a medical doctor treats a patient for some ailment connected with their genitals and during the scope of such treatment inserts a finger or object into the patient's vagina or anus.¹²⁴

¹¹⁹ See (*supra*) 2.3.1.3 for a discussion of the common law element of consent.

¹²⁰ See Snyman (2008) 363 – 367 for a complete overview of the consent requirement. Moreover, that such element is no more than a codification of that which applied at common law.

¹²¹ Sexual Offences Act 2007, Preamble.

¹²² For a complete discussion of the element of ‘unlawfulness’ see (*supra*) 2.3.1.4.

¹²³ *cf* with the common law offence of rape where the only ground of justification that could realistically have been invoked was that of necessity.

¹²⁴ Snyman (2008) 367.

3.2.4 INTENTION

Intention is specifically incorporated into the statutory reformulation of the offence. It therefore stands to reason that the perpetrator must have the intention to commit an act of sexual penetration with the complainant without his or her consent in order to be found guilty of rape.¹²⁵ In instances where the perpetrator foresaw the possibility that the consent of the complainant may be lacking¹²⁶ but nevertheless continues to cause sexual penetration to occur, then he/she may be said to have intention in the form of *dolus eventualis*.¹²⁷

3.2.5 SEXUAL PENETRATION

The final and most contentious definitional element is sexual penetration. Within the architecture of the Sexual Offences Act 2007 the definition of sexual penetration forms the lynchpin for two extremely important and independent offences, namely rape and compelled rape.¹²⁸ The term “sexual penetration” is defined as: -

- includ[ing] any act which causes penetration to any extent whatsoever by –*
- (a) the genital organs of one person into or beyond the genital organs, anus, or mouth of another person;*
 - (b) any part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or*
 - (c) the genital organs of an animal, into or beyond the mouth of another person . . .*¹²⁹

The Sexual Offences Act 2007 further defines genital organs as “includ[ing] the whole or part of the male and female genital organs, and further includes surgically constructed or reconstructed genital organs”.¹³⁰

¹²⁵ *Ibid.*

¹²⁶ Factors which may – for example - vitiate consent are intoxication and mental defect.

¹²⁷ See generally Burchell (2006) 705; Snyman (2008) 367; De Wet (1985) 137 – 155.

¹²⁸ See (*infra*) 3.3 for a discussion of the offence of compelled rape.

¹²⁹ Sexual Offences Act 2007, s1.

¹³⁰ *Ibid.*

3.2.5.1 THE INTERPRETATION OF SEXUAL PENETRATION

Unlike the preceding definitional elements the term “sexual penetration” and its corresponding definition has caused a lot of controversy. The root of such controversy being the use of the wording “which causes” in the first line of the definition of sexual penetration. *Snyman* argues that through the use of this wording the statutory definition of rape is no longer a personal or autographic offence but rather now a materially defined one.¹³¹ The author argues that read in this fashion the term sexual penetration should be seen as a *genus* of which the actual penetration by the perpetrator is merely a species.¹³² Thus, the statutory definition of rape would encompass all forms of penetration, including where a perpetrator procures an unwilling or innocent agent to commit an act of sexual penetration.¹³³ Moreover, it would render the inchoate and participatory offences contained within section 55¹³⁴ inapplicable as materially defined offences are by definition so broad that participatory offences are never applicable.¹³⁵ If this interpretation is accepted as being correct, the inclusion of the offence of compelled rape would be superfluous. This - with due respect to the author - cannot be correct as one of the fundamental presumptions of statutory interpretation is that statutes do not contain invalid or purposeless provisions.¹³⁶

Section 39(2) of the Constitution provides that “when interpreting any legislation . . . every court, tribunal or forum must promote the spirit purport and objects of the Bill of Rights”. The proper approach

¹³¹ *Snyman* (2008) 358. See also *Van Der Bijl* (2010) 23 *SACJ* 224 where the learned author proceeds in her interpretation of the offence of rape on the premise that rape is now a materially defined offence.

¹³² *Snyman* (2008) 358.

¹³³ Criminal liability would flow through the operation of the maxim *qui facit per alium facit per se* - which finds application only in respect of materially defined offences – and the offender would be found guilty of the statutory offence of rape rather than compelled rape. See *Snyman* (2008) 360.

