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**ADULT FEMALE RAPE SURVIVORS' VIEWS ABOUT THE CONSTITUTIONAL,  
HUMAN RIGHTS AND COMPULSORY HIV TESTING  
OF ALLEGED SEX OFFENDERS****Nigel Bradely Bougard,<sup>1</sup> Karen Booyens<sup>2</sup> and Rene Ehlers**

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**ABSTRACT**

*The reality of rape as a direct form of contact crime remains deeply entrenched in South African communities, despite numerous efforts from various governmental stakeholders to curb this heinous crime. The Criminal Law (Sexual Offences and Related Matters) Amendment Act (32 of 2007), came into effect in 2007 as a strategic approach to prevent secondary victimisation of a victim of sexual offence through the Criminal Justice System (CJS). One of the strategies employed in the aforementioned Act, is the compulsory Human Immunodeficiency Virus (HIV) testing of alleged sex offenders. The compulsory HIV testing of an alleged sex offender evoked controversy pertaining to its efficiency and the human rights violations that might be incurred upon the alleged accused. This article will highlight the subjective perceptions of adult female rape survivors towards their rights and the rights of alleged sex offenders following rape. The research was conducted at four Thuthuzela Care Centres (TCCs) in the Gauteng province, which are one stop multi-disciplinary state-owned facilities providing medico-legal services for victims of sexual offences in South Africa. The study was exploratory- descriptive in nature within a positivistic paradigm. Quantitative research methods were employed, with the aid of a self-administered questionnaire as a measuring instrument given to adult female rape survivors to complete. Forty-five research respondents participated in the study. This article thus serves as one of two domains under investigation relating to the current study.*

**Keywords:** *Human Rights; Constitution; Compulsory HIV testing; rape victim/survivor.*

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**INTRODUCTION**

Since the inception of the Criminal Law (Sexual Offences and Related Matters) Amendment Act (32 of 2007), little research has been done to explore its efficacy as a strategic approach in addressing the high levels of sexual violence against women. In contrast, the empowerment of victims of sexual violence through the compulsory HIV testing of alleged sex offenders, should be implemented with extreme caution as much more empirical evidence needs to be gathered to assess the implications thereof. An application for the compulsory HIV testing of an alleged sex offender can be lodged before or after the arrest of such an offender, which is highly dependent upon the investigation or prosecution of an alleged rapist (McQuoid-Mason, 2009: 31-36). Substantial evidence that the alleged sexual offence has been committed by the alleged sex offender(s) and the compelled HIV testing of the alleged sex offender(s) would be favourable for the purposes of investigating or taking legal action against the accused (Faull & Mphuthing, 2009: 132).

Numerous debates have emerged since the implementation of Chapter 5 of the previously mentioned Act, which entails services for victims of sexual offences and the compulsory HIV testing of an alleged sex offender. The compulsory HIV testing of alleged offenders had been met with mixed reactions with a main emphasis on the feasibility thereof. Nevertheless, an alleged sex offender can be tested for HIV within a 90-day period upon the

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request of the victim or interested persons. A formal application to have an alleged sex offender tested for HIV should thus be lodged before a magistrate within the aforementioned timeframe, implying that the process is not automatic (McQuoid-Mason, 2009: 31-36).

Roerhs (2007: 31-36), argues that legal provisions may only be reasonable for the compulsory HIV testing of an alleged sex offender if the processes it entails ominously overshadowed the rights of the alleged sex offender. An example of an instance as such is linked to the case of *NM and others vs Smith and others* (CCT69/05) [2007] ZACC 6; 2007 (5) SA 250 (CC); 2007 (7) BCLR 751 (CC) (4 April 2007), in which the court acknowledged that the disclosure of an *indis status* (the HIV status of a person) invades the right against unselective disclosure. It is also important to take into consideration the views of the constitutional and human rights of the accused, such as the right to privacy (Roerhs, 2007: 31-36). Jewkes (2011), from the Medical Research Council of South Africa (MRC), however, holds the viewpoint that it is complicated when addressing the human rights dilemma surrounding the rights of an alleged sex offender at the point that they are tested, which might subsequently entail the disclosure of their HIV status that she deems as a breach of privacy. The influence of a coerced HIV test on an 'alleged sex offender's' human rights are proportional, suggesting that the trauma inflicted upon the victim justifies the compelled HIV testing of an alleged 'sex offender'.

Jewkes (2011), further argues that the HIV test result is also of questionable value, as an alleged sex offender in the window period (a period in which an HIV test could be falsely negative) may be immeasurably risky to a victim of a sexual offence. Although the prerequisites of Chapter 5 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act (32 of 2007) pursue to offer some sense of relief to the victim of rape in knowing that the perpetrator was HIV negative during the time that the rape occurred, an alleged sex offender in the window period could test HIV negative, even though further tests might reveal different results. The compulsory HIV testing of alleged sex offenders should thus holistically benefit the victim of a sexual offence, and not necessarily the interests of society (Jewkes, 2011).

As outlined by the AIDS Law Project (ALP), the compulsory HIV testing of an alleged sex offender raises numerous concerns. First and foremost, the compulsory HIV testing of an alleged sex offender would not be beneficial to rape survivors who were already HIV positive at the time of the rape, the former also being inclusive of marginalised women who had been victims of gang rape and where no arrests had been made. Secondly, counselling as a single approach does not necessarily give rape survivors acumen into the intricacies of contracting HIV. Thirdly, the ALP suggests that most rape survivors would not have the aptitude to make an informed choice on whether or not to apply for the compulsory HIV testing of an alleged sex offender, which would make it difficult to predict the potential outcomes of the HIV test result of an alleged sex offender (AIDS Law Project, 2006: 5-8; Naidoo & Govender, 2011: 6).

The aim of the article is to provide a synopsis of the subjective views of adult female rape survivors towards the constitutional and human rights of both the victim and alleged sex offender following rape. More specifically the objectives are to contextualise the reality and dynamics of human rights as a social phenomenon; provide an overview of the development of trends regulating harmful HIV-related behaviour; and highlight the idiosyncratic viewpoints of rape survivors towards the rights of victims and alleged sex offenders according to the Criminal Law (Sexual Offences and Related Matters) Amendment Act (32 of 2007).

## OVERVIEW OF THE CONCEPTS

### Human Rights

Human rights promote the dignity of every man, woman and child, with its progress heavily dependent upon facts being presented in an accurate mode of communication. Human rights strive to accentuate key aspects pivotal to life such as freedom, status or protection of the right-holders. The rights of any person should thus be interpreted as being “resistant to trade-offs, but not too resistant”, implying that if rights are in conflict with one another, one right is most likely to be outweighed over and above another (Kohen, 2005: 32; Griffin, 2008: 14-15; Beitz, 2009: 10; Clinton, 2010: 13).

In addition, the nature of human rights is multifarious, since it encompasses a number of entities that cannot be seen or documented accurately without a strong scientific focus. Bearing the aforesaid in mind, human rights belong to all people, irrespective of nationality, age, culture, race or gender. Henceforth, these rights are universal, inclusive to everyone globally. Similarly, the Office for the High Commissioner of Human Rights [sa] explicates human rights as being inherent to all human beings, which entitle them to be treated equally without discrimination. As such, human rights are all interdependent, interrelated and indivisible (Ife, 2012: 19; Benavides (15/08/2013); United Nations Human Rights. Office for the High Commissioner of Human Rights, [sa]).

