

LEGAL RESPONSES TO RAPE IN MARRIAGE

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DECLARATION

I, LAURA KYALO, do hereby declare that this dissertation is my original work, both in substance and in style; the same having never, to the best of my knowledge and belief, been presented in any other university or institution for any award. Where reference has been made from other scholars the same have been duly acknowledged.

Signed:

Date:

Accordingly, this work has been presented to the undersigned supervisor.

Prof Kameri Mbote.

Signed:

Date:

ABSTRACT

This dissertation sought to discuss and analyze the issue of rape in marriage. The scope of the study covers marital rape in relation to the Kenyan context and it has been compared with other jurisdictions such as Ghana which is also facing the same problem whereby marital rape has been neglected but is advancing steps to curb its prevalence. It has further been compared with the American jurisdiction and United Kingdom where some states have criminalized marital rape cognizant by law.

The main objective of the dissertation is to analyze the limits of conjugal rights granted to a wife and husband. In addition to this, to discuss the rights i.e. the right of equality, freedom and inherent dignity that a woman is entitled to. Lastly, to analyze avenues of protecting women who are abused in their marriage.

The justification of the study is that there is need for guidance on the constitutionality and legality of criminalizing spousal rape and clarification on whether this practice and manifestation is protected under the freedom from discrimination and right to equality. This is because many women have suffered simply because the silence in the law creates legal impunity for men who sexually assault or rape the women who are their wives or intimate partners. This therefore legitimizes this particular form of violence against women. This is a human rights problem that cries for redress, both legally and socially. Furthermore, an examination on the state's failure to criminalize sexual assaults breaches the due diligence standard and fails to comply with the international human rights norms. This evidently outlines that there is a significant gap in the laws around the world that ensure legal impunity for men who sexually abuse their wives, thus it indicates the global scale of the human rights law reform still to be conducted in this field. This research project is therefore, essential to provide guidance and elaborate on the international law to women in certain jurisdictions where marital rape is an unknown crime.

The conclusion focuses on the criminalization of rape in marriage and the recommendations which entails some of the responses that should be adopted in order to curb the marital vice. These include both legal and non-legal responses

LIST OF STATUTES AND CONSTITUTIONS

California Penal Code

Constitution of Ghana (1960).

Constitution of Ghana (1992).

Constitution of Kenya 2010

Constitution of the United States amendment XIV.

Criminal Code Act (1960) (Ghana)

Sexual Offences Act (Act No. 3 of 2006)

LIST OF CASES

Brooks v. Canada Safeway, [1989] 1 S.C.R. 1219,

C.K.(A Child) Through Ripples International As Her Guardian And Next Friend) & 11 Others v. Commissioner Of Police/Inspector General Of The National Police Service & 3 Others [2013] eKLR.

Janzen v. Platy Enterprises, [1989] 1 S.C.R. 1252,

Merton v. State, 500 So. 2d 1301, 1305 (Ala. Crim. App. 1986);

People v. DeStefano, 121 Misc. 2d 113, 163-64, 170,467 N.Y.S.2d 506,515-16 (County Ct. 1983);

People v. Liberta, 64 N.Y.2d 152, 163-64, 170, 474 N.E.2d 567, 573-76, 485 N. Y.S.2d 207, 213-16 (1984)

R. v. Mills [1999] 3 S.C.R. 668

Regina v R [1991]

Shunn v. State, 742 P.2d 775,778 (Wyo. 1987).

State v. Oliver, 70 N.C. 60, 62 (1874)

Steven Seaboyer v. Her Majesty the Queen et al, Supreme Court of Canada,

Williams v. State, 494 So. 2d 819,830 (Ala. Crim. App. 1986);

CHAPTER ONE

1.1 Introduction

'If no permanent injury has been inflicted, nor malice, cruelty nor dangerous violence shown by the husband, it is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive'.¹

1.2 Background of the study

For quite some time, assault inside marriage was not esteemed an offense. This maybe originated from the patriarchal way of society inside of the African connection as well as worldwide. It further goes that the praise of the male as against the female sex assumes a major part in belittling the female sex. This position has been seen to penetrate through every one of the circles of life.²

Marital rape is unwanted sexual penetration (vaginal, anal or oral) or contact with the genitals that is the result of actual or threatened physical force or when the spouse is unable to give affirmative consent.³ More specifically marital rape is a regime that involves a lack of consent in the institution of marriage. The Sexual Offences Act defines rape as a situation when a person intentionally commits an act which causes penetration with his or her genital organs without consent from the other person or the consent is obtained by force or by means of threats or intimidation of any kind.⁴ On the other hand, the courts have evinced marital rape as highlighted in the case of *Regina v R* which charged a husband with marital rape.⁵

There are principally three types of marital rape. These are; force only rapes, battering rapes and obsessive rape.⁶ Spousal rape remains a somewhat slippery idea more so in the African Culture.

¹ State v. Oliver, 70 N.C. 60, 62 (1874)

² Klopper and Human, *If God is Male, then male is God*, Pretoria University Law Press, 2007, 3

³ Bergen, *Wife rape: Understanding the response of survivors and service providers*, Sage Publications, 1996, 5

⁴ Section 2, Sexual Offences Act CAP 62A (2006)

⁵ Regina v R [1991]

⁶ Accessed from <[http:// www.aajmag.com/maritalrape.htm](http://www.aajmag.com/maritalrape.htm) > accessed on 17/3/2016

This stems from the fact that it is for the most part seen that once two people of 'eligible age' meet up into the union that then structures the establishment of marriage, then consent to sex is considered to have been given and at all times. This builds up the thought of marital rights. The marital privileges of a woman have been undermined on the grounds that it is expected by virtue of getting married she consequently loses a say on her matrimonial rights. As an outcome emerging thereof spousal assault/conjugal assault has remained fairly alien for those in the African society and in this specific case Kenya. It is unclear with reference to why it is not viewed as a culpable wrongdoing in Kenya while in different jurisdictions for instance United States of America and South Africa the act is criminalized.

A report conducted by the UN outlined that 127 countries exempt marital rape from criminal sanctions.⁷ Sexual assault perpetrated by a spouse is entirely legal while sexual assault in general is criminalized in these countries. This is an issue that needs to be addressed because as a society we can't ignore certain crimes because they are deemed less crimes. Human rights violations are now well recognized however this specific form of gender violence has managed to escape out of both criminal sanctions and human rights approbation in almost one third of the world's nations. Research conducted indicates that out of majority of the women who are faced with violence, it is usually perpetrated by men known to the victims.

However, in some jurisdictions steps have been taken to curb marital rape. Some states have limited the exemption to include married partners who live apart and in a few cases married partners who have begun dissolution proceedings. Some have taken a step further by including

⁷ U.N. , Progress of the World's Women(,2011-2012), 33

cohabitants and formerly married persons.⁸ In a nutshell, rape in marriage is an issue that is of great importance that needs to be dealt with.

1.3 Statement of the problem

Spouses have conjugal rights in marriage and hence there is the assumption that there is implied consent for indulging in sex at any time. However, there are circumstances that can negate consent. For instance, where there is the risk of contracting STIs and HIV, violence in the marriage, danger to the health and well-being of the other partner. While conjugal rights are both for spouses; women are the ones who suffer from violation when they do not consent. Hence, a woman's right to equality, freedom and inherent dignity have been neglected.

1.5 Objectives of the Study

The specific objectives of this research are:-

1. To analyze the limits of conjugal rights granted to a wife and husband;
2. To discuss the rights i.e. the right of equality, freedom and inherent dignity that a woman is entitled to;
3. To analyze other avenues of protecting women who are abused in their marriages.

1.6 Hypothesis/Assumptions

The following assumptions/hypotheses were formulated in conducting this study:-

1. That women have a right to consent to their conjugal rights;
2. That women are entitled to the right to equality, freedom and inherent human dignity within a marriage;
3. That the State and the International Community are aware of the various breaches of the rights stated above;
4. That the above organs are committed to the protection of the stated rights of a woman.

1.7 Research questions

The following questions will be a guide during the entire discourse of this research.

1. Does marriage automatically result to infinite consent to conjugal rights?

⁸ Siegel, *The marital Exemption: Evolution to Extinction*, Engaged Scholarship, 199, 2-4.

2. Does rape in marriage undermine the rights of a woman to equality, freedom and inherent dignity?
3. Does the state/ international community provide adequate protection for women who are abused in their marriage?

1.8 Literature Review

This research does not present itself as a pioneer in the controversy and the issues involving the subject of marital rape and neither does it set to be the first to extensively study the concept of marital rape. Indeed, there are numerous distinguished scholars and researchers who have undertaken and written extensively on this subject. Similarly, there are various local and international instruments that discourage violation of women rights especially the issue of marital rape.

Crichton states that intimate partner violence includes multiple violations of sexual and reproductive rights .This leads to devastating impacts on the well-being of the individual affected and their health. Violence against women includes various practices. These are sexual and psychological violence by intimate partners, marital rape, forced sex work and female genital mutilation (FGM). In the Kenyan context, it has been noted that the government does not provide legal aid neither does it support survivors of gender violence. This is despite the fact that statistics clearly indicate the rate at which the women are affected is prevalent. As a result, the NGOs and other private organizations step in.⁹ It is clear that women's rights to equality, freedom and human dignity are being undermined. This paper shall therefore, seek to fill this gap.

A study by FIDA demonstrated that 74.5% of women have been abused in their homes. The women interviewed lamented that their husbands abused them and regarded them as property

⁹Crichton, Musembi and Ngugi, Painful Tradeoffs: Intimate-partner Violence and Sexual and Reproductive Health Rights in Kenya, Institute of Development Studies,2008,9-10

and ignored any notions of consent to sexual activity.¹⁰ It was observed that marital rape has several effects and is deemed to be the highest risk to contracting STIs and HIV infection.¹¹ It is miserable that marital assault is a long process and most times the victim can't recall when the perpetrator committed the act.¹² As a result when such incidents are reported to the police they regard them as domestic matters which do not warrant mediation by the criminal equity framework. This is due to the inefficient justice system and lack of specialists who could provide vital confirmation for conviction. Violence against women constitutes an infringement of the rights and fundamental freedom of women and invalidates their enjoyment of those rights and freedom, and consequently is an obstruction to the accomplishment of equity, development and peace.¹³

The United Nations has recognized that violence against women invalidates women's rights to practice their fundamental freedoms.¹⁴ On the other hand, the CEDAW Committee has specifically identified these rights as being hindered or entirely invalidated by gender violence.¹⁵ These rights are protected in the core human rights treaties that have been ratified by majority of the countries. These treaties impose obligations on states to regulate the actions of private actors. The core treaties protecting human rights include the ICCPR, ICESCR, CEDAW and the Convention against Torture. Moreover, these bodies such as CEDAW have interpreted these rights to include the prohibition of marital rape. Though by ratifying the conventions, states are carefully accepting the jurisdiction of treaty bodies to monitor state compliance and to provide substantive content for the rights.

¹⁰ Mbote and Mubuu, Federation of Women Lawyers Kenya, Gender Based Domestic Violence in Kenya, 2005, 26-27.

¹¹ Accessed from < <http://www.aphrc.org/insidepage/?articleid=574> > accessed on 17/3/2016 African Population and Health Research Centre, "Marital Rape and its Impacts: A Policy Briefing for Kenyan Members of Parliament

¹² Kung'u, Criminalization of Marital Rape in Kenya, University of Toronto Publishers, 2011, 2- 3.

¹³ UN Declaration, Violence against Women, 1993, 48/104.

¹⁴ DEVAW, ,pmb1, article 1,4(c)

¹⁵ General Recommendation 19, the Committee on the Elimination of All Forms of Discrimination against Women.

Indeed, several International Conventions acknowledge the importance of human rights. These include ; the Universal Declaration of Human Rights (UDHR), The International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

The Constitution of Kenya in article 27 stipulates that every person is equal before the law and has the right to equal protection and equal benefit from the law.¹⁶It further states in article 27(3) that women and men have the right to equal treatment including the right to equal opportunities in political, economic, cultural and social spheres.¹⁷ Further, article 28 highlights that every person has inherent dignity and the right to have that dignity respected and protected.¹⁸ In article 45 it outlines that parties to a marriage are entitled to equal rights at the time of marriage, during the marriage and at the dissolution of the marriage.¹⁹This is a clear indication that the Kenyan laws are going silent on the issue of rape within marriage. It is an issue that needs to be addressed because provisions from the Constitution imply that men and women have equal rights. Therefore, the right to protection from rape within marriage should be inclusive of these rights. This is in an attempt to eliminate discrimination against women.

Despite the presence of the entire local and the international instruments which outlaw marital rape as being an outright violation of women rights, there still exists a gap to the effect that discrimination among women in Kenya on the basis of their sexuality is evident. This is despite various other jurisdictions outlawing rape within marriage as a crime. With the backing of our Constitution, we should be able to outlaw marital rape through a critical re-evaluation of our

¹⁶ Article 27(1), Constitution of Kenya(2010)

¹⁷ Article 27(3), Constitution of Kenya(2010)

¹⁸ Article 28, Constitution of Kenya (2010)

¹⁹ Article 45(3),Constitution of Kenya(2010)

statutes to incorporate the same. This is by viewing a woman as equal to a man hence catering for her rights that are inherently hers²⁰ and further by acknowledging her conjugal rights and by respecting them.

1.9 Scope of the Study

The study covers marital rape in relation to the Kenyan context and it shall be compared with other jurisdictions such as Ghana which is also facing the same problem whereby marital rape has been neglected but is advancing steps to curb its prevalence. It shall further be compared with the American jurisdiction and United Kingdom where some states have criminalized marital rape cognizant by law.

