CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO.: CCT 314/24

In the matter between:

EMBRACE PROJECT NPC First Applicant

IH Second Applicant

CENTRE FOR APPLIED LEGAL STUDIES Third Applicant

and

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES First Respondent

MINISTER IN THE PRESIDENCY FOR WOMEN, YOUTH AND PERSONS WITH DISABILITIES Second Respondent

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA Third Respondent

CCT 315/24

In the matter between:

CENTRE FOR APPLIED LEGAL STUDIES Applicant

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EMBRACE PROJECT NPC First Respondent

IH Second Respondent

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MINISTER IN THE PRESIDENCY FOR WOMEN, YOUTH AND PERSONS WITH DISABILITIES Fourth Respondent

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA Fifth Respondent

CENTRE FOR APPLIED LEGAL STUDIES (CALS) WRITTEN SUBMISSIONS

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> "In no other crime does the response of the victim play such a large role in the very definition of the crime. Imagine that one's response to being robbed or hijacked during the very event could plausibly be considered a decisive factor in determining whether the crime actually transpired. Why does rape law do this?"[1]

INTRODUCTION

1. This is a case that contains both an application for confirmation and an appeal to this Honourable Court.

2. The First and the Second Applicant ("**the Embrace applicants**") seek confirmation of the orders of invalidity granted by the court *a quo*.[2]

3. CALS seeks to appeal the judgment and order of the court *a quo* in relation to its case before the court *a quo*.[3]

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[1] L du Toit (2007) 'The Conditions of Consent' in R Hunter and S Cowan (eds), *Choice and Consent* at 61.

[2] Volume 1, page 1, para 1.

[3] Volume 1, page 65, para 2.

4. CALS' case is concerned with the frontal challenge to the constitutionality of section 3, 4, 5, 6, 7 and 11A of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (SORMA)("**the impugned provisions"**).[4]

5. CALS argues that consent as a definitional element of the above sections is an unjustifiable limitation on individuals' (especially women, children and gender-diverse individuals') rights to equality.[5]

6. CALS applied to this Honourable Court for leave to appeal on 22 October 2024 for leave to appeal the 30 September 2024 order of Honourable Justice Baqwa of the High Court of South Africa Gauteng Division, Pretoria. CALS' appeal requests this Court to set aside and replace or alternatively vary the order of the court a quo.[6]

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[4] Volume 1, page 66, para 2.2.

[5] Volume 1, page 66, para 2.2.

[6] Volume 1, page 73, para 4.

7. CALS received no opposition from the government respondents in relation to its application to appeal the decision of Justice Baqwa. However, on 4 November 2024 CALS received opposition from the Embrace applicants.[7]

8. CALS has not opposed the Embrace applicants' application for confirmation. Instead, CALS seeks to appeal against the judgment of the court *a quo*, which dismissed its claim without engaging substantively with its merits.[8]

9. CALS' application and appeal aims to remedy the rights violations at the source from which it emerges - the inclusion of consent as definitional element of sexual offences.

JURISDICTION AND LEAVE TO APPEAL

10. This matter comes before this Honourable Court as confirmation proceedings in terms of section 167(5), read with section 172(2), of the Constitution. This Court has exclusive jurisdiction to confirm the High Court of South Africa, Gauteng Division, Pretoria (court *a quo*) declaration of

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[7] Volume 3, page 228, Notice of Intention to Oppose.

[8] Volume 1, page 73, para 4.

constitutional invalidity of the impugned sections. Thus, this matter engages the supervisory jurisdiction of this Court in respect of the declaration of invalidity.

11. In addition, this Honourable Court has jurisdiction over this appeal in terms of section 172(2)(d) of the Constitution.

12. This matter concerns the right to equality, among others, and therefore engages the Constitution's jurisdiction. CALS submits that it is in the interest of justice and the need for finality that dictates that the constitutionality or otherwise of these impugned provisions be determined

GROUNDS OF APPEAL

Failure to consider CALS' pleaded case under section 172(1) of the Constitution

13. CALS argues that the court *a quo* failed to consider and conduct any form of constitutional analysis of CALS' pleaded case, as required by section 172(1)(a) of the Constitution. Despite being faced with a frontal challenge posed by CALS to the constitutionality of the impugned sections there was no meaningful consideration.

14. By way of demonstration, at paragraph 30 of the court *a quo* judgment, under the heading "Issues for Determination", the court *a quo* failed to list CALS' pleaded constitutional invalidity of the impugned provisions. The court *a quo* then proceeded to only consider the case pleaded by the Embrace applicants.[9]

15. Furthermore, the court *a quo* proceeded through paragraphs 31 to 69 with consideration of the issues, with CALS' pleaded case only being briefly considered at paragraph 36, where the court a quo stated that:

> *"Whilst the submissions and the logic thereof by the third applicant are understandable. In the context of the present application, they are not sustainable due to the fact that "consent" in the definition of rape and other offences is included as a policy decision by the South African Parliament. That decision accords with international practice… The proposition, therefore by the third applicant would fall foul of the doctrine of separation of powers".*[10]

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[9] *Embrace Project NPC v Minister of Justice and Correctional Services* 04856/22) [2024] ZAGPPHC 961; 2025 (1) SACR 36 (GP).

[10] Id at para 36.

16. CALS thus contends that the court *a quo* failed to do the required constitutional analysis.

17. The court *a quo* erred by placing the proverbial “cart before the horse” in finding that CALS’ pleaded case would fall foul of the separation of powers doctrine, without first doing any analysis of CALS’ main contention that consent as a definitional element of the crime of rape and other sexual offences is inconsistent with the Constitution in that it unlawfully infringes upon the right to equality and dignity.

18. CALS submits that the court *a quo* ought to have taken the following approach –

    18.1. When faced with a frontal challenge to the constitutionality of sections 3, 4, 5, 6, 7, and 11A of the SORMA, the court *a quo* ought to have first considered whether the applicant (CALS) had shown that there was an impairment of a constitutionally protected right or rights and that there was a prima facie showing of impairment.

    18.2. If the court *a quo* was satisfied that the above was objectively shown by CALS, it then ought to have considered whether the impairment was justifiable under section 36 of the Constitution.

18.3. The section 36 analyses would include an onus on the state to show that the limitation, for example, is justified in an open and democracy society.

18.4. If the court *a quo* had then found through the section 36 analysis that the rights pleaded by CALS were unjustifiably infringed then the court would turn to section 172(1) of the Constitution.

18.5. Section 172(1)(a) would then require that the court *a quo* "must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency".

18.6. Once the court *a quo* has declared the invalidity of the sections it then turns to a section 172(1)(b) consideration. Here the court a quo can consider factors such as the separation of powers doctrine and then make "any order that is just and equitable", instead of relying on the separation of powers doctrine to knock out CALS' case from the starting blocks.[11]

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[11] Volume 1, page 80 – 81, para 30.

19. In summary, the court *a quo* failed to engage in the analysis at all with the frontal challenged pleaded by CALS. Thus, the court *a quo* fundamentally erred in its approach to the consideration of CALS' case.[12]

DOES CONSENT AS DEFINITIONAL ELEMENT OF THE IMPUGNED PROVISIONS VIOLATE SECTION 9 OF THE CONSTITUTION?

20. Section 9(1) of the Constitution provides that the principle of equality before the law confers the right to equal protection and benefit of the law.

21. Section 9(3) contains prohibition of unfair discrimination on certain grounds ("the listed grounds"). Section 9(5) presumes discrimination on listed grounds to be unfair.

22. This Court has held that:

> *"[o]ur jurisprudence is resolute that the type of equality underpinning our constitutional framework is not mere formal equality, but in order to give meaning to the right to dignity, also substantive equality. Substantive inequality "is often more deeply rooted in social and economic cleavages*

[12] Volume 1, page 81, para 31.

> *between groups in society", and so it aims to tackle systemic patterns where the structures, context and impact underpinning the discrimination matters".*[13]

23. Furthermore, this Court stated that there is also the principle of intersectionality, which interrogates how aspects of identity are mutually constitutive. In *Mahlangu v Minister of Labour*,[14] this Court said:

> *"There is nothing foreign or alien about the concept of intersectional discrimination in our constitutional jurisprudence. It means nothing more than acknowledging that discrimination may impact on an individual in a multiplicity of ways based on their position in society and the structural dynamics at play. There is an array of equality jurisprudence emanating from this Court that has, albeit implicitly, considered the multiple effects of discrimination".*[15]

24. Intersectionality is particularly relevant in our grossly unequal society, in which people occupy vastly different positions in society in terms of wealth and resources.

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[13] *Qwelane v South African Human Rights Commission* 2021 (6) SA 579 (CC) at para 58.

[14] *Mahlangu v Minister of Labour* 2021 (2) SA 54 (CC).

[15] Id at para 76.

25. Based on this, unfair discrimination is the linchpin of inequality. It is for this reason that section 9(3) of the Constitution expressly proscribes unfair discrimination on specified ground.