### Constitution

The Constitution within the South African context is an essential body of principles or a recognised set of practices according to which a state or organisation should adhere to. Government structures are organised within a constitution, which determines the manner in which power is regulated amongst various political units. The core function of a Constitution is to protect democracy through the distribution and division of power among three pillars of a state. The Legislature is seen as the most vital pillar, comprising as it does of parliament, provincial legislatures and local councils. Within these various structures, laws are made, the monitoring of the executive is enforced, policies are adopted and implemented, laws are passed by the legislature; yet not neglecting the role of the judiciary that tries cases and administers justice. The judiciary functions as a separate independent entity, inferring that no one can interfere in the duties of the Constitutional Court and other courts in South Africa. In practice, the Constitution ‘watches’ over the powers of the state. Furthermore, human rights are deeply enshrined in a special part of the Constitution referred to as the Bill of Rights. Chapter 2 of the 1996 Constitution contains the South Africa’s Bill of Rights in which provisions are made in protecting equality, human dignity, privacy and life amongst others. Freedom of expression and religion are also inclusive of the Bill of Rights, which also relate to matters such as labour relations, education, children and the legal process in its totality. Furthermore, the Bill of rights affirms the democratic values of an individual such as equality, dignity and freedom (Republic of South Africa, 1996. Constitution of the Republic of South Africa, 1996).

### Compulsory HIV testing

It is generally acknowledged that HIV testing takes three forms that are considered to be acceptable. These modes of HIV testing include voluntary testing (VT) in which consent is given by an individual prior to the test, mandatory testing is a scenario in which a person is tested whether they consent or not due to legislation emerging from public health policies; and routine testing in which an extra tube of blood is taken for HIV testing. An example of mandatory HIV testing takes place when a person donates blood. Another example of mandatory testing is when a person joins the United States (US) military for Foreign Service; testing is conducted randomly and not just upon entry. Mandatory HIV testing is thus grounded upon a utilitarian argument which states that HIV testing is acceptable, although

not desirable, with an emphasis on the restriction of human rights of some individuals which is tolerable for the sake of achieving a greater good for a greater number (Bernard, [sa]: 3-4).

The concepts mandatory and compulsory HIV testing cannot be applied synonymously. Compulsory HIV testing is imposed by the law as acting in the interest of the wider community, whilst mandatory HIV testing is applied as being 'obligatory' and a requirement for a number of reasons. Other examples of mandatory HIV testing are the HIV prenatal testing of pregnant women and HIV testing of all individuals above 15 years of age to obtain a long-term worker's or student permit for specific countries such as Canada and Australia. It is also of interest that mandatory HIV testing serves as a prerequisite to get a marriage certificate in countries such as Nigeria, which also include partner notification in a number of countries. In Colorado, United States of America (USA), the identity of HIV-positive individuals is reported to public health officials (Levinsky, 2003: 1; PlusNews Southern Africa, 2008: 8; Bernard, [sa]: 3; Bisailon, 2010: 1).

Compulsory HIV testing denotes to the testing of a person without validated consent, which may involve the use of intimidation, physical force, coercion or any other modes of pressure. It was recommended by government organisations internationally that compulsory HIV testing should be a criterion for 'high risk' population groups such as drug users or prisoners, which was strongly opposed, since the compulsory HIV testing of specific groups of individuals might have no impact on the spread of HIV (Compendium of key documents relating to human rights and HIV in Eastern and Southern Africa, 2008: 1).

### **Rape**

Prior to the reformation of the Criminal Law (Sexual Offences and Related Matters) Amendment Act (32 of 2007) in South Africa, the definition of rape only made reference to a male having unlawful and intentional sexual intercourse with a female without her consent. This implied that a sexual offence committed against a male victim was recorded as indecent assault, which bears a lesser penalty (Snyman, 2002: 439; Booyens, 2008: 8). As a result, the then South African Law Commission (SALC) recommended replacing the words 'male' and 'female' with a gender impartial term of reference, namely: 'person' (SALC, 2002: 114; Booyens, 2008: 7), which denotes that a man can now also be considered as a victim of rape. However, for the purpose of this article the focus will be on adult female rape survivors. In the Criminal Law (Sexual Offences and Related Matters) Amendment Act (32 of 2007), rape is defined as an act by any person who intentionally and unlawfully commits an act of sexual penetration without the consent of another person (Snyman, 2002: 455; Burchell, 2005: 699; Booyens, 2008: 6).

Sexual penetration comprises of any act that leads to penetration to any extent of the following:

- (a) the genital organs of one person into or beyond the genital organs, anus or mouth of another person;
- (b) any other 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 (Criminal Law (Sexual Offences and Related Matters Amendment Act 32 of 2007).

Koss, Abbey, Campbell, Cook, Norris, Testa, Ullman, West and White (2007: 357-370), contextualise rape as the vaginal, anal or oral intercourse obtained through force or threat thereof. It also involves instances whereby the victim did not or was unable to give consent. Rape is also defined as any illegal form of unlawful and intentional sexual conduct

forced upon an individual, without his/her consent (Madiba & Vawda, 2010: 28). Rich (2003: 22) defines consent as:

“An agreement that includes an understanding of proposed behaviours or interaction based on age, maturity, developmental level, functioning, and experience; knowledge of social standards for the proposed behaviour or interaction; awareness of possible consequences and alternatives; honouring agreement or disagreement; voluntary decision; and mental competence”.

Consent is therefore a voluntary agreement, which is decided upon by all parties. This suggests an individual giving permission, willingly and deliberately agreeing, to the sexual act (Centre for Applied Legal Studies & Tshwaranang Legal Advocacy Centre<sup>2</sup> [sa]: 3).

### **Victim/survivor**

A victim is an individual who had suffered psychological, physical, sexual, or financial harm through the actions of another person during the execution of a crime (McFarquhar, 2011: 210; Department of Justice and Constitutional Development, 2007: 2). In 1985, the United Nations (UN) declared a Declaration of Basic Principles of Justice for Victims of Crime, which subsequently included a broader definition of victims:

“Victims mean persons who, individually or collectively have suffered harm, including physical harm or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power. A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term ‘victim’ also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimisation” (as cited in Goodey, 2005: 10).

In the Criminal Law (Sexual Offences and Related Matters) Amendment Act (32 of 2007), the perception of victim refers to any person against whom a sexual offence had been committed against. Organisations working with women, who had suffered sexual or domestic violence, claim that some of these persons’ prefer not to be seen as victims, but rather choose the word survivor to describe them (Sexual Violence Research Initiative, 2007: 8; Williams, 2012: 115). For the purpose of this article, the concepts victim and survivor will be used interchangeably.

## **LITERATURE REVIEW**

### **The nature of human rights**

Human rights protection in Africa is relatively new in origin. In the no regional system of human rights existed which enabled state protected rights related to tradition and domestic laws (particularly with a focus on protecting the rights of women). It is envisioned that in a traditional African society, the protection of human dignity was the responsibility of rules and customs regulated by indigenous law. This perception, however, has changed from previous approaches utilised internationally. Indecisiveness towards the importance of human rights in Africa can be traced back to its background (Hansungule, 2011: 1-2). The African continent has been a host to some of the most notorious means of human rights violations, suggesting that human rights practices still remain a new entity to implement in practicality. Very little practical benefits on human rights in Africa can be seen, although progress can be seen as Africans participate increasingly more in global programmes, such as protecting the rights of

civilians. Furthermore, it can be speculated that the main reason for Africa's decision to comply with international human rights standards, can be linked to the development of human rights standards (Hansungule, 2011: 3-4).