1.10 Justification of the Study

There is need for guidance on the constitutionality and legality of criminalizing spousal rape and clarification on whether this practice and manifestation is protected under the freedom from discrimination and right to equality. This is because many women have suffered simply because the silence in the law creates legal impunity for men who sexually assault or rape the women who are their wives or intimate partners. This therefore legitimizes this particular form of violence against women. This is a human rights problem that cries for redress, both legally and socially. Furthermore, an examination on the state's failure to criminalize sexual assaults breaches the due diligence standard and fails to comply with the international human rights norms. This evidently outlines that there is a significant gap in the laws around the world that ensure legal impunity for men who sexually abuse their wives, thus it indicates the global scale of the human rights law reform still to be conducted in this field. This research project is therefore, essential to provide guidance and elaborate on the international law to women in certain jurisdictions where marital rape is an unknown crime.

²⁰ Article 27 (4), Constitution of Kenya (2010)

1.11 Limitations

The research shall be founded and based mainly upon the geographical region of Kenya, with significant reference to American jurisprudence, journals and other relevant publications.

1.12 Chapter Breakdown

This research is broken down into five chapters. Chapter one is the introduction which comprises the background of the research laying out the research objectives, methodology as well as literature review. Chapter two deals with the theoretical framework on the subject of rape in marriage. Chapter three deals with the incidences of marital rape in Kenya and the law dealing with it. Chapter four tackles the comparative case study, jurisprudence and findings/evidence. Chapter five concludes the entire work and provides recommendations while trying to include both the legal and non-legal responses to the problem of marital rape.

CHAPTER TWO

2.1 THEORETICAL FRAMEWORK AND METHODOLOGY

This paper is premised on four major theories touching on the rights and liberties of individuals in a marital rape case analysis. These are the human rights theory, the utilitarian theory, the classic rape theory and the equality theory to put into perspective the concept of marital rape and the illegitimacy surrounding its' exception.

2.2 The Human Rights Theory

This theory calls for elevating human beings to a higher level, that of humanity which is the pinnacle of all being. This is quite evident in the provisions of the Universal Declaration of Human Rights that all human beings are born free and equal in dignity and rights and should act towards one another in a spirit of brotherhood.²¹ These human rights are not only inherent to all human beings but also indivisible,²² and are widely considered to be of universal application, if the words of Robert Wilson are anything to go by, 'Notwithstanding disputes over their conceptualization and application, human rights are among the few utopian ideals, and there is a remarkable degree of consensus by governments on the principle at least that certain rights be protected under the law.'²³ The human rights approach abhors such actions as categorizing marital rape as an exception to cases of rape.

John Locke argues that in a natural state, everyone had a natural right to defend his life, health, liberty or possession. This school of thought is the basis the American founding fathers coined their declaration of independence that 'All men are created equal; (...) they are endowed by their

²¹ *Universal Declaration of Human Rights UN General Assembly 217 A (III)* (10 December 1948), art 1.

²² *Universal Declaration of Human Rights UN General Assembly* preamble.

²³ Robert W, *Human Rights Culture and Context: Anthropological Perspective* (1997).

creator with certain unalienable rights among which include the right to life, liberty and pursuit of happiness.’²⁴

John Janzekovich further argues that the human rights approach must take into account the different cultures of mankind. However, he states that ‘an appeal on human kind is said to be an appeal on the values of freedom and equality among humankind.’

The Human rights approach therefore according to John Janzekovich is based on the assumption that ‘human beings have a unique and special sense of being which translates directly into notions of worth and value.’ However, he goes on to state that even though these rights are important, they are not immutable citing a situation of a murderer being incarcerated or executed for his actions. This argument therefore justifies the use of force in protection of one’s self.

Margaret MacDonald proposes that, ‘...safeguard and restore, where necessary, the Rights of Man, those ultimate points at which the authority and social differences varnish, leaving the solitary individual with his essential human nature, according to one political theory, or a mere social fiction, according to another.’²⁵ Hart further proposes that a theory of rights can be derived from the minimum content of natural law.²⁶

2.3 Utilitarianism

Robin Barrow summarized the utilitarian approach as ‘the assignment of moral goodness or rightness to only one kind of consequence-effects on overall wellbeing’.²⁷ Safety, security and protection of human life are one of the main responsibilities of any government under the Social Contract theory. Therefore the overall wellbeing of each individual person, places a legal duty upon any government to protect and promote these rights.

²⁴ See Declaration of Independence 2 (U.S. 1776).

²⁵ MacDonald M, *Natural Rights, in Human Rights* (1970)41.

²⁶ H.L.Hart, *The Concept of Law* (Oxford, Clarendon Press, 1961)189.

²⁷ Barrow R, *Utilitarianism:A Contemporary Statement* (1991)39.

Barrow further argued that utilitarianism called for maximum utility for affected persons. This was further stated by Bernard Arthur Owen as the fundamental idea of utilitarianism where he said that, 'The fundamental rightness of our actions is determined by the effect these have on the well being of others and us'.²⁸ This therefore means that in case of any action that tends to interfere with the well being of any person, his or her consent must be sought.

Richard Frey proposes a similar argument. He goes ahead to state that the utilitarian approach is premised on 5 components.²⁹ He stated that, 'Firstly, there is the consequence component. This is where the rightness or wrongness of an act is tied to the production of bad and good consequences. Some utilitarian's say that there is something inherently good and bad in particular acts because of the sorts of outcomes these acts produce. Others argue that acts are not themselves good or bad, but that outcomes will primarily determine goodness.

The second component stated by Frey is the value component. He defines it as 'where the goodness and badness of consequences is evaluated by means of some standard intrinsic value of goodness.' In this respect Frey stated that where action is taken to prevent a wrong or evil from happening, the action is deemed as a good. Similarly, where the action itself is used in a wrong manner, action is deemed a wrong or evil.

The range component, 'minimizing principle and the welfare element of utilitarianism, are the third, fourth and fifth components stated by Frey respectively. He provides that the range component is 'where the consequence of the act affects everyone and not just the agent in the determination of moral rightness.' This applies adequately in the case of an attacked person who uses excessive force to repel an attack or rather retaliates at the time when the threat ceases to be

²⁸Arthur Owen B.W, 'Morality: An Introduction to Ethics, Harper Essays in Philosophy' (1972) 93 *New York: Harper and Row*.

²⁹ Frey R, *Utility and Rights* (1984)4.

a threat. In the long run, regardless of there being a good intent, the use of the excessive force causes unnecessary injury to the attacker thereby making the action immoral and unjustifiable.

Jeremy Bentham, a proponent of the utilitarian approach stated the fundamental axiom in terms of the 'Greatest happiness of the greatest number.'³⁰ This theory serves to justify the requirement of consent in sexual intercourse in a marriage.

2.4 Classic Rape Theory

Until four decades ago, rape theories and researches across board ignored rape in marriage³¹ because sexuality in marriage has been shrouded in great secrecy though its abuse abounds.³² In addressing the concept of marital rape, this research adopts the *classic* rape theory propounded by Williams.³³ It examined and attempted to explain why spouses will not label any form of sexual abuse in marriage as rape or accede to its criminalization.³⁴

Classic rape is rape by an assailant unknown to the victim.³⁵ It is synonymous with: aggravated rape,³⁶ real rape³⁷ and blitz rape³⁸ According to Burt & Alvin³⁹ classic rape is stereotyped (an over-generalized impression of what characterizes something especially one that does not allow for individuality or variation) by the general public, police and judges.⁴⁰

³⁰Bentham J, *An Introduction to the Principle of Morals and Legislation* (Edited by J.H Burns and H.L.A Hart) 1970 5.

³¹ Brownmiller S, *Against Our Will: Men, Women, and Rape*. New York 1975; Russell, D. E. H, *Rape in Marriage*. New York: MacMillan 1982.

³² Cheal D, *Families in Today's World: A Comparative Approach*. New York: Routledge 2008; Finkelhor D, & Yllo K., *License to Rape: Sexual Abuse of Wives*. New York: The Free Press 1985.

³³ Williams L, *The Classic Rape: When do Victims Report? Social Problems* 1984. 459-467.

³⁴ Makafui Adodo-Samani P, 'Criminalisation Of Marital Rape In Ghana: The Perceptions Of Married Men And Women In Accra' - University of Ghana <http://ugspace.ug.edu.gh>

³⁵ Williams L, *The Classic Rape: When do Victims Report? Social Problems* 1984. 459

³⁶ Estrich S, *Carnal Knowledge: Rape on Trial*. Massachusetts: Harvard University Press 1987 pg 4.

³⁷ Burt M. R, & Albin R, S. 'Rape Myths, Rape Definitions and Probability of Conviction' 3 *Journal of Applied Social Psychology*, 11 212-230.

³⁸ Lees S, *Carnal Knowledge: Rape on Trial*. London: Hamish Hamilton Ltd 1996.

³⁹ Burt M. R, & Albin R, S. 'Rape Myths, Rape Definitions and Probability of Conviction' 3 *Journal of Applied Social Psychology*, 11 212-230.

⁴⁰ Makafui Adodo-Samani P, 'Criminalisation Of Marital Rape In Ghana: The Perceptions Of Married Men And Women In Accra'

Classic rape's circumstances and characteristics are that, the victim must be a total stranger to the perpetrator (not ever acquainted); the victim should not: have led the rapist on in any way (sexy, sexual situation, way of dressing); have been drunk in his presence or company. The victim should have: gotten pregnant after the rape; been infected with sexually transmitted venereal diseases; been abducted and raped. There must be evidence of: physical injuries that have been sustained; weapon use; enough active resistance; degree of force used- choked, tied, locked up, gagged, drugged, blindfolded. Some of the indications must lead to hospitalization- beaten, extrinsic violence; sudden attack; multiple assailants- gang rape.⁴¹ These serve as a stereotype of rape generally and known to attract great active sympathy.⁴²

Ultimately, if rape does not have features of classic rape, it is not rape. Yet, contrary to prevailing stereotypes, most victims of rape are not raped by total strangers.⁴³ The inability to accept rape as rape when it is not classic may largely be attributable to the conception of what fits to be rape because legal definitions across board have been ignored.⁴⁴

Classic rape's characteristics are usually mind boggling and widely attract sympathy from the society to the judiciary for immediate sanctions. The assumption is that victims also share these notions because they also belong to the general public⁴⁵ thus the conventional wisdom pertaining to marital rape.⁴⁶

⁴¹ Makafui Adodo-Samani P, 'Criminalisation Of Marital Rape In Ghana: The Perceptions Of Married Men And Women In Accra'

⁴² Basile, K. C. (1999). Rape by Acquiescence: The Ways in Which Women "Give in" to Unwanted Sex with Their Husbands. *Violence Against Women*, 5(9), 1036-1058; Burt, M. R., & Albin, R. S. 'Rape Myths, Rape Definitions and Probability of Conviction' 11 *Journal of Applied Social Psychology* 3 (1981) 212-230.

⁴³ Cheal D, *Families in Today's World: A Comparative Approach*. New York: Routledge 2008.

⁴⁴ Makafui Adodo-Samani P, 'Criminalisation Of Marital Rape In Ghana: The Perceptions Of Married Men And Women In Accra.'

⁴⁵ Williams L, *The Classic Rape: When do Victims Report? Social Problems*, 459-467.

⁴⁶ Makafui Adodo-Samani P, 'Criminalisation Of Marital Rape In Ghana: The Perceptions Of Married Men And Women In Accra.'

Additionally, stereotyped classic rape does not feature most of the characteristics of marital rape. For example, a husband is privy to his wife's nakedness unconditionally which will certainly lead him on to force sex on his non-consenting wife. For these reasons, marital rape is less likely to attract any sympathy and action at all because it is a far departure from the socio-cultural schema of classic rape. The thin line between rape and consented sex is consent which only couples can define in relation to their relationship.⁴⁷

Ghana is an example of a country that is not at all immune to the classic rape stereotype. Cusack confirmed the classic rape theory featuring intimates in a nationwide survey regard to rape. The female was perceived to be unmarried. Rape was most often viewed as an offence committed by strangers.⁴⁸ In discussing issues centered on sexual violence, rape to the respondents was acquaintance rape. The husband is nowhere labelled a rapist.⁴⁹ It will even be a taboo leading to estrangement and divorce.

2.5 Equality Theory

2.5.1 Equality Theory and Law

The goal of equality theory is to develop legal analyses that expose the root source of the discrimination at issue, so that the discrimination can be eliminated.⁵⁰ Equality theory provides insight into the law which human rights advocates can use to achieve social change. Equality theory recognizes the diversity of women's lived experiences and seeks to develop inclusive and

⁴⁷ Makafui Adodo-Samani P, 'Criminalisation Of Marital Rape In Ghana: The Perceptions Of Married Men And Women In Accra'

⁴⁸ Cusack K, 'Defining Violence'. In Coker-Appiah D, & Cusack K, (Eds.). *Breaking the Silence and Challenging the Myths of Violence Against Women and Children in Ghana*. Accra: Gender Studies & Human Rights Documentation Centre 1999c, 14-33.

⁴⁹ Dwamena-Aboagye A. (2004). Rape Within Marriage... How does it feel like? 26 *Sister Watch* 3 (2004) 28-29.