¹³⁴ Sexual Offences Act 2007, s55 provides that –

Any person who—

(a) attempts;

(b) conspires with any other person; or

(c) aids, abets, induces, incites, instigates, instructs, commands, counsels or 15 procures another person, to commit a sexual offence in terms of this Act, is guilty of an offence and may be liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.

¹³⁵ See the discussion of participation in *Snyman* (2008) 257 – 278.

¹³⁶ *Curtis v Minister of Safety & Security* 1996 (5) BCLR 609 (CC) at [57]. See also *Snyman* (2008) 360, where the author himself confirms this notion and proposes that in order to cure this anomalous situation such actors should despite being guilty of rape should nevertheless be found guilty of compelled rape.

when construing legislation, in light of this constitutional injunction, is reflected in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*.¹³⁷ The applicable principles of interpretation were spelt out by the Constitutional Court in *Bato Star* as follows:

*It is no doubt true that it is a primary rule of statutory construction that words in a statute must be given their ordinary grammatical meaning. But it is also a well-known rule of construction that words in a statute should be construed in the light of their context.*¹³⁸

Similarly the Constitutional Court recently held that a court may only depart from the clear language of a statute where it -

*[W]ould lead to absurdity so glaring that it could never have been contemplated by the legislature, or where it would lead to a result contrary to the intention of the legislature, as shown by the context or by such other considerations as the Court is justified in taking into account.*¹³⁹

It is important, for purposes of interpreting the statutory definition of rape, to highlight the purpose of the Sexual Offences Act 2007. The Sexual Offences Act 2007 seeks to abolish and repeal the common law offence of rape - which was the product of an outdated dispensation - replacing it with a new expanded definition irrespective of gender.¹⁴⁰ Moreover, the purpose - which is made manifest throughout the statute, particularly in its long title, its preamble and its objects - is to afford "complainants of sexual offences the maximum and least traumatising protection that the law can provide", by "criminalising all forms of sexual abuse or exploitation".¹⁴¹ Thus, the Sexual Offences Act - in stark contrast to the previous laws governing sexual offences - seeks to provide for a constitutionally sound system which emphasises the protection of fundamental rights of the victims of sexual violence. It was designed to represent a decisive break with the past.

¹³⁷ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC).

¹³⁸ *Bato Star* (*supra* n137) at [89]. Quoted in *Van Vuuren v Minister of Correctional Services and Others* 2012 (1) SACR 103 (CC).

¹³⁹ *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 (2) SA 311 (CC) at [232]. Quoted in *Boksburg* (*supra* 111).

¹⁴⁰ See Sexual Offences Act 2007, s2.

¹⁴¹ Sexual Offences Act, s2(b). Cited in *Boksburg* (*supra* 111) at [21].

In addition to the above considerations, a proper interpretation of the statutory offence of rape must be done in the light of the rule of law and the Constitution.¹⁴² In *Pharmaceutical Manufacturers Association of South Africa and Others: In Re: Ex Parte Application of the President of the RSA and Others* the Constitutional Court stated that –

*[T]he rule of law embraces some internal qualities of all public law: that it should be certain, that it is, ascertainable in advance so as to be predictable and not retrospective in its operation; and it be applied equally, without unjustifiable differentiation.*¹⁴³

It is against this backdrop that the statutory definition of rape must be understood in order to guide its interpretation

To determine the ambit of the statutory definition of rape the provision must be read as a whole. Upon a proper reading it becomes clear that the offending wording - “which causes” - do not form part of the definitional elements of the offence – unlike murder¹⁴⁴ - but rather are found within the statutory definition of the definitional element of “sexual penetration”. The purpose of a definition section in a statute is to operate as an interpretative aid by ascribing certain words a technical meaning that often deviates from their ordinary grammatical meaning.¹⁴⁵ This is best illustrated if one considers the ordinary grammatical interpretation as ascribed by the Oxford English dictionary, namely “the insertion of the penis, or a penis-like object, into the vagina or anus in copulation or another sexual act”.¹⁴⁶ Similarly the Merriam Webster dictionary defines “sexual intercourse”¹⁴⁷ as “heterosexual intercourse involving penetration of the vagina by the penis” and intercourse (as anal or oral intercourse) that does not involve penetration of the vagina by the penis.¹⁴⁸

¹⁴² *Van Vuuren (supra n138)* at [52].