26. In *Harksen v Lane NO*,[16] this Court emphasised that the prohibition of unfair discrimination in the Constitution is instrumental in that it provides a bulwark against invasions of the right to human dignity. While equality and dignity are self-standing rights and values, axiomatically, equality is inextricably linked to dignity.[17]

27. Sexual offences are specifically acknowledged as a form of gender-based violence ("GBV") in Constitutional Court jurisprudence. For example, in *Tshabalala v S (Centre for Applied Legal Studies and Another as Amici Curiae),*[18] this Court held:

> *"[c]ourts across the country are dealing with instances of rape and abuse of women and children on a daily basis. The media is in general replete with gruesome stories of rape and child abuse on a daily basis. Hardly a day passes without any incident of gender-based violence being*

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[16] *Harksen v Lane NO* 1998 (1) SA 300.

[17] Id at para 50.

[18] *Tshabalala v S; Ntuli v S* 2020 (5) SA 1 (CC) ("*Tshabalala*").

> *reported. This scourge has reached alarming proportions. It is sad and a bad reflection of our society that 25 years into our constitutional democracy, underpinned by a Bill of Rights, which places a premium on the right to equality and the right to human dignity, we are still grappling with what is a scourge in our nation".*[19]

28. While the impugned provisions are on the face of it neutral, the impact of the law is anything but neutral. Legislation that is drafted in universal terms, ignoring gender-specific situations and power relations that underpin sex- and gender-based discrimination, including gender-based violence against women.

29. CALS submits that where sexual offences predominantly affect a certain group of individuals who enjoy explicit protection under the Constitution then laws which deal with how their cases will proceed through the criminal justice system (including rules of evidence and burdens of proof) must not differentiate between these victims and victims of non-gendered crimes.

30. Crime in general, and sexual offences specifically, are not gender-specific. However, women are disproportionately affected by sexual offences and

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[19] Id at para 61.

are often the targets of such crimes.[20] Gender-based violence is defined as violence that targets individuals or groups of individuals based on their gender.[21] The Preamble of SORMA states that

> *"WHEREAS **women and children, being particularly vulnerable, are more likely to become victims of sexual offences**, including participating in adult prostitution and sexual exploitation of children;*
>
> *WHEREAS the prevalence of the commission of sexual offences in our society is primarily a social phenomenon, **which is reflective of deep-seated, systemic dysfunctionality in our society,** and that legal mechanisms to address this social phenomenon are limited and are reactive in nature, but nonetheless necessary;*
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> *WHEREAS several international legal instruments, including the United Nations Convention on the Elimination of all Forms of Discrimination Against Women, 1979, and the United Nations Convention on the Rights of the Child, 1989, place obligations on the Republic towards the combating and, ultimately, eradicating of abuse and violence against women and children;*

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[20] K Chinnian and A Pietersen (2020) '*Gender construction in sexual offences cases: a case for fully reviving the Sexual Offences Courts' Acta Juridica* 135 at 138.

[21] Id at 138.

AND WHEREAS the Bill of Rights in the Constitution of the Republic of South Africa, 1996, enshrines the rights of all people in the Republic of South Africa, including the right to equality, the right to privacy, the right to dignity, the right to freedom and security of the person, which incorporates the right to be free from all forms of violence from either public or private sources, and the rights of children and other vulnerable persons to have their best interests considered to be of paramount importance".

31. Women in South Africa experience violence in many different forms, including rape, indecent assault, sexual harassment, emotional and psychological abuse, economical abuse and verbal abuse.[22] Studies emphasise that girls are three to six times more likely than boys to experience sexual abuse, and the vast majority of sexual abuse is perpetrated by men, no women.[23] Men's violence towards women is a clear display of the patriarchy and unequal power relations at play.[24]

32. Patriarchy refers to the power imbalances between men and women in various societal institutions; these imbalances enable male privilege and

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[22] South African Commission for Gender Equality (2000) *A Framework for Transformative Gender Relations in South Africa* at 68.

[23]F Pickup, S Williams & C Sweetman (2001) *Ending Violence against Women: A Challenge for Development and Humanitarian Work at* 18.

[24] Id at 68.

the subjugation of women. Patriarchy is ubiquitous, permeates every facet of life, and is deeply embedded in our consciousness, even filtering through to judicial systems.[25]

33. Gender inequality, male hegemony and power dynamics are at the core of a patriarchal society, and enable the high rate of sexual offences and the low conviction rate of offenders when offences are reported to the police. The criminal justice system does not always provide a safe space for sexual offence victims/survivors to relate their experiences of sexual violence.[26]

34. In *Tshabalala*, this Court said that "…for far too long rape has been used as a tool to relegate the women of this country to second-class citizens, over whom men can exercise their power and control, and in so doing, strip them of their rights to equality, human dignity and bodily integrity".[27]

35. CALS submits that women and gender-diverse individuals who are the disproportionate victims in sexual offence cases experience the criminal

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[25] Chinnian & Petersen at 135.

[26] Id at 136.

[27] *Tshabalala* at para 1.

law in an unfairly discriminatory way through the retention of consent as an element of sexual offences. This Court has held that the determining factor that makes discrimination unfair is the impact of the discrimination on its victims. Unfair discrimination "principally means treating people differently in a way which impacts their fundamental dignity as human beings who are inherently equal in dignity".[28] The concept of dignity is thus of central importance to understanding unfair discrimination. Unfair discrimination is differential treatment that is harmful or demeaning. It occurs where law or conduct perpetuates or does nothing to remedy existing disadvantages and marginalisation.[29]

36. The intention of GBV is to perpetuate and promote hierarchical gender relations. No matter how the violence is manifested it ultimately serves the same end: the preservation of male control and power.[30] In *Masiya v Director of Public Prosecution (Centre for Applied Legal Studies and Another as Amici Curiae),*[31] this Court said the following:

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[28] *Prinsloo v Van der Linde* 1997 (3) SA 1012 at para 31.

[29] I Currie and J De Waal (2013) *The Bill of Rights Handbook* (Sixth ed) at 223.

[30] *Tshabalala* at para 54.

[31] *Masiya v Director of Public Prosecution (Centre for Applied Legal Studies and Another as Amicus Curiae)* 2007 (5) SA 30 (CC).

> *"Today rape is recognised as being less about sex and more about the expression of power through degradation and the concurrent violation of the victim's dignity, bodily integrity and privacy. In the words of the International Criminal Tribunal for Rwanda the 'essence of rape is not the particular details of the body parts and objects involved, but rather the aggression that is expressed in a sexual manner under conditions of coercion".* [32]

37. This view of patriarchy and masculinity provides a useful starting point for examining rape within the context of gender roles and reinforcement of relations of power. This view was endorsed by this Court in *Tshabalala*, where this Court held "[t]he high incidence of sexual violence suggests that male control over women and notions of sexual entitlement feature strongly in the social construction of masculinity in South Africa. Some men view sexual violence as a method of reasserting masculinity and controlling women".[33]

38. CALS submits that it is imperative that the relationship between rape and power be considered when analysing whether the inclusion of consent as

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[32] Id at para 78.

[33] *Tshabalala* at para 1.

a definitional element of the impugned provisions amounts to unfair discrimination.

39. In *Tshabalala,* Khampepe J held that "[f]or many victims and survivors of rape, they "do not experience rape as a sexual encounter but as a frightening, life-threatening attack" and "as a moment of immense powerlessness and degradation".[34] She continues and states: "[r]ape, at its core, is an abuse of power expressed in a sexual way. It is characterised with power on one side and disempowerment and degradation on the other. Without more being said, we know which gender falls on which side".[35]

40. As Khampepe J said: "the importance of the proper construction and characterisation of rape cannot be gainsaid. This is because in all incidents of rape, there are two victims – the direct victim and the indirect victim. The former refers to someone who is actually raped whereas the latter refers

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[34] Id at para 70.

[35] Id at para 73.

to people who are affected by the rape incident and the treatment of that direct victim. Again, this reinforces that rape is systemic and structural".[36]

41. Accordingly, CALS submits that consent as a definitional element of the impugned provisions is unfair discrimination for the following reasons.

The first problem with consent: gendered versus non-gendered crime

42. The impugned provisions differentiate between victims of gendered crimes and victims of non-gendered crimes. It becomes, necessary, to consider the governmental purpose of the section, whether that purpose is a legitimate one and, if so, whether the differentiation does have a rational connection to that purpose.

43. The purpose of SORMA is to "comprehensively and extensively review and amend all aspects of the laws and the implementation of the laws relating to sexual offences, and to deal with all legal aspects of or relating to sexual offences in a single statute". Section 2 deals with the objects of SORMA, it aims, amongst others, to:

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[36] Id at para 77.

43.1. afford complainants of sexual offences the maximum and least traumatising protection that the law can provide, to introduce measures which seek to enable the relevant organs of state to give full effect to the provisions of this Act and to combat and, ultimately, eradicate the relatively high incidence of sexual offences committed in the Republic by:

43.2. protecting complainants of sexual offences and their families from secondary victimisation and trauma by establishing a co-operative response between all government departments involved in implementing an effective, responsive and sensitive criminal justice system relating to sexual offences;

43.3. giving proper recognition to the needs of victims of sexual offences through timeous, effective and non-discriminatory investigation and prosecution;

43.4. minimising disparities in the provision of services to victims of sexual offences.

