

## Compulsory testing of alleged sexual offenders – implications for human rights and access to treatment

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Rape is a major criminal and public health problem in South Africa. Not only does it inflict major trauma on the victim, but it also affects the integrity and dignity of the victim and puts him or her at risk of contracting various sexually transmitted diseases such as HIV and other sexually transmitted infections (STIs).

This paper proceeds with the current definition of rape, the provisions of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 and the arguments relating to compulsory HIV testing of perpetrators, and post-exposure prophylaxis for rape victims/survivors. It reviews the legal and ethical issues relating to compulsory HIV testing of perpetrators, as well as the access to antiretroviral treatment of rape victims and perpetrators if they are diagnosed with HIV infection.

It concludes that compulsory testing may provide a feeling of reassurance to victims/survivors but does not protect them from infection, since they have to take all the necessary precautions that they would otherwise have taken had they not demanded the HIV test of the perpetrator.

People, especially women, are threatened continually in their every day surroundings. They face violence in their communities, in their homes and in the workplace. The continuous threat dominates the core of their existence, affecting the way women think and behave.<sup>1</sup>

Recently there have been calls in the media for compulsory HIV testing of rape perpetrators.<sup>2,3</sup> The Minister of Women, Children and Persons with Disabilities, Noluthando Mayende-Sibiya, said that rape victims should be encouraged to apply for compulsory HIV testing of alleged rapists.<sup>3</sup>

As things stand, the perpetrator will be compelled to be tested for HIV. A number of issues arise. Firstly, the victim and various others will know the HIV status of the perpetrator, whereas the perpetrator will not know the status of the victim. Secondly, the perpetrator, once convicted, is likely to receive free antiretroviral (ARV) treatment, and the question arises whether the victim is as likely as the perpetrator to receive treatment.

The following issues will be explored in this paper: (i) has compulsory HIV testing of the alleged perpetrator violated his rights? (ii) will compulsory HIV testing make any difference to preventing the victim from being infected? (iii) should a perpetrator be given treatment in preference to the victim, or vice versa? (iv) can the victim, if she tests positive, demand ARV treatment from the government? and (v) is South Africa progressively realising the human right to health and treatment for perpetrators of rape and victims equitably?

## Legislative and other provisions

### Definitions

The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (hereafter the Amendment Act 2007)<sup>4</sup> redefines and broadens the definition of rape. Accordingly, rape means any unlawful and intentional commission of an act of sexual penetration with a complainant without his/her consent; the rape victim means any person alleging that a sexual offence has been perpetrated against him or her.<sup>4</sup> The preferable term for this is 'rape survivor'.<sup>1</sup> For the purposes of this paper, rape victim and rape survivor will be used interchangeably.

### Rights of an accused person

Accused persons or unsentenced prisoners have the same rights as the general population.<sup>5</sup> They have the right to the presumption of innocence even: (i) for very serious crimes; (ii) if they have been refused bail; or (iii) if there is already strong evidence to show guilt.<sup>6</sup>

### Confidentiality

According to the South African Constitution, everyone has a right to freedom and security of the person<sup>7</sup> and privacy.<sup>8</sup> The National Health Act<sup>9</sup> further guarantees the right of confidentiality to everyone, which includes the right not to have the privacy of their communications infringed, and states that 'All information concerning a user, including information relating to his or her health status, treatment or stay in a health establishment, is confidential.'<sup>10</sup> In terms of the National Health Act 2003, disclosure of HIV status

is permitted only when: (i) the patient consents to the disclosure; (ii) a court order or any law requires the disclosure; and (iii) non-disclosure of the information represents a serious threat to public health.<sup>10</sup>

## Policy on testing

According to the Department of Health's National Policy on Testing for HIV,<sup>11</sup> testing for HIV may only be done with informed consent (except for a few exceptions), and pre-test and post-test counselling must be given to each person before the test and after the person receives the test result, respectively. If a facility is not able to do counselling, the person must be referred to another place for counselling.