⁵⁰ Feminist legal theory involves a broad diversity of perspectives and frameworks of analysis, for example, liberal feminism, Marxist feminism, radical feminism, socialist feminism and postmodern feminism. See Elizabeth C, 'Theoretical Excursions' in Elizabeth C, (ed) *Locating Law: Race/Class/Gender Connection*, Fernwood Publishing Company: Halifax, 1999, 19.

representative analyses of the law that are relevant to all women.⁵¹ This goal is achieved by developing intersectional discrimination analyses.⁵² Equality theory seeks to expose biases in the law that operates to disadvantage women and create experiences of inequality. It challenges traditional interpretations of the law which perpetuate patriarchy and oppression and which have been historically accepted as impartial. A central feature of equality theory as it relates to women's human rights is asking the woman question:

‘the woman question... is designed to identify the gender implications of rules and practices which might otherwise appear neutral or objective. ... In law, asking the woman question means examining how the law fails to take into account the experiences and values that seem more typical of women than of men, for whatever reasons, or how existing legal standards and concepts might disadvantage women’.⁵³

Equality theorists challenge the legitimacy of the ‘official’ version of the law as an impartial and objective means of resolving conflict.⁵⁴ A fundamental cornerstone of the ‘official’ version of the law is that the law is neutral and treats everyone the same. Equality theorists demonstrate that the law is not neutral as it affects men and women differently, and that the law can act to perpetuate gender discrimination practiced within society at large. Equality theory explores the ways that the law reflects and reinforces the social, economic, and political structures that oppress women

⁵¹ See Silvers A, ‘Reprising Women’s Disability: Feminist Identity Strategy and Disability Rights’ 13 *Berkeley Women’s Law Journal*, 81 (1998)-The practice of feminist essentialism and the historical failure of white, non-disabled, heterosexual, urban women to confront issues of discrimination other than gender, is a long one.

⁵² Adrienne K. W., ‘Brief Reflections Toward a Multiplicative Theory and Practice of Being’ 1 *Berkeley Women’s Journal*, 6 (1990) 181; See also Dianne P., ‘Connecting Grounds of Discrimination to Real People’s Real Experiences’ 13 *Canadian Journal of Women and the Law* 1(2001).

⁵³ Katharine T. B., ‘Feminist Legal Methods’ in Kelly D. W (ed) *Feminist Legal Theory Foundations*, Philadelphia: Temple University Press, 1993, 550, 551.

⁵⁴ See Elizabeth C., ‘Theoretical Excursions’ in Elizabeth C, (ed) *Locating Law: Race/Class/Gender Connection*, Fernwood Publishing Company: Halifax, 1999, 19; Mary J.M., ‘Feminism and Legal Method: The Difference It Makes’ 3 *Australian Journal of Law and Society* 30 (1986).

within society.⁵⁵ Equality theory aims to understand women's oppression and to promote women's equality within society. The starting point in developing equality theory and women's rights can be understood to be Catharine MacKinnon's statement that "The law sees and treats women the way men see and treat women."⁵⁶ This reality is clearly evident in the context of marital rape law.

One of the foundations of equality theory is the development of a substantive equality analysis to achieve an equality of results.⁵⁷ Formal equality, under which women are treated the same as men, is generally rejected under a substantive equality analysis in favour of differential treatment intended to challenge the sources of women's oppression. However, formal equality can provide for meaningful equality in certain situations.⁵⁸ Formal equality is a useful model to ensure that women are guaranteed the same rights as men, for example, the right to vote, or the right to enter a profession, or the right to own property. There are situations when women want identical treatment to men, and in such cases, formal equality is the goal. However, there are situations when treating women the same as men results in inequality. For example, treating victims of rape

⁵⁵ Kathleen A. L, 'Celebration and Struggle: Feminism and Law' in Angela M and Geraldine F, (eds) *Feminism: From Pressure to Politics*, Montreal: Black Rose Books, 1989, 99,102.

⁵⁶ MacKinnon C, 'Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence' 8 *Signs* 635 (1983) 644.

⁵⁷ Radical feminists are credited with successfully advancing a substantive analysis of women's equality rights. One of the successes of radical feminist legal theory and practice in Canada includes the development of a fairly sophisticated understanding of the social construction of gender. It is generally now well recognized that gender is an inequality, constructed as a socially relevant differentiation in order to maintain the inequality of women. It was radical feminists, such as Catharine MacKinnon, who advanced the understanding of the category of gender as constituting a serious power differentiation between men and women – specifically, male supremacy and female subordination. Through the effective political and legal strategies of radical feminist equality rights advocates in Canada advocating for the establishment of substantive equality, many of the misogynist lies told to justify the maintenance of the category of gender, have been exposed and proved false. Both judicial and legislative decision makers have been persuaded, at least to some degree, that gender difference is an instrument and artefact of male dominance. There are multiple examples of judicial and legislative efforts to challenge the discrimination that is a result of the social construction of gender. The Supreme Court of Canada decisions in *Brooks v. Canada Safeway*, [1989] 1 S.C.R. 1219, *Janzen v. Platy Enterprises*, [1989] 1 S.C.R. 1252, and *R. v. Mills* [1999] 3 S.C.R. 668, as well as the legislation introduced into the *Criminal Code* via Bills C-49 and C-46, demonstrate the degree to which the social construction of gender and the substantive equality rights of women have been advanced in Canada.

⁵⁸ Fiona S, *The Legal Treatment of Marital Rape In Canada, Ghana, Kenya And Malawi - A Barometer Of Women's Human Rights* 2010, 10.

the same as victims of gender neutral crimes and allowing for their re-victimization through the judicial system, e.g. through the application of evidence law that results in a disadvantageous impact, or refusing women maternity leave because men do not receive maternity leave. Facially neutral laws and policies can have discriminatory disparate impacts on groups protected by human rights law, and such laws and policies constitute human rights violations.⁵⁹

Formal equality, which provides that likes be treated alike, provides inadequate protection against discrimination for most disadvantaged persons. Formal equality invokes the similarly situated test that requires equality claimants to compare themselves to those who represent the dominant norm, for example, women must compare themselves to men,⁶⁰ which is often impossible for claimants to do because of the very discrimination that they have experienced. Formal equality also necessitates only equality of treatment, a form of equality that often fails to provide for full inclusion of disadvantaged persons. Formal equality does not take into account the ways in which different groups in society have experienced systemic disadvantages. Under a formal model of equality, the disadvantaged only get equality in the areas of life in which they are most like the dominant norm. Catharine MacKinnon has described the limitations with formal equality as —if men don't need it, women don't get it.⁶¹

The fundamental difficulty with formal equality theory is that it makes disadvantage invisible through a consideration of equality in terms of sameness and difference, rather than in terms of dominance and subordination.⁶² Formal equality theory asserts a neutral standard that fails to take into consideration the power imbalances that have resulted from years of oppression. When

⁵⁹ Fiona S, *The Legal Treatment of Marital Rape In Canada, Ghana, Kenya And Malawi - A Barometer Of Women's Human Rights* 10.

⁶⁰ Robert Sharpe et al., *The Charter of Rights and Freedoms*, Chapter 15 —Equality, available at: <http://ql.quicklaw.com/servlet/qlwbic.qlwbi?qlsid=C1ZIAObvMH0DJXdx&qlcid=00005&qlvrb=QLCMD&C=CS+SHAR+393+>

⁶¹ MacKinnon C, 'Reflections on Sex Equality Under the Law' *Yale Law Journal*, (1991) 1281

⁶² Shelagh D, 'The Process of Achieving Equality' in Ryszard C, (ed) '*Human Rights in Canada: Into the 1990's and Beyond*' Ottawa: M.O.M. Printing, 1990,18.

formal equality does not work for a disadvantaged group, substantive equality, meaning differential treatment that provides for an equality of results, can be the answer. Examples of substantive equality include government subsidized day care for children, the design of wheelchair accessible buildings, and the accommodation of the rules of evidence to ensure that women are not re-victimized through rape trials. Substantive equality is focused on the social consequences of difference, when difference is used to justify domination. Substantive equality is committed to challenging norms and systems that result in harmful and disparate effects.⁶³

An essential element of a substantive equality analysis is the inclusion of a contextualized approach to equality questions. The contextualized approach to equality rights requires the consideration of the socio-historic roots of the inequality at issue.⁶⁴ With respect to women, such an inquiry would require legislators or judicial decision makers to consider “an historical context characterized by disenfranchisement, preclusion from property ownership, exclusion from public life, and sex-based poverty and devaluation of women’s contributions in all spheres of social life which continue down to the present day.”⁶⁵ The objective of using a contextualized approach is to demonstrate that the inequality at issue has been socially constructed and legally enforced. Radha Jhappan argues that a contextualized equality analysis begins “... not from the liberal assumption that the law applies equally to all save for the odd deviation from the norm, but rather from the assumption of women’s experience of subordination.”⁶⁶

⁶³ Fiona S, *The Legal Treatment of Marital Rape In Canada, Ghana, Kenya And Malawi - A Barometer Of Women’s Human Rights* 2010, 11.

⁶⁴ Fudge J, ‘The Public/Private Distinction: The Possibilities of and the Limits to the Use of *Charter* Litigation to Further Feminist Struggles’ 25 *Osgoode Hall Law Journal* 3, (1987) 485, 497.

⁶⁵ Fudge J, ‘The Public/Private Distinction: The Possibilities of and the Limits to the Use of *Charter* Litigation to Further Feminist Struggles’ 25 *Osgoode Hall Law Journal* 3, (1987) 485, 497.

⁶⁶ Radha J, ‘The Equality Pit or the Rehabilitation of Justice’ 10 *Canadian Journal of Women and the Law* 60 (1998), 72.

Women outside of the dominant norm have expressed appreciation of the value of the contextualized approach to equality because it diminishes the focus on the sameness/difference dichotomy.⁶⁷ The goal of a contextualized equality rights analysis is to identify the source of the claimant's subordination in order to eradicate it. While the idea of subordination involves a comparative concept, the contextualized approach provides for some liberation from the more traditional equality rights analysis that is usually grounded in a rigid comparative analysis of two different categories of experience. Using a contextualized approach to equality, women with disabilities, for example, need not necessarily argue that they are the same as either non-disabled women and/or disabled men and so deserve the same treatment, nor that they are different from non-disabled women and/or disabled men so that they deserve different treatment. Through a contextualized analysis, women with disabilities can argue that their subordination has been socially constructed and legally enforced. The focus is thereby switched from the individual to systemic discrimination, allowing for a more comprehensive understanding of the experience of subordination that is especially useful for those that experience intersecting forms of discrimination.⁶⁸

2.5.2 Equality Law and Marital Rape Law

By asking “the woman question”, and exploring how the law fails to address what is unique about sexual assault, and how sexual assault law can contribute to women's inequality, it becomes clear that sexual assault, including marital rape, is not like any other crime. It is one of

⁶⁷ Radha J, ‘The Equality Pit or the Rehabilitation of Justice’ 10 *Canadian Journal of Women and the Law* 60 (1998), 72; Fiona S, ‘Beyond Compassion and Sympathy to Respect and Equality: Gendered Disability and Equality Rights Law’ in , Dianne P, & Richard D, (eds) ‘*Critical Disability Theory: Essays in Philosophy, Politics, Policy, and Law*’ Vancouver: University of British Columbia Press, 2006 267, 269.

⁶⁸ The application of contextualized equality rights analyses specific will not guarantee the success of an equality claim as, even assuming the analysis is a good one, there is no guarantee that the judiciary will appreciate the significance of the experiential reality of the claimants' lives. Dianne Pothier has concluded that ‘The ultimate question (with respect to judicial assessments of human dignity) is whether the court ‘gets’ the context of the claimant to be able to make a sensible judgment about human dignity’. However, without the advancement of contextualized equality analyses, it is likely that the distinctive experiences of claimants, such as women with disabilities, will be ignored, and that their entitlement to equal treatment will not be recognized.

the clearest expressions of women's subjugation and oppression on the basis of sex, and is closely linked with the overall inferior position of women in society. The threat of sexual violence is an ever-present one which influences a woman's daily life and autonomous choices including her mobility, activities and acquaintances. Sexual assault as a form of violence against women is commonly understood to be a product of patriarchy, the system of male control over women. The act of rape is not an end in itself, but a means of enforcing prescribed gender roles in society and maintaining the social hierarchy in which men retain control. The socio-historic root of sexual assault is the exercise of power and control of men over women that is justified based upon sexist social constructions of women as inferior to men.⁶⁹

In sex-unequal societies, both sexes are taught to accept sexual aggression by men against women as normal to some degree. Male sexual exploitation of women is fostered by traditional gender roles in which male sexuality embodies the role of the aggressor, female sexuality embodies the role of the victim, and some force is romanticized as acceptable. Sexual assaults frequently occur in the context of normal social events, often by an assailant who is known to the victim. Sexual assault is categorical and group-based. Under most circumstances, men are not subject to sexual assault by women. Women occupy a disadvantaged status as victims and targets of sexual aggression. Rape, and the fear of rape, function as a mechanism of social control over women, enabling men to assert dominance over women and maintain the existing system of gender stratification. Rape operates as both a symbol and reality of women's subordinate social status to men. Diana Majury has commented on the experience of violence and women's inequality as follows:

⁶⁹ The cross-cultural legitimacy of this theory is affirmed in Peggy R. S, 'The Socio-Cultural Context of Rape: A Cross-Cultural Study' in O'Toole L.L, and Jessica R. S, (eds) *Gender Violence: Interdisciplinary Perspectives* New York: New York University Press, 1997, 52; Fareda B, *Women, Law and Human Rights: An African Perspective* Portland, Oregon: Hart Publishing, 2005, 171-172.