44. CALS argues that the consent as a definitional element provides not fulfil the stated object in section 2 of SORMA.

45. The law has historically approached crimes which have women as the predominant victims with caution and mistrust. An example of this is the (mis)use of the cautionary approach, which historically was applied to the testimony of women who alleged that men had raped them. The Supreme Court of Appeal in *S v Jackson* described the foundation for the cautionary approach, and said,

> *"[t]he cautionary rule in rape cases is based on the principle that women are naturally prone to lie and to fantasise, particularly in sexual matters and that they are naturally vengeful and spiteful and therefore likely to point a finger at an innocent man just out of spite. There is absolutely no evidence that women are less truthful than men, or that they fantasise more or that they are naturally vengeful and spiteful. Therefore the cautionary rule is based on a principle which is discriminatory towards women, and inappropriate in countries committed to equal rights for men and women, and the rule should be prohibited on this ground alone. The cautionary rule has been called a lingering insult to women".*[37] [our emphasis]

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[37] *S v Jackson* [1998] 2 All SA 267 (A) at para 13.

46. Another example of the misogyny of laws relating to sexual offences (and women victims) is the previous applicability of the common law defence of "conjugal rights" where a man raped his wife. Du Toit argues that:

> *"[t]he slow acceptance of marital rape as a legal possibility is a clear indication of the extent to which rape is still very often implicitly viewed as a kind of property crime, and sexual relations more generally as relations of male ownership of, and control over, women's sexuality. Before the acknowledgement of marital rape, if a man forced sex with his wife against her will, then it was still not regarded as rape, because the formal consent was deemed to have been given by way of the marriage contract, months or years ago, and was considered irreversible except through divorce. This would be a clear case of where her consent and her will clashed, because they existed in different time frames."* [38]

47. The defence has since correctly been prohibited under section 56(1) of SORMA.

48. CALS' expert Professor Jameelah Omar, in her expert report, submits that unlike other types of assaults, such as common assault or other grievous types of assaults, sexual assault is effectively deemed to be lawful but for

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[38] L Du Toit (2008) 'The contradictions of consent in rape law' *South African Review of Sociology* at 60.

the lack of consent. This means that in sexual assault cases the starting point is that the 'conduct' (that is, the sexual activity) is lawful unless the allegation that it was 'without consent' can be proven beyond a reasonable doubt. In other words, but for the lack of consent, the conduct would be lawful.[39]

49. The retention of consent as a definitional element is because of the misconception that rape and sex are "two sides of the same coin", divided only by consent:

> *'It is, however, inappropriate to consider rape to be otherwise lawful sexual intercourse, rendered unlawful through lack of consent. Rape is forced or coerced sex, where coercion need not be direct, explicit or through physical force. The unlawful conduct is therefore not consent-less sex but a forced assault'.*[40]

50. This is a public policy choice, one heavily influenced by historical and social factors and (mis)understandings of gender, sex, sexuality and a general patriarchal approach that is so visible in the law of sexual offences.

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[39] Volume 6, page 565, para 19.

[40] Volume 6, page 565 at para 22.

51. Although any offence could have consent as a definitional element inserted, it is telling that it is almost exclusively sexual offences that do. Cowan says that consent as an element: "signals, as it does in the law of sexual offences generally that because the behaviour has, usual positive social value 'or, it is deemed sufficiently unharmful to be of a neutral value'", the criminal law should not discourage it; it is *prima facie* lawful unless consent is absent.[41]

52. Du Toit argues that the retention of consent "reinforces the traditional view of normal or normative sexuality thereby masculinising the implied rapist and feminising the implied victim of rape whether these persons are in fact sexed male or female".[42]

53. As Du Toit emphatically argues:

> *"[w]e know the story well: how often women's paralysis, reactions of shock, nausea, submission or fear are used to argue in court that the forced sex was either not (completely) against her will or not without her consent, however implicitly given. In no other crime does the response*

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[41] Volume 6 page 566, para 23.

[42] Volume 6 page 566, para 24.

> *of the victim play such a large role in the very definition of the crime. Imagine that one's response to being robbed or hijacked during the very event could plausibly be considered a decisive factor in determining whether the crime has actually transpired. Why does rape law do this?"*[43]

54. Professor Omar indicates that there have been global calls arguing for the removal of consent from the definition of rape.[44] Mackinnon contends that: "rape should be defined as sex by compulsion of which physical force is one form. Lack of consent is redundant and should not be a separate element of the crime".[45]

55. In her groundbreaking work, *Rape Redefined,* MacKinnon argues for the removal of consent from the discourse of sexual violence and to instead focus on the inescapable contextual aspects that influence sexual encounters.[46] She also argues that that while non-consent focuses on rape "fundamentally as a deprivation of sexual freedom, a denial of self-acting",

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[43] Du Toit at 144.

[44] Volume 6, page 566, para 25.

[45] C MacKinnon (1989) *Toward a Feminist Theory of the State,* Cambridge, MA: Harvard University Press at 245

[46] K McLoughlin & A Ringin (2024) 'Giving Meaning to Consent at the International Criminal Court and Beyond: A (Qualified) Defence of Consent', *Australian Feminist Studies* at 4.

coercion as the basis of liability "sees rape fundamentally as a crime of inequality, whether of physical or other force, status or relation".[47]

56. She argues that consent "ignores the inequality of the sexes as content for, as well as potential content in, sexual interactions", finding that, "coerced submission can merge with consent not because juries make mistake, but because forced and threatening conditions are so standard a feature of relations between women and men under conditions of sex inequality that they can look like sex".[48]

57. Further, MacKinnon proffers that "consent to sex, or failure of proof of non-consent, is routinely found in situations of despairing acquiescence, frozen frights, terror, absence of realistic options, and socially situated vulnerability".[49]

58. CALS submits by retaining consent as a definitional element the lawmakers hinders sexual offences law reformation by continuing to sexualise the offences instead of framing the offences as offences

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[47] C MacKinnon (2006) *Are Woman Human? And Other International Dialogues.* Cambridge, MA: Harvard University Press at 237 - 8.

[48] C MacKinnon (2016) "Rape Redefined" *Harvard Law & Policy Review* 10 (2) at 439-40.

[49] Id at 447.

grounded on violence. Rape is not a sexual act driven by sexual desire; rather it is a violent and hostile act which is aimed at dominating, humiliating and terrorising the victim. As cemented by du Toit, rape is consistently pushed back within the realm of sexual crimes rather than violence.

59. CALS submits that consent is not a factor or element in crimes such as robbery. It is understood that the robbery occurs without the victim consenting thereto, the same principle should be applied to sexual offences. This would have the effect of desexualising the offence and shifting the focus from sex to assault. As Professor Omar argues it would cure "misconception that sexual violence is just sex gone wrong rather than an act of criminality".[50]

60. According to Hall:

> *"[m]ale sexuality is linked to aggression, forcefulness and initiative, and female sexuality is constructed as passive and receptive. The sexual 'scripts' for normal sexuality cast men in the role as predator and women in the role of victims. The basic elements of rape are this already present*

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[50] Volume 6, page 567, para 28.

> *in normal intercourse. On this view rape is not the polar opposite of normal sex, but an extreme form of it. Its deviance lies in its extremeness, not in its 'otherness'. The dominant reality of rape, as encoded into language of the law, is that of a sexual experience for both the assailant and the victim. This 'reality' is a male reality".* [51]

61. Desexualising sexual offences would unburden the victim with having to prove that they were not a willing participant in the unlawful sexual act, that they were not overpowered by their own sexual desires and entertained the sexual advances of the perpetrator only to regret it later and cry "rape".

62. Removing consent as a definitional element would therefore provide greater consistency and coherency in the criminal law.

63. Victims of other non-gendered crimes are not affected by consent at all. The prosecution does not need to prove consent as it is not a definitional element of crimes such as assault, murder, robbery and theft, amongst others. The differentiation does arise from the gendered nature of the crime, this differentiation has the potential to demean persons in their inherent humanity and dignity. It follows that the consent as a definitional

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[51] K Ross (1993) 'Women, rape and violence in South Africa two preliminary studies' *Community Law Centre University of the Western Cape* at 10.

element of the impugned provisions discriminates against victims of sexual offences, who are predominantly women.

64. Despite women's socio-cultural differences, sexual domination serves as a unifying factor for all women, irrespective of their specific experiences of oppression. The Justices in *Chapman v S* succinctly provided a statement of what women's lived experiences ought to be, when they stated:

> *"Women in this country… have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives. Yet women in this country are still far from having that peace of mind".*[52]

65. Despite the ideal circumstances described above, in reality, violence against women affects all women, regardless of whether they were exposed to such violence or not. The common denominator for all women, whether they are affected or not, is that they live in fear. Weldon provides

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[52] *Chapman v S* 1997 (3) SA 341 (A) 345A–B.

credence to MacKinnon's argument that all women are affected by sexual violence by claiming that—

> *"[women] are expected to alter their behavior to minimize risk: they oughtn't stay late at the office alone, or walk unescorted after dark,or draw public attention to themselves, or be in private spaces with men – even men they know well. Thus, violence against women restricts the ability of all women to take advantage of their rights as citizens of a democratic public".* [53]

The second problem with consent: a focus on the victim's conduct and the disproportionate burden on the complainant in sexual offences

66. In criminal cases, each element of the crime must be proven beyond a reasonable doubt. Thus, by including consent in the definition of many sexual offences, the prosecution has the obligation to prove that consent was not present beyond a reasonable doubt.

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[53] L Weldon (2002) *Protest, Policy, and the Problem of Violence against Women*, University of Pittsburgh Press at 11.

