I INTRODUCTION

Nine years into South Africa’s democratic dispensation, the levels of violence against women, particularly sexual violence, remain alarmingly high. The frequency, extent and nature of sexual violence in South Africa have gained international attention over the past years. Although it is a crime that affects all South Africans, women are far more likely to be the victims, and evidence suggests that the already unacceptably high rate of sexual assault continues to increase. Increasingly, too, the link is being drawn between women’s sexual victimisation and their extreme vulnerability to sexually transmitted infections and HIV/AIDS.

Against this background, the recent publication of the South African Law Commission’s Report on Sexual Offences is significant. This report, which includes a draft Sexual Offences Bill, represents the conclusion of the commission’s comprehensive investigation into sexual
offences against children and adults. It recommends a number of incisive amendments to existing law, ranging from the substantive definitions of criminal offences to matters of procedure and evidence. These rules were long described as inadequate and unsatisfactory, particularly from the perspective of rape complainants.

One of the more noteworthy proposals put forward by the law commission is the revised definition of what constitutes ‘rape’. The commission recommends that the current definition of rape (i.e. ‘unlawful, intentional sexual intercourse with a woman without her consent’) be replaced with the following formulation:

‘Any person who unlawfully and intentionally commits any act which causes penetration to any extent whatsoever by the genital organs of that person into or beyond the anus or genital organs of another person, or any act which causes penetration to any extent whatsoever by the genital organs of another person into or beyond the anus or genital organs of the person committing the act, is guilty of the offence of rape.’

In addition, the Bill proposes the introduction of two more sexual offences relating to unlawful sexual penetration, namely ‘sexual violation’ and ‘oral genital sexual violation’.

The question that inevitably arises is what the impact of this redefinition of the offence of rape as proposed by the law commission will be. Will this merely be an exercise in semantics, or will this reformulation in some way contribute to the establishment of a criminal justice regime that responds to the nature and extent of sexual violence in South Africa?
In examining this question, this chapter will begin with an exploration of the objectives of rape law reform, with specific emphasis on the aims of reformulating the offence of ‘rape’. It will then analyse the redefinition of rape as proposed by the law commission. This analysis will primarily focus on the gender-neutrality of the proposed new offences, the element of unlawfulness and the introduction of the notion of ‘coercive circumstances’. Finally, the chapter concludes with recommendations for the further development of law reform measures relating to rape in the South African context.

II SETTING THE OBJECTIVES FOR RAPE LAW REFORM IN SOUTH AFRICA

1. Experiences with rape law reform in other jurisdictions

In recent years, a number of jurisdictions have taken steps to reform the law relating to sexual violence and amend the legal definition of rape. Changes in this regard have typically consisted of different configurations of measures such as amending the definition of rape, abolishing rules demanding corroboration of the evidence of victims of sexual violence and placing limits on the admissibility of evidence relating to the victim’s previous sexual history. Of specific interest in the South African context are the changes effected to the common-law definition of rape as inherited from the English legal tradition. These changes have generally included the following:

(a) A shift in emphasis away from the perception of rape as an offence against ‘public morals’ towards a perception of rape as an offence against the personal dignity and sexual autonomy of the complainant.

14 The term ‘rape law’ is used here to include the rules of substantive criminal law and the law of evidence and criminal procedure applicable to criminal offences relating to sexual violence.

15 Bacik et al note that since 1989, the definition of rape has been changed in all the countries included in their survey of rape laws in fourteen European Union member states (with the exception of Denmark and Greece) – I Bacik et al The Legal Process and Victims of Rape (1998) 1.


17 In Canada, for example, the Criminal Law Amendment Act S C 1980–81–82 c 125 moved a number of crimes, including rape and indecent assault, from Part IV of the Criminal
A shift in focus away from the ‘sexual’ element of the crime towards the element of ‘violence’; and

A shift away from inquiring whether the complainant had consented to the sexual act towards inquiring whether the accused used coercion in order to have sex with the complainant.

One would expect that the experience in numerous other jurisdictions with reform measures would provide South Africa with an easy to follow ‘template’ for rape law reform. Goldberg-Ambrose, however, convincingly demonstrates that the opinions of researchers, who have set out to establish the effects of these legal changes, cover a broad spectrum.\textsuperscript{19} Findings range from those that cast doubt on whether the amendments have had any impact at all, to others that have discerned improvements in arrest, prosecution, conviction rates, the sentences meted out to convicted rapists, or the experiences of rape victims at trial. She emphasises, that in order to assess the impact of rape law reform, there should be agreement on what the standards for success will be. It is, therefore, useful briefly to analyse the stated objectives of the South African Law Commission’s recommendations.