¹⁴³ *Pharmaceutical Manufacturers Association of South Africa and Others: In Re: Ex Parte Application of the President of the RSA and Others* 2000 (2) SA 674 (CC) at [39]. Cited in *Van Vuuren (supra n138)* at [52].

¹⁴⁴ Murder – which is accepted as being a materially defined offence - is defined as the unlawful causing of the death of another human being. See *S v Sigwaha* 1967 (4) SA 566 (A) at 570 – 571. See also Snyman (2008) 447 at the authorities cited therein.

¹⁴⁵ De Ville (2000) 104.

¹⁴⁶ <<http://www.oed.com/view/Entry/140090?redirectedFrom=penetration#eid>> (accessed 30 April 2011).

¹⁴⁷ See Artz & Smythe (eds) (2008) 23 - 25 for a complete discussion of the *rationale* behind the use of the terminology ‘sexual penetration’ instead of ‘sexual intercourse’.

¹⁴⁸ <<http://www.merriam-webster.com/dictionary/sexual%20intercourse>> (accessed 30 April 2011).

It is clear from the foregoing that the definitions of “sexual penetration” and “sexual intercourse” are products of a heterosexual understanding of what ‘normal’ sexual relations are. They do not reflect the humiliation and degradation inflicted on victims – either female or male - nor do they appropriately acknowledge a victims right to dignity, equality, privacy and freedom and security of a person.¹⁴⁹ The ordinary grammatical definitions are therefore limited and do not accord with the constitutional imperatives as reflected by the legislatures intention, to repeal the common law offence of rape and replace it with a “new expanded statutory offence or rape, applicable to all forms of penetration without consent, irrespective of gender”.¹⁵⁰

In this context the words “which causes” have a clear and logical reason for being incorporated within the definition of sexual penetration. They have not been inserted to abolish the formal nature of rape rather they have been inserted to cure the legal defect of it being physiologically impossible for a woman to rape a man without the use of an object or digit. The use of the words “which causes” provide the bridge needed in order for a woman to effect non-consensual penetration on a man. This scenario was recently dealt with in the unreported judgment of *S v Manqxeke*.¹⁵¹ The case involved the rape of a 15 year old physically disabled and mildly mentally challenged child by his 45 year old care-giver.¹⁵² The accepted facts - which are illustrative of the scenario – where as follows:

*The accused put his penis into the bottle, but he did not urinate. She took his penis out of the bottle and then brushed the front of his penis and his testicles with her finger. . . She then took off her pants and panties, got underneath the blankets and said if he did not sleep with her, she would have him arrested by the police. . . He was lying on his back and the accused climbed on top of him with her face facing his face. She inserted his penis into her vagina and moved up and down. He did not say anything at first because he was enjoying the feeling, but he then felt pain in his penis and told her that he did not want what was happening and that she was forcing him, but she continued with the up and down movements (sic).*¹⁵³

The care-giver was convicted of contravention of section 3 of the Sexual Offence Act 2007.

¹⁴⁹ See also *Masiya* (*supra* n22) at [30].

¹⁵⁰ Sexual Offences Act 2007, Long Title.

¹⁵¹ *S v Manqxeke* (unreported) Eastern Cape High Court, Port Elizabeth.

¹⁵² *Manqxeke* (*supra* 151) pg183.

¹⁵³ *Manqxeke* (*supra* 151) pgs157 & 158.

3.2.5.2 CONCLUDING REMARKS

Given the relevant statutory interpretative mechanism enunciated above, it is submitted that two general conclusions may be drawn. First, the definition of “sexual penetration” as defined in section 1 of the Sexual Offences Act 2007 does not form part of the definitional elements of the statutory defined offence of rape. Second, the clear usage of the word “which causes” must be understood as providing a technical meaning to a particular form of penetration and must not be construed as the abolishment of the formal nature of rape. Any such contention must be met with a level of scepticism especially considering that by doing so it would render the offence of compelled rape nugatory and would render the section 55 of the Sexual Offences Act 2007 inapplicable in such instances. Moreover, such interpretation runs contrary to the purpose of the Sexual Offences Act 2007, specifically, and the rule of law generally.