The fact that violence is inflicted upon women as women, that is, because we are women, both expresses and reinforces women's unequal status in Canadian society. Offences of violence against women – rape, female partner assault, sexual harassment, incestuous assault, pornography, and prostitution – are gendered offences; they are rooted in male dominance and female subordination.⁷⁰

Sexual assault is a form of oppression that is direct and indirect, and crosses all borders of race, class, ableism and sexual orientation – the threat of violence is a form of oppression that touches almost every woman in some shape or form. However, as with all experiences of discrimination and oppression, it is important to remember that violence is experienced differently by different groups of women.⁷¹ Racialized women in North America have articulated clearly the differences associated with their experience of sexual violence as an exercise of power and control rooted in racism and sexism, the effects of which cannot be separated.⁷² Disabled women have also articulated the differences associated with their experience of sexual violence as an exercise of power and control rooted in ableism and sexism, the effects of which cannot be separated.⁷³

Sexual assault law has traditionally worked against women as a means of securing justice and equality. The criminal law has operated to perpetuate women's inequalities, and served to re-victimize women who have been raped. Sexual assault laws were founded upon sexist myths and stereotypes, and the discriminatory thinking that informed the development of these laws continues to inform the thinking of legislators, law enforcement personnel and judicial decision makers. Rape mythologies that are perpetuated through the criminal law include the myths that women lie about rape out of malice, and that women use false rape claims as a means to exact

⁷⁰ Diana M, 'Seaboyer and Gayme: A Study In Equality' in Julian V. R, and Renate M. M, (eds) 'Confronting Sexual Assault: A Decade of Legal and Social Change' Toronto: University of Toronto Press, 1994 268,268-269.

⁷¹ Kimberle C, 'Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Colour' 43 *Stanford Law Review* (1991) 1241; Colleen S, 'Women as Wives: Immigration Law and Domestic Violence' 26 *Queen's Law Journal* 1(2000).

⁷² Kimberle C, 'Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Colour' 43 *Stanford Law Review* (1991) ,76.

⁷³ Fiona S, 'Beyond Compassion and Sympathy to Respect and Equality: Gendered Disability and Equality Rights Law' in , Dianne P, & Richard D, (eds) 'Critical Disability Theory: Essays in Philosophy, Politics, Policy, and Law' Vancouver: University of British Columbia Press, 2006 267, 269.

vengeance in their relationships with men. Karen Busby has argued that in Canada the mythology that women lie about rape underpins all of the other rape myths, despite the fact that there is no evidence that the incidence of false reports is any higher in the sexual assault context than in other contexts.⁷⁴ In Kenya, under the Penal Code, women who are found guilty of filing false rape claims face the same sentence that the accused would have faced if he had been found guilty. This relatively new law, the effect of which is to deter sexual assault victims from filing claims because of the risk that they may be found to have made a false claim exists only with respect to sexual assault victims⁷⁵, and was developed in response to the mythology that women lie about rape. Sexist rape mythologies continue to find a home in the law, such as the case in Kenya. They are also introduced through evidence rules, for example, relevance and reliability rules.⁷⁶ These rape mythologies are alive and well in the context of marital rape complaints.

2.6 Methodology

This paper is based on the collation of qualitative data obtained from secondary and tertiary resources. These include but are not limited to, analysis of information from online resources, journals and articles, reports from relevant organizations, text books, case law, news articles, and statute. Further, works by scholars, professionals and commentaries by those with vast knowledge in the appropriate fields applicable will be used and cited

2.7 Conclusion

There are various theories that discuss and explain the concept of marital rape. The human rights theory provides that rights are not only inherent to all human beings but also indivisible and are widely considered to be of universal application and should therefore be protected. The human

⁷⁴ Karen Busby, 'Not a Victim Until a Conviction is Entered: Sexual Violence Prosecutions and Legal 'Truth' in *Locating Law: Race, Class, Gender Connections*, Elizabeth Comack, ed., *supra* at 261.

⁷⁵ It is unclear how a claim will be determined to have been —false, for example, if a simple acquittal will suffice.

⁷⁶ Jennifer Koshan, —The Legal Treatment of Marital Rape and Women's Equality: An Analysis of the Canadian Experience! September, 2010 at 22 and 56-57

rights approach therefore abhors such actions as categorizing marital rape as an exception to cases of rape.

Robin Barrow summarized the utilitarian approach as ‘the assignment of moral goodness or rightness to only one kind of consequence-effects on overall wellbeing’. Safety, security and protection of human life are one of the main responsibilities of any government under the Social Contract theory. Therefore the overall wellbeing of each individual person, places a legal duty upon any government to protect and promote these rights.

Equality theory on the other hand provides insight into the law which human rights advocates can use to achieve social change. Equality theory recognizes the diversity of women’s lived experiences and seeks to develop inclusive and representative analyses of the law that are relevant to all women.

CHAPTER THREE

3.1 INCIDENCES OF MARITAL RAPE IN KENYA AND THE LAW DEALING WITH IT

3.2 Introduction

Marital rape is not a criminal offence in Kenya. Kenyan women, like their counterparts in other countries in the world suffer from cases of domestic violence including marital rape.

Violence against women cases have been a widespread problem in Kenya for a long period of time. In 1966, the Kenyan government attempted to address the problem of wife beating by setting up the Commission on Marriage and Divorce.⁷⁷

The Commission recommended a proposed bill explicitly outlawing wife beating but when it was taken to Parliament in 1968, all male legislators opposed it arguing that wife battery was a “normal” customary practice and that such a law could amount to undue interference in the domestic affairs of a husband and a wife. In the media, cases of domestic violence have also been highlighted. In 1983, a husband gouged out his wife’s eyes for bearing him a female child only; in 1998, a highly publicized case where a woman was battered by her husband, a Kenyan police officer, succumbed to death; in 1999, a woman was slashed on the face, head, and hands after her husband found her singing along to a ‘*ndombolo*’ song on the radio in front of a guest.⁷⁸

Sexual abuse, while a common form of systemic intimate violence, is rarely reported.⁷⁹ The stereotypical image of rape is non-consensual sex with a stranger, occurring in a strange and unsafe location⁸⁰ Because of this perception, a victim or her society may not recognize the crime of rape when her sexual partner of many years demands sex without her consent.⁸¹ Intimate

⁷⁷ Ondicho T.G, *Battered Women: A social-legal Perspective of their Experiences in Nairobi*, Center for African Area Studies, Kyoto University. 36

⁷⁸ Ondicho T.G, *Battered Women: A social-legal Perspective of their Experiences in Nairobi*, Center for African Area Studies, Kyoto University. 36

⁷⁹ Meyersfeld B, *Domestic Violence &International Law*(Oregon: Oxford &Portland, 2010),.132.

⁸⁰ Meyersfeld B, *Domestic Violence &International Law*(Oregon: Oxford &Portland, 2010). 132

⁸¹ Meyersfeld B, *Domestic Violence &International Law*(Oregon: Oxford &Portland, 2010). 132.

partner violence is often systemic and it may be difficult for the victim to keep track of the events and dates when the crimes were committed.⁸²

The law on violation of a woman's integrity takes into consideration all aspects of the abused woman's life, characterized by threats, assault and mental stress, and has been drawn up so as to facilitate prosecutors of perpetrators who repeatedly have violated the integrity of a woman with whom they are in an intimate relationship.⁸³

3.3 Marital Rape Statistics in Kenya Vis a vie legal rights

It is difficult to obtain accurate statistics on sexual violence against women in the home. This is because of the fact that marital rape is not a crime in Kenya.

It is well appreciated that marital rape is synonymous with domestic violence and that neither can be tackled in isolation of the other. In this regard therefore, a rather peculiar aspect of domestic violence in Kenya (as is elsewhere in the world) and marital rape in particular is that while it is acknowledged as being prevalent, even pervasive, no exact figures exist as to its occurrence. The figures that exist in studies conducted in Kenya vary greatly but the bottom line is that the cases of marital rape associated with domestic violence are on the increase in a country where intercourse between a man and woman in a matrimonial bed is regarded as normal practice regardless of the circumstances so surrounding.⁸⁴

In 2002, The Attorney General of Kenya, Hon. Amos Wako while addressing Parliament stated that 51% of the Kenyan women were in abusive relationships and that the violence often resulted in severe injury or death of the woman. Obviously in the process, sexual violence indeed does occur. In a study conducted the same year, the Attorney General further added that the same 51%

⁸² Meyersfeld B, *Domestic Violence & International Law* (Oregon: Oxford & Portland, 2010),160.

⁸³ Meyersfeld B, *Domestic Violence & International Law* (Oregon: Oxford & Portland, 2010),160.

⁸⁴ Shimoli E, "New Law to Target Domestic Brutes" Daily Nation, Friday, November 3, 2002.

was the proportion of women living in Nairobi, Kenya's capital and thus considering that the incidents and prevalence of domestic violence are appreciably higher in the rural areas than in the Capital, it is arguable that the national prevalence may well be higher than the alleged 51%.⁸⁵ In a grim rejoinder, the government released a report⁸⁶ complementing that of FIDA, Kenya. Whereas this was a government report and thus viewed with skepticism out of the government's notorious way of downplaying social issues in a way of painting a positive picture, the report nonetheless shows that the reality will be rather grim⁸⁷. Contrasted with the government's report which is most likely in all circumstances understated, those from a private sector study published in 2002 indicated that a staggering 83% of women reported physical abuse. Specifically on intimate violence, 60% of women reported that they were victims of domestic abuse⁸⁸. In 2003, the first government survey, Kenyan Demographic and Health Survey, collected data on violence against women and found that 16% of married and divorced or separated women experienced sexual violence from their husbands,⁸⁹ and reported instances women of being slapped, pushed/shaken/thrown, punched or forced to have intercourse with their husbands.⁹⁰ In the 2008-2009 Kenya Demographic and Health Survey, it was reported that 17% of 'ever-married' women experienced sexual violence by a husband, with 14% of the cases experienced

⁸⁵ Nyaund T, 'Domestic Violence in Kenya – Report of a Baseline Survey Among Women in Nairobi' (March 2002) *International Federation of Women Lawyers (FIDA) Kenya*.)

⁸⁶ Central Bureau Of Statistics, (Government of Kenya)

⁸⁷ Part of the Report read thus; Forty four percent of women married, divorced or separated aged 15 – 49 report that they have been physically or sexually violated by their husbands or partners while 29% said that they have been victims of such violence in the year preceding the survey.

⁸⁸ Johnston T, 'Domestic Abuse in Kenya', *Nairobi :Population Communication Africa*,(2002),p.10 as quoted in Patrick Kiage, 'Domestic Violence in Kenya: Towards More Effective intervention,' *Law Society of Kenya Journal* 1 (2005) 1 p. 48

⁸⁹ Central Bureau of Statistics (CBS) [Kenya], Ministry of Health [Kenya] and ORC Macro, 2004, *Kenya Demographic and Health Survey 2003):Key Findings*, Calverton, Maryland, USA at 14

⁹⁰ Central Bureau of Statistics (CBS) [Kenya], Ministry of Health [Kenya] and ORC Macro, 2004, *Kenya Demographic and Health Survey 2003):Key Findings*, Calverton, Maryland, USA at 14

within the twelve months of the survey.⁹¹ In the latter report, 14% of the women interviewed reported that they were forced to have sex with their husbands when they did not want to.⁹²

Sexual and Gender Based Violence (SGBV) entails widespread human rights violations, and is often linked to unequal gender relations within communities and abuses of power.⁹³ According to Jewkes, violence against women is rooted in gender inequality.⁹⁴ He argues that violence against women involves men and women where ‘the female is usually the victim and which arises from the unequal power relationship between men and women.’⁹⁵ It can take the form of sexual violence or persecution by the authorities, or can be the result of discrimination embedded in legislation or prevailing societal norms and practices. It can be both a cause of forced displacement and an intolerable part of the displacement experience.⁹⁶

SGBV in Kenya, as elsewhere in the world, is a complex issue that has as its root in the structural inequalities between men and women that result in the persistence of power differentials between the sexes. Women’s subordinate status to men in many societies, coupled with a general acceptance of interpersonal violence as a means of resolving conflict, renders women disproportionately vulnerable to violence from all levels of society: individual men, within the family and community, and by the state.⁹⁷

⁹¹ Kenya National Bureau of Statistics (KNBS) and ICF Macro, *Kenya Demographic and Health Survey 2008-2009*, Calverton, Maryland: KNBS and ICF Macro. 275.

⁹² Kenya National Bureau of Statistics (KNBS) and ICF Macro, *Kenya Demographic and Health Survey 2008-2009*, Calverton, Maryland: KNBS and ICF Macro. 275.

⁹³ See *Beijing Declaration and Platform for Action*, 15 September 1995, Paragraphs 113 & 114.

⁹⁴ Jewkes R, *Intimate Partner Violence: Causes and Prevention*, (2002) 359, available at <http://www.thelancet.com/journals/lancet/article/PIIS0140673602083575/abstract.htm>, accessed on 19 February 2014.

⁹⁵ Jewkes R, *Intimate Partner Violence: Causes and Prevention*, (2002) 361, available at <http://www.thelancet.com/journals/lancet/article/PIIS0140673602083575/abstract.htm>, accessed on 19 February 2014.

⁹⁶ Dr. Ruth Aura, ‘Situational Analysis and the Legal Framework on Sexual and Gender-Based Violence in Kenya: Challenges and Opportunities’.

⁹⁷ Dr. Ruth Aura, ‘Situational Analysis and the Legal Framework on Sexual and Gender-Based Violence in Kenya: Challenges and Opportunities’.