The existence of human rights can also find its roots from the idea that a rationally identifiable moral order exists which precedes social and historical conditions. Additionally, this notion is universally interpretive and likewise applicable. This proclaimed 'moral universalism' as opposed to the artificial concept, 'legal universalism,' creates the idea that the law has universal validity to regulate human behaviour. Nonetheless, it still remains debatable whether human rights have universal reach or not (Hansungule, 2011: 10-11). It has been argued that numerous scholars espouse that human rights evolved from a Western perspective, denying its claims to universality; and those that claim its cultural component can produce the same results. Cultural relativism is, however, the opposite of human rights. Cultural enthusiasts reject claims that universalism is ignorant towards the non-cultural content of human rights, which has no limits in terms of their construction and form thereof. Accordingly, this particular school of thought provides clarity and emphasises that a right cannot exist in isolation of culture, which gives meaning to life and further defines it (Hansungule, 2011: 13-14).

Human rights have, since its subsistence inspired transnational social movements, which have revolutionised and succeeded in offering protection for the marginalised and oppressed. These agencies have provided a platform for powerful political actors to address their views in their own right. Although it cannot be ignored that human rights within its own capacity feud intense controversy, as it became the dominant normative for international legitimacy and global politics. Modern human rights reflect rationalist, humanist and humanistic sensibilities in which each component describes a set of rights that belong to everyone. Significantly, one must always bear in mind that human rights have been and will always be seen as an integral struggle related to racism, poverty, sexism and resistance towards authoritarian rule (Goodhart, 2009: 235). The study therefore seeks to explicate the essence of human rights and constitutional rights of both the victim of rape and the alleged sex offender.

### **An overview of the criminalisation of the intentional transmission of HIV in Africa and Internationally**

Countries such as the USA, the United Kingdom (UK) and Australia have laws that criminalise the intentional exposure of HIV through rape or other modes of sexual violence, with heavy penalties for the convicted sex offender (Act Health Australia, 2007: 5; Bennet-Carlson, Faria & Hanssens, 2010: 201).

Thirty-six states in the USA have HIV-specific laws that deal with, among others, engaging in sexual relations that are most likely to infect a partner with an STI; participation in unprotected sex with the intent to infect another person with HIV; and partaking in sexual penetration, regardless of whether semen or other bodily fluids has been discharged, without informing the other person of one's HIV status. In the United Kingdom (UK) a person may be charged with 'recklessly inflicting grievous bodily harm' and if convicted can be sentenced to imprisonment of up to five years. Australia is a country in which most states have public health legislation relating to the deliberate and reckless transmission of HIV. In New South Wales, there is a specific clause in their legislation that criminalises sexual intercourse without full disclosure of one's HIV status. Australian criminal law also criminalises the risk of actual transmission of a serious disease (Weait, 2011: 11-20).

The introduction of the compulsory HIV testing of an alleged sex offender, with a view to prove that the accused might have been HIV-positive at the time of the alleged sexual assault, has also been observed in several sub-Saharan African countries. Laws as such can be seen in South Africa and Lesotho, while Zimbabwe and Swaziland only have legal provisions

pertaining to the compulsory HIV testing of alleged or convicted sex offenders. More than 40 percent of Southern African Development Countries (SADC), have laws specifically aimed at addressing harmful HIV-related behaviour (Stefiszyn, 2008: 6; ARASA, 2009: 23).

Substantial sanctions can be imposed if an alleged sex offender was aware of his HIV-status at the time of the apparent rape or sexual assault. Namibia imposes 45 years for repeat offenders, whereas Lesotho enforces a death sentence upon a convicted sex offender who was aware of his HIV-status at the time of the rape or sexual assault. Botswana has two modes of sentencing, namely: a life imprisonment coupled with corporal punishment. Zimbabwe enacts the lowest possible sentence of 20 years imprisonment if the sex offender was aware of his HIV-status and still proceeded with the rape or sexual assault (ARASA, 2009: 25).

In South Africa, the minimum sentence legislation was introduced in 1997 by the Criminal Law Amendment Act (105 of 1997). Rape carries a minimum sentence of life imprisonment if:

- the victim was exposed to the sexual assault or rape over a period of time, whether the act had been perpetrated by the accused, or by any other co-perpetrator or accomplice(s);
- the sexual offence had been committed by more than one person, in an effort to promote a common purpose or conspiracy (gang rape);
- the sexual assault had been executed by an individual who had prior convictions of a similar offence, which might be related to two or more sexual offences, and had not been sentenced yet;
- the rapist was aware of his/her HIV/AIDS status at the time of the incident;
- the age of the victim is under 16 years of age; or
- the victim of rape is physically impaired, and due to her disability is considered to be more susceptible to sexual violence, or is mentally debilitated, or suffered grievous bodily harm (GBH) when the rape took place (Criminal Law Amendment Act 105 of 1997; Muntingh, 2009: 182; Booyens, 2011: 81).

Furthermore, an alleged sex offender may also be charged with attempted murder in South Africa, if it is suspected that he/she wanted intentionally to infect another individual with HIV during the course of a sexual offence. To prosecute an individual for attempted murder, it has to be proven that he/she wanted to infect another with HIV, which presents less significant problems than manslaughter due to the legal technicality of proving the aforementioned. The advantage of using the charge of attempted murder to prosecute harmful HIV-related behaviour, creates a situation in which the state does not have to prove causation, nor the death of the victim or the actual transmission of HIV. It is also a prerequisite for a charge of attempted murder to be substantiated with proof of the 'highest state of mind', suggesting that the accused was aware of his/her actions at the time of the commission of the crime. The prosecutor thus has to prove that the accused acted with the purpose of deliberately infecting another with HIV. In addition, the prosecution for attempted murder does not consider the consent of the victim as a means of defence (Eba, 2007: 28).

### **Human rights of the alleged sex offender**

Human rights are seen as being justifiable if the restrictions are within the sphere of the law. This should also be based upon reasonable interest(s) in relation to provisions guaranteeing these rights and is comparable to the means of constituting the least restrictive and intrusive measures within a democratic society. Countries have legitimate ground to confine human rights within the context of the compulsory HIV testing of alleged sex offenders, in

accordance to universally set standards (United Nations International Guidelines on HIV/AIDS and Human Rights Consolidated Version, 2006: paragraph 104; Tadesse, 2007: 16).

For the purpose of this article, the right to privacy and the constitutional rights of the alleged sex offender will be discussed.

### **Right to privacy**

The right to privacy is not absolute, inferring that an individual's right to privacy asserts a sense of perception that an individual as such should have control over his or her personal information and allowed to execute their personal affairs without any means of incursion (Van Der Bank, 2012: 77). The restriction of the right to privacy of an alleged sex offender relating to compulsory HIV testing is defensible according to section 36 of the South African Constitution (108 of 1996), which asserts that rights can be limited if it is reasonable and justifiable. On the contrary, the former is not applicable within a democratic society that promotes the values of freedom, equality and human dignity, suggesting that the compulsory HIV testing of an alleged sex offender is unconstitutional. Although legislators envisioned that the Criminal Law (Sexual Offences and Related Matters) Amendment Act (32 of 2007) would provide a platform for victims of sexual assault and rape to know the HIV status of the alleged assailant and would provide a sense of restoration with regard to their human integrity and dignity, it still remains unclear what the role and function of the compulsory HIV testing of an alleged sex offender is, until the Constitutional Court makes a judgement upon these rulings (Smythe, Pithey & Artz, 2011: 16-47). In the case of *NM and others v Smith and Others* 2007 (5) SA 250, the Constitutional Court stressed that a person's HIV status is a private matter. The acknowledgement that a person's individual HIV status needs to be protected was documented as follows: "Every individual deserves protection against indiscriminate disclosure due to the nature and negative social context the disease has, as well as the potential intolerance and discrimination that result from its disclosure" (Smythe et al, 2011: 16-46).