2. \textit{Objectives of the proposed Sexual Offences Bill}

The South African Law Commission notes that its proposed reform measures aim to address the growing and complex problems relating to rape and sexual abuse of particularly women and children, and the processes and procedures underpinning the South African criminal justice system in this regard.\textsuperscript{20} The overall intention of the proposed changes is to encourage victims of sexual violence to approach the system for assistance and to improve the experiences of those victims who enter the criminal justice system, whilst at the same time giving due regard to the rights accorded to alleged perpetrators of sexual offences.\textsuperscript{21}

We agree that, by broadening the definition of rape, making it more reflective of the experiences of victims one may indirectly provide more appropriate redress and increase victims’ access to the criminal justice system.\textsuperscript{22} An example is found in the present distinction between instances of vaginal penetration by the penis (regarded as the offence of ‘rape’) and acts of forced penetration other than vaginal penetration by a penis (punished as ‘indecent assault’). While some may argue that as long

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\textsuperscript{19} Goldberg-Ambrose (n 17) 174–7.

\textsuperscript{20} South African Law Commission (n 7) 3.

\textsuperscript{21} Ibid.

\textsuperscript{22} A Pantazis ‘Notes on male rape’ (1999) 12 SACJ 369 at 370ff.
as the offender does not go unpunished, it does not really matter whether he or she is charged with rape or indecent assault, it is submitted that there are a number of practical implications to this distinction.

First, Schedules 5 and 6 of the Criminal Procedure Act\textsuperscript{23} treat indecent assault differently from the offence of rape for purposes of the determination of the accused’s pre-trial disposition in terms of s 60(11) of this Act.\textsuperscript{24} Secondly, indecent assault is also treated differently from rape in terms of Act 105 of 1997.\textsuperscript{25} Thirdly, rape trials must be heard in the regional or high court, since the district court lacks substantive jurisdiction in respect of rape.\textsuperscript{26} This is not the case with indecent assault, which may also be heard in the district court. Although there may be prescriptions issued by the Directors of Public Prosecutions to the effect that ‘more serious’ instances of indecent assault should be heard on regional court level, anecdotal evidence indicates that such serious cases are, on occasion, tried in district court.\textsuperscript{27}

The objectives for law reform set by the law commission coincide with the framework suggested by commentators such as Goldberg-Ambrose for assessing the goals of rape law reform and the standards for success in achieving them. She suggests that the goals of law reform should include the following:

(a) transformation of public attitudes about women’s right to sexual autonomy and about what constitutes coercive sex;

(b) changing the criminal justice system so women are no longer unwilling to report rape;

(c) increasing the arrest, prosecution and conviction rates for rape to levels more like those for other serious crimes;

\textsuperscript{23} Act 51 of 1977.

\textsuperscript{24} Section 60(11)(a) provides that where an accused is charged with an offence listed in Schedule 6, he or she will be detained in custody unless he or she adduces evidence to satisfy the court that exceptional circumstances exist which in the interests of justice permit his or her release. Section 60(11)(b) provides that where an accused charged with an offence listed in Schedule 5, the accused will be detained in custody until he or she adduces evidence to satisfy the court that the interests of justice permit his or her release.

\textsuperscript{25} Criminal Law Amendment Act 105 of 1997. Section 51 of this Act provides for the mandatory imposition of minimum sentences under certain circumstances.

\textsuperscript{26} Magistrate’s Court Act 32 of 1944.

\textsuperscript{27} The experience of a victim of sexual violence may vary greatly depending on whether the matter is heard in district or in regional court. District court prosecutors are generally less experienced than regional court prosecutors, and district courts rarely have the special facilities for victims of sexual violence such as closed-circuit TV systems and separate waiting rooms allocated to regional courts. Case loads also differ, with district courts generally bearing a heavier case load, making thorough pre-trial consultation with witnesses extremely difficult if not impossible.
eliminating those features of the rape trial that make the woman feel as if she is the defendant\textsuperscript{28} and make the whole experience of testifying painful and degrading; and

increasing the amount of jail time served by convicted rapists to make it more comparable to time served by equally serious offenders.\textsuperscript{29}

The potential impact of the proposed reform measures should also be considered within a framework of constitutional imperatives. The combined effect of constitutional provisions\textsuperscript{30} and international human rights norms is to impose clear duties on the South African state to re-examine and reform current sexual violence law.\textsuperscript{31} It is, however, not enough to simply ‘reform’ the law: the objectives of reform measures should fit into the normative paradigm outlined by the constitution and international human rights law.\textsuperscript{32} ‘This paradigm in broad terms requires the government and the courts ‘to protect the public in general and women in particular against violent crime’. More specifically, the standards and norms set in international law require states

‘to take effective legal, preventive and protective measures to address violence against women, including, among others, –

(a) enactment of just and effective remedies for acts of violence, including criminal sanctions, civil remedies and compensatory provisions;

(b) providing victims of violence with access to mechanisms of justice (including specialised legal services);

(c) preventing revictimisation of women; and

(d) adopting and reviewing legislation to ensure its effectiveness.’\textsuperscript{34}

III THE NATURE OF THE CRIMINAL OFFENCE OF ‘RAPE’

In order to examine the amended definition of rape as proposed by the law commission, it is necessary to first gain an understanding of the nature of the crime as it is currently delineated in South African criminal law.

\textsuperscript{28} This term is used in the context of the United States.

\textsuperscript{29} Goldberg-Ambrose (n 17) 177.