The impact of SGBV is devastating. The individual women who are victims of such violence often experience life-long emotional distress, mental health problems and poor reproductive health, as well as being at higher risk of acquiring HIV and intensive long-term users of health services. In addition, the cost to women, their children, families and communities is a significant obstacle to reducing poverty, achieving gender equality and ensuring a peaceful transition for post-conflict societies. This, in conjunction with the mental and physical health implications of gender-based violence, impacts on a state or region's ability to develop and construct a stable, productive society, or reconstruct a country in the wake of conflict.⁹⁸

The state in most cases perpetrates or tolerates violence against women either through action or non-action by prioritizing custom or tradition over the respect of fundamental freedoms and rights belonging to women. Kenya is especially guilty of having a system that is replete with cases of abuse of women's rights.⁹⁹ However, the recent case of *C.K.(A Child) Through Ripples International As Her Guardian And Next Friend) & 11 Others v. Commissioner Of Police/Inspector General Of The National Police Service & 3 Others*¹⁰⁰ where the High Court made a finding that the police's failure to effectively enforce Section 8 of the Sexual Offences Act, 2006 infringed upon the petitioners right to equal protection and benefit of the law contrary to Article 27(1) of the Constitution of Kenya, 2010 was a step forward in the right direction. In addition, the court observed that by failing to enforce existing defilement laws the police contributed to development of a culture of tolerance for pervasive sexual violence against girl children and impunity.

⁹⁸ Dr. Ruth Aura, 'Situational Analysis and the Legal Framework on Sexual and Gender-Based Violence in Kenya: Challenges and Opportunities'.

⁹⁹ Dr. Ruth Aura, 'Situational Analysis and the Legal Framework on Sexual and Gender-Based Violence in Kenya: Challenges and Opportunities'.

¹⁰⁰ [2013] eKLR.

3.4 Legal Framework on Marital Rape as an abuse of women rights

Kenya has a plethora of legal provisions safeguarding the rights of a woman in addition to being a signatory to various regional and international instruments on protection of gender and social rights.

The place of international law as an instrument employed by states to resolve global issues cannot be under-estimated. These global issues are not only those affecting the state parties in their 'national' capacity, but also individual issues bordering on express or implicit violation of human rights.¹⁰¹ The surfeit of international legal instruments and statements dealing with violence against women suggest that international bodies and states have identified violence as a global rights concern. Until very recently, violence against women generally was not thought of as a proper subject for international human rights law.¹⁰² The main achievement of the international instruments therefore, is to recognize SGBV as a human rights violation.¹⁰³

By virtue of article 2(6) of the Constitution of Kenya 2010, any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution. This then gives life to various instruments such as the Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A (III) (UDHR), Vienna Declaration and Programme of Action: World Conference on Human Rights (adopted 12 July 1993 UN Doc. Conf. 157/23); Declaration on Elimination of Violence Against Women (adopted 20 December 1993 UNGA Res 48 /104) (DEVAW); UN Resolution on Elimination of Domestic Violence Against Women (adopted 19 February 2004 UNGA Res 58/147); Beijing Declaration and Platform for Action (adopted 17

¹⁰¹ Meyersfeld B, *Domestic Violence and International Law* (2010) 32.

¹⁰² Hasselbacher L, 'State Obligations Regarding Domestic Violence: The European Court of Human Rights, Due Diligence, And International Legal Minimums of Protection' (2010) 2 *Northwestern Journal of International Human Rights* 8 192. See also Wing AK, 'A Critical Race Feminist Conceptualization of Violence: South African and Palestinian Women' (1997) 60 *Albany Law Review* 944.

¹⁰³ Dr. Ruth Aura, 'Situational Analysis and the Legal Framework on Sexual and Gender-Based Violence in Kenya: Challenges and Opportunities'.

October 1995, UN Doc A/Conf. 177/20) (BPFA); the Convention on Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979 UNGA Res 34/180) CEDAW) and regionally, African Charter on Human and People's Rights (adopted 27 June 1981 UN Doc CAB/LEG/67/3) (ACHPR) and Protocol to the African Charter on Human and peoples' Rights on the Rights of Women in Africa (adopted 11 July 2003) (Maputo Protocol).

Therefore internationally and regionally there exist a series of instruments meant to protect women and girls against SGBV. This in turn has aptly helped recognize SGBV as a human right violation.

CEDAW for instance establishes international standards for guaranteeing equality between women and men within the family as well as between the family and the state.¹⁰⁴ The essence of this convention, as of the UDHR, is respect for human dignity and respect for the human capacity to make responsible choices. The 1993 World Conference on Human Rights in Vienna brought together women's non-governmental activists with UN and human rights leaders.¹⁰⁵

Together they agreed to further insist that state and local biases in the implementation of CEDAW, due to so-called religious and cultural interpretations or reservations, be eliminated.¹⁰⁶

DEVAW and BPFA later helped to further crystallize the doctrine that women's rights are human rights. In particular, these accords reinforce CEDAW principles which establish that states be held responsible for failing to demonstrate 'due diligence' in averting or punishing violence against women that occurs either in the public or the private sphere. As a result, these Conventions and Agreements have created space in which practices that were once considered as private issues like domestic violence, which is a form of SGBV, can now be understood as

¹⁰⁴ Meyersfeld B, *Domestic Violence and International Law* (2010) 32..

¹⁰⁵ Burton B, et al *'Justice, Change, and Human Rights: International Research and Responses to Domestic Violence* (2002) 22.

¹⁰⁶ Burton B, et al *'Justice, Change, and Human Rights: International Research and Responses to Domestic Violence* (2002) 24.

human rights violations of public concern. The growing use and widespread application of human rights discourse itself has begun to dissolve the public-private divide, and has further provided a moral momentum for direct response by national governments and non-governmental sectors.¹⁰⁷

The Maputo Plan of Action for the Operationalization of the Sexual and Reproductive Health and Rights Continental Policy Framework (Maputo Protocol) on the other hand seeks to take the continent forward towards the goal of universal access to comprehensive sexual and reproductive health services in Africa. The Protocol seeks the reduction of gender based violence.

The question that needs to be answered is, has Kenya complied with these instruments? Of great importance in answering this is the principle of due diligence as enounced under international law principles. The due diligence principle provides a standard of care used to determine whether a state has complied with its international obligations.¹⁰⁸ In several international conventions and accords, there has now been explicit acknowledgment of the state's responsibility for human rights violations by private actors in both the public and private spheres. A state has both negative and positive obligations towards her citizens. One of the duties is to refrain from acts of violence against women as well as to prevent and protect women from violence. Similarly, a state has a duty to punish perpetrators and compensate victims of violence. The state may be held responsible under international law for failure to provide reasonable and adequate measures to prevent or address women's rights violations. DEVAW for instance, includes explicit directions

¹⁰⁷ Dr. Ruth Aura, 'Situational Analysis and the Legal Framework on Sexual and Gender-Based Violence in Kenya: Challenges and Opportunities'

¹⁰⁸ Black's Law dictionary defines due diligence as diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation. Garner B.A., *Black's Law Dictionary* (9th ed) (2009) 488.

to countries to ‘not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination.’¹⁰⁹

3.5 Conclusion

Effective protection can be established only by preventing SGBV, identifying risks and responding to survivors, using a coordinated, multi-sectoral approach. The present protection environment in Kenya is fraught with challenges and filled with opportunities, which should be carefully considered when devising responses. Whereas the Kenyan legal framework provides a mechanism for addressing SGBV, the levels to which the frameworks respond to the plight of the survivors of SGBV is debatable.¹¹⁰ The legal and policy framework mostly focuses on bringing of the accused person to ‘justice’ without a corresponding obligation of alleviating the conditions of the survivor of SGBV. In fact, the survivor of SGBV is more of an alien to the criminal justice system because the offence is perceived by the system to have been committed against the state, not against the survivor of the SGBV as an individual.¹¹¹

¹⁰⁹ Article 4 of DEVAW.

¹¹⁰ Dr. Ruth Aura, ‘Situational Analysis and the Legal Framework on Sexual and Gender-Based Violence in Kenya: Challenges and Opportunities’.

¹¹¹ Dr. Ruth Aura, ‘Situational Analysis and the Legal Framework on Sexual and Gender-Based Violence in Kenya: Challenges and Opportunities’

CHAPTER FOUR

4.1 COMPARATIVE CASE STUDY: JURISPRUDENCE FROM OTHER JURISDICTIONS IN RELATION TO RAPE IN MARRIAGES

4.2 Introduction

Over the last three decades, sexual violence against women in intimate partner relationships has become a global health issue. The development of a human rights perspective on the phenomenon has been more recent. Assessing the prevalence of coercive sex in the context of intimate relationships—and marital rape in particular—is challenging for many reasons. Sexual violence is highly stigmatized and is among the few crimes in which the victim might also be blamed for the harm experienced.¹¹²

Furthermore, women who have been victims of what is legally defined as marital rape might not acknowledge it as such, and there are extraordinary social and cultural pressures to maintain the “sanctity” of certain kinds of intimate relationships, particularly marriage.¹¹³ Consequently, worldwide estimates of non-volitional sex vary substantially. A British national probability survey supported by the American National Intimate Partner and Sexual Violence Survey shows that one in five women report experiencing attempted non-volitional sex, and one in ten women report experiencing completed non-volitional sex since age 13 years.¹¹⁴

In 2006, it was estimated that marital rape could be prosecuted in at least 104 countries (in four of these countries, marital rape could be prosecuted only when the spouses were judicially separated), and since 2006 several other countries have outlawed spousal rape.

In many countries it is not clear if marital rape may or may not be prosecuted under ordinary rape laws. Several countries in Eastern Europe and Scandinavia made spousal rape illegal before 1970, but other countries in Western Europe and the English-speaking Western World outlawed

¹¹² Professor McWilliams M, & Professor Ní Aoláin F, ‘Human Rights Meets Intimate Partner Sexual Violence-Transitional Justice Institute’ *Ulster University Transitional Justice Institute Research Paper No.* 16-10.

¹¹³ Transitional Justice Institute, University of Ulster & University of Minnesota Law School. <http://www.politicalsettlements.org>.

¹¹⁴ <http://ssrn.com/abstract=2152311>

it much later, mostly in the 1980s and 1990s. Most developing countries outlawed it in the 1990s and 2000s.¹¹⁵

This chapter therefore looks at the issue of marital rape in Kenya legal culture while trying to reconcile how the practice is dealt with in other jurisdictions to wit: Ghana, United Kingdom and United States of America.

4.3 Marital Rape in Kenya

Marital rape is a thorny issue in Kenya as it is in other jurisdictions across the world. This situation is further exacerbated by the fact that the patriarchic male dominated society is the epitome of Kenya's many tribes and cultures.

4.4 Legal Framework on Marital Rape

There is no law that governs or restricts the issue of marital rape in Kenya. The principal statute that merely touches on the subject is The Sexual Offences Act.¹¹⁶ The Act does not prohibit or criminalize forced sex within marriage. Spousal rape has been explicitly exempted in section 43 (5) of the Act which provides that with regards to claims of sexual abuse such as rape it shall not apply in respect of persons who are lawful married to each other.

This exemption clause tends to legalize rape within marriage. The lack of laws criminalizing marital rape creates an assumption that the wife is an exclusive property of the husband. It also asserts a lower status of married women. Marital rape is a form of domestic violence which reinforces women's sexuality in institution of marriage and in the greater society.¹¹⁷

¹¹⁵ <http://ssrn.com/abstract=2152311>.

¹¹⁶ No 3 of 2006.

¹¹⁷ Sampson F, *The Legal Treatment of Marital Rape in Canada, Ghana , Kenya and Malawi : A Barometer of Women's Rights*, 2010, 54.

4.5 Regulation of Rape in Kenya

It appears that social toleration of marital rape makes it difficult for women to report violence associated with it or get any help to end it.¹¹⁸ This has led to a situation where many women feel like they are naturally obliged to submit to sex in their marriages, and husbands believing that marriage give them an absolute right to have sex with their wives whenever they want to.¹¹⁹

This may be the rationale that led Kenya to draft its laws and defining the offence of rape as follows:

1. *A person commits the offence termed rape if-*
 - a) *He or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;*
 - b) *The other person does not consent to penetration; or*
 - c) *The consent is obtained by force or by means of threats or intimidation of any kind.*
2. *In this section the term-intentionally and unlawfully- has the meaning assigned to it in section 43 of this Act.*
3. *A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life.¹²⁰*

In order to give effect to the above section, it is imperative that it is read together with section 43 of the Sexual Offences Act which provides for the marital rape exemption. This section provides as follows:

- S 43 (1) an act is intentional and unlawful if it is committed*
- a) *In any coercive circumstances;*
 - b) *Under false pretenses or by fraudulent means; or*
 - c) *In respect of a person who is incapable of appreciating the nature of an act which causes the offense.*
2. *The coercive circumstances, referred to in subsection (1) (a) include any circumstances where there is*

¹¹⁸ Hanson Frieze I, 'Investigating the Causes and Consequences of Marital Rape' 8 *Signs, Women and Violence* 532 (1983), 533.

¹¹⁹ Lisa Eskow R, 'The Ultimate Weapon?: Demythologizing Spousal Rape and Conceptualizing Its Prosecution' (1996) 48 *Stanford Law Review* 677, 688.