The case of *Jansen van Vuuren & Another No v. Kruger* 1993 (4) SA 842 (A), in which a medical practitioner disclosed the HIV positive test result of his patient to a friend, clearly serves as an example that the malicious disclosure of an HIV test result is taken seriously by the South African Constitutional Court. The Constitutional Court expressed that disclosing the HIV status of an individual would create an undesirable position in which harmful policy consequences would be the end result. The Constitutional Court also further asserted that it is in the best interest of a person to keep HIV test results private, as a means to prevent or reduce discrimination and stigmatisation of People Living With HIV/AIDS (PLHWA) (Heneke, 2009: 757).

### **Constitutional rights**

Section 8(1) of the Constitution (108 of 1996) permits for the vertical representation of the Bill of Rights, which states that any offence whether it may be for investigational purposes should be subjected to constitutional review. The constitutionality of taking blood samples as authorised by section 37 of this Bill could be disputed on the grounds of infringement in cases that include the right to privacy, security and freedom of the person; which is also inclusive to the right not to provide self-incriminating evidence. Section 36 of the same Bill permits limitations that are related in a law of general application, and in circumstances in which limiting the right to privacy can be justified. The disposal of less restrictive measures should thus also be assured (Ndawula, 2010: 27).

As mentioned earlier in the article, it is evident that the constitutional rights of alleged sex offenders are overstepped if the right to privacy and human dignity is not practiced, seeing that the individual is forced to undergo an HIV test without his/her consent. The HIV



test results are also made known 'for the greater interest of society', although legislation should benefit the interests of the victim and not society. The invasive nature of the compulsory HIV testing of an individual violates their right to bodily integrity. Hence, HIV testing without consent can never be justified, which should be applied after succinct exploration of the justification thereof. As with other human rights violations, claimed justifications require careful scrutiny before its actual implementation in legislation. Laws governing the compulsory HIV of persons necessitate cautiousness, since this sort of practice does not provide reliable information about the rape survivors' risk of contracting HIV; is a misdirected approach in addressing the needs of victims of sexual assault or rape; and may not necessarily facilitate the psychological recovery of the victim. Moreover, privacy adjacent to the victims' HIV status post-trial could also be problematic, suggesting that victims could be made vulnerable to questions relating to their prior sexual history and HIV status before the assault (Pearsehouse, 2007: 7).

## **RESEARCH METHODOLOGY**

The research methodology addresses the scientific means in which the research had been conducted. These aspects include the research approach; sampling and data gathering methods; measurement of quality such as reliability and validity and the data analysis of the statistics. The research was conducted at four TCCs in the Gauteng province.

The study was based upon a positivistic paradigm which stresses that knowledge must originate from unbiased, rigorous, and empirical observations. Quantitative research permitted the researcher to quantify the responses of rape survivors via the use of statistical procedures (Smith, 2004: 49). The purpose of the research was thus descriptive in nature. Furthermore quantitative research was also utilised, since little empirical work had been done on the matter of the compulsory HIV testing of alleged sex offenders within the South African context (Rubin & Babbie, 2005: 126; Maxfield & Babbie, 2009: 185). Therefore, another purpose was also to explore the phenomenon under investigation.

Basic research formed the foundation of the study and was limited to exploring and describing the subjective perspectives of adult female rape survivors and the compulsory HIV testing of alleged sex offenders (Durrheim, 2002: 41). The study took the form of a descriptive survey design, with the aid of a self-administered questionnaire. The questionnaire comprised of six sections, although for the purpose of this article only section A (biographic and demographic information), section D (constitutional and human rights) and section F (recommendations pertaining to current sexual offences) were included. The self-administered questionnaire was handed to the adult female rape survivors to complete with the assistance of the Victim Assistance Officer (VAO) and staff located at the respective TCCs, after which the respondent placed the completed questionnaire in an envelope and sealed it. The envelope was handed to the VAO and collected by the researcher at a predetermined date and time. The principal researcher also trained the staff at the respective TCCs prior to the data collection process. A 5-point Likert scale was utilised to facilitate the research respondents in answering the questionnaire, as surveys are frequently used to establish the attitudes and opinions of individuals (Fouché, Delpont & De Vos, 2011: 156). Data gathering was continued until saturation was reached (Maree, 2007: 179).

The sampling method employed for the study was non-probability sampling. This sampling method is used for research purposes in which the researcher is not familiar with the population size or members of the population (Gravetter & Foranzo, 2003: 118; Leedy & Ormrod, 2010: 45; Strydom, 2011: 231). Adult female rape survivors were selected voluntarily depending upon their availability and willingness to participate in the study (Strydom & Venter, 2002: 207; Gravetter & Forzano, 2003: 125). More specifically, availability (convenience) sampling was thus used during the course of the research. Convenience sampling can be biased in the sense that certain groups may be over-represented

in a sample chosen by convenience, such as a racial group being overrepresented in the study, implying that the research respondents were mainly African women (Monette, Sullivan & DeJong, 2002: 149; Gravetter & Forzano, 2003: 125; Monette et al, 2005: 355; Grinnell & Unrau, 2008: 355; Strydom, 2011: 231-232). The selection of the adult female respondents was based according to the following criteria:

- 18 years of age or above;
- The rape must have occurred within a period of the past two years; and
- The victim must be preferably be undergoing court preparation at the facilities offering such services (although quite a substantial number of respondents opted not to lay charges against their alleged assailant).

### **INTERPRETATION OF THE DATA**

Quantitative data analysis is a systematic procedure in which the raw data are restructured to allow for the numerical presentation and interpretation of the results (Patton, 2002: 432). The coded data was captured in the Statistical Package for Social Sciences (SPSS) IBM 22 for analysis. Once the data had been checked for errors, analysis commenced. Data analysis generally takes two forms (i.e. descriptive and inferential analysis). Due to the explorative and descriptive purposes of the study, as well as the sampling method used, only descriptive analysis was undertaken, as the aforementioned allowed the researchers to describe the data in terms of scores for each variable (Durrheim, 2006: 189).

The Fisher's exact test was used for computing the exact probability of the chi-square statistic with accuracy when small samples are used. The aforesaid is a statistical test in which the underlying probability distribution for a two-way table permits the hypergeometric (numerous special or specific functions) distributions for an exact test. Furthermore, it also utilises the distribution of all contingency tables possible under the assumption of independence. Small-sample inference entrenched in the Fisher's exact test is that the conditional distribution is free of nuisance parameters. Similarly, exact confidence interval(s) and test(s) are set, which allows for probability calculations rather than approximate ones. It is, however, important to take note that small samples can be quite conservative. The Fisher's exact test thus computes the precise probability of outcomes in a 2x2 contingency table. In addition, the use of a two-sided Fisher's exact test is more common than one-sided tests. The latter would thus also prevent researchers from being biased when it comes to interpreting the data (Agresti, 2002: 93; Field & Miles, 2010: 596-600; Azen & Walker, 2011: 61; Salkind, 2011: 293).