\textsuperscript{30} The following rights set out in the Bill of Rights are of specific significance here: the right to freedom from all forms of violence from both public and private sources (s 12(1)(c), the right to equality (s 9), the right to dignity (s 10). These provisions should also be read with s 7(2) of the Constitution, which extends the protective ambit of these rights.

\textsuperscript{31} See H Combrinck ‘The right to freedom from violence and the reform of sexual assault law in South Africa’ in J Sarkin and W Binchy (eds) Human Rights, the Citizen and the State: South African and Irish approaches (2001) 184 at 188.

\textsuperscript{32} Ibid.

\textsuperscript{33} S v Abrahams 2002 (1) SACR 116 (SCA) 127f; with reference to S v Baloyi 2000 (2) SA 425 (CC), 2000 (1) BCLR 86 (CC); Carmichele v Minister of Safety and Security 2001 (4) SA 938 (CC).

\textsuperscript{34} B Pithey et al (n 10) 20–1.
Burchell and Milton point out that the decision by a society to criminalise conduct is usually shaped by the desire to protect certain values or interests that are prized by the particular society. The authors identify the following as the principal interests that motivate criminalisation: maintaining or retaining human and civil rights, public sensibilities, collective welfare and maintenance of the government of the state. The rights protected under the first category include the rights to life, bodily integrity, dignity, personal security and property. The offence of rape, aimed at protecting sexual autonomy, resides under this category.

Historically, the offence of rape was formulated in order to protect interests that were unrelated to notions of sexual autonomy. In ancient societies, women fell under the power of either a father or a husband, and the crime of rape therefore came into existence to protect the economic interests of these patriarchs. In early Roman law, the crime of ‘raptus’ was aimed at punishing a man who violated patriarchal control over a woman, either by taking her out of his custody by abduction or having sexual intercourse with her without the patriarch’s agreement.

In later Roman law, forced sexual intercourse came to be punished as a form of the general prohibition on ‘unchaste’ sexual relations (stuprum). Stuprum per vim was not so much a distinct crime as one of the disapproved forms of unchastity. In the instances of both raptus and stuprum per vim, it is therefore clear that the protected interest was not the sexual autonomy of women.

The Roman-Dutch authorities limited rape to cases of forcible sexual intercourse with a woman without her consent. The essence of the offence was the employment of physical force to overcome the victim’s resistance. The woman was expected to cry out to indicate her lack of consent, and also immediately to lay a complaint. If the woman submitted, either through fear or duress, it was not rape. The victim was required to –

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35 Burchell and Milton (n 2) 25.
36 Bohler-Muller makes the interesting argument that ‘sexual autonomy’ should be understood to encompass not only the right to control sexual access to one’s body (sexual integrity) and emotional integrity, but also ‘relational autonomy’, ie the entitlement to sustaining and respectful relationships with others. See N Bohler-Muller ‘Valuable lessons from Namibia on the combating of rape’ (2001) 14 SACJ 71 at 72–3.
37 Burchell and Milton (n 2) loc cit.
38 See S Brownmiller Against Our Will: Men, Women and Rape (1975) 16–30 for a detailed discussion of the historical development of the offence of rape; see also generally L Fryer ‘Law versus prejudice: Views on rape through the centuries’ (1994) 7 SACJ 60–77.
39 Brownmiller (n 38) 18. See also C Hall ‘Rape: The politics of definition’ (1988) 105 SALJ 67 at 79 fn49.
40 Burchell and Milton (n 2) 489.
41 Literally ‘defilement by force’.
42 Burchell and Milton (n 2) 490.
In English law, similar to early Roman law, rape was originally understood as the crime of ‘deflowering’ a virgin woman, therefore affecting her value as a bride. However, the crime was later redefined as the ravishment of any woman ‘where she did not consent’ and ‘by force’. For a long time, the offence was construed narrowly and limited to situations where the woman’s resistance was overcome through physical force. The courts, however, gradually widened the ambit of the offence by construing ‘absence of consent’ to include instances where intercourse was obtained through fraud or deception. This is essentially the definition of rape as adopted in South Africa from English common law.

The vestiges of the historical origins and development of the offence remain to this day. A powerful reminder is the fact that the offence as it currently stands in South Africa only punishes sexual intercourse with a woman without her consent – clearly a reminder of the extent to which patriarchal interests in controlling women’s sexuality originally demanded protection. Brownmiller makes the following compelling observation:

‘A female definition of rape can be contained in a single sentence. If a woman chooses not to have intercourse with a specific man and the man chooses to proceed against her will, that is a criminal act of rape. Through no fault of woman, this is not and never has been the legal definition.’