¹²⁰ See section 3, *Sexual Offences Act* (Act No. 3 of 2006)

- a) *Use of force against the complainant or another person or against the property of the complainant or that of any other person;*
 - b) *Threat or harm against the complainant or another person or against the property of the complainant or that of any other person; or*
 - c) *Abuse of power or authority to the extent that the person in respect of whom an act 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*
3. *False pretenses or fraudulent means, referred to in subsection (1) (b), include circumstances where a person –*
- a) *In respect of whom an act is being committed, is led to believe that he or she is committing such an act with a particular person who is in fact a different person;*
 - b) *In respect of whom an act is being committed, is led to believe that such an act is something other than that act; or*
 - c) *Intentionally fails to disclose to the person in respect of whom an act is committed, that he or she is infected by HIV or any other life threatening sexually transmissible disease...*

This section shall not apply in respect of persons who are lawfully married to each other.¹²¹

The above section indicates clearly that it is not an offence to coerce another person into a sexual act by using force or threat of harm if you are legally married to that person. Therefore section 43 referred to above is in conflict with gender equality and it constitutes violence against women. It is submitted therefore that Kenya ought to act swiftly in abolishing section 43 (5) of the Sexual Offences Act because it violates and undermines international and regional instruments dealing with gender equality and violence against women.¹²²

4.6 Marital Rape in Ghana

Ghana, one of the West African vibrant economies is comprised of diverse African cultures which come with the patriarchy of men dominating women. Marital Rape is therefore not a unique practice in Ghana.

¹²¹ See section 43(5), *Sexual Offences Act* (Act No.3 of 2006)

¹²² Nqobizwe Mvelo N, *Marital Rape Exemption In Kenya: Some Lessons From International Law 1 OIDA International Journal of Sustainable Development* (2015), 8. Available at <http://www.ssrn.com/link/OIDA-Intl-Journal-Sustainable-Dev.html>

On February 22, 2007, the Ghanaian Parliament passed the long awaited *Domestic Violence Act* ("DV Act").¹²³

Unfortunately, the DV Act, as passed, fails to proscribe one of the most insidious forms of violence within the family - marital rape.¹²⁴ Although the original bill specifically prohibited marital rape, parliament bowed to public pressure and removed the provision, leaving husbands free to rape their wives with impunity. This comes at a time when the Ghanaian authorities acknowledge that marital rape constitutes a violation of a woman's human rights. The Ghanaian Parliament must therefore act immediately to expressly make marital rape a crime, like any other act of domestic violence.¹²⁵

Some say that the failure to criminalize marital rape protects the privacy and sanctity of marriage,¹²⁶ but in reality it creates a violent, degrading and dehumanizing place for women in the family. Moreover, sexual abuse within marriage crushes the marital bond and is a betrayal of the holiness and sanctity of marriage. In contrast to the view that a marriage should include love, comfort and honor, as the traditional marriage vows provide,¹²⁷ some distinguished Ghanaians

¹²³ Emmanuel Adu-Gyamerah, House clears hurdle, Domestic Violence Bill passed at last, Daily Graphic, February 22, 2007, available at <http://www.parliament.gh/womencaucus/news/House%20Clears%20Hurdle,%20Domestic%20Violence%20Bill%20Passed%20at%20last.php>. On May 3, 2007, President Kufour assented to the Act and it became law.

¹²⁴ Stafford Kaymar N, 'Permission for Domestic Violence: Marital Rape in Ghanaian Marriages, 2010 29 Women's Rights Law Rep 63-Marital rape in Ghana is a legal impossibility, since there is no crime of rape within a marriage. Acknowledging this fact, the author uses the term "marital rape" to mean a married man having sexual relations with his wife against her will.

¹²⁵ Kaymar N, 'Permission for Domestic Violence: Marital Rape in Ghanaian Marriages, 2010 29 Women's Rights Law Rep 63

¹²⁶ Quaye S A, Amponsah O M, & Asare E P, *Domestic Violence Bill, Ghanaian Chron.*, Sept. 13, 2005.

¹²⁷ Episcopal Church, *The Book of Common Prayer and Administration of the Sacraments and Other Rites and Ceremonies of the Church According to the Use of the Protestant Episcopal Church in the United States of America* 301-04 (1953). Ironically, the Church of England has chosen to omit the term 'obey' from the traditional marriage vows in order to stem domestic abuse. See Daniel Blake, Church Omits 'Obey' from Marriage Vows to Tackle Domestic Abuse, *Christian Today*, Oct. 3, 2006, http://www.christiantoday.com/article/church_omits_obey_from_marriage_vows_in_efforts_to_tackle_domestic_abuse/7843.htm (last visited Mar. 13, 2008). The article uses the Episcopal Church as an example of traditional Christian wedding vows because 68.8% of Ghanaians practice some form of Christianity. CIA, *The World Fact Book: Ghana*, <https://www.cia.gov/library/publications/the-world-factbook/geos/gh.html> (last visited Apr. 8, 2008).

consider the exemption from criminal liability for marital rape to be legitimate. Dr. Edward Mahama,¹²⁸ a prominent Ghanaian who was the President and Medical Director of Superior Medical Centre in Accra, noted "if we talk about marital rape, it means we are going into the bedroom, and we have no right to go there."¹²⁹ After admitting that sexual abuse may exist in marriage, he noted that, "you cannot legislate on such issues."¹³⁰ In support of the statutory exemption, another noted politician, Professor John Evans Atta Mills,¹³¹ called for the "sanctity" of marriage to be protected.¹³² Additionally, at a meeting of Chiefs in the Upper East Region, the men¹³³ concluded that the bill was "meant only for urban dwellers" and "the proposed law on marital rape [was] anti-Ghanaian."¹³⁴ Apparently, in the Chiefs' eyes, in order to truly be Ghanaian, you must preserve patriarchy and continue the subjugation of women.¹³⁵

Consent to marriage is the equivalent of consent to sex in Ghanaian custom and law. This assumption cannot stand. Legally permitting a married man to have sexual relations with his wife

¹²⁸ Dr. Mahama was a former presidential candidate for the People's National Convention and currently serves as President and Medical Director of Superior Medical Centre in Accra, as well as Lecturer and Consultant of the Korle Bu Teaching Hospital. Chairman on PNC, Dr Edward Mahama, <http://www.ghanaweb.com/GhanaHomePage/people/pop-up.php?ID=186> (last visited Mar. 13, 2008).

¹²⁹ Gyau Orhin I, *Domestic Violence Bill Under Siege, Public Agenda*, 2004.

¹³⁰ This statement is a nod to the long running public/private debate over a state's responsibility for private acts. Clearly, Dr. Mahama believes the State's responsibility to protect women from violence ends at the bedroom door. For a more in-depth evaluation of the public/private debate, see Sullivan D, 'The Public/Private Distinction in International Human Rights Law', in Julie P, & Wolper A (ed), *Women's Rights, Human Rights: International Feminist Perspectives*, 1995, 126.

¹³¹ Dr. Atta Mills is a former presidential candidate for the National Democratic Congress and is expected to run for the post again in the December 2008 elections. He is a noted academic and scholar who held the position of Vice President of Ghana in 1997. Professor John Evans Atta Mills, 2008 NDC Presidential Candidate, <http://www.attamills2008.com/about.html> (last visited Mar. 13, 2008).

¹³² Gyau Orhin I, *Domestic Violence Bill Under Siege, Public Agenda*, 2004.

¹³³ Women cannot be chiefs, but can be queen mothers. No comments were noted by queen mothers. Article 277 of the Ghanaian Constitution defines a chief or queen mother as "a person, who, hailing from the appropriate family and lineage, has been validly nominated, elected or selected and enskined or installed as a chief or queen mother in accordance with the relevant customary law and usage." 1992 Ghana Constitution Chapter 22, Art. 277. Article 274(2) of the Constitution charges Parliament with determining the members of the Regional House of Chiefs, which was done through Legislative Instrument 991 ("LI 991"). L.I. 991 (1994) (Ghana). However, LI 991 only lists male titles as members in the Regional Houses of Chiefs, which can be construed to mean that Parliament intended only males to be members of these bodies.

¹³⁴ Upper East Chiefs Dissatisfied With Domestic Violence Bill, *Ghanaian Chron.*, Sept. 24, 2004

¹³⁵ Kaymar N, 'Permission for Domestic Violence: Marital Rape in Ghanaian Marriages, 2010 29 Women's Rights Law Rep 63.

against her will is the equivalent of condoning sexual assault and/or rape. The passage of the DV Act leaves the status of the marital rape exemption in question and there is therefore the need for the Ghanaian Parliament to explicitly repeal the clause in section 42(g) of the Criminal Code, which provides for the exemption.¹³⁶ The history of the common law basis for the marital rape exemption in Ghanaian statutes was originally imported from British common law and was later codified into the criminal law of Ghana, where it remains today.

Unlike the U.K., Ghana's marital rape exemption is not merely a common law application. This exemption is codified in the Ghanaian Criminal Code and therefore requires legislative action to remove the offending provision. However, the DV Act, as passed, does not remove the marital rape exemption, and thus leaves married women subject to certain forms of domestic violence.¹³⁷

4.7 Ghanaian Law on Marital Rape

4.7.1 i) Human Rights Provisions in the Ghanaian Constitution

In a report to the U.N. General Assembly, the Division for the Advancement of Women of the Department of Economic and Social Affairs of the United Nations Secretariat noted that: Violence against women [which includes marital rape] is a violation of women's human rights and prevents women from enjoying their human rights and fundamental freedoms, such as the rights to life and security of the person, to the highest attainable standard of physical and mental health, to education, work and housing and to participation in public life.¹³⁸

Chapter Five of the Ghanaian Constitution is entitled "Fundamental Human Rights and Freedoms," and generally mirrors international standards regarding human rights.¹³⁹ These

¹³⁶ Section 42(g), Criminal Code Act (1960) (Ghana).

¹³⁷ Kaymar N, 'Permission for Domestic Violence: Marital Rape in Ghanaian Marriages, 2010 29 Women's Rights Law Rep 63.

¹³⁸ The Secretary-General, In-depth Study on All Forms of Violence Against Women, P156, delivered to the General Assembly, U.N. Doc. A/61/122/Add.1 (July 6, 2006), available at <http://daccessods.un.org/TMP/457539.3.html> [hereinafter The Secretary-General, In-depth Study on All Forms of Violence Against Women].

¹³⁹ Chapter 5, *Constitution of Ghana* (1992).

provisions in Chapter Five support the notion that Section 42(g) of the Criminal Code violates women's human rights and is in violation of the Constitution. Article 15(1) of the Constitution states that "the dignity of all persons shall be inviolable."¹⁴⁰ Subsection 2 of Article 15 further mandates that "no person shall ... be subjected to - (a) torture or other cruel, inhuman or degrading treatment or punishment; (b) any other condition that detracts or is likely to detract from his dignity and worth as a human being."¹⁴¹ Sanctioning rape, either within or outside a marriage, is an affront to a person's dignity and security.¹⁴²

It is torture for women to endure the daily mental anguish of not knowing whether they will be forcibly violated. In the case of *Ms. A.T. v. Hungary*, the Committee on the Elimination of Discrimination against Women noted "women's human rights to life and to physical and mental integrity cannot be superseded by other rights, including the right to property and the right to privacy."¹⁴³ One cannot imagine an argument the Ghanaian government could make that would supersede a woman's right to physical integrity. Even if local Ghanaian custom views a wife as the property of her husband, international law supports her right to security of person over his right to the use of property.¹⁴⁴

The customary practice of treating women as chattel also cannot stand. Chapter 5, Article 26(2) of the Ghanaian Constitution maintains that "all customary practices which dehumanize or are injurious to the physical and mental well being of a person are prohibited."¹⁴⁵ Marital rape must

¹⁴⁰ Chapter 5, Article 15(1), *Constitution of Ghana* (1992).

¹⁴¹ Chapter 5, Article 15(2), *Constitution of Ghana* (1992).

¹⁴² Kaymar N, 'Permission for Domestic Violence: Marital Rape in Ghanaian Marriages, 2010 29 Women's Rights Law Rep 63.

¹⁴³ *Ms. A.T. v. Hungary*, Views of the Comm. on the Elimination of Discrimination Against Women, P 9.3, 32nd Sess., Annex III (Jan. 26, 2005), available at <http://www.un.org/womenwatch/daw/cedaw/protocol/decisionsviews/CEDAW%20Decision%20on%20AT%20vs%20Hungary%20English.pdf>

¹⁴⁴ Kaymar N, 'Permission for Domestic Violence: Marital Rape in Ghanaian Marriages, 2010 29 Women's Rights Law Rep 63.

¹⁴⁵ Chapter 5, Article 26(2), *Constitution of Ghana* (1992).

be interpreted to fall under the ambit of this constitutional provision. Customary law presumed that upon marriage a man has a "right" to sex with his wife long before section 42(g) of the Criminal Code was enacted. As such, the act of rape upon one's wife should be considered no less dehumanizing or injurious merely because the custom was subsequently codified. It should be noted that Ghanaian Parliament has criminalized other harmful practices towards women, such as female genital mutilation, *trokosi*¹⁴⁶ and widowhood rituals. Why would Parliament fail to protect women from marital rape, unless it was beneficial to permit it? Recall, the Upper East Chiefs' comments, that prohibiting marital rape was "un-Ghanaian."¹⁴⁷ This statement is a clear sign that the practice of marital rape is a cultural tool of domination and humiliation for husbands to use against their wives.¹⁴⁸

Therefore, the portion of section 42(g) related to the sexual consent given at marriage is unconstitutional and should be considered void. Ghanaian Parliament should formally repeal the provision to ensure there is no confusion in this matter and should move to educate the public and the judiciary about the inconsistencies in the custom, law, and the human rights provisions of the Constitution.¹⁴⁹

4.7.2 ii) [The Criminal Code](#)

It has long been considered acceptable in Ghana for a man to have sexual relations with his wife against her will. This attitude comes from the previously discussed common law notion that women upon marriage per se give consent for sexual relations. Section 31(j) of the Ghanaian

¹⁴⁶ Trokosi is "a traditional practice that enslaves girls, often under the age of 10, to a fetish shrine for offenses allegedly committed by a member of the girl's family." Ctr. for Reprod. Rights, *Women of the World: Laws and Policies Affecting Their Reproductive Rights* Anglophone Africa 24 (1997), available at <http://www.reproductiverights.org/pub bo wowafrika.html#pdf>.