The confidence interval for interpreting the Fishers exact test was set at 95 percent ( $>0.05$ ), inferring that the  $p$ -value should be less than 0.05 in order to acknowledge a level of significance between categories. Thus,  $p$ -values should always be directed by confidence intervals of the parameter estimates and value of the effect size measures (Sun, Pan & Wang, 2010: 5-6, 13; Fay, 2010: 373; Salkind, 2011: 165, 290).

The effect size of cross-tabulations was also applied to investigate if significant relationships existed. Effect size ( $\varphi$ ) is any statistical technique that quantifies the degree to which sample size results deviate from the expectations specified in the null hypothesis. The wider scope of the effect size is to measure the categories in two groups, namely: the mean differences and strengths of relations (how big these strengths are). Since no null hypothesis formed part of this study, the effect size will simply indicate the strength of relationships between categories. Effect sizes are envisioned to provide an indication of relative positions of one category (or groups) to another. The most common mode of reporting effect size is by benchmarking the results into categories, such as small (0.0-0.20), medium (0.20-0.50) and large ( $>0.50$ ). Since this study was of a sensitive nature, the effect size should be considered

or included continuously, as a small to medium effect size might also indicate important factors to deliberate when interpreting the final research results. An effect size adds a new facet to understanding noteworthy outcomes and making a judgement from these results, since the sample size is not taken into account when it comes to the interpretation of the data. Effect sizes are used to inform practical impact, although they may be regarded as being inherently meaningful (i.e. persuading policies) (Sun et al, 2010: 3; Salkind, 2011: 197-198).

Since the questionnaire was self-developed, the researcher made use of *Cronbach's alpha coefficient* ( $\alpha$ ) statistical test, as a means of ensuring internal (test-retest) reliability of the measuring instrument. The internal reliability of a measuring instrument is more plausible if  $\alpha=0.7$ , although a general value of  $\alpha=0.8$  is considered to be more satisfactory. Henceforward it is also important to take into consideration that as the number of items within a specific scale increases, so does the  $\alpha$  value. The aforesaid creates the imprint that the measuring instrument is very reliable which is not always the case since, as the number of items increases, so does your  $\alpha$  value as mentioned earlier (Field, 2009: 674-675). Ritter (2010: 3-5), however, warns that reliability should not be misinterpreted as a characteristic of a measuring instrument or test, but should rather be deemed as an accurate observation of the scores, suggesting that reliability relates to the consistency of scores.

Pretesting a questionnaire with the assistance of experts in identifying problems and verifying that the measuring instrument is measuring what it is supposed to measure was thus adhered to (Agarwal, 2007: 7; Agarwal, Xu & Poo, 2011: 1092). Henceforth, for the purpose of this study, content validity was established via the revision of the questionnaire with the aid of experts (statisticians) and TCC staff after the completion of the pilot study.

### **Overview of the biographic and demographic information**

The majority of the respondents (n=19; 42.2%), accessed the TCC at Chris Hani Baragwanath Academic Hospital (CHBAH) (NthabisengTCC). The aforesaid is the largest hospital in the southern hemisphere with about 3 200 beds and 6 760 staff members, located in Soweto (Johannesburg) (Chris Hani Baragwanath Hospital, [sa]). Fewer respondents (n=11) 24.4 percent reported the alleged rape at the Natalspruit Hospital and Laudium Community Healthcare Centre (LaudiumTCC) separately, whereas the least number of the respondents reported the rape incident at the Tembisa Hospital (MasakhaneTCC) (n=4) 8.9 percent. Most of the respondents were young adult females between 18-24 years of age (n=15) 33.3 percent, whilst the age category of 25-29 and 30-34 years of age were disseminated equally (n=8) 17.8 percent. This was followed by a more mature age group of 40-44 years of age (n=7) 15.6 percent. The age categories 35-39 years of age (n=4) 8.9 percent; and 45-49 years of age (n=3) 6.7 percent had the least number of research participants.

A large number of the respondents were African (n=38) 84.4 percent, followed by a lesser number of Coloured respondents (n=5) 11.1 percent, with Indian respondents being the least representative of the total number of research respondents (n=2) 4.4 percent. No white respondents participated in the study as the TCCs are primarily established in African residential areas (townships). The language of choice of the respondents is broadly dispersed with isiZulu (n= 17) 37.8 percent being the language of choice of the respondents, followed by Sesotho (n=7) 15.6 percent and Setswana (n=6) 13.3 percent. Sepedi (n=5) 11.1 percent was also significantly spoken by the research respondents. The less common mode of communication was Afrikaans (n=4) 8.9 percent, English (n=3) 6.7 percent and Xitsonga (n=2) 4.4 percent. Only one (n=1) 2.2 percent of the respondents indicated Sesotho Leboa as her home language.

Most of the respondents (n=42) 93.3 percent indicated being South African citizens, whereas (n=3) 6.7 percent were non-South Africans. Two of the respondents stated that they were from Zimbabwe, whereas the third non-South African respondent did not indicate the

country of origin. The majority of the respondents (n=17) 37.8 percent completed or are currently busy with Grades 11-12, whilst (n=8) 17.8 percent completed their Grades 8-10. A few respondents (n=5) 11.1 percent completed a certificate or diploma, whereas (n=4) 8.9 percent completed a Bachelors/B Tech degree. In this study two (4.4%) of the respondents only finished schooling up to primary level (Grades 1-7). The majority of the respondents were single (n=30) 66.7 percent, followed with an equal number of respondents (n=5) 11.1 percent being either divorced or living with a partner. Very few respondents (n=4) 8.9 percent were married and one (n=1) 2.2 percent respondent being currently separated from her partner. A noteworthy number of respondents (n=18) 40.0 percent lived with their parents, followed by (n=11) 24.4 percent who lived with a husband or partner. A few of the respondents (n=6) 13.3 percent lived with other relatives, whilst (n=5) 11.1 percent were living with their children or (n=4; 8.9%) lived alone. One of the respondents, however, did not indicate her current living arrangement. The area of residence for most of the respondents was the township (eKasi) (n=26) 57.8 percent, followed similarly by (n=9) 20 percent residing in either the city (metro) or informal settlement (Mkhuku). Only one respondent had an unknown mode of residence, which was not specified. A low income of R 25 000 or less per annum (n=32) 71.1 percent was specified by most of the respondents. An average income of R50 000-R100 000 (n=4), 8.8 percent, and R150 000-R200 000 (n=6); 13.4 percent was indicated as an approximate household income of the adult female respondents per annum. A higher income of R 250 000 (n=1) 2.2 percent and R300 000 or more (n=2) 4.4 percent was opined by the respondents.

The table below provides an overview of the subjective views of adult female rape survivors towards the constitution and human rights of both the victim and the alleged sex offender.