3.2.6 CONCLUSION

It is clear from the above discussion that rape remains - as it was at common law - a personal or autographic offence. It therefore does not criminalise the conduct of the ‘innocent perpetrator’ and thus the offence of compelled rape has not been rendered superfluous.

3.3 COMPELLED RAPE AND THE STATUTORY PERPETRATOR

Proceeding from the premise that the statutory offence of rape remains an autographic offence, the next question to be answered is whether the statutory offence of compelled rape provides for the criminalisation of the ‘innocent perpetrator’ rape.

Section 4 of the Sexual Offences Act 2007 under the heading compelled rape provides that “[a]ny person (‘A’) who unlawfully and intentionally compels a third person (‘C’), without the consent of C, to commit an act of sexual penetration with a complainant (‘B’), without the consent of B, is guilty of the offence of compelled rape”..

The offence consists of the following essential elements: (1) compelling a person; (2) to commit an act of sexual penetration; (3) without the consent of such third person; (4) without the consent of a the

complainant; (5) unlawfulness and (6) intention. The elements of sexual penetration, consent, unlawfulness and intention were discussed under the deconstructive analysis of rape and will not be repeated here. In what follows particular emphasis is placed on the notions of compelling another and who qualifies as a victim.

3.3.1 COMPULSION

This definitional element makes it clear – in gender neutral terms – that the offence is completed once a person is compelled to perpetrate an act of sexual penetration on another. Compulsion must be understood as *vis compulsive* or relative compulsion otherwise the person would not act in the technical legal sense. Moreover, the compulsion must be of such a nature that it negates the person's ability to exercise free will. This interpretation is further gainsaid by the legislatures express qualification of the act – in the technical legal sense – of the *actus reus* perpetrator through the use of the words “without the consent of C”.

The express ‘double qualification’¹⁵⁴ brings the offence in line with the principles of the ground of justification of necessity. Moreover, it gives statutory recognition that a person may – in certain circumstances – be compelled to commit an act of sexual penetration without attracting criminal liability.¹⁵⁵ The applicability or otherwise will be largely a question of fact. Although it is hoped that the prosecution would carefully consider such scenarios so as to prevent secondary victimisation should the *actus reus* perpetrator have been blameless.

3.3.2 THE VICTIM(S)

A contentious issue within the offence of compelled rape that has been noted is the question as to who qualifies as a victim as it is apparent from the above that the *actus reus* perpetrator lacks consent. In this regard the definition of compelled rape lends itself to two starkly different interpretations in regards to who qualifies as a victim. The first interpretation and perhaps the most obvious is that the victim is the person who is sexually penetrated by the *actus reus* perpetrator. This obviously being at

¹⁵⁴ The term ‘double qualification’ is used here to describe the need for a person to have been compelled to commit an act of sexual penetration and that such penetration occurs without the his/her consent.

¹⁵⁵ See Snyman (2000) 115 – 123 for a complete discussion of necessity. See also *S v Goliath* 1972 (3) SA 1 (A) for a discussion of necessity and the offence of murder.

face value the correct interpretation if one considers the language employed.¹⁵⁶ The second interpretation which does not readily appear at face value is that both the person identified in the definition as the complainant and the person who is compelled to effect such sexual penetration are victims. It is the latter interpretation that is correct.

In *Bato Star*¹⁵⁷ Ngcobo J held that –

Implicit in this command [section 39(2) of the Constitution] are two propositions: first, the interpretation that is placed upon a statute must, where possible, be one that that would advance at least an identifiable value enshrined in the Bill of Rights; and, second, the statute must be reasonably capable of such interpretation. This flows from the fact that the Bill of Rights 'is a cornerstone of democracy'. It 'affirms the democratic values of human dignity, equality and freedom'.

. . .