67. During the adjudication of the offence, the victim is tasked with proving beyond a reasonable doubt that they communicated their unwillingness to engage in the sexual act and that such unwillingness could not have been misinterpreted by the offender.

68. Even harder to adjudicate are cases where the victim consents to parts of the sexual encounter but not to others. An apt example would be where a person consents to penile vaginal sexual intercourse but does not consent to anal intercourse and is thereafter forced to engage in anal sex. Since consent is central to the offence, it becomes insurmountable for the victim to prove that there was no consent for the act and that such a lack of consent was clearly communicated to the penetrator.

69. The Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Dr Tlaleng Mofokeng, writes that consent for sexual contact consists of more than a “yes” or “no”. She says that consent must involve the details of condom use, what kind of sexual positions will be involved, what body parts will be

used and when the sexual contact ends. She further asserts that "[t]hings like relationship status do not constitute consent forever".[54]

70. CALS argues that such situations exist because consent is an element of the offence instead of coercive circumstances.

71. Du Toit explains that:

> *"the complainant convinces the judge or jury that her body and her mind were in a real sense working against one another, that she was split or divided in herself, that her body passively underwent sexual intercourse while her mind, spirit, soul or will was actively resisting it, that she lost her mind-body integrity for the duration of the intercourse. Given these contradictory requirements, it is then small wonder that rape courts often find the complainants to be deeply paradoxical, contradictory or enigmatic." ",...She is required to prove the absence of something essentially invisible, the absence of consent, rather than the unlikelihood of active desire on her own part".*[55]

72. CALS submits that discrimination arises from the retention of consent as an element of sexual offences as it focuses attention on the conduct of the

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[54] T Mofokeng (2019) *A guide to sexual health and pleasure,* Pan Macmillan at 174.

[55] Du Toit at 402.

victim rather than that of the accused. Whereas most common law and statutory crimes are solely concerned with whether the accused acted unlawfully. Furthermore, this is also where many common law and statutory law offences do not have women as disproportionate victims of the crime.

73. Du Toit argues viewing rape as a sexual crime dependant on the woman's consent also implies that the law's focus is on female sexuality and the burden of proof is placed on the victim. She states, "[t]o approach the wrong of rape as embedded in the non-consensual nature of the act is inevitably to place the ethical burden on the victim", because the courts must try to determine "whether the victim sufficiently communicated her non-consent, or whether that non-consent was likely given the history of the victim".[56]

74. The current structure of sexual offence crimes reflects archaic beliefs that rape and other sexual offences are simply sex or other sexual encounters

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[56] Id at 390.

without consent. Instead, these offences are about violence, control, and coercion. Not sexuality.

75. In *Tshabalala*, this Court held that "[t]he requirement of sexual penetration is a legal requirement which relates to the biological element of sexual intercourse". For many victims and survivors of rape, they "do not experience rape as a sexual encounter but as a frightening, life-threatening attack" and "as a moment of immense powerlessness and degradation".[57]

76. CALS submits that the removal of consent as a definitional element would force a great deal of focus on the conduct of the accused, rather than on how the victim responded and would be in line with the objects of SORMA. Focusing on the accused would also negate the impact of the overemphasis on whether the perpetrator could have genuinely believed there was consent if their behaviour in potentially coercing the victim were under greater scrutiny.

77. As Professor Omar submits there is no other assault for which the absence of consent must be proven beyond a reasonable doubt. For common

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[57] *Tshabalala* at para 70.

assault, for example, the unlawful and intentional application of force to the person of another or inspiring the belief in the other person that force is to be immediately applied.[58]

78. Professor Omar states that an emphasis on proving the absence of consent fundamentally affects the rhetoric of sexual violence and the possibility of proving a sexual offence in court. Unlike common assault or other grievous types of assault, sexual assault is effectively deemed to be lawful but for the lack of consent. This means that in sexual assault cases the starting point is that “conduct” the sexual activity is lawful unless the allegation that it was without consent must be proven beyond a reasonable doubt.

79. She continues and argue that consent remains a deeply contented issue. First, it is usually the primary point of contention in a rape case and second, it does not address frequently occurring sexual violations between people who know each other, where the alleged perpetrator continued with the

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[58] Volume 6, page 564, para 17.

sexual act without clear agreement by the victim giving rise to the defence of mistaken belief in consent.[59]

80. In other words, she argues that situations where the law would have previously likely found that there was no real consent have been clarified while the more common “she said, he said” situations are no clearer than before and therefore are adjudicated using legal precedent under the common law.[60]

The third problem with consent: returning to the force requirement

81. Historically rape laws in South Africa were predominantly informed by the colonial British and focused on women as the primary victim of rape and men (predominantly black men) as the perpetrators. This can be seen as early as the 1800s in the Cape of Good Hope where rape was classified as an act of “illegal reproduction” experienced on “women by men”.[61]

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[59] Volume 6 page 563, para 15.

[60] Volume 6 page 563, para 16.

[61] J Graham (2018) ‘”Keep the Boys Happy”: A critical investigation into rape trends at the Cape, 1795 – 1895’, *Masters in Arts (History),* University of Stellenbosch, at 10.

82. Rape laws in the Cape at the time were not only narrow in relation to who could be a victim (women and predominantly white women) but also included racist application. Graham notes that punishment of black men who raped white women was far more severe than where white men who raped black women at the time. For example, in 1829 – 1842, 22 persons accused persons accused of rape were coloured. Of the 13 coloured men convicted of rape; all were sentenced to hangings. In comparison two white men were convicted of raping white women, and both received 10 years' imprisonment and 75 lashes.[62]

83. The historically racist and sexist formulation of rape laws and application thereof, was part of the notion of the “Black Peril” and the use of the death sentence was seen as a way to protect white women who were framed as “virtuous” against the “violence of lust” of black men.[63] The protection of white women was furthered by the idea that the violation of the woman was a property crime where women were the objects of their fathers or husbands.[64]

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[62] Id.

[63] Id.

[64] Id.

84. Summarily, the emergence of rape law in South Africa has never been neutral and instead the laws were based on racists, sexist and classist foundations. The movement to developing victim-centred rape laws in South Africa must acknowledge that we are using the "master's tools to try to dismantle the master's house". Rape laws have developed significantly since the colonies, yet, the continued discriminatory views and biases based on gender, race and class continue to permeate these efforts.

85. Similarly, in *Masiya* this Court traced the history of sexual offence crimes and noted that the formation of sexual offences was around protecting the chaste behaviour of a woman rather than her interests which include autonomy.[65] Women were viewed as property and their "value" was based on their virtue and chastity.

86. With South African rape laws being heavily influenced by British laws, it is important to note that in 19th century England rape was defined as "sexual intercourse that was against a woman's will by force, fear or fraud". Prior to the 19th century British law defined rape as the "carnal knowledge of a woman against her will" where in order to prove the offence it was

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[65] *Masiya* at para 20.

necessary to show that the accused used fore or violence. The term "carnal" contributed to the constructions of rape as "theft of male property in female sexuality" which traces back to men's ownership of women in English law.[66]

87. Although force and resistance and have largely been modified or abolished in SORMA, these are often still employed to interpret whether or not the sexual intercourse or sexual activity was consensual, as courts tend to revert to the standard of physical force or resistance. For example, in the Eastern High Court, Grahamstown decision of *Coko v S* the court stated:

> *"No force or threats were used to coerce the Complainant (who is the same age as the Appellant). After he had taken his clothes off, he returned to place his head in between her thighs, again with no force. He then performed oral sex on her, which she testified she had no objection to. On the complainant's version, there was no manifestation of any refusal of consent between the kissing, the oral sex and the penetration".*
> [67]

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[66] Graham at 111.

[67] *Coko v S* (CA&R 219/2020) [2021] ZAECGHC 91; [2021] 4 All SA 768 (ECG); 2022 (1) SACR 24 (ECG) para 94.

88. In the case of *S v Amos* (IH's case), the presiding officer in the case states:

> *"[t]he fact that the complainant did not signify her opposition to the acts in any way makes it impossible for the Court to be satisfied that the accused subjectively knew that he did not have consent to proceed with the acts".*[68]

89. It is clear from the above that there is a certain threshold of resistance that a victim must reach (even implicitly so) for a court to be satisfied that the accused was aware of her lack of consent.

90. In *Masiya,* this Court traces the historical focus on "force" at the centre of the definition of rape. This Court said:

> *"In this period, patriarchal societies criminalised rape to protect property rights of men over women. The patriarchal structure of families subjected women entirely to the guardianship of their husbands and gave men a civil right not only over their spouses' property, but also over their persons. Roman-Dutch law placed force at the centre of the definition with the concomitant requirement of "hue and cry" to indicate a woman's lack of consent. Submission to intercourse through fear, duress, fraud or*

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[68] Volume 2, page 216.

deceit as well as intercourse with an unconscious or mentally impaired woman did not constitute rape but a lesser offence of stuprum.

In English law the focus originally was on the use of force to overcome a woman's resistance. By the mid-eighteenth century force was no longer required for the conduct to constitute rape and the scope of the definition was increased to include cases of fraud or deception. This latter definition was adopted in South Africa".[69]

91. Ross argues that the definition of rape, wrongly focuses on the male perspective and sees rape as just sex where the man has been "too aggressive" and has "gone too far".[70] Ross argues further that since there is no universal test for "non-consent" courts have relied on force or resistance by the victim as a (deceptively), simple formula to determine non-consent. Thus, force or resistance becomes a requirement of non-consent.[71]

92. This "force or resistance" requirement wrongfully assumes that "real victims" of sexual violations will respond in a particular way.