### Adult female rape survivors' perspectives towards constitutional and human rights

**Table 1: Views towards constitutional and human rights**

Variable	Views towards constitutional and human rights													
	Strongly agree		Agree		Neutral		Disagree		Strongly disagree		Missing cases		Total	
	n	%	n	%	n	%	n	%	n	%	n	%	n	%
1. The compulsory HIV testing of rapist(s) is <u>reasonable</u> and can be <u>justified</u> .	17	37.8	11	24.4	10	22.2	5	11.1	1	2.2	1	2.2	45	100
2. Rapist(s) <u>deserve</u> the right to a fair trial.	9	20.0	9	20.0	5	11.1	7	15.6	14	31.1	1	2.2	45	100
3. Rapist(s) <u>should</u> have the right to <u>privacy</u> , (their HIV status should not be made known to anyone)	4	8.9	8	17.8	5	11.1	10	22.2	17	37.8	1	2.2	45	100
4. Victims of rape have the right to <u>know</u> the HIV test result of their <u>rapist(s)</u> .	19	42.2	16	35.6	5	11.1	2	4.4	2	4.4	1	2.2	45	100
5. The court must consider the rights of <u>both</u> the <u>victim</u> and the <u>rapist(s)</u> .	10	22.2	9	20.0	14	31.1	5	11.1	5	11.1	2	4.4	45	100
6. Rapist(s) <u>should not</u> have rights to privacy at all.	14	31.1	15	33.3	6	13.3	3	6.7	6	13.3	1	2.2	45	100
7. Victims of <u>rape</u> should be treated with <u>fairness</u> and <u>respect</u> .	20	44.4	16	35.6	2	4.4	1	2.2	3	6.7	3	6.7	45	100
8. Victims of rape should have the right to be <u>offered</u> and <u>receive</u> information about their <u>court case</u> .	21	46.7	20	44.4	2	4.4	1	2.2	1	2.2	0	0	45	100

9. Victims of rape should have the right to be <b>offered and receive information</b> about <b>medical</b> and <b>psychological</b> aftercare following rape.	24	53.3	17	37.8	2	4.4	1	2.2	1	2.2	0	0	45	100
10. Victims of rape should have the right to <b>protection</b> by the law against intimidation (when you are threatened to drop the case).	22	48.9	17	37.8	2	4.4	1	2.2	2	4.4	1	2.2	45	100
11. Victims of rape should have the right to <b>receive assistance from</b> TCCs.	24	53.3	15	33.3	1	2.2	2	4.4	0	0	3	6.6	45	100
12. Victims should have the right to <b>restitution</b> (a feeling that the wrongdoing was addressed by the Criminal Justice System).	17	37.8	13	28.9	9	20.0	2	4.4	1	2.2	3	6.7	45	100
13. The rights of the <b>accused</b> should not be put before the needs of the <b>victim</b> .	16	35.6	11	24.4	9	20.0	5	11.1	0	0	4	8.9	45	100
14. The <b>HIV status</b> of a rapist (s) should be <b>considered</b> (taken seriously) by the court during sentencing.	19	42.2	13	28.9	6	13.3	4	8.9	3	6.7	0	0	45	100
15. The <b>HIV status</b> of the rapist (s) should be treated as a <b>serious factor</b> (an intentional attempt to spread HIV).	26	57.8	8	17.8	6	13.3	4	8.9	1	2.2	0	0	45	100
16. Rapist (s) who tested <b>HIV-positive</b> should also be charged with <b>attempted murder</b> .	25	55.6	12	26.7	3	6.7	3	6.7	1	2.2	1	2.2	45	100
17. After rape, both the <b>victim(s)</b> and <b>rapist(s)</b> should be tested for HIV.	24	53.3	10	22.2	6	13.3	4	8.9	1	2.2	0	0	45	100
18. The compulsory HIV testing of rapist(s) will <b>prevent</b> rape in future.	14	31.1	6	13.3	7	15.6	4	8.9	8	17.8	6	13.3	45	100
19. More TCCs should be made available.	29	64.4	8	17.8	2	4.4	1	2.2	0	0	5	11.1	45	100
20. Victims of rape should be able to <b>access</b> counselling services <b>free of charge</b> , even after the <b>court process</b> .	28	62.2	9	20.0	4	8.9	1	2.2	1	2.2	2	4.4	45	100
21. Victims of rape should be able to access counselling services <b>free of charge</b> , even if the rapist was <b>never caught</b> by the police.	29	64.4	8	17.8	1	2.2	1	2.2	0	0	6	13.3	45	100

The 21 variables will be discussed briefly.

***Variable 1: The compulsory HIV testing of rapist(s) is reasonable and can be justified***

A noteworthy number of respondents who strongly agreed and agreed combined (n=28) 62.2 percent specified that the compulsory HIV testing of alleged rapist(s) is sensible and can be justified, whereas (n=6) 13.3 percent of the respondents had a negative attitude towards the aforesaid statement. Ten (22.2%) of the respondents were neutral.

***Variable 2: Rapist(s) deserve the right to a fair trial***

A low number of respondents (n=18) 40 percent indicated an enthusiastic perception towards rapist(s) deserving the right to a fair trial (strongly agreed and agreed combined). It is, however, important to take note that (n=14) 31.1 percent of the respondents strongly disagreed that rapists deserved the right to a fair trial.

***Variable 3: Rapist(s) should have the right to privacy***

Even if the response to this variable was quite widely distributed, a reasonable number of respondents, namely: seventeen (37.8%), strongly disagreed that rapists should have the right to privacy, suggesting that the HIV status of the alleged rapist should be made known. Ten (22.2%) of the respondents, however, disagreed with the statement.

***Variable 4: Victims of rape have the right to know the HIV status of their rapist(s)***

The majority of the respondents (n=19) 42.2 percent strongly agreed, whereas, (n=16) 35.6 percent agreed that victims of rape have the right to know the HIV status of the alleged rapist(s). A lesser number of the respondents strongly disagreed and disagreed respectively (n=2) 4.4 percent.

***Variable 5: The court must consider the rights of both the victim and the rapist***

A notable response was recorded as (n=14) 31.1 percent of the respondents were neutral that the court must consider the rights of both the victim and the rapist, although (n=10) 22.2 percent strongly agreed and (n=9) 20.0 percent agreed.

***Variable 6: Rapist(s) should not have any rights to privacy at all***

An equal number of respondents (n=14) 31.1 percent strongly agreed that rapists should not have any rights to privacy which, was also supported by (n=15) 33.3 percent of the respondents who agreed with the statement. A low number of the total respondents (n= 6) 13.3 percent were neutral or disagreed.

***Variable 7: Victims of rape need to be treated with fairness and respect***

Nearly half of the respondents (n=20) 44.4 percent strongly agreed that victims of rape should be treated with fairness and respect, which was correspondingly followed with a comparable response of (n=16) 35.6 percent who agreed.

***Variable 8: Victims of rape should have the right to be offered and receive information about their court case***

Almost half of the respondents (n=21) 46.7 percent strongly agreed that rape survivors should have the right to be offered and receive information relating to their case, whilst (n=20) 44.4 percent of the respondents agreed.

***Variable 9: Victims of rape should have the right to be offered and receive information about medical and psychological aftercare***

An above average number of respondents (n=24) 53.3 percent strongly agreed that victims of rape should have the right to be offered and receive information about medical and psychological care. In addition, (n=17) 37.8 percent of the respondents agreed and a low response of (n=2) 4.4 percent were neutral.

**Variable 10: Victims of rape have the right to be protected by the law against intimidation**

Close to half of the respondents (n=22) 48.9 percent strongly agreed to be protected by the law against intimidation, whilst (n=17) 37.8 percent agreed.

**Variable 11: Victims of rape should have the right to receive assistance from TCCs**

An above average number of respondents (n=24) 53.3 percent strongly agreed that victims of rape should have the right to receive assistance from TCCs, while fifteen (33.3%) of the respondents agreed with this statement.