There is an increasing recognition in South African law that the act of rape is not an essentially sexual one, but rather an act of force and coercion. However, this recognition is a relatively recent one and one, it is argued, that has not yet become as firmly entrenched in the popular and judicial mindset as one may hope. This is evident, for example, from the statements made by the court a quo in S v Mahomotsa to the effect that the incident in question (the accused had forced each of the two complainants to have sex more than once) was the result of –

‘... the virility of a young man, still at school, who had intercourse with other

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44 Burchell and Milton (n 2) 490–1.
45 Brownmiller (n 38) 18.
46 2002 (2) SACR 435 (SCA).
school pupils against their wishes, and note, school pupils who had already previously been sexually active.\footnote{At 442b–c (our translation from the Afrikaans original). It is encouraging to note that the Supreme Court of Appeal (per Mpati JA) held that this approach constituted a material misdirection on the part of the court \textit{a quo} – at 442d–f.}

There is a popular tendency to place human sexual behaviour on a continuum, with seduction on the one end and rape on the other, with varying degrees of sexual overtures, persuasion and coercion and the threat of physical force in between.\footnote{See S Lees \textit{Carnal Knowledge: Rape on Trial} (1996) 71–94.} This construction allows society to perceive of rape as ‘sex gone wrong’ and allows one to overlook the fact that rape and sex do not belong on the same continuum at all. It also allows one to overlook the force or coercion that is essentially what the criminal law claims to be punishing. What needs resolution is the question whether the law commission’s definition of rape will be more representative of the interests we aim to protect and the specific behaviour that we aim to punish.\footnote{See Pantazis (n 22) 372.}

\section*{IV PROPOSALS OF THE SOUTH AFRICAN LAW REFORM COMMISSION}

\subsection*{1. Background}

In 1996, the South African Law Commission set up a project committee to investigate the substantive and procedural aspects of the law in relation to sexual offences against children.\footnote{The law commission also published a report on women and sexual offences in 1985 – see South African Law Commission Project 45 ‘Report on women and sexual offences in South Africa’ (1985). This report, which recommended minimal changes to South African law, was (correctly, we argue) subjected to harsh criticism by feminist scholars: see e.g Hall (n 39).} The project committee began its investigation in 1997. Discouraged by the slow progress of the project committee, in March 1999 the (then) Deputy Minister of Justice\footnote{Dr Manto Tshabalala-Msimang.} commissioned a task team to make proposals for amending the existing laws relating to sexual offences against \textit{adults}. The task team, made up of a criminologist, legal researchers and legal activists, prepared a report entitled ‘\textit{Discussion Document on the Legal Aspects of Rape in South Africa}’.\footnote{B Pithey et al (n 10).} This report formed the basis of the law commission’s first and second Discussion Papers on Sexual Offences.\footnote{See South African Law Commission Discussion Paper 85 (n 8) at para 7.3.20.}

At the end of 1999, the South African Law Commission released its first report on the substantive law relating to sexual offences, focusing both on sexual offences against women and children. According to the
The proposed new definition of rape replaces the concept of sexual intercourse (penetration of the vagina by a penis) with that of sexual penetration (allowing for penetration of both genital organs and the anus by the penis) and purports to introduce a gender-neutral understanding of victim and perpetrator — i.e. it recognizes that the perpetrator may be a woman and the victim may be a man (and vice versa).

More specifically, the proposed Sexual Offences Bill outlines the offence of rape as follows:

3. (1) Any person who unlawfully and intentionally commits any act which causes penetration to any extent whatsoever by the genital organs of that person into or beyond the anus or genital organs of another person, or any act which causes penetration to any extent whatsoever by the genital organs of another person into or beyond the anus or genital organs of the person committing the act, is guilty of the offence of rape.

(2) An act which causes penetration is prima facie unlawful if it is committed —
(a) in any coercive circumstance;
(b) under false pretences or by fraudulent means; or
(c) in respect of a person who is incapable in law of appreciating the nature of an act which causes penetration.

(3) Coercive circumstances, as referred to in subsection (2)(a), include any circumstances where —
(a) there is any use of force against the complainant or another person or against the property of the complainant or that of any other person;
(b) there is any threat of harm against the complainant or another person or against the property of the complainant or that of any other person; or
(c) there is an abuse of power or authority to the extent that the person in respect of whom an act which causes penetration is committed is inhibited from indicating his or her resistance to such an act, or his or her unwillingness to participate in such an act.
False pretences or fraudulent means, as referred to in subsection (2)(b), are circumstances where a person –
(a) in respect of whom an act which causes penetration is being committed, is led to believe that he or she is committing such an act with a particular person who is in fact a different person;
(b) in respect of whom an act which causes penetration is being committed, is led to believe that such an act is something other than that act; or
(c) intentionally fails to disclose to the person in respect of whom an act which causes penetration is being committed, that he or she is infected by a life-threatening sexually transmissible infection in circumstances in which there is a significant risk of transmission of such infection to that person.

(5) The circumstances in which a person is incapable in law of appreciating the nature of an act which causes penetration as referred to in subsection (2)(c) include circumstances where such person is, at the time of the commission of such act –
(a) asleep;
(b) unconscious;
(c) in an altered state of consciousness;
(d) under the influence of any medicine, drug, alcohol or other substance to the extent that the person’s consciousness or judgement is adversely affected;
(e) a mentally impaired person; or
(f) below the age of 12 years.

(6) A marital or other relationship, previous or existing, shall not be a defence to a charge of rape.