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[69] Id at para 21 and 22.

[70] Ross at 10.

[71] Ross at 11.

93. In the court a *quo* the Justice Baqwa summarised the *amici* position as "highlighting the significance of incorporating psychological perspectives when assessing consent".[72] Furthermore, he accepts the evidence of the amici that victims may experience different "peritraumatic responses" (the physical, emotional, cognitive, and behavioural reactions that occur during or right after a traumatic event).[73] During a sexual violation, a victim can experience the subjective feelings of "fear, paralysis, numbness and detachment" and although some victims may resist the attacker, "a substantial number of survivors do not".[74]

94. While the definitional element of consent appears to be neutral, this is not the case. Victims of sexual offences are often women and gender-diverse persons, and as this Court has already stated in cases like, rape is about differential power relations between victim and perpetrator. Using "force" or "resistance" as a hidden requirement of non-consent has an unfair impact on women and gender-diverse persons as it dictates how such persons should respond in order for the rape to be valid.

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[72] *Embrace Project NPC v Minister of Justice* [2024] ZAGPPHC 961 para 24.

[73] Id at para 25.

[74] Id at para 24.

SECOND GROUND OF APPEAL – THE FAILURE TO MEANINGFULLY CONSIDER THE EXPERT EVIDENCE

95. CALS submit that the court *a quo* failed to meaningfully consider the expert evidence of Professor Omar.

96. Professor Omar's evidence in summary included:

96.1. Consent as a definitional element is one of the aspects of the law of sexual offences that is most heavily criticised.

96.2. Numerous scholars have long decried the discriminatory impact on the victim (such victims being predominantly women) as it forces a trial to focus on the conduct of the victim.

96.3. Consent is not well understood and its dictionary and legal-meaning can easily be confused.

96.4. Placing too much emphasis on individual autonomy means that complainants can suffer the law's imposition of what she terms "imputed autonomy". What this means is that the complainant is a vulnerable member of society, a woman or a child, for example,

> and does not enjoy the freedom to exercise their autonomy in any real manner, particularly to reject sexual advances. In such a situation, the law employs a freedom to exercise autonomy, an "expressive" approach to consent, where the complainant is deemed to have an autonomy that she does not have. Following that reasoning, the ability to consent and the actual consent itself are then imputed onto the complainant.[75]

97. To demonstrate the court *a quo's* failure to adequately and meaningfully consider the expert evidence of Professor Omar, which is integral for the section 172(1) constitutional analysis, CALS refers to the judgment by the court *a quo* whereby the only reference to Professor Omar's evidence is set out under paragraph 22 and 23:

> *"The third applicant relies on the expertise of Professor Jameelah Omar (Prof Omar) who argued that consent is a deeply contested issue and a primary point of contention in rape cases. This has been a discourse by numerous scholars who condemn consent as having a discriminatory impact on the victim as it forces a trial to focus on the conduct of the victim...*

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[75] Volume 1, pages 82-83, para 35.

> *…The definitional element of consent places too much emphasis on individual autonomy. Usually, the victims are the vulnerable members of the society (women and children), they do not enjoy the freedom to exercise their autonomy in a way that they can reject sexual advances. The law imposes a freedom to exercise autonomy and an expressive approach to consent where victims are deemed to have an autonomy that they do not have".* [76]

98. The evidence of Professor Omar is only referred to in the above two paragraphs of the court *a quo*'s judgment. It can be seen that the court a quo's did not meaningful engage and consider Professor Omar's evidence, or indeed engage with the reasonableness of Professor Omar's conclusions.

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[76] *Embrace NPC* at para 22.

THIRD GROUND OF APPEAL – INTERNATIONAL AND COMPARATIVE LAW

International law

99. The infusion of our international obligations, into our law in relation to sexual offences is manifest if regard be had to the preamble of SORMA where it is stated:

> *"Whereas several international legal instruments, including the United Nations Convention on the Elimination of all Forms of Discrimination Against Women, 1979, and the United Nations Convention on the Rights of the Child, 1989, place obligations on the Republic towards the combating and, ultimately, eradicating of abuse and violence against women and children".*[77]

100. South Africa is a party to several core international human rights treaties du toithat protect the rights and interests of women and gender diverse

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[77] *Tshabalala* at para 97.

individuals, including the Convention on the Elimination of all Forms of Discrimination Against Women and the Convention ("**CEDAW**").

101. CEDAW has three primary pillars on which it is based: non-discrimination, substantive equality and state obligation. CEDAW imposes a duty on a state to prohibit all forms of gender-based discrimination that has the effect or purpose of impairing the enjoyment by women of fundamental rights and freedoms and to take reasonable and appropriate measures to prevent the violation of these rights.

102. Under General Recommendation 19, the CEDAW Committee notes that "gender-based violence is a form of discrimination which seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men".[78] The Committee also stated that the general prohibition of gender discrimination includes gender-based violence. Gender-based violence is violence that is directed against a woman because she is a woman or which affects women disproportionately. Gender-based violence includes

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[78] CEDAW (1992) *General Recommendation No. 19: Violence Against Women* UN Committee on the Elimination of Discrimination Against Women.

acts that inflict physical, mental, or sexual harm or suffering, threats of such acts, coercion, or other deprivations of liberty.[79]

103. Article 15 of CEDAW is of significance in this matter in so far as it relates to gender discrimination within a country's legal system. Summarily, article 15 states that "[s]tate parties shall accord to all women equality with men before the law". This places an obligation on both the legislature and the judiciary to create laws and interpret laws in ways which are not discriminatory against women.

104. Further to this, the State has a due diligence obligation in terms of numerous international instruments to "prevent, investigate and punish violence".[80] With regard to the State's obligation to punish acts of gender-based violence there is an implicit role on a State to also create, monitor and amend laws to ensure they do not obstruct the process of punishment.

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[79] CEDAW, *General Recommendation No. 19* (1992) 6.

[80] UN General Assembly, *Declaration on the Elimination of Violence against Women* (1993) GA Res 48/104, 20 December 1993, Article 4(i).

105. In the case of *Goekce v Austria* the facts are concerned with a woman who was killed by her abusive partner, yet the issues of a State's due diligence obligations around the eradication of gender-based violence remain pertinent.[81] The CEDAW Committee found that the Austrian government had failed to meet numerous obligations through their failure to act timeously and prosecute the abusive partner of the deceased, which included acquitting the abusive man on one occasion due to Goekce's injuries being minor.

106. In relation to the State's due diligence requirement the Committee stated "[w]ith regard to articles 1 together with 2 (e) of the Convention, the authors state that the Austrian criminal justice personnel failed to act with due diligence to investigate and **prosecute acts** of violence and protect Şahide Goekce's human rights to life and personal security". [82]

107. The Committee highlighted the due diligence requirement which includes successful prosecution of gender-based violence crimes, and states

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[81] CEDAW*, Communication No. 5/2005*, CEDAW/C/39/D/5/2005 (2007) para 7.3.

[82] CEDAW*, Communication No. 5/2005* (2007), para 3.5.

> *"…the remedies that came to mind for purposes of admissibility related to the obligation of a State party concerned to exercise due diligence to protect; investigate the crime, punish the perpetrator, and provide compensation as set out in general recommendation 19 of the Committee".*[83]

108. The issues that emanate from including consent as a requirement of certain sexual offences was highlighted by Radhika Coomaraswamy, the Special Rapporteur on violence against women, its causes and consequences as early as 1995. She stated that:

> *"In most countries, rape is defined by statute or by common law as sexual intercourse without the consent of or against the will of the victim. Research from all jurisdictions indicates that any woman who has to prove that she did not consent will face enormous difficulty unless she shows signs of fairly serious injury. She will face particular difficulty if she knows or has had a sexual relationship with the man in the past".*[84]

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[83] CEDAW*, Communication No. 5/2005* (2007), para 7.3.

[84] UN Commission on Human Rights (1994) *Preliminary Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, Ms. Radhika Coomaraswamy*, E/CN.4/1995/42 at 42, para 182.

109. In considering that South Africa successfully prosecutes only 8.6% of rapes reported to the South African Police Service, CALS submits that the due diligence requirement creates an obligation on the State to irradicate laws which create barriers to the successful prosecution of gender-based violence crimes and even more so when such laws are discriminatory in nature.[85]

110. The approach to framing rape as a crime that does not include consent as a definitional element is not foreign to international law.

111. It was through the prompting of Trial Judge Navi Pillay that the prosecutor included sexual violence crimes in the 1998 case of *The Prosecutor v Jean-Paul Akayesu*.[86]

112. Akayesu was found guilty of nine out of fifteen counts of crimes he was charged with. The tribunal found that as mayor of Taba, Rwanda, during the events of the Rwanda genocide in 1994, Akayesu was responsible for

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85 M Machisa *et al* (2017) Rape Justice in South Africa: a Retrospective Study of the Investigation, Prosecution and Adjudication of Reported Rape Caes from 2012, South African Medical Research Council.