**Variable 12: Victims of rape should have the right to restitution**

A few of the respondents (n=17) 37.8 percent strongly agreed that victims of rape should have the right to restitution, whilst (n=13) 28.9 percent agreed. A less prominent response (n=9) 20.0 percent of the respondents were neutral.

**Variable 13: Rights of the accused rapist should not be put before the needs of the victim**

A noteworthy number of respondents (n=16) 35.6 percent strongly agreed that the rights of the accused should not be put before the needs of the victim, while (n=11) 24.4 percent of the respondents agreed. A low number of respondents (n=9) 20.0 percent were neutral, whereas (n=5) 11.1 percent disagreed.

**Variable 14: The HIV status of a rapist should be considered by the court during sentencing**

A significant number of adult female rape survivors (n=19) 42.2 percent strongly agreed that the HIV status of a rapist should be considered by the court during sentencing, (n=13) 28.9 percent agreed and (n=6) 13.3 percent were neutral.

**Variable 15: The HIV status of the rapist should be treated as a serious factor during sentencing and should be seen as a means of intentional transmission of HIV**

An above average number of respondents (n=26) 57.8 percent strongly agreed that the HIV status of the rapist should be treated as a serious factor during sentencing, and ought to also be seen as a means of intentional transmission of HIV, with a smaller number of respondents (n=8) 17.8 percent who agreed. Fewer respondents (n=5) 11.1 percent opined a negative response towards the former statement.

**Variable 16: Rapist(s) who tested HIV-positive should also be charged with attempted murder**

More than half of the respondents (n=25) 55.6 percent strongly agreed that rapists who tested HIV-positive should also be charged with attempted murder, and (n=12) 26.7 percent of the respondents agreed.

**Variable 17: Both the victim and rapist must be tested for HIV after rape**

A significant number of respondents (n=24) 53.3 percent strongly agreed that both the victim of rape and the rapist should be tested for HIV following rape, followed by (n=10) 22.2 percent of the respondents who agreed and (n=6) 13.3 percent of the respondents were neutral. A few respondents (n=4) 8.9 percent indicated an adverse response towards the statement.

**Variable 18: Compulsory HIV testing of rapist(s) will prevent rape in future**

The research respondents articulated a wider scope of response towards the compulsory HIV testing of rapists as a preventive strategy towards rape in future, since (n=14) 31.1 percent of the respondents strongly agreed, (n=6) 13.3 percent agreed and (n=7) 15.6 percent were neutral. No empirical data, however, existed at the time of writing to support the idea that the compulsory HIV testing of alleged sex offenders will prevent rape in future.

**Variable 19: More TCC centres should be made available**

Most of the respondents (n=29) 64.4 percent strongly agreed that more TCC centres should be made available, while (n= 8) 17.8 percent agreed.

**Variable 20: Victims should be able to access counselling services free of charge, even after the court process**

A large number of rape survivors (n=28) 62.2 percent strongly agreed that victims of rape should receive continuous access to counselling services free of charge, even after the court process, which is reinforced by (n=9) 20.0 percent of the respondents who agreed.

**Variable 21: Victims should have access to counselling services even if rapist is never caught by the police**

Most of the research respondents (n=29) 64.4 percent strongly agreed that victims of rape should have access to counselling services even if the rapist was never caught by the police, whereas (n=8) 17.8 percent agreed.

Statistical tests were run on all the variables to see if a significant association occurred views about constitutional and human rights when compared to the age category and income status of the research respondents. Cross tabulations were thus restricted to cases in which the  $p < 0.05$ . For the purpose of the cross tabulations, the age categories were divided in two groups, namely: 18-39 years of age (early adulthood) and 40-65 years of age (middle adulthood) (Eysenck, 2004: 10).

**Table 2: Cross tabulation and statistical tests with age category and views towards constitutional and human rights**

Variable				Response	Age category			
					18-39		40-65	
					n	%	n	%
1. The court must consider the rights of <b>both</b> the <b>victim</b> and the <b>rapist(s)</b>				Agree	19	51.4	0	0
				Disagree	7	18.9	3	50
Missing cases		Fisher's exact test $p$	Effect size $\phi$	Neutral	11	29.7	3	50
n	%	0.0321	0.3697	Total	37	100	6	100
2	4.4							
Variable				Response	Age category			
					18-39		40-65	
					n	%	n	%
2. Victims of rape should have the right to be <b>offered and receive information</b> about <b>medical</b> and <b>psychological</b> aftercare following rape.				Agree	37	94.9	4	66.7
				Disagree	1	2.6	1	16.7
Missing cases		Fisher's exact test $p$	Effect size $\phi$	Neutral	1	2.6	1	16.7
n	%	0.0799	0.3369	Total	39	100	6	100
0	0							

More than half (n=19) 51.4% of the adult female rape survivors in the age category of 18-39 years of age (early adulthood) agreed that the court should consider the rights of both the victim and the rapist(s), whereas there was no response for the age category of 40-65 years of age (middle adulthood). A noteworthy association but small effect size of ( $p=0.0321$ ;  $\phi=0.3697$ ) was obtained during the cross tabulation of the variable within the age categories. Two (4.4%) missing cases were excluded from the analysis.



A large proportion of the research respondents (n=37) 94.9 percent in the age category of 18-39 years of age, agreed that victims of rape should have the right to be offered and receive information about psychological and medical aftercare following rape, whilst (n=4) 66.7 percent of the respondents in the age category of 40-65 years of age agreed. A weak association and small effect size of ( $p=0.0799$ ;  $\phi=0.3369$ ) was, however, observed during the cross tabulation of the variable with the age categories.

The researchers made use of *Cronbach's alpha coefficient* ( $\alpha$ ) statistical test, as a means of affirming internal (test-retest) reliability of all 21 items of the measuring instrument. For the purpose of this study the internal reliability of the items within the scales of section of the questionnaire focusing on the constitutional and human rights was calculated as  $\alpha=0.860$ , a quite significant confirmation of internal reliability.

## DISCUSSION

The research respondents were relatively young adult females between the ages of 18-24 years. These findings are also in line with research conducted by Lammers, Martin, Andrews and Seedat in 2010, who found that out of a sample of 1 132 rape survivors at the Karl Bremer Hospital Rape Centre in Cape Town between 1 August 2007 to 31 July 2008, the average age was 20.7 years of age (Lammers, Martin, Andrews & Seedat, 2010: 1). Almost all the research respondents were African, a result that corresponds to a study conducted in Gauteng in 2001 by Tshwaranang Legal Advocacy Centre to End Violence Against Women (TLAC), MRC and Centre for the Study of Violence and Reconciliation (CSVR), which comprised of 11 926 reviewed rape cases in which 73 percent of rape survivors were African. IsiZulu was the language spoken by most of the respondents, a language of choice in the Gauteng province. It is also important to take note that 79.2 percent of the total population in the aforementioned province are African (Vetten, Jewkes, Sigsworth, Christofides, Loots, & Dunseith, 2008: 30; Index Mundi, 2014: 3; Fact Sheet Gauteng, [sa]: 1).