The Health Professions Council of South Africa (HPCSA) recognises that testing for HIV is unlike testing for any other medical condition and that special conditions apply.<sup>12</sup> Accordingly, HIV testing must only take place with the voluntary, informed consent of the patient, and the test results of HIV-infected patients should be treated with the highest possible level of confidentiality.<sup>12</sup> This right to privacy is also endorsed by the South African Medical Association.<sup>13</sup>

## Right to access to health care services

The South African Constitution states that everyone 'has the right to have access to health care services'<sup>14</sup> and that no one may be refused emergency medical treatment.<sup>14</sup> It further states that 'the state must take reasonable legislative and other measures within available resources to achieve the progressive realisation of these rights'.<sup>14</sup>

Whereas not all citizens currently enjoy universal access to health, the period since 1994 has seen a radical transformation of the health sector in favour of increased access to health care for the poor, improved quality of services, and making the health system more cost effective.<sup>15</sup> However, whether the South African government has ensured a progressive realisation of these basic requirements is a matter for further debate and exploration. Moreover, South Africa has attempted to protect, promote, and realise virtually every health-related right in the country's Bill of Rights.<sup>15</sup>

While much progress has been made with regard to accessing ARV treatment by prisoners,<sup>16</sup> victims still encounter many obstacles in accessing this treatment. This demonstrates that we are still a long way from ensuring the realisation of the human right to access health care in this aspect of life in South Africa.

## Bar on unfair discrimination

The Constitution provides for the right to equality before the law<sup>17</sup> and prevents people from being unfairly discriminated against on the ground of, *inter alia*, gender.<sup>17</sup> Furthermore, the rights relating to both men and women include the right to be treated fairly and be given reasons by administrative bodies if fair treatment cannot be offered.<sup>18</sup>

## Relevant case law

The positions advanced in this paper have been tested by a number of cases. This legal framework was tested in the case of *C v Minister of Correctional Services*<sup>19</sup> in which a prisoner was subjected to an HIV test without his consent and counselling. The court held that, in these circumstances, the deviation from the ac-

cepted norm of informed consent, including the fact that there was no pre-counselling, was of such a degree that it was material and wrongful. It is submitted that these requirements for testing have become universal in South Africa.

According to the Constitution there is a positive obligation on the State to take the legislative steps to provide access to health care services.<sup>14</sup> In landmark judgments in the *Grootboom*<sup>20</sup> and *Treatment Action Campaign*<sup>21</sup> cases, the Constitutional Court affirmed the principle that the measures taken by the State for the delivery of socio-economic rights must be reasonable, comprehensive and accessible. Following on these precedents, the Durban High Court ordered the government in the Westville Prisoners case<sup>16</sup> forthwith to provide ARV treatment to affected prisoners.

## Review of the Amendment Act 2007

The Amendment Act 2007 states that if a victim has been exposed to the risk of infection with HIV as the result of a sexual offence having been committed against him/her, he/she may: (i) receive post-exposure prophylaxis (PEP) for HIV infection at a public health establishment at State expense and in accordance with the State's prevailing treatment norms and protocols; (ii) be given free medical advice surrounding the administering of PEP prior to the administering thereof; and (iii) be supplied with a prescribed list containing the names, addresses and contact particulars of accessible public health establishments contemplated in the Act. This is subject to the proviso that he/she has reported the matter to the South African Police Services (SAPS)<sup>22</sup> and a designated health establishment.<sup>22</sup> Furthermore, the victim may, within 90 days of the commission of the offence, make an application for an order that the alleged offender be tested for HIV.<sup>23</sup> The results of the HIV test should be shown to the presiding officer, the victim and other interested persons as the case may be;<sup>24</sup> such interested persons may be the investigating officer, the alleged offender, the prosecutor, and any other person who needs to know the test results for purposes of any civil proceedings or an order of a court.<sup>25</sup>

Specific guidelines to be followed for compulsory HIV testing and disclosure of results are laid down by the Act.<sup>26</sup> Furthermore, the Act makes it a criminal offence for a person with malicious intent or in a grossly negligent manner to: (i) lay a charge with the SAPS regarding an alleged sexual offence to ascertain HIV status of any person; and (ii) to disclose the results of the HIV test in contravention of the Act.<sup>27</sup>

## The alleged perpetrator

It is trite law that the alleged rapist or accused person is presumed innocent until proved guilty of the offence. If this principle is compromised, the alleged perpetrator may be acquitted or found not guilty of rape even though it seems clear that he committed the offence.<sup>1</sup> The Constitution further protects his rights to privacy and confidentiality.<sup>10</sup> According to the provisions of both the Constitution and the National Health Act 2003, the alleged perpetrator has the right to refuse to give consent for HIV testing. The National Policy on HIV Testing empowers everyone (including the alleged perpetrator) not to be tested without their consent and gives them the right to receive pre- and post-test counselling along with HIV testing. It is contended that the Amendment Act 2007 runs counter to the National Policy on HIV Testing, and is potentially in conflict with key constitutional protections over privacy, confidentiality and consent as well as the Health Professions Council of South Africa

(HPCSA)'s ethical provisions. However, none of these rights are absolute and they may be qualified provided the limitation is reasonable and justifiable.