86 *Prosecutor v Akayesu*, Case No. ICTR-96-4-T, Judgment, at 598 (Sept. 2, 1998).

maintaining law and order in that commune, that he knew about or where he was present during crimes committed, and that he did nothing to prevent said crimes being committed.[87]

113. The tribunal found that acts of sexual violence, beatings and killings occurred, at times with the facilitation of Akayesu, and subsequently found him guilty of crimes against humanity (murder), crimes against humanity (rape), and crimes against humanity (other inhumane acts).[88] Akayesu was sentenced to life imprisonment.

114. It was during this trial that a definition of rape was enumerated internationally for the first time and was defined as 'a physical invasion of a sexual nature, committed on a person under circumstances which are coercive'. Consent was not considered as a feature at all.[89]

115. In coming to this definition, the Tribunal Bench reportedly canvassed domestic laws from states of all legal traditions and attempted to form a definition which represented the majority view. Judge Pillay later

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[87] K Mcloughlin and A Ringin at 7.

[88] Id at 7.

[89] Id at 7.

commented on this aspect, stating that “there was no place whatsoever for the consideration of consent. I hoped that this ruling would remove the age-old practice of focusing on the conduct of the woman to establish the guilt of the perpetrator”.[90]

116. Non-consent is absent from the definition because it is redundant: coercion is present because consent is absent. Coercion can be circumstantial as well as physical: “[t]hreats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances”.[91]

117. Similarly, the Rome Statute does not require establishing consent as an element of rape although it remains a defence. The crime of rape is in Articles 7 and 8, listed as both a crime against humanity and a war crime. Consent is not present within the definition of these crimes.[92]

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[90] Id at para 7.

[91] *Akayesu* at 688. There, examples of coercive circumstances were given as armed conflict or the military presence of Interahamwe among refugee Tutsi women at the bureau communal.

[92] K Mcloughlin and A Ringin at 9.

118. In *Prosecutor v Germain Katanga,* the Trial Chamber of the International Criminal Court stated that the Elements of Crimes (authorising document) to the Rome Statute, does not refer to a victim's lack of consent and therefore it need not be proven.[93]

Regional

119. The African Commission on Human and Peoples' Rights ("the African Commission") passed a resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity.[79] The resolution sets out that states must take the necessary measures to ensure that the rights of victims of violence are guaranteed, irrespective of their race, colour, nationality, citizenship, ethnicity, profession, political opinions, sex, sexual orientation, gender identity, gender expression or any other factor that could lead to discrimination against them. The interpretation of article 2 of the African Charter is open ended and inclusive, and aims at offering the

[93] Id at 10.

maximum protection to all Africans, hence the inclusion of sex, gender and sexual orientation as prohibited ground of unfair discrimination.

120. Further, states must take legislative and all other necessary measures to guarantee the well-being and security of victims and witnesses of violence. States must also ensure that they diminish the negative impact that actions to combat violence and its consequences can have on victims and witnesses. In particular, states must ensure that the potentially negative consequences for victims and witnesses, of procedures to investigate acts of violence and efforts to prosecute perpetrators, are reduced as much as possible.

121. Moreover, states must adopt legislative measures, and any other measures required to guarantee effective, sufficient and timely remedies, including reparations, to the victims of violence. Remedies must be affordable and accessible without unjustified delays. There should be effective access to justice, a guarantee of fair and equitable treatment that is adapted to the legal proceedings undertaken, adequate, effective and timeous reparation for any damages sustained; and free access to information regarding remedies and the methods of obtaining reparation.

Reparation must include individual and collective measures, including restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.

122. According to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa ("**Maputo Protocol**"), discrimination is required to be combated by enacting and effectively implementing appropriate legislative or regulatory measures, including those prohibiting and curbing all forms of discrimination, particularly those harmful practices, which endanger the health and general well-being of women.

123. In combating discrimination against women, article 2(1) requires states to take 'appropriate' measures. 'Appropriate measures' in the view of the CEDAW Committee, suggests that the intervention responds specifically to the resistance and obstacles to the elimination of discrimination against women.

124. CALS submits the exclusion of consent as a definitional element of rape is solidly in line with international law.

COMPARATIVE SUPPORT FOR CALS' POSITION

Namibia

125. Namibia has historically followed the approach of English law and South African law. However, it embarked on a process of re-evaluating and examining the effectiveness of its rape laws post-independence. As a result of this evaluation Namibia passed the Combatting of Rape Act 8 of 2000 ("the Act"). In terms of section 2(1), rape is defined as

> "*any person (in this Act referred to as perpetrator) who intentionally under coercive circumstances – commits or continues to commit a sexual act; or causes another person to commit a sexual act with the perpetrator or with a third person, shall be guilty of the offence of rape"*.

126. It is important to highlight that it is significant that Namibia has moved away from the notion of consent and defines rape using coercive circumstances, similar to International Criminal Tribunal for Rwanda. Namibia recognised that coercion was a new concept, within the context of rape, in this regard, the Act goes on to explicitly set out (in a non-

exhaustive list) what constitutes coercive circumstances. The Act defines coercive circumstances as follows:

126.1. the application of physical force to the complainant or to a person other than the complainant;

126.2. threats (whether verbally or through conduct) of the application of physical force to the complainant or to a person other than the complainant;

126.3. threats (whether verbally or through conduct) to cause harm (other than bodily harm);

126.4. to the complainant or to a person other than the complainant under circumstances where it is not reasonable for the complainant to disregard the threats;

126.5. circumstances where the complainant is under the age of fourteen years and the perpetrator is more than three years older than the complainant;

126.6. circumstances where the complainant is unlawfully detained;

126.7. circumstances where the complainant is affected by –

126.8. physical disability or helplessness, mental incapacity or other inability (whether permanent or temporary); or

126.9. intoxicating liquor or any drug or other substance which mentally incapacitates the complainant; or

126.10. sleep,

126.11. to such an extent that the complainant is rendered incapable of understanding the nature of the sexual act or is deprived of the opportunity to communicate unwillingness to submit to or to commit the sexual act.

Eswatini

127. The Sexual Offences and Domestic Violence Act, No. 15 of 2018, ("SODV Act") became a law in Eswatini in June 2018. The SODV Act changes some of the definitions of sexual crimes and creates new crimes. Since the Kingdom of Eswatini is a signatory to CEDAW. The SODV Act plays an

important role in domesticating the provisions in CEDAW relating to gender-based violence.

128. Section 3 of the Sexual Offences and Domestic Violence Act, 2018 define rape as an unlawful sexual act with a person. Section 3(3) provides that an unlawful sexual act for purposes of this Part constitutes a sexual act committed under the following circumstances:

128.1. In any coercive circumstance;

128.2. Under false pretence or by fraudulent means;

128.3. In respect of a person who is incapable in law of appreciating the nature of the sexual act;

128.4. Duress;

128.5. Psychological oppression or

128.6. Fear of violence.

Lesotho

129. The Sexual Offences Act 29 of 2003 defines sexual offences under section 3 states that a sexual act is *prima facie* unlawful if it takes place in any coercive circumstances. The Act defines coercive circumstances to include:

129.1. there is an application of force, whether explicit or implicit, direct or indirect, physical or psychological against any person or animal;

129.2. there is a threats, whether verbal or through conduct, of application of physical force to the complainant or a person other than the complainant;

129.3. the complainant is below the age of 12 years;

129.4. the complainant is unlawfully detained:

129.5. the complainant is affected by-

129.6. physical disability, mental incapacity, sensory disability, medical disability, intellectual disability, or other disability, whether permanent or temporary; or

129.7. intoxicating liquor or any drug or other substance which mentally or physically incapacitates the complainant; or

129.8. sleep,

129.9. to such an extent that he/she is rendered incapable of understanding the nature of the sexual act or deprived of the opportunity to communicate unwillingness to submit to or to commit the sexual act;

129.10. the complainant submits to or commits the sexual act by reason of having been induced, whether verbally or through conduct, by the perpetrator, or by some other person to the knowledge of the perpetrator, to believe that the perpetrator or the person with whom the sexual act is being committed is some other person;

129.11. as a result of the fraudulent misrepresentation of some fact by or any fraudulent conduct on the part of the perpetrator, or by or on the part of some other person to the knowledge of the perpetrator, the complainant is unaware that a sexual act is committed with the perpetrator; and

129.12. a perpetrator knowing or having reasonable grounds to believe that he/she is infected with a sexually transmissible disease, the human immuno-deficiency virus or other life-threatening disease does not, before committing the sexual act, disclose to the complainant that he/she is so infected.

130. In *Rex v Makebe High Court of Lesotho*,[94] the complainant alleged that the defendant raped her. The defendant vehemently denied the allegations and testified that the sex was consensual.

131. The High Court treated the defendant's claim of consent as an affirmative defence ruling that he had the burden of proving consent, on a balance of

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[94] (27/2011, CR579/2010, Review Order No. 04/2011, Leribe District) High Court of Lesotho

probabilities. The Court held that the defence was unable "through cross examination, to show that the sex was consensual".[95] Consequently, the court convicted the defendant of rape.

132. CALS submit that this was a landmark case because it shifts the burden of proving consent in rape cases. However, it does not shift the burden of proving innocence to the accused. Instead of requiring the prosecution to prove a lack of consent, the defendant had to prove that the victim consented to the sexual encounter, and all this is because of the empowering legislation which does not have consent as a definitional element of rape.