Section 4, which defines a sexual violation, states that –

‘. . . any person who unlawfully and intentionally commits any act which causes penetration to any extent whatsoever by any object, including any part of the body of an animal, or part of that person, other than the genital organs, into or beyond the anus or genital organs of any other person, is guilty of the offence of sexual violation.’

Section 5 refers to the act of ‘oral genital sexual violation’ –

‘. . . any person who unlawfully and intentionally commits any act which causes penetration to any extent whatsoever by the genital organs of that person, or the genital organs of an animal, into or beyond the mouth of another person, is guilty of the offence of oral genital sexual violation.’

The law commission also proposes the enactment of a number of other offences, including compelled or induced indecent acts, certain acts

57 The scope of this chapter does not permit a detailed discussion of these offences.
58 Clause 7.
committed within the view of children or mentally impaired persons, and acts which cause penetration or indecent acts with certain children with their consent. It appears that offences relating to sexual violence that do not reside under any of the ‘new’ statutory offences may be penalised under the common law offences of indecent assault or crimen iniuria.

2. ‘Gender-neutrality’

One of the aspects specifically highlighted by the law commission as an improvement in its new definition of rape is its gender-neutrality, i.e. the fact that the victim can be a man and the perpetrator a woman. While this objective is laudatory, a closer scrutiny of the definition reveals that the latter change has not been achieved satisfactorily. It is argued that it is a physiological impossibility for a woman to commit ‘an act that causes penetration by her genital organs into or beyond the anus or genital organs of another person’. Therefore, it is impossible for a woman to commit the offences set out in clauses 3(1) and 5. Moreover, a hypothetical situation where a woman ‘rapes’ a child with a bottle or other object would not constitute rape according to this definition, but rather the offence of ‘sexual violation’.

One of the original points of criticism against the common-law offence of rape was its ‘object-specificity’, i.e. the fact that the offence required the use of a penis. Commentators have expressed the view that the definition should be extended also to recognise penetration with objects such as bottles or sticks as rape. As it currently stands, the reformulation of the definition of rape does not address this concern.

The commission bases its distinction between penile penetration and penetration with ‘other objects’ on a reluctance to label perpetrators of less serious forms of penetration (for example, ‘slight’ digital penetration of a victim’s genital organs) as ‘rapists’. The commission’s hesitation to include other forms of sexual penetration (i.e. vaginal or anal penetration by an object or forced oral intercourse in the form of penile penetration of

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59 Clause 9.
60 Clause 10.
61 We have argued elsewhere that this scheme is not satisfactory, and that the common-law offence of ‘indecent assault’ should first be reformulated to give greater clarity regarding the distinction between this offence and the proposed statutory offences, and should secondly be included in the Sexual Offences Bill – see H Combrinck and Z Khan Comments on Discussion Paper 85 (1999) Unpublished paper submitted to the South African Law Commission para 6 [on file with author].
63 Set out in clause 4.
64 Pithey et al (n 10) 28.
65 Ibid.
66 South African Law Commission (n 7) 23.
the victim’s mouth) in the definition of rape is therefore aimed at avoiding undue prosecution of an accused for an offence that does not constitute ‘real’ rape.

Penetration by another object and forced oral penetration are just as violent as penetration by a genital organ. The proposed grading in the definition of offences only serves to minimise other sexual violations and creates an opportunity for the reduction of charges in matters that prosecutors may regard as ‘difficult’ rape cases. As Bacik et al note: If the legal definition of rape is not sufficiently broad, the experience of the rape victim may not be regarded legally as constituting rape even though she defines it as rape.67

If the objective of the reformulation of the definition is to protect the sexual autonomy of rape victims and to advance the notion of rape as an act of violence rather than a sexual act, the emphasis on penile penetration as an element of rape undermines this objective. An alternative to establishing the separate offences of ‘rape’, ‘sexual violation’ and ‘oral genital sexual violation’ would be to extend the proposed definition of rape to include acts set out in the definitions of the latter two offences and to keep the offence of ‘indecent assault’ for all non-penetrative sexual acts falling outside of this extended definition.

The provisions of the Namibian Combating of Rape Act may be instructive in this regard. The Act defines ‘rape’ as the intentional commission of a sexual act with another person under coercive circumstances. A ‘sexual act’ is defined in s 1(1) to cover a number of penetrative and non-penetrative acts.68 Significantly, the acts of ‘insertion of the penis’, ‘insertion of any other body part’ as well as ‘insertion of any object’ are all included in the definition of a ‘sexual act’.