¹⁴⁷ Upper East Chiefs Dissatisfied With Domestic Violence Bill, *Ghanaian Chron.*, Sept. 24, 2004

¹⁴⁸ Kaymar N, 'Permission for Domestic Violence: Marital Rape in Ghanaian Marriages, 2010 29 *Women's Rights Law Rep* 63.

¹⁴⁹ Kaymar N, 'Permission for Domestic Violence: Marital Rape in Ghanaian Marriages, 2010 29 *Women's Rights Law Rep* 63.

Criminal Code permits for justifiable force or harm on numerous grounds, including "the consent of the person against whom the force is used."¹⁵⁰ Section 42 of the Criminal Code provides additional guidance relating to the consent to force provision, stating:

*The use of force against a person may be justified on the ground of his consent, but...a person may revoke any consent which he has given to the use of force against him, and his consent when so revoked shall have no effect for justifying force; save that the consent given by a husband or wife at marriage, for the purposes of the marriage, cannot be revoked until the parties are divorced or separated by a judgment or decree of a competent Court.*¹⁵¹

Therefore, upon marriage, spouses consent to the use of force against them in certain situations by virtue of their marriage contract. But what is the scope of the consent given and do husbands and wives give consent to the same actions? Although the limits of the consent are not defined, the Criminal Code suggests that sometimes the wife consents to matters that the husband does not.¹⁵²

For example, section 100 of the Criminal Code is tangential to section 42 stating,

"if a female is compelled to marry another person by duress as to make the marriage void or voidable, the marriage is of no effect for the purpose...of this [Criminal] Code with respect to consent."¹⁵³

The concept of a contract being void for duress is a well-developed principle of contract law. However, the wording of this section suggests that only women give certain consents at marriage, including by implication the consent to sexual relations. Therefore, if a woman enters the marriage of her free will and without undue coercion, she consents to being raped by her lawful husband.¹⁵⁴

¹⁵⁰ Chapter 5, Article 31(j), *Constitution of Ghana* (1960).

¹⁵¹ Section 42(g), *Criminal Code Act* (1960) (Ghana).

¹⁵² Kaymar N, 'Permission for Domestic Violence: Marital Rape in Ghanaian Marriages, 2010 29 *Women's Rights Law Rep* 63.

¹⁵³ Section 100, *Criminal Code Act* (1960) (Ghana) (emphasis added).

¹⁵⁴ Kaymar N, 'Permission for Domestic Violence: Marital Rape in Ghanaian Marriages, 2010 29 *Women's Rights Law Rep* 63.

This provision can be interpreted in one of two ways. Either the meaning of section 100 is that only women, and not men, consent to the use of force against them, or section 100 only protects women, and not men, if they are compelled to marry under duress. Under either interpretation, the provision is facially discriminatory and is therefore unconstitutional under Article 17 the Ghanaian Constitution, which provides that "all persons shall be equal before the law,"¹⁵⁵ and "[a] person shall not be discriminated against on grounds of gender."¹⁵⁶

The Ghanaian Constitution is the supreme law of the land by virtue of Article 1(2).¹⁵⁷ Under that article, any laws found to be inconsistent with any provisions of the Constitution are considered void "to the extent of the inconsistency."¹⁵⁸ Assuming the courts found section 100 of the Criminal Code to be unconstitutional based on a violation of Article 17's anti-discrimination provision, one would still be faced with clause (g) of section 42 of the Criminal Code, which has been read to include per se consent to sexual relations upon marriage.¹⁵⁹ On its face, section 42(g) is neutral, as both husbands and wives give certain consents to the use of force at marriage.¹⁶⁰ However, even if facially neutral this provision still offends the Ghanaian Constitution.¹⁶¹

4.8 Conclusion

The original draft of the Domestic Violence Bill could not pass if it repealed the marital rape exemption, so Parliament sacrificed women's honor and dignity of person to secure its passage.

¹⁵⁵ Chapter 5, Article 17(1), *Constitution of Ghana* (1992).

¹⁵⁶ Chapter 5, Article 17(2), *Constitution of Ghana* (1992).

¹⁵⁷ Chapter 1, Article 2, *Constitution of Ghana* (1992).

¹⁵⁸ Chapter 1, Article 2, *Constitution of Ghana* (1992).

¹⁵⁹ Section 42(g), Criminal Code Act (1960) (Ghana).

¹⁶⁰ An argument could be made that section 42(g) of the Criminal Code violates Article 17 of the Constitution in that married women are subject to rape and unmarried women are not. Harking back to Lord Wills' statement that, "it is, I should hope, equally true that a married woman, no less than an unmarried woman, would be justified in such refusal" *R. v. Clarence*, [1886-90] All E.R. Rep. 133, 139. As marital status is not included as a class protected from discrimination, such an argument is outside the scope of this article.

¹⁶¹ Kaymar N, 'Permission for Domestic Violence: Marital Rape in Ghanaian Marriages, 2010 29 Women's Rights Law Rep 63.

Yet, passage of the DV Act without a provision criminalizing marital rape is tantamount to support for the practice. Arguably, the Ghanaian legislature did not intend marital rape to be considered domestic violence or rape. Despite its constitutional and international obligations, the Ghanaian Parliament left Ghanaians with a legal conundrum. Was Section 4 of the DV Act meant to repeal the marital rape exemption? Given the fact that the criminal classification for rape (a felony) lies outside the scope of the DV Act, the courts may have to make a tremendous leap to conclude that the exemption is repealed. However, marital rape is a clear human rights violation; a sympathetic court might also strike the provision down as unconstitutional.¹⁶²

Under Ghana's international obligations, the government is required to take action to eliminate marital rape. Although the marital rape exemption of section 42(g) is illegal under the Ghanaian Constitution and should be considered void, Parliament must officially repeal section 42(g) of the Criminal Code and remove it from the sphere of judicial interpretation and discretion.¹⁶³

Repealing section 42(g) of the Criminal Code will aid in educating the Ghanaian population that marital rape will not be tolerated by the government and will thereby help to eliminate the practice. The Ghanaian government must stand up for women's rights.¹⁶⁴

4.9 Marital Rape in the United Kingdom (UK)

In England, earlier as a general rule, a man could not have been held to be guilty as a principal of rape upon his wife, for the wife is in general unable to retract the consent to sexual intercourse, which is a part of the contract of marriage. However, the marital rape exemption was abolished

¹⁶² Kaymar N, 'Permission for Domestic Violence: Marital Rape in Ghanaian Marriages, 2010 29 Women's Rights Law Rep 63.

¹⁶³ Kaymar N, 'Permission for Domestic Violence: Marital Rape in Ghanaian Marriages, 2010 29 Women's Rights Law Rep 63.

¹⁶⁴ Kaymar N, 'Permission for Domestic Violence: Marital Rape in Ghanaian Marriages, 2010 29 Women's Rights Law Rep 63.

in its entirety in 1991. The House of Lords held in *R. v. R.*¹⁶⁵ that the rule that a husband could not be guilty of raping his wife if he forced her to have sexual intercourse against her will was an anachronistic and offensive common-law fiction, which no longer represented the position of a wife in present-day society, and that it should no longer be applied.¹⁶⁶

Corresponding amendment to the statutory law was made through Section 147 of the Criminal Justice and Public Order Act, 1994. This judgment was also affirmed by the European Court of Human Rights in the decision of *SW v. UK*¹⁶⁷. In New Zealand, the marital rape exemption was abolished in 1985 when the present Section 128 to the Crimes Act, 1961 was enacted. Subsection (4) now provides that a person can be convicted of sexual violence in respect of sexual connection with another person notwithstanding that they are married at the time the sexual connection occurred. Further, the fact that the parties are married or have been in a continuing relationship will not warrant a reduction in sentence. There is now, therefore, no distinction in principle to be drawn between sexual violation in marriage and outside of marriage. In Mexico, the country Congress ratified a bill that makes domestic violence punishable by law. If convicted, marital rapists could be imprisoned for 16 years.¹⁶⁸

Rape is one of the most heinous crimes and is one of the most emotionally and politically charged topics of public debate. Concerns about the extent of wife rape must be understood in the context of the general disquiet which has arisen as a consequence of publicity surrounding the spiraling increase in recorded rapes in England and Wales.¹⁶⁹

¹⁶⁵ *R v R* [1991] 3 WRL 767

¹⁶⁶ <http://ssrn.com/abstract=2152311>

¹⁶⁷ ECHR 22 Nov 1995

¹⁶⁸ <http://ssrn.com/abstract=2152311>

¹⁶⁹ Smith L, *Concerns About Rape*, HMSO, London 1989a

4.10 United States of America

4.10.1 *The Constitutionality of the Marital Rape Exemption*

In United States researchers estimate that 10% to 14% of married women experience rape in marriage. When researchers examined the prevalence of different types of rape, they found that marital rape accounts for approximately 25% of all rapes. Despite the prevalence of marital rape, this problem has received relatively little attention from social scientists, practitioners, the criminal justice system, and larger society as a whole. In fact, it was not until the 1970s that the society began to acknowledge that rape in marriage could even occur. Till recently, the general rule was that a husband could not be convicted of the offence of raping his wife as he is entitled to have sexual intercourse with his wife, which is implied under the contract of marriage. In 1993, marital rape became a crime in all fifty States, under at least one section of the sexual offence codes. However, it is remarkable that only a minority of the States has abolished the marital rape exemption in its entirety, and that it remains in some proportion or other in all the rest. In most American States, resistance requirements still apply. In seventeen States and the District of Columbia, there are no exemptions from rape prosecution granted to husbands. However, in thirty-three States, there are still some exemptions given to husbands from rape prosecution. When his wife is most vulnerable (e.g. she is mentally or physically impaired, unconscious, asleep etc.) and is legally unable to consent, a husband is exempt from prosecution in many of these thirty-three States. The existence of some spousal exemptions in the majority of States indicates that rape in marriage is still treated as a lesser crime than other forms of rape.¹⁷⁰

¹⁷⁰ <http://ssrn.com/abstract=2152311>

Importantly, the existence of any spousal exemption indicates an acceptance of the archaic understanding that wives are the property of their husbands and the marriage contract is entitlement to sex.¹⁷¹

During the 1980s a handful of state judges either held or opined in dicta what must be incontrovertible to the feminist community, as well as to most progressive legal advocates and academics: the so-called marital rape exemption, whether statutory or common law in origin, constitutes a denial of a married woman's constitutional right to equal protection under the law.¹⁷² Indeed, a more obvious denial of equal protection is difficult to imagine: the marital rape exemption denies married women protection against violent crime solely on the basis of gender and marital status.¹⁷³

Indeed, that a number of feminist commentators¹⁷⁴ and a few state court appellate judges¹⁷⁵ felt it necessary to argue to a still skeptical and often hostile listening audience that marital rape exemptions constitute a denial of the fourteenth amendment's guarantee that no state shall deny to any group of its citizens equal protection of its law¹⁷⁶ evidences the degree to which women's injuries still are trivialized and rendered invisible by a pervasively misogynist legal, political, and social culture. That the arguments of these advocates met with such limited success in abolishing the exemption reveals how short a distance women have come, and how far they have

¹⁷¹ <http://ssrn.com/abstract=2152311>

¹⁷² See, e.g., *Merton v. State*, 500 So. 2d 1301, 1305 (Ala. Crim. App. 1986); *Williams v. State*, 494 So. 2d 819,830 (Ala. Crim. App. 1986); *People v. Liberta*, 64 N.Y.2d 152, 474 N.E.2d 567, 573-76, 485 N. Y.S.2d 207, 213-16 (1984); *People v. DeStefano*, 121 Misc. 2d 113, 163-64, 170,467 N.Y.S.2d 506,515-16 (County Ct. 1983); *Shunn v. State*, 742 P.2d 775,778 (Wyo. 1987).

¹⁷³ West R, 'Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment' 42 *Florida Law Review* 45 (1990)

¹⁷⁴ See Freeman R, 'But If You Can't Rape Your Wife, Who(m) Can You Rape?: The Marital Rape Exemption Re-Examined' 15 *Family Law Quarterly* 1, (1981) 29; Note, 'To Have and To Hold: The Marital Rape Exemption and the Fourteenth Amendment' 99 *Harvard Law Review* (1986) 125; Comment, 'For Better or for Worse: Marital Rape' 15 *Northern Kentucky Law Review* (1988) 611, 631-34.

¹⁷⁵ See, e.g., *People v. Liberta*, 64 N.Y.2d 152, 163-64, 170, 474 N.E.2d 567, 573-76, 485 N. Y.S.2d 207, 213-16 (1984) (opinion by Judge Wachtler advancing the most complete argument).