Furthermore, as a consequence of the Amendment Act 2007, the HIV status of the perpetrator will now be known by a number of people, namely the victim, the presiding officer, the prosecutor and his lawyer, which is tantamount to an involuntary disclosure of his status. It can therefore be argued that such provisions violate his rights.

It is also trite that the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable, based on human dignity, equality and freedom, and taking into account all relevant factors.<sup>28</sup> The Constitution therefore places the responsibility on the State to make sure that the limitation is reasonable and justifiable.<sup>28</sup> Furthermore certain 'relevant factors' as listed in section 36 need to be taken into account.<sup>28</sup> The limitation of some of the perpetrator's rights in this case, such as privacy of his test results, may be reasonable, bearing in mind that he is alleged to have inflicted trauma on the victim and violated the privacy, dignity and integrity of the victim by committing the rape. The rationale for this limitation of the alleged perpetrator's rights is the extremely high rate of rape in South Africa. According to the SAPS, 55 114 cases of rape were reported in the period 2004/2005.<sup>29</sup> Since it is estimated that only 1 out of every 9 rapes is reported, the total number of rapes is potentially much larger.<sup>29</sup> Furthermore, these figures do not include incidents of indecent assault (10 123 in the same period).<sup>29</sup>

A further issue concerns the availability of ARVs to prisoners. As discussed *supra*, prisoners can now receive ARVs if they fulfil the relevant criteria.<sup>16</sup> While the ruling in *EN v Government of RSA* did not address the availability of ART to awaiting-trial prisoners or alleged perpetrators, it can be argued that the alleged perpetrator falls in the category of 'similarly situated prisoners'<sup>16</sup> alluded to in the judgment. It is possible, however, that such detainees may not receive ARV treatment should they otherwise fulfil the criteria for treatment, which amounts to discrimination against this category of prisoner. There is also the moral dilemma of forcing a person to test for HIV, and then denying him access to ARV treatment.

The Guidelines of the South African HIV Clinicians Society go some way in addressing this anomaly by proposing the provision of HIV-related health care to persons held in the following situations: (i) detention in police custody, with or without charge; (ii) incarceration of prisoners awaiting trial, convicted and/or sentenced; (iii) detention in military custody; (iv) detention while awaiting deportation; (v) incarceration of children (persons below 18 years); and (vi) infants and/or children accompanying persons in any of the above situations.<sup>30</sup>

## The victim/survivor

The requirement of the Act<sup>4</sup> for the victim to receive PEP seems reasonable and is indirectly supported by the Centers for Disease Control and Prevention<sup>31</sup> and the World Health Organization.<sup>32</sup> The Amendment Act 2007, however, fails to take into consideration the effect of the window period, namely the period during which a person may be infected with HIV while the blood test may not show HIV antibodies. Bearing this in mind, a person whose test proves negative for HIV should not be regarded as completely free from the infection until he/she has been tested again after 3 months, provided that during that time he/she has not been exposed to the

virus again. The knowledge of the HIV status of the perpetrator will therefore not change the victim's needs for PEP, since he/she must take ARVs whether or not the perpetrator's status is positive.

Under the Amendment Act 2007, a rape survivor can only access treatment at a State facility if the rape is reported and a charge laid within 72 hours of the alleged event.<sup>22</sup> This is reasonable, since 72 hours is the latest time recommended to initiate PEP after an event such as an attack or occupational exposure. With respect, the provision that the victim has 90 days in which to demand testing of the alleged perpetrator does not make sense if the purpose of testing the perpetrator is to enable the survivor to make a decision about the need for PEP, which in any event must be commenced within 24 hours (or 72 hours at the latest). An added complication is that the alleged perpetrator may be in the window period for HIV infection, and therefore the 90-day time frame does not serve this purpose.