The commission’s concern with creating a layered scheme of penetration-based offences is further related to sentencing purposes. However, we argue that the introduction of such a graded scheme of definitions is not necessary: it is possible to make such a distinction once there has been a conviction of rape, as is currently the case in terms of Act 105 of 1997.69

We concur with the following statement by Davis J in S v Schwartz:70

‘As controversial a proposition as this is bound to be, as not all murders carry the same moral blameworthiness, so too, not all rapes deserve equal

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67 Bacik et al (n 15) 2.
68 The Act also includes cunnilingus (oral stimulation of the female genitals) and any other form of genital stimulation in its definition of a ‘sexual act’. It could be argued that the inclusion of these non-penetrative acts delineates the offence too broadly, and that it should be limited to penetrative acts.
69 Criminal Law Amendment Act, 105 of 1997. The Act distinguishes between different instances of rape; however, the basic operational concept is that of the offence of ‘rape’, and the ‘grading’ occurs in terms of the circumstances under which the offence is committed.
70 1999 (2) SACR 380 (C).
punishment. That is in no way to diminish the horror of rape; it is however to say that there is a difference even in the heart of darkness.\footnote{At 386b-c. The Supreme Court of Appeal (per Cameron JA) referred to this dictum with apparent approval in \textit{S v Abrahams} 2002 1 SACR 116 (SCA) 127e.}

In principle, therefore, making a distinction between different instances of rape for purposes of sentencing is not in itself objectionable. However, this distinction should not occur on the level of enacting different offences relating to forced penetration.

It should further be noted that the proposed Sentencing Framework Bill, which will repeal the provisions of Act 105 of 1997, places extensive reliance on the notion of ‘serious offences’. However, this term is not defined in the Bill.\footnote{See in this regard L Artz and D Quenet \textit{Comments on Discussion Paper 91 Sentencing: A New Sentencing Framework} (2000) Unpublished paper submitted to the South African Law Commission 1–2 [on file with authors].} This implies that where one starts diluting the offence of ‘rape’ to another (less serious) form of violation, there is a real risk that the sentencing framework will not capture instances of ‘sexual violation’ or ‘oral genital violation’ as ‘serious offences’.

It is therefore argued that by proposing a hierarchy of penetrative offences, the law commission perpetuates the procedural and substantive distinctions between penile penetration and other forms thereof.

3. \textit{Unlawfulness}

In clause 3(2) of the Bill, the law commission proposes that an act which causes penetration is \textit{prima facie} unlawful if it is committed in any coercive circumstance, under false pretences or by fraudulent means, or in respect of a person who is incapable in law of appreciating the nature of an act which causes penetration.\footnote{These phrases are explained in more detail in subsequent clauses. ‘Coercive circumstances’ is defined in clause 3(3), ‘false pretences or fraudulent means’ is defined in clause 3(4) and the circumstances in which a person is incapable ‘in law of appreciating the nature of an act which causes penetration’ are set out in clause 3(5).}

The motivation for this provision is initially found in the first discussion paper. The commission notes here that once unlawfulness is established by proof that the rape took place in certain circumstances, the \textit{onus} must be on the accused to prove his or her defence that may or may not be based on consent as a justification for his or her actions.\footnote{South African Law Commission Discussion Paper 85 (n 8) at para 9.4.7.3.8. See also Milton (n 62) 367.} As Van der Merwe points out, the law commission did not clearly indicate at this point whether it intended to impose a so-called ‘reverse onus’ (where, instead of the state proving the guilt of the accused beyond reasonable doubt, the onus is on the accused to prove his innocence) or whether it...
proposed placing an evidentiary burden on the accused. The former would not only fly in the face of established principles of criminal liability, but would also run the risk of being found constitutionally suspect.

In its 2002 Report, the commission is at pains to state that what is intended in clause (3)(2) is indeed an *evidentiary* burden.

‘The Commission is satisfied that its proposal does not place a reverse onus on the accused, but merely an evidential onus . . . [t]o make it clear that its proposals do not alter the standard of proof required when an accused adduces evidence in rebuttal, it is deemed appropriate to add words to this effect in subclause (10), where the accused’s entitlement to raise defences at common law is retained.’

The crisp question arising here is whether this provision is necessary at all. According to the principles of South African law of evidence, the state bears the burden of proof to prove the guilt of the accused beyond a reasonable doubt. This burden of proof remains on the state throughout the trial. Schwikkard notes that at the outset of the trial, ‘in tandem with the burden of proof’, the state must also discharge an evidential burden.

The state will do this by establishing a *prima facie* case against the accused. Once a *prima facie* case is established, the evidential burden will *shift* to the accused to adduce evidence in order to escape conviction. The burden of proof, however, remains with the prosecution.

The state also bears the burden of proving the absence of any defence raised by the accused, for example, the absence of private defence, compulsion or necessity and consent. While there is a procedural duty on the accused to introduce his or her defence (for example by putting his defence to state witnesses during cross-examination), this duty does not in any way translate into a burden resting on the accused to prove his defence.

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75 S E van der Merwe ‘Re-defining rape: Does the Law Commission really wish to introduce a reverse onus?’ (2001) 14 SACJ 60 at 62–6.

76 Van der Merwe (n 75) 68; see also Combrinck and Khan (n 61) para 5.1.

77 South African Law Commission (n 7) 33.

78 Ibid. Subclause (3)(2) should be read with subclause (3)(9), which provides that nothing in this section may be construed as precluding any person charged with the offence of rape from raising any defence at common law to such charge, not does it adjust the standard of proof required for adducing evidence in rebuttal.