¹⁷⁶ Constitution of the United States amendment XIV.

yet to travel, toward full equality and the necessary result of equality: an assurance that the state will provide a modicum of safety in our private lives against sexual assault.¹⁷⁷

Some states did make limited progress in reforming marital rape law during the 1980s. A few abolished the exemption entirely; - but only a few. The majority continue to permit rape or sexual assault within marriage by according it a lower level of criminality than extramarital rape of sexual assault, by criminalizing only certain kinds of marital rape, or by criminalizing only first-degree rapes.¹⁷⁸ Some states, ironically in the name of reform, may have worsened the problem of marital rape by extending the exemption to include women who rape their husbands in order to make the exemptions appear "gender neutral."¹⁷⁹ This extension provides a false neutrality to an institution that almost invariably endangers only women's lives.¹⁸⁰ Other states have limited the exemption to exclude married partners who live apart¹⁸¹ and, in a few cases, married partners who have begun dissolution proceedings.¹⁸² These restrictions on the exemption, however, are a mixed blessing. While the restrictions undoubtedly limit the application of the exemption, they further entrench the core rationale of the exemption: the protection of the privacy and integrity of the true marital relationship against legal intervention justifies whatever burden forced sex imposes on a married woman's safety and privacy. Furthermore, movements in other states to extend the marital rape exemption offset these limits.

¹⁷⁷ West R, 'Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment' 42 *Florida Law Review* 45 (1990), 46.

¹⁷⁸ See, e.g., California Penal Code section 262.

¹⁷⁹ Cf. S.D. Codified Laws Ann. § 22-22-1.1 (1988) (recognizing spousal rape).

¹⁸⁰ See Freeman R, 'But If You Can't Rape Your Wife, Who(m) Can You Rape?: The Marital Rape Exemption Re-Examined' 15 *Family Law Quarterly* 1, (1981) 29; Note, 'To Have and To Hold: The Marital Rape Exemption and the Fourteenth Amendment' 99 *Harvard Law Review* (1986) 125; Comment, 'For Better or for Worse: Marital Rape' 15 *Northern Kentucky Law Review* (1988) 611, 631-34.

¹⁸¹ See, e.g., Ky. REV. STAT. ANN. § 510.010(3) (Baldwin 1989) (action only if petition filed for separation or divorce and parties living apart); LA. REV. STAT. ANN. § 14.41 (West 1986) (spouse cannot be charged unless parties living apart and offender knows that a temporary restraining order or injunction has been issued); MD. CRIM. LAW. CODE ANN. § 27-464D (RepL vol. 1989 & Supp. 1989) (if living together, actual force, rather than threat of force, required); Miss. CODE ANN. § 97-3-99 (Supp. 1989) (spouse cannot be charged for sexual battery unless parties living apart; statute silent on rape);

¹⁸² See, e.g., IDAHO CODE § 18-6107 (1989) (action only if separated or filing for divorce).

For example, some states have extended the marital rape exemption to include cohabitants and formerly married persons.¹⁸³

This pattern of one-step-forward, two-steps-back progress on the criminalization of marital rape illustrates the general pattern of thinking in the 1980s regarding marital rape. While virtually every progressive commentator, judge, or legislator (feminist and otherwise) who seriously has considered the issue readily has concluded that these laws violate equal protection,¹⁸⁴ and while explicit vocal support from conservatives for the exemption almost entirely has disappeared from scholarly literature,¹⁸⁵ no major upheaval of the law reflects or foreshadows such progressive unanimity.

Whether or not the United States Supreme Court or state supreme courts ever rule on the unconstitutionality of marital rape exemptions, Congress has the power, the authority, and arguably the duty, to do so, under section five of the fourteenth amendment.¹⁸⁶ Congress could enact a federal law guaranteeing protection to all women against violent sexual assault. Consistent with rationality requirements, this law would prohibit irrational discrimination against married women in the making and enforcement of rape laws. This federal law also would guarantee, consistent with the anti-subordination mandate of the fourteenth amendment, that

¹⁸³ Many states include cohabitants within the scope of the marital rape exemption. *See* CONN. GEN. STAT. ANN. § 53a.-70(b) (West 1985); Ky. REV. STAT. ANN. § 510.010(3) (Baldwin 1989); MONT. CODE ANN. § 45-5-511 (1989); N.M. STAT. ANN. § 30-9-10 (1989); 18 PA. CONS. STAT. ANN. § 3103 (Purdon 1£183).

¹⁸⁴ *See* Freeman R, 'But If You Can't Rape Your Wife, Who(m) Can You Rape?: The Marital Rape Exemption Re-Examined' 15 *Family Law Quarterly* 1, (1981) 29; Note, 'To Have and To Hold: The Marital Rape Exemption and the Fourteenth Amendment' 99 *Harvard Law Review* (1986) 125; Comment, 'For Better or for Worse: Marital Rape' 15 *Northern Kentucky Law Review* (1988) 611, 631-34.

¹⁸⁵ *see* Hilf, 'Marital Privacy and Spousal Rape' 16 *New England Law Review* (1980) 31, 43-44 (limited spousal immunity supports marital privacy rights and encourages reconciliations); Comment, 'Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard' 62 *Yale Law Review* (1952) 55, 74 (policy of protecting reliance on behavior of others should prevail over the demand for protection of the woman's right to withhold consent).

¹⁸⁶ *See* Constitution of the United States amendment XIV, no 5; *see also* *Katzenbach v. Morgan*, 384 U.S. 641, 650 (1966) (section 5 of the fourteenth amendment is a positive grant of legislative power authorizing Congress to exercise its discretion in determining the need for and nature of legislation to secure fourteenth amendment guarantees).

states would not perpetuate or insulate the sexualized social, private, or intimate subordination of women by men.

Lastly, consistent with the "protection" mandate of the fourteenth amendment, it would guarantee that no state would deny to women protection of the state against private criminality. The political will may not be sufficient to sustain such a bill, but the constitutional authority for it surely exists.¹⁸⁷

4.11 Conclusion

Jurisprudence from different jurisdictions in the world has shown that the issue of marital rape is deeply embedded in the institution of marriage. This is so due to the belief that once parties to a marriage come together, the issue of sex is a man's right and no consent from the wife is needed. This therefore ends up violating the rights of a woman in the said marriages.

Most pieces of legislations world over, have enshrined the concept of marital rape exemptions to the effect that a violation of a woman's right in a marriage is not considered a criminal offense per se. This is despite the fact that Constitutions of various countries in the world have enshrined very elaborate chapters and sections on human rights protection.

There is therefore the need to amend or repeal the contentious sections in the various statutes of different countries in order to criminalize marital rape thereby upholding and respecting the rights of wome

¹⁸⁷ West R, 'Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment' 42 *Florida Law Review* 45 (1990).

CHAPTER FIVE

5.1 CONCLUSION AND RECOMMENDATIONS

5.2 Conclusion

In the previous chapters, it has been shown that illegalization of marital rape is a concept that is yet to be adopted by most of the free nations of the world. This is due to the perception that sex within a marriage is by two consenting partners. Kenya has not been left behind in this legal conundrum yet her woman suffers as much from the effects of non-consensual sex in marriage.

Marital rape is a societal vice that affects women in marriages. These women suffer in silence since the term marital rape has never been known of in law. Instead, the statutes have been marital rape an exemption. It is even astonishing to say the least that a woman would report their husbands for rape within marriages.

The very reason why marital rape is not known in law is because of the patriarchal society that views a woman as a chattel who has sold off her right to consent when she gets into marriage. This is a serious violation of a woman's right to consent as envisioned in the Constitution and international instruments. These laws postulate that a woman in a marriage is as equal as the husband and her consent is needed when she partakes of any activity in the marriage including sex. The effect of marital rape to a woman has adverse effects to both her psychological well being and health.

Various theories have been discussed to show the various reasons why rape in a marriage continues to prevail. Theories discussing the illegitimacy of marital rape have also been discussed.

The problem of marital rape in other jurisdictions such as Ghana and United Kingdom have also been discussed and it has emerged that the problem of marital rape is prevalent in these countries though they have moved a step further to illegalize it.

The discussion then presented some of the responses that should be adopted in order to curb the marital vice. These are summarized in the recommendations part of this research. Various legal responses will be mooted for the Kenyan policy makers, stakeholders and the legislature to consider while reforming the Sexual Offences Act and the Penal Code.

5.3 Recommendations

This research has in its discussion section recommended the following as the possible legal responses and non legal solutions to the problem of marital rape.

5.4 Legal Solution

5.4.1 Criminalization of marital rape

The criminalization of marital rape¹⁸⁸ constitutes an historic opportunity to enact laws which effectively combat violence against women.¹⁸⁹ Legal impunity for marital rape constitutes state endorsed violence against women. The equal treatment of women before and under the law within the context of marital rape is critical to ensuring the recognition of women as full citizens, and ensuring their freedom from violence.¹⁹⁰

The legal treatment of marital rape offers insight into the value placed on women's human rights by a society. In Canada, marital rape was criminalized in 1983, providing official and symbolic recognition of women's equality in the institution of marriage and in general.

In addressing the criminalization of marital rape, ACWHRP is mindful of the constitutional protections assigned to customary law, and the importance of customary law in society in

¹⁸⁸ In Canada 1983 *Criminal Code* revisions resulted in the replacement of the term 'rape' with 'sexual assault', which includes a broader range of offences than 'rape'. Jennifer Koshan's paper 'The Legal Treatment of Marital Rape and Women's Equality: An Analysis of the Canadian Experience' September, 2010 includes analysis of sexual violence in spousal relationships more broadly, beyond the marriage context.

¹⁸⁹ Dianne Martin and Janet Mosher have suggested that the criminalization of domestic violence is problematic in that it lays blame at the level of the individual, pathologizes the behaviours of individual abusers, depoliticizes women's struggles from violence, and isolates each case in terms of individual facts. (Dianne Martin L, and Janet Mosher E, 'Unkept Promises: Experiences of Immigrant Women with the Neo-Criminalization of Wife Abuse' (1995) 8 *Case Western Reserve Journal of International Law* 1(1995).

¹⁹⁰ Fiona S, *The Legal Treatment of Marital Rape In Canada, Ghana, Kenya And Malawi - A Barometer Of Women's Human Rights* 2010, 3.

ACWHRP's African partner countries. To achieve increased protection for women from the violence of marital rape, and to achieve the advancement of women's human rights, the relationship between customary law, women's equality, and marital rape must be addressed.¹⁹¹

The courts and law enforcement personnel must be careful not to perpetuate discriminatory thinking about women and sexual assault in their treatment of marital rape cases. They must be careful to ensure that decisions do not reproduce myths and stereotypes that disadvantage women. As Catharine MacKinnon has written:

'Each time a rape law is created or applied, or a rape case is tried, communities rethink what rape is. Buried contextual and experiential presumptions about the forms and prevalence of force in sexual interactions, and the pertinence and modes of expression of desire, shape determinations of law and fact and public consciousness. The degree to which the actualities of raping and being raped are embodied in law tilt ease of proof to one side or the other and contribute to determining outcomes, which in turn affect the landscape of expectations, emotions, and rituals in sexual relations, both everyday and in situations of recognized group conflict.'¹⁹²

Based on the Canadian experience, criminalization of marital rape is an insufficient but necessary step towards the achievement of women's equality, and certainly constitutes an advancement of women's rights.

5.5 Non-Legal Solutions

5.5.1 a) Education

Education is vital for empowerment and increased choices which then translate into the rejection and abandoning of any form of violence. Knowledge helps to identify violence in any form. Thus, education is important because it helps individuals to make informed decisions that impact

¹⁹¹Fiona S, *The Legal Treatment of Marital Rape In Canada, Ghana, Kenya And Malawi - A Barometer Of Women's Human Rights* 2010, 4

¹⁹² Catharine A. MacKinnon, 'Defining Rape Internationally: A Comment on *Akayseu*' in *Are Women Human: And Other International Dialogues* The Belknap Press of Harvard University Press, Cambridge, Massachusetts 2006 at 237.

their very well-being including sexuality.¹⁹³ Women who are empowered (albeit educated, wealthy and employed) have been found to be more assertive on their sexual and reproductive rights, and better at negotiating for safer sexual intercourse than their counterparts who are less empowered.¹⁹⁴

Purposefully, the Kenyan educational curricula must incorporate sex education at all levels from the kindergarten to the tertiary level. Acquisition and modification of attitudes towards sexuality can then be realized to curb sexual abuse not only in the home but in educational institutions, workplaces, market places, churches, mosques, hospitals and anywhere because sexual abuse takes place even in the mortuary (i.e. cadaveric sex).¹⁹⁵

Family planning education must be intensified because some women only refuse their husbands sex for fear of unplanned pregnancy which is a genuine fear for a woman as the burden of child care most of the time rests solely on them. Midwives must advise mothers as to when it is practically and clinically safe for them to resume sexual activity after childbirth because of the different child birth procedures. Practically, husbands must be invited upon discharge of their wives after childbirth to be educated on when it is safe for them to resume normal sexual activities. This will mitigate traditional beliefs and myths handed down from generation to generation that has characterized sex after childbirth which has degenerated into misunderstandings.¹⁹⁶

¹⁹³ Yeboah K., and Batse Z, *Prevalence and Predisposing Factors of Violence Against Women and Girls* in Cusack K and Manuh T (Eds.). *The Architecture for Violence Against Women*. Accra. Gender Studies & Human Rights Documentation Centre. 2009, 68-92.

¹⁹⁴ Tenkorang E. Y, and Owusu Y. A, 'Coerced First Sexual Intercourse Among Women in Ghana: Evidence from the Demographic and Health Survey' 17 *Sexuality & Culture* (2012) 170.

¹⁹⁵ Makafui Adodo-Samani P, 'Criminalisation Of Marital Rape In Ghana: The Perceptions Of Married Men And Women In Accra' - University of Ghana <http://ugspace.ug.edu.gh>. 84.

¹⁹⁶ Makafui Adodo-Samani