Research conducted by Bello and Pather (2008: 46) with rape survivors at Karl Bremer Hospital Rape Centre, Tygerberg in Cape Town, found that 28.6 percent of the total respondents of the research sample had completed their secondary schooling, indicating comparable results with the current research findings. This is not surprising, since most of the respondents fall within the age category of 18-24 years of age, with 18-19 year old research respondents most likely to be enrolled in Grades 11-12. Furthermore, the same study found that 91.8 percent of the victims were single, which are comparable to the current study, since 66.7 percent of the adult female rape survivors were single at the time of the study (Bello & Pather, 2008: 46). Another reason for the high number of respondents being single could be directly related to the majority of the respondents falling in the 18-24 age category, 33.3 percent.

Almost half of the respondents 46.7 percent wanted to be informed about their case more frequently, whereas 53.3 percent strongly agreed that victims should receive medical and psychological care after rape. Long-term psychological and if deemed necessary medical care was thus opined as a priority for more than half of the research respondents.

It was of interest to see that almost half 42.2 percent of the respondents strongly agreed that the HIV status of an alleged sex offender should be made known to the victim, although the disclosure of the HIV status of the alleged rapist may set the foundation for malicious conduct. Disclosure of an individual's HIV status directly violates the right to privacy, as postulated in South Africa's Constitution (Heneke, 2009: 759; Smythe et al, 2011: 16-46). Furthermore, it is also rooted in the in Criminal Law (Sexual Offences and Related Matters) Amendment Act (32 of 2007) that anyone who wilfully and maliciously discloses the HIV status of an alleged sex offender, is guilty of an offence and might be liable to a fine or imprisonment of up to three years, or imprisonment and a fine.

The majority of the respondents 62.2 percent collectively strongly agreed and agreed that the compulsory HIV testing of an alleged sex offender is reasonable and can be justified. The HIV status of alleged rapist also surfaced as an important factor to be considered by the court during sentencing, since 42.2 percent strongly agreed with this statement. Furthermore, a person that intentionally transmits HIV to another should face additional charges such as attempted murder, was also firmly relayed by the victims, since 57.8 percent of the respondents strongly agreed that the HIV status of an alleged sex offender should be taken seriously during sentencing. In most sub-Saharan countries, heavy sentences are imposed for the intentional transmission of HIV through coerced sexual intercourse, ranging from life sentences to the death penalty in instances whereby the alleged rapist was aware of his HIV-positive status during the execution of the sexual assault (ARASA, 2009: 25).

Various challenges and limitations presented themselves during the research process. Prior to the data collection, it was foreseen that the questionnaire would be translated into Afrikaans, Sepedi and Isizulu, being three official languages commonly spoken in the Gauteng province. This, however, would have greatly increased the volume capacity of the questionnaire, making respondents more reluctant to answer the questionnaire. The literacy levels and subsequently the ability of the research respondents to complete the questionnaires were another major obstacle. This led to the language of the questionnaire being modified to simpler terminology after the initial pilot study. The study, however, does not make specific reference to illegal immigrants or sex workers as victims of rape, nor does it specify if the victim experienced domestic violence or marital rape at the hands of the perpetrator.

TCCs are predominantly situated in the township, which thus excluded the white ethnic group from the study, who predominantly make use of private health facilities (TCC staff, 2014). The study also did not make reference to any information relating to the details of the actual rape and HIV status of the rape survivor, due to ethical restrictions. The principal researcher was heavily reliant upon the staff located at the respective TCC to administer the questionnaire, thus having limited control over the data collection process. Many of the respondents accessed the TCCs over weekends or in the evenings for counselling, court preparation or to collect their remaining post-exposure prophylaxis (PEP), leaving them with little time to complete the questionnaire, since they make use of public transport and did not want to leave the centre late at night. It is also imperative to take note that not all rape survivors were undergoing court preparation, since some victims might not have laid criminal charges against the alleged rapist or their case is not currently being heard in court. The research results can also not be generalised within the context of the broader population due to the small research sample of 45 respondents.

In light of the above, it became evident that the adult female rape survivors in their adulthood had a positive attitude towards the rights of the victim, and that both the rights of the alleged sex offender and the victim should be considered by the court. The compulsory HIV testing of alleged sex offenders also seemed to be beneficial to the well-being of the victim of rape, since the majority demonstrated an optimistic approach to the practice as such.

## **RECOMMENDATIONS FOR POLICY CONSIDERATION**

The following suggestions were made by the research respondents pertaining to their legal rights, yet not neglecting the rights of the alleged sex offender.

Respondent 1: *“The government must educate women about their legal rights because we really don’t know about these things.”* From the above statement, there is a need for government to mobilise and sustain more educational programmes about the legal rights of rape survivors.

Respondent 2: *“Everyone must know their status even to attempted rape. Women must be aware of the rapists and report immediately. If you are affected to take it easier, do not stress.”* The rape survivors opined a desire to know their own HIV-status, which is also inclusive of having the opportunity to be informed of the HIV status of their assailant.

Respondent 3: *“Every woman must know their right and place they must report every case to the police station. They will know their rights if we do awareness.”* As mentioned earlier that all human beings have rights, it is evident from the statement opined by the rape survivor that women be afforded with information about their rights and procedures in reporting a sexual offence at a police station.

Respondent 4: *“When someone a woman or man was rape must inform him/her about the legal rights because not all of us know about legal right.”* An aspiration to be informed about the legal rights of a rape survivor had once again been prompted by one of the respondents.

Respondent 5: *“An assessment should take place in a session when tests are done then should be well informed of the rights to the whole situation, even to know results of the perpetrator.”* An overview of the procedures about the compulsory HIV testing of an alleged sex offender had been brought forth by a respondent, since she would like to be informed of the application process that it entails.

## **CONCLUSION**

The study unearthed the subjective views of adult rape survivors as a point of consideration from a constitutional and human rights perspectives. Although various arguments had been raised about the efficacy and sufficiency of the compulsory HIV testing of alleged sex offenders, one can assume from the research results that rape survivors would find this approach favourable within the context of sexual offences. Sanctions in an attempt to regulate and curb the transmission of HIV have become common practice in a number of countries, whilst the motive thereof still remains unclear. The right to privacy is not absolute, a right which can be impinged upon if the rights of an alleged rape assailant significantly outweighs the interests of a society. It is envisioned that the Constitution of any given society should act as a guardian to protect and safeguard the welfare and security of any individual, free from coercion in relation to bodily integrity, with the intent of keeping the HIV-status of an accused of sexual violence private, an endeavour inclusive of its remnants rests upon constitutional review.

The profile of the respondents yielded to be young female adults, mostly school leavers, single; African; and from a low socio-economic background. The research found that the research respondents had a positive approach towards their own constitutional and human rights, with various perceptions towards the rights of the alleged sex offender. It became evident that the compulsory HIV status of alleged sex offenders would be beneficial in assisting the victim's road to recovery, although the feasibility thereof still remains questionable. The statistical analysis of the data provided insight into a need to have both the victim and alleged rapist tested for HIV following rape. Furthermore, the victims also expressed a desire to receive continuous medical and psychological care irrespective of the circumstances surrounding their rape or sexual assault. It is, however, unclear whether the compulsory HIV testing of alleged sex offenders would be feasible, or simply imposed to be used as a gateway to criminalise the intentional transmission of HIV within the South African context.

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**ENDNOTES**

1. Interested persons are a person of interest who have a material interest in the well-being of a victim, including a spouse, medical practitioner, partner, family member, parent, guardian, caregiver, curator, counsellor, health service provider, teacher or social worker.
2. The Centre for Applied Legal Studies & Tshwaranang Legal Advocacy Centre is affiliated with the University of Witwatersrand, South Africa.

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