South Africa is a country in transition The preamble to the Constitution 'recognises the injustices of our past' and makes a commitment to establish 'a society based on democratic values, social justice and fundamental rights'. This society is to be built on the foundations of the values entrenched in the very first provision of the Constitution. These values include human dignity, the achievement of equality and the advancement of human rights and freedoms.¹⁵⁸

If the definition of compelled rape is analysed two independent sets of identifiable rights may be identified. First, the rights of the complainant to dignity, equality and freedom are infringed through the conduct of the *actus reus* perpetrator, these violations are in turn attributed to the perpetrator of compelled rape. Second, the rights of the *actus reus* perpetrator's right to dignity, equality, freedom are too infringed by the complainant and which in turn must be attributed to the perpetrator of compelled rape.¹⁵⁹ Moreover, not accepting that the *actus reus* perpetrator is too a victim not only runs contrary to the purpose of the Sexual Offences Act 2007 – preventing secondary victimisation – it also denies such

¹⁵⁶ See Snyman (2008) 370 where the author argues that the victim of the offence is that person who is sexual penetrated by reason thereof.

¹⁵⁷ *Bato Star* (*supra* n137).

¹⁵⁸ *Bato Star* (*supra* n137) at [73]. Cited in *Van Vuuren* (*supra* n138) at [47].

¹⁵⁹ E.g. X (a man) – at gun point - forces Y(a female) to sexually penetrate Z(a male) by manipulating her body to cause penetration. See the discussion of sexual penetration (*supra*) par 3.2.5.

person the right to approach a court.¹⁶⁰ It has been raised in academic and legal practitioner circles that in order to cure this anomalous situation that the perpetrator should be charged with two counts of compelled rape. This argument must be rejected for it runs contrary to the ordinary principles of criminal proceedings as such additional charge would tantamount to duplication of charges.¹⁶¹ In accordance with this *dictum* of *Bato Star* the offence of compelled rape must be interpreted in a manner consistent with the Constitution and accordingly acknowledges the rights of both victims.

3.3.3 CONCLUSION

In considering the definitional elements repeated above and those elaborated upon under the discussion of the statutory definition of rape it is evident that the offence of compelled rape seeks to criminalise the conduct identified in *Saffier*¹⁶² referred to throughout this dissertation as the 'innocent perpetrator' rape. Moreover, given that rape remains a personal or autographic offence the enactment of the offence of compelled rape can be seen as a statutory exception to this notion, since it criminalises the actions of a person other than the *actus reus* perpetrator.

¹⁶⁰ See Constitution, s34 which provides that "[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate another independent and impartial tribunal or forum".

¹⁶¹ See generally *Gaseb* (*supra* n103) for a discussion of this principle.

¹⁶²

CHAPTER 4: CONCLUSION

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4.1 INTRODUCTION

This dissertation investigated whether the inclusion of the offence of compelled rape as an independent crime was necessary in order to criminalise the conduct of an offender who does not him/herself penetrate the complainant. It also identified and sought to provide a solution to the conundrum of the offender of compelled rapes liability in relation to the person who he/she caused to penetrate the complainant.

As is evidenced from the preceding chapter the legislature's intention in this regard is not always clear from a simple reading of the impugned section. This unfortunate state of affairs is further exacerbated by the fact that no jurisprudence to date exists to provide clarity and few authors are *ad idem* about the scope and ambit of the offence. The presence of these factors has attributed too much of the intellectual discomfort and confusion regarding not only the offence under review but also the statutory definition of rape.

It was concluded in the preceding chapter's that at the Sexual Offences Act 2007 has at its core the statutory protection of a victim of sexual violence's rights. Given such emphasis on the rights of the victim a palpable panacea for this intellectual discomfort could not be sought without an interpretation that was not consistent within the rubric of the objective norms of the Constitution.

Accordingly, this chapter draws together two overarching conclusions. Firstly, there are those that relate to the inclusion of the offence of compelled rape as a wholly independent offence. Secondly, there are those that specifically relate to the areas that legislature should review in order for the Sexual Offences Act 2007 to function optimally.