80 It is possible that even if the accused does not adduce evidence, he will not be convicted if the court is satisfied that the prosecution has not proved guilty beyond reasonable doubt. The lengths to which the accused will have to go to ‘counter’ the state’s *prima facie* case will depend on the strength of the case made by the state. Schwikkard *ibid*.

81 Schwikkard *op cit* (n 79) 526.

82 Ibid (n 79) 529.
The proposed provision appears to require the state to present proof of two elements, namely that the accused committed an act causing sexual penetration and that he or she committed such act under coercive circumstances, under false pretences or in respect of a person incapable of appreciating the nature of penetration. Once the state has established that the act causing penetration was committed under the ‘listed’ circumstances, this act is prima facie unlawful. According to the commission, an evidential burden now shifts to the accused to show that his actions were not unlawful. Where the accused wishes to raise the defence of consent to counter the element of unlawfulness, he or she would not have the onus of proving such a defence. The burden of proof to ‘disprove’ the accused’s defence of consent remains on the state.83

We accordingly submit that the proposed subclause 3(2) takes the matter no further than would have been the case if coercive circumstances, false pretences or the victim’s lack of capacity were recognised as elements of the offence that the state has to prove. We, therefore, propose that this subclause is, first, unnecessary and, secondly, has the potential of confusing the burden of proof with the evidentiary burden that an accused would bear once the state has provided prima facie evidence of the offence.

The law commission’s proposal aims to move away from ‘absence of consent’ and the resultant trial of the victim.84 As much as this objective is a sound one, it should be acknowledged that it is simply not possible to keep the absence of consent on the part of the victim out of the trial where this is the basis of the accused’s defence. It may be possible, for example, to attempt to limit the traumatising impact of cross-examination regarding alleged consent through strict application of the proposed amendments to the law of evidence and procedure. However, we argue that the introduction of a nebulous evidential burden as proposed in clause (3)(2) will not contribute to meeting this objective.

4. ‘Coercive Circumstances’

As explained above, the law commission proposes that the state must prove that penetration took place under coercive circumstances, under false pretences or with a person unable to appreciate the nature of the act in order to constitute an unlawful act. Of particular significance is the notion of coercive circumstances.85 The Bill lists ‘coercive

83 South African Law Commission (n 7) at 33.
84 South African Law Commission Discussion Paper 85 (n 8) at para 9.4.7.3.14. See also our discussion of the objectives of rape law reform above.
85 The notion of ‘false pretences or fraudulent means’ as set out in clause 3(4) is largely a restatement of accepted South African law (subclauses 3(4)(a) and (b)). Subclause 3(4)(c) however introduces a new proposal, i.e that ‘false pretences or fraudulent means’ should include
circumstances’ as including force, threat of harm, and abuse of power.  

The law commission points out that a shift from ‘absence of consent’ to ‘coercion’ represents a shift of focus from the subjective state of mind of the victim to the imbalance of power between the parties on the occasion in question:

‘It also allows one to understand that coercion constitutes more than physical force, or threat thereof, but may also include various other forms of exercise of power over another person: emotional, psychological, economic, social or organisational power.’

The replacement of ‘absence of consent’ as an element of rape highlights a significant symbolic shift in the understanding of the true nature and experience of sexual violence. For the victim, the distinction between rape and consensual intercourse is not to be found in consent. Rather, it concerns the coercion that is used to vitiate her consent. Therefore, viewing ‘absence of consent’ as the central element of the offence serves to define the experience from the perspective of the perpetrator, rather than the victim.

While the removal of ‘absence of consent’ from the definition of rape may have symbolic importance, evidence relating to what constitutes ‘coercion’ may still have the effect of focusing on the conduct of the victim. It may be argued that where the state proves the existence of coercive circumstances, absence of consent should not be an issue at trial. However, in other jurisdictions where legislation set out to advance the protection of women’s sexual autonomy by shifting the focus at trial to the presence of coercive circumstances, with no requirement that the prosecution prove absence of consent, the influence of the common-law tradition remained strong. One reason for this is the fact that the accused may, and in the majority of cases will, raise the defence of consent.

In order for the notion of ‘coercive circumstances’ to escape the pitfalls of ‘absence of consent’ it is important for the courts to recognise that circumstances where ‘a person intentionally fails to disclose to the person in respect of whom an act which causes penetration is being committed, that he or she is infected by a life-threatening sexually transmissible infection in circumstances in which there is a significant risk of transmission of such infection’. This provision is aimed predominantly at penalising the intentional non-disclosure of HIV infection – see South African Law Commission (n 7) 34–5. While this provision is controversial and deserving of closer examination, the scope of this article does not permit a more detailed discussion of this specific aspect.

86 Clause 3(3).
87 South African Law Commission Discussion Paper 85 (n 8) at para 9.4.7.3.14. See also Hall (n 39) 75–6.
88 Combrinck and Khan (n 61) Annexure B.
89 Ibid.
90 See e.g Goldberg-Ambrose (n 17) 182; J Bargen and E Fishwick Sexual Assault Law Reform: A National Perspective (1995) 64.
‘coercion’ goes beyond physical force or even the threat of physical force. The provisions of subclause 3(3) go some way towards demonstrating this point, by including in coercive circumstances not only ‘use of force’ but also ‘threat of harm’. It is argued that the notion of ‘threat of harm’ goes wider than would have been the case if ‘threat of force’ were used, since ‘harm’ may also include emotional harm or economic hardship.