133. CALS submits that Eswatini, Lesotho and Namibia are powerful examples of how the law on sexual offences can operate effectively without consent as a definitional element.

134. Taking into account the law of South Africa's neighbouring countries that it appears that the general trend is towards the definition of rape without

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[95] Id at 4.

consent following international criminal law. CALS submits that "[t]he wave of change seems to be moving – certainly preponderantly – in one direction". [96] Also, the retention of consent as a definitional element by some countries is not necessarily an indication that these countries would not abolish it even if called upon to do so. In certain cases, it may well be that the issue of consent as a definitional element has never arisen for judicial determination.[97]

RESPONSES TO EMBRACE APPLICANTS' SUBMISSIONS

135. The Embrace applicants oppose CALS' relief and argue that doing away with consent would retain the defence of a mistaken belief in consent (the Embrace applicants call this the "the Amos defence").

136. It is worth-nothing that the defence of mistaken belief in consent emerges from the common law definition of rape in South Africa, which is codified in Section 3 of SORMA.

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[96] 2015 (5) SA 83 (CC) at para 37.

[97] Id at para 38.

137. It is crucial to note that the crime of rape can only be committed intentionally.[98] This is because the accused's attention must relate to all the elements of the crime, as the accused must have known or foreseen and discounted the possibility that the complainant had not consented to the sexual penetration. To this end, it is arguable that a subjectively mistaken belief that the person has consented to sex, however unreasonable, constitutes a valid defence since it excludes the element of intent.[99]

138. The genesis of the defence lies in the complex concept of *mens rea* which includes not only unlawfulness but also knowledge of unlawfulness. *Mens rea* is thus made up of two elements, the intellectual one and the volitional one.

139. The intellectual element requires the individual to have knowledge of the elements of the act, the circumstances mentioned in the definitional

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[98] *R v K* 1958 3 SA 420 (A) 421; *R v Z* 1960 1 SA 739 (A) 743A, 745D; (although these cases relate to the old common law crime of rape, they still apply to the new crime. It is nevertheless an indication that intent as an element of rape must be present for the crime of rape to be constituted); Van der Bijl 2010 SACJ 236; Hoctor Snyman's Criminal Law 307.

[99] S Stal (2023) 'Does Mistaken Belief in Consent Constitute a Defence in South African Rape Cases?' *PER* 28

elements and of unlawfulness. The volitional element consists of directing one's will towards the act. The volitional element thus changes what is ultimately "day dreaming", "wishing" or a "thought crime" into intention.

140. In relation to the nature of the knowledge of unlawfulness, Justice Ackermann settled what this knowledge would entail in *S v Magidson*,[100] where he explained that actual knowledge of unlawfulness is not necessary, but rather imputed knowledge would suffice. As to what an "imputed" knowledge entails, Justice Ackermann clarified that it is sufficient if the accused realised what they are doing may possibly be unlawful and then reconciles themselves with this possibility. Snyman further explains that knowledge can thus include being aware of the possibility that an element of an offence exists and then reconciling themselves to this possibility (*dolus eventualis*).[101]

141. Since the accused must have knowledge of every element of the offence, a person accused of rape must similarly have knowledge that there was a

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[100] *S v Magidson* 1984 (3) SA 825 (T).

[101] C Snyman (2012) Criminal Law (LexisNexis) at 179 – 180.

lack of consent by the complainant. This emerges from the definition of rape, which according to section 3 of SORMA is defined as,

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

142. The mistaken belief in consent defence only exists through the inclusion of consent as an element of the crime. By removing consent from the definition of certain sexual offences the accused no longer can raise mistaken belief as a defence. Rather the accused must raise consent as a justification.

143. Burchell states that for consent to succeed as a defence or justification, the following requirements must be met: (1) the complainant's consent in the circumstances must be recognised by law as a possible defence; (2) it

must be real consent (not mistaken); (3) it must be given by a person capable of consenting in terms of the law.[102]

144. Burchell goes on to explain that "consent is a defence to rape because the harm that the crime seeks to prevent is sexual penetration of an unwilling person likewise consent is a defence to theft because the purpose of this crime is to prevent non-consensual dealing with the property of another".[103]

145. CALS thus submits that the "Amos defence" would not continue to exist in law if consent was removed as a definitional element of sexual offences. The accused in defence is case may use the defence of consent, that does not make the defence away, but such consent must not be mistaken.

146. The Supreme Court of Canada has considered the defence of mistaken belief in consent on a number of occasions.[104] The case law generated by the Court on this issue specifically recognises that the mistaken belief

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[102] J Burchell (2011) South African Criminal Law and Procedure 4th ed, Juta at 217.

[103] Id at 219.

[104] *Pappajohn v The Queen* [1980] 2 SCR 120; *Sansregret v The Queen* [1985] 1 SCR 570; *R v Osolin* [1993] 4 SCR 595; *R v Park* [1995] 2 SCR 836; *R v Esau* [1997]; *R v Ewanchuk* [1999] 1 SCR 330; *R v Davis* (1999) 29 CR (SCC).

defence raises questions about the protection of fundamental human rights such as the right to equality, human dignity and bodily integrity.[105]

147. The doctrine underlying this defence has been criticised for defining sexual assault from the perspective of the accused as opposed to that of the complainant.[106]

148. The Constitution serves a transformative purpose that is advanced through our equality and dignity jurisprudence. It recognises that the values of equality and human dignity, although linked, each serve as independent rights and constitutional values which must be given specific content. Consent as a definitional element does not advance the material well-being of women and gender-diverse persons. Declaring the impugned sections invalid will fulfil the transformative mandate set by our Constitution, at both an individual and a group-based level.

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[105] In Park (n34) para 38, L'Heureux-Dube J emphasised the importance of the link between the *mens rea* requirement in cases of sexual assault and the equality provision contained in section 15 of the Canadian Charter of Rights and Freedoms. See also J Temkin (2005) Rape and the Legal Process, Oxford at 131.

[106] C MacKinnon 'Reflections on sex equality under law' (1990-1991) 100 *Yale Law Journal* 1281 at 1304.

FOURTH GROUND POLICY – POLICY ISSUE

149. If this Court agrees with CALS on its submission in the main, the logical conclusion would be to declare consent as a definitional element of the impugned provisions as invalid and unconstitutional.

150. This Court in *Mahlangu* said that declaring an Act of Parliament invalid is a serious intrusion into the domain of Parliament but that intrusion is permitted by the Constitution.[107]

151. The Court *a quo* erred in finding that the proposition by CALS would fall foul of the doctrine of separation of powers and that the Constitutional Court is not likely to confirm an order with that consequence. The Court *a quo* was still obliged by section 172(1)(a) of the Constitution to conduct a constitutional analysis of the impugned sections of the Act.

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[107] *Mahlangu* at para 142.

152. The Court *a quo* ought to have considered and applied the principle of separation of powers in *Glenister v President of the Republic of South Africa*,[108]where this Court held that it is a necessary component of the doctrine of separation of powers that courts have a constitutional obligation to ensure that the exercise of power by other branches of government occurs within constitutional bounds.

153. The Court *a quo* ought to have held that:

> *"under our constitutional democracy, the Constitution is the supreme law. It is binding on all branches of government and no less on Parliament. When it exercises its legislative authority, Parliament must act in accordance with, and within the limits of, the Constitution, and the supremacy of the Constitution requires that 'the obligations imposed by it must be fulfilled. [109]*

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[108] 2009 (1) SA 287 (CC).

[109] *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC) at para 200.

154. When considering a just and equitable remedy, a court must therefore be guided by the principle of separation of powers. When certifying the final Constitution, this Court had to consider the principle of separation of powers. This Court held:

> *"The principle of separation of powers, on the one hand, recognises the functional independence of branches of government. On the other hand, the principle of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another. In this sense it anticipates the necessary or unavoidable intrusion of one branch on the terrain of another. No constitutional scheme can reflect a complete separation of powers: the scheme is always one of partial separation. In Justice Frankfurter's words, '[t]he areas are partly interacting, not wholly disjointed'*".[110]

155. The Court *a quo* ought to have held that the separation of powers principle cannot serve as an ouster:

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[110] *In re: Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) para 108-109.

> "[W]hile the doctrine of separation of powers is an important one in our constitutional democracy, it cannot be used to avoid the obligation of a court to prevent the violation of the Constitution. The right and the duty of this Court to protect the Constitution are derived from the Constitution, and this Court cannot shirk from that duty".[111]

156. The Court *a quo* ought to have exercised its powers under section 172(1)(b) to make any order that is just and equitable. Such power includes suspending the declaration of invalidity to give the legislature time to cure the defect.

CALS' REMEDY

157. The starting point on the issue of an appropriate remedy is found in section 172 of the Constitution. Section 172(1)(b) empowers this Court, when deciding a constitutional matter within its power, to declare any law or conduct that is inconsistent with the Constitution invalid to the extent of its inconsistency.

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[111] *Doctors for Life* at para 200.

158. This Court is further empowered to make any order that is just and equitable, which may include an order limiting the retrospective effect of the declaration of invalidity or its suspension with the aim of allowing Parliament to correct the defect.[112]

159. CALS seeks an appeal against the judgment and order of the court *a quo*. It seeks that the impugned provisions be declared unconstitutional immediately.

