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

**BY**

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*For all other victims of rape*



## DEDICATIONS

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**XXXXXXXXXXXX**



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

*(Arthur Bryant: Illustrated London News)*



# **SUMMARY**

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

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

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

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



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

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



# **OPSOMMING**

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

**DEUR CHARNELLE VAN DER BIJL**

**PROMOTOR: PROFESSOR FRANS VILJOEN**

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

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





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

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



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