4.2 SUMMARY OF FINDINGS

In order to evaluate the problem statement contained within this dissertation, five research objectives were put forth. These objectives were comprehensively dealt with in the preceding chapters and in summary may be restated as follows:

- 4.2.1 Chapter two sought to determine what the rationale for the inclusion of the offence of compelled rape by the legislature was. It was determined that at common law the offence of rape did not find application in instances where the offender did not him/herself penetrate the complainant personally. The reason why such offence did not find application was as a result of the offence being categorised as an autographic or personally defined offence that could only be perpetrated through one's own body. It was further established that at common law such offender would not attract liability as an accomplice owing to the theory of strict accessoriness that has been approved by our courts. This anomalous situation lent itself to the author dubbing such offender an 'innocent perpetrator' to rape.
- 4.2.2 The chapter further sought to establish, whether the consideration of rights had a part to play in the criminalisation of acts of sexual violence, and whether given such rights based understanding what rights would be violated in instances of sexual violence. In summation the chapter concluded that given the patriarchal assumptions that underlay the common law offence of rape that such offence had become defunct and could no longer be justified in terms of society's evolved understanding of interests in need of protection. It further ascertained that acts of sexual violence violated the not only the right to freedom of security of the person, but also the right to privacy and the right to dignity.
- 4.2.3 An investigation was conducted in chapter three as to whether given the purportedly wide ambit of the statutory definition of rape that it was at all necessary to enact the offence of compelled rape. The answer hereto hinged on the question of whether or not the new statutory definition of rape was still to be regarded as an autographic offence, as should it not be so construed as

such it would follow that the offence of compelled rape would be superfluous. Through a proper interpretation of the term “sexual penetration” it was concluded that the legislature did not intend to abolish the formal nature of rape and that the enactment of the offence of compelled rape bore testament to this.

- 4.2.4 The study further showed that the offence of compelled rape was inserted by the legislature in order to address the situation of an offender who did not commit the offence of rape as defined but rather had caused a unique form of degradation to be affected on his/her victims. That being the compelling of two innocent persons to engage in an act of sexual penetration without either such parties consent. The study established that it was this form of sexual violence that had been sought to be criminalised, and one could therefore not speak of the offence being inserted *ex majore cutela*.
- 4.2.5 Lastly, the dissertation sought to provide an understanding as to who qualified as the victim(s) in incidences of compelled rape. In order to make such determination a comparison was drawn between the rights affected by the person who was penetrated and the person who was compelled to cause such penetration. This was then contrasted with the broader aims of the Sexual Offences Act 2007, particularly the concept of secondary victimisation. Through such analysis two conclusions were derived. Firstly, it was established that the rights affected were identical and hence given the constitutional underpinnings of the text both must be classified as victims. Secondly, this interpretation was consistent with the aim of preventing secondary victimisation as it follows should such person not be classified as a victim he/she would be subjected to such victimisation.
- 4.2.6 Despite this study providing a concretised right based understanding of what the legislature’s intention was in the enactment of the offence, there is one area that the author opines is in need of statutory reform. That is the sentence to be imposed where a person has been found guilty of the offence of compelled rape. As it stands the offender is on the same footing as that of a person found guilty of rape, according to the Criminal Law Amendment Act.¹⁶³ It is *trite* that an offence is punished according to the degree of the right the particular conduct violated. However, the equating of the statutory definition of rape with that of compelled rape in terms of sentence does not pay homage to the fact that there are two victims. It is synonymous with the

¹⁶³ Criminal Law Amendment Act 105 of 1997.

previous position that in instances of the “innocent perpetrator” such person would only be found guilty of the less serious offence of incident assault and sentenced to a shorter period of imprisonment. It is of grave concern if we revert to the system of the past and do not adequately address this most serious violation of rights. Therefore, to reflect the gravity of this offence the legislature should accordingly amend the Criminal Law Amendment Act to provide for a sterner sentence in instances of compelled rape.

4.3 A FINAL WORD

In conclusion it is submitted that whilst the intention of the legislature in comprehensively dealing with matters of sexual violence are most laudable, the legislature should have articulated the concepts and definitions in a clearer fashion. It is hoped that through the emphasis of victim’s right that the judiciary will help fulfil the legislature’s intention in providing a criminal law system governing acts of sexual violence in a manner that accords with the experiences of the victim.

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