160. In *Mvumvu v Minister for Transport* [113] this Court held

> *"Unless the interests of justice and good government dictate otherwise, the applicants are entitled to the remedy they seek because they were successful. Having established that the impugned provisions violate their rights entrenched in the Bill of Rights, they are entitled to a remedy that will effectively vindicate those rights. The court may decline to grant it only if there are compelling reasons for withholding the requested remedy. Indeed, the discretion conferred on the courts by section 172(1) must be exercised judiciously".*[114]

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[112] *Mahlangu* at para 121.

[113] 2011 (2) SA 473 (CC).

[114] Id at para 46.

161. Crime prevention is an absolute necessity. Legislation that seeks to achieve that objective must ordinarily be preserved and enabled to avoid the guillotine of unconstitutionality.[115] The impugned provisions are that kind of legislation.

162. In *Economic Freedom Fighters v Minister of Justice and Correctional Services*,[116] this Court held:

> *"In crafting a remedy, we must therefore remind ourselves that ours is an interim relief – a short term solution – whose lifespan is at the mercy of Parliament's prompt and more enduring intervention. The long term solution is best left to Parliament whose primary responsibility it is to grapple with and settle conceivable definitional challenges. While waiting for it to exercise its legislative authority in relation to the content of the provision, we have to ensure that the lacuna created by our invalidation of section 18(2)(b) is filled. And that would be achieved by reading-in a word into this provision. Like every reading-in exercise, this too must be done in a manner that is sensitive to separation of powers."*[117]

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[115] *Economic Freedom Fighters v Minister of Justice and Correctional Services* 2021 (2) SA 1 (CC) at 66.

[116] Id at para 67.

[117] Id at para 67.

163. We submit that it is necessary to afford Parliament the opportunity to remedy this constitutional defect. We submit that this Court gives Parliament 24 months within which to do what it is needed.

164. CALS asks this Court to provide a short-term solution by reading in "coercive measures" where "without the consent" appears. This remedy will ensure that there is no lacuna created by the invalidation of consent as a definitional element.

165. This Court in *Tshabalala* held that GBV has reached alarming proportions and joint efforts by the courts, society and law enforcement agencies are required to curb this pandemic.[118]

166. This Court held that:

> "*This Court would be failing in its duty if it does not send out a clear and unequivocal pronouncement that the South African Judiciary is committed to developing and implementing sound and robust legal principles that advance the fight against gender- based violence in order to safeguard the constitutional values of equality, human dignity and safety and security. One such way in which we can do this is to dispose*

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[118] *Tshabalala* at para 63.

of the misguided and misinformed view that rape is a crime purely about sex. Continuing on this misguided trajectory would implicate this Court and courts around this country in the perpetuation of patriarchy and rape culture".[119]

167. The interim remedy proposed by CALS is supported by academic scholars, international and comparative jurisdictions and earlier definition of rape by Parliament.

168. Du Toit argues that the definition of rape should turn on whether the penetration was coerced or took place under coercive circumstances, with the implicit understanding that coercive penetration (the violation of a person's sexual integrity) is inherently and direly harmful to the whole, embodied person.[120]

169. This approach is supported by the Sexual Offences Amendment Bill of 2003. The Bill defined rape as follows:

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[119] Id at para 63.

[120] Du Toit at 391.

"(1) A person who unlawfully and intentionally commits an 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, referred to in subsection (2)(a), include any circumstances where there is—

(a) a use of force against the complainant or another person or against the property of the complainant or that of any other person;

(b) a threat of harm against the complainant or another person or against the property of the complainant or that of any other person; or

(c) 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".[121]

170. The South African Law Commission (Project 107, Discussion Paper 85 Sexual Offences: The Substantive Law, 12 August 1999) proposes, in the form of a section in a draft Sexual Offences Act, the following as the definition of the crime of rape:

Rape

"2. (1) Any person who intentionally and unlawfully commits an act of sexual intercourse with another person, or who intentionally and unlawfully causes another person to commit such an act is guilty of an offence.

(2) For the purposes of this Act, an act of sexual intercourse is prima facie unlawful if it takes place in any coercive circumstances.

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[121] B50 (2003) published in Government Gazette No. 25282 of 30 July 2003. See https://static.pmg.org.za/docs/2006/060621oldbill.pdf.

(3) No marriage or other relationship shall be a defence against a charge of an offence under this section.

(4) No person shall be charged with or convicted of the common law offence of rape in respect of an act of sexual intercourse committed after the commencement of this Act.

(5) Subject to the provisions of this Act, any reference to "rape" in any law shall be construed as a reference to the offence of rape under this section, unless it is a reference to an act of sexual intercourse committed before the commencement of this Act which shall be construed to be a reference to the common law offence of rape".

171. This interim remedy shifts the focus from the conduct of the complainant to the conduct of the alleged perpetrator. If the victim was coerced into participating, then a conviction is a possibility.

172. CALS submits that this proposed new formulation does not change the onus on the prosecution to prove that the sexual conduct was unlawful.[122] The aim is instead, to give the prosecution a wider scope to prove

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[122] J Milton (1999) 'Re-defining the crime of rape: The Law Commission's proposals' 12 *SACJ* 364.

unlawfulness without putting the complainant “on trial” in order to prove lack of consent.

173. What this means is that it will be up to the accused to prove that the complainant did in fact validly consent to the sexual intercourse.

174. This shifts the psychological nature of the enquiry away from what the victim did to what the accused did and puts him on terms to excuse or justify his conduct.[123]

COSTS CONCERNING THIS APPLICATION

175. This case concerns not only the interests of the individual applicants but also extends to include public interest at large. Where in 2023, South Africa has been found to be among the top five countries with the highest rates

[123] Id.

of rape globally; the successful prosecution of sexual offences is in the interest of every individual in the country.[124]

176. Victims and survivors of sexual violations have a particular interest in encountering a criminal justice system that not only provides them with justice through successful convictions but also laws that are non-discriminatory and are victim-centred.

177. The *Biowatch Trust v Registrar Genetic Resources and Others* principle generally holds that where litigation between the state and private parties seeks to assert or vindicate a particular right in the Bill of Rights, if the private party is unsuccessful, then the private party should not be liable for the state's costs.[125]

178. We thus request that if CALS and the other applicants are unsuccessful in their prayers, the above honourable court upholds the *Biowatch* principle and makes no order as to costs.

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[124] World Population Review (2023) Rape statistics by country 2023 https://worldpopulationreview.com/country-rankings/rape-statistics-by-country.

[125] *Biowatch Trust v Registrar Genetic Resources* 2009 (6) SA 232 (CC).

179. However, due to entities such as CALS litigating on behalf of its client's interests and the public interest and doing so pro bono, if successful, CALS requests that the above Honourable Court order costs in its favour, including the costs of one counsel.

CONCLUSION

180. CALS submits that the warning by Justice Sachs in *S v Baloyi*,[126] albeit in the context of domestic violence is apt:

> *"The ineffectiveness of the criminal justice system . . . sends an unmistakable message to the whole of society that the daily trauma of vast numbers of women counts for little".*[127]

181. Justice Khampepe in *Tshabalala v S* concluded by saying:

> *"Addressing rape and other forms of gender-based violence requires the effort of the Executive, the Legislature and the Judiciary as well as our*

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[126] *S v Baloyi* 2000 (2) SA 425 (CC).

[127] Id at para 12.

> *communities. The structural and systemic nature of rape emphasises that it would be irrational for the doctrine of common purpose not to be applicable to the common law crime of rape, while being applicable to other crimes".*[128]

182. Similarly, CALS submits that the structural and system nature of rape emphasises that it would be irrational for consent as a definitional to continue be applicable to sexual offences, while not being applicable to other crimes.

183. Our jurisprudence in the context of rape has moved in an inexorable direction consonant with our constitutional norms and values. There is however still a lot of work to be done. Removing consent as a definitional element of sexual offences is a step in the right direction that is consonant with constitutional values.

184. As this Court in *Tshabalala* acknowledges "[f]eminist writers have for some decades urged the elimination of the various barriers to convicting the

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[128] *Tshabalala* at para 78.

offender".[129] The continued inclusion of consent as a definitional element is one such barrier.

185. The issue of rape has been the subject of extensive analysis within legal and feminist circles, with feminist responses being focused on the need to acknowledge rape as a form of sexual violence and a violation of dignity and autonomy of women.[130]

186. Experience has shown that if legal initiatives are (re)constructed from women's real experiences of violation then the law can make a difference. As Mackinnon aptly phrases it:

> *"[L]aw is not everything, but [it] is not nothing either. Perhaps the most important lesson is that the mountain can be moved. . . [and] women's experiences can be written into the law, even though clearly tensions [will] remain".*[131]

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[129] *Tshabalala* at para 81.

[130] D Smythe and L Artz (2008) *Should We Consent? Rape Law Reform in South Africa,* Juta at 50.

[131] C Mackinnon (1987) *Feminism Unmodified: Discourses on Life and Law*, Harvard University Press at 116.

187. In conclusion, the constitutional duty and international obligations provide the legal and logical basis to remove the consent as a definitional element of the impugned provisions.

188. In this regard, we ask that leave to appeal be granted, the judgment and order of the court a quo be set aside and the notice of motion in the court a quo be made an order of this Court.

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