While the government has vowed to scale up PEP and a comprehensive package of sexual assault care to 90% of facilities in the country by 2010,<sup>33</sup> there is no guarantee that a survivor in such a situation will be able to access such a facility.

## The conundrum

There is a measure of unfairness in that a victim of rape may not receive appropriate treatment, including ARVs, should she require it, unless her CD4 count falls to 200 cells/ $\mu$ l. She may not know the location of the facility, or the facility may be a long distance away. Moreover, a negative or positive HIV test can only be confirmed more than 3 months later (after a further confirmatory test), at which point it is too late to commence PEP. At the same time, if she is eventually diagnosed as HIV positive she may not easily be able to access ARV treatment because of the slow pace of the scale-up of treatment in the public health sector.

This begs the question: how far has the State gone to ensure progressive realisation of the human rights enshrined in the Constitution for victims of rape? The Constitution<sup>34</sup> and international law<sup>35</sup> oblige the State to ensure the progressive realisation of all human rights (including therefore those of the victim). In *Grootboom* the court obliged the State to provide an enabling environment for the provision of housing by identifying the 'legal, administrative operational and financial hurdles and lowering them over time'.<sup>20</sup> In the context of ARV provision, there are two possible ways that this can be accomplished, namely: (i) the provision of additional funds; and (ii) the reduction of the cost of medicines through various legislative and regulatory measures.<sup>36</sup>

Although our jurisprudence has ensured a significant degree of the realisation of the human right to access health care for prisoners,<sup>16</sup> this has not necessarily occurred in respect of rape victims. This may be due to the fact that prisoners have been catapulted into the spotlight because they are regarded as a vulnerable population, and their cause has been taken up by powerful lobby groups such as the Treatment Action Campaign and the AIDS Law Project. That prisoners are wards of the State and deserving of State protection cannot be faulted. However, should these protections be at the expense of the rights of victims?

Clearly, our jurisprudence has not developed in this respect in ensuring the realisation of this human right for victims. Rape victims are often treated shabbily by the State agents and their rights are often violated by: (i) the perpetrator; (ii) the State, in failing

to provide ARV treatment; and (iii) State agents, in denying them timely justice. Presiding officers have different perceptions of the seriousness of rape, which have led to divergent and inconsistent interpretations of 'substantial and compelling circumstances' in the context of minimum sentencing legislation and have been widely criticised for trivialising the harm of rape.<sup>37</sup> This lacuna in the protection of victims' rights is probably because victims are a diverse group and are not as easily identifiable as prisoners.

## Conclusion

The Amendment Act 2007 has redefined rape and broadened its definition. It allows males and females to be treated in a similar manner in the event of rape. It further empowers victims to demand HIV testing of the alleged perpetrator and to access PEP.

This empowerment of victims to access PEP by the Amendment Act 2007 and existing government policy is a progressive move in the face of the HIV pandemic, and although it cannot protect the victims against rape, it can at the very least protect them against new infection with HIV.

Although compulsory testing of the alleged perpetrator for HIV allows the victim to know if the perpetrator is living with HIV, it does not protect the victim from infection since she has to take all the necessary precautions which she would otherwise have taken had she not demanded an HIV test of the perpetrator. It merely provides for a sense of reassurance. Furthermore, the fact that the perpetrator, if convicted, is more likely to have access to ARV treatment than the same unsentenced alleged perpetrator and the victim appears discriminatory and remains an anomaly. This situation may be the result of the manner in which our jurisprudence has developed, as well as poor implementation and other logistical problems.

It is hoped that the renewed commitment by Government to scaling up treatment as per the National Strategic Plan, as well as the undertaking by the President<sup>38</sup> on World AIDS Day to accelerate testing and treatment and put effective systems in place, will go a long way towards addressing the challenges discussed here.

## Recommendations

To mitigate some of these discrepancies, it is recommended that the government: (i) ensures that victims have easy access to treatment, thus putting paid to the impression that perpetrators, once arrested, have better rights than victims; (ii) ensures that victims/survivors are able to access free treatment at State expense following rape in the form of PEP and a full package of care, depending on HIV status; (iii) provides holistic care for all who test positive for HIV (alleged perpetrators and victims/survivors); (iv) ensures that other obstacles to the fair treatment of victims are addressed, including uncaring and insensitive police officers, district surgeons and presiding officers; and (v) ensures the provision of adequate numbers of well-trained district surgeons and health professionals who understand the proper treatment of rape victims.

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