This approach is not new in South African law. It is, in fact, the approach that the Appellate Division took in a number of cases where the accused relied on coercion in the form of the abuse of a power imbalance between him and the victim (other than the use or threat of physical force) in order to commit the offence. This was expressed as follows in R v Swiggelaar:

In the case of S v S, the Appellate Division took careful cognisance of the power dynamics, including those resulting from race differences, between the complainant and the perpetrator (a police official). The court recognised that under the specific circumstances of the case (which, it is argued, would amount to ‘coercive circumstances’ under clause 3(3)) the actions of the accused constituted the offence of rape. The principles adopted by South African courts regarding the requirements of proof of resistance and use of physical force are therefore clear.

In practice the use of physical force by the accused may play an important role in the way that police officials and prosecutors approach rape cases. As a general rule, members of the South African Police Service (SAPS) are not entitled to make any decisions as to whether to accept a complaint of a sexual offence or not. The law commission, however, notes that SAPS members do exercise substantial discretion on whether to accept a charge of a sexual offence, whether and how to proceed with an investigation and whether to refer the case to the prosecuting

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Footnotes:

91 Section 3(3)(a).
92 1950 1 PH H61 (A). Emphasis added. This dictum was also applied in the more recent judgment in S v F 1990 (1) SACR 238 (A).
93 1971 (2) SA 591 (A).
94 Translation from the Afrikaans original.
95 See South African Law Commission Discussion Paper 102 (n 8) at para 3.2.5.2.
authorities for a decision on whether to prosecute or not. The discretion to decide that a report is ‘unfounded’ is wide and may include reasons such as that the victim is not believed or regarded as credible, or reluctance to pass on cases that will not stand up at subsequent stages in the criminal justice process (such as cases involving absence of physical injury). Research has also shown that factors increasing the likelihood of arrest in rape cases include: the use of a weapon and/or the use of force; level of resistance used by the victim; other witnesses.

While it is, therefore, argued that the notion of ‘coercive circumstances’ is not really new and in effect restates existing South African law, it is important to consider the extent to which practical implementation of the law is based on a limited understanding of ‘absence of consent’. This imperfect understanding may undermine the potential benefits of the proposed Bill, and may limit victims’ access to justice.

V CONCLUSION

In spite of the issues we raise above, the redefinition of the offence of rape as proposed by the law commission is in principle a progressive development. There can be no doubt that the common-law definition of rape has outlived whatever usefulness it may once have had. We specifically welcome the replacement of ‘sexual intercourse’ with ‘penetration’, and support the decision to relegate ‘consent’ to a possible defence to be raised by the accused rather than lack of consent being an element of the offence. We also believe that the introduction of the notion of ‘coercive circumstances’, while not a revolutionary innovation, is a step in the right direction.

The answer to the question posed initially, i.e. whether the proposed changes to the definition of rape will meet the stated objectives, is a complex one. Such definitional changes should not be seen in isolation, but should rather be viewed as one element of a composite set of measures aimed at achieving the above objectives. It may appear overly optimistic

96 Ibid at para 3.2.5.2–3.2.5.3. A SAPS member may decide whether a case is ‘founded’ or ‘unfounded’. A decision that a case is ‘unfounded’ implies that the file is closed, usually without the file being submitted to the prosecuting authorities for decision-making.

97 South African Law Commission (n 8) at para 3.2.5.4.


99 A recent study of the implementation of the Domestic Violence Act 116 of 1998 has shown that even where legislation contains both detailed definitions of acts of domestic violence and specific instructions as to the duties of police officials when dealing with incidents of such violence, the officials still assume wide discretionary powers in the interpretation of the Act. See generally P Parenzee et al Monitoring the Implementation of the Domestic Violence Act: First Research Report (2001).

100 Commentators point out that the symbolic value of law reform measures in changing popular perception should not be underestimated. It may be in this realm that the notion of ‘coercive circumstances’ has specific value.
to expect the redefinition of the offence of rape to achieve these broad objectives in itself. However, it is argued that this reformulation should be evaluated in conjunction with the procedural and evidential changes proposed by the law commission.

In the final analysis, legal reform measures and their implementation within the criminal justice system form part of complex and interdependent network of structural responses. In order to meet the objectives identified earlier, it goes without saying that such law reform should be accompanied by measures to ensure the proper implementation of the new provisions. These measures should include meaningful changes in evidential and procedural rules applicable to rape investigations and trials, as well as the development of supportive policies.\(^{101}\) Failure to put such measures in place may ultimately result in the (re)definition of rape remaining ‘a wall of words’ and the ideal of the broad protection of sexual autonomy being lost.

\(^{101}\) See in this regard, Pantazis (n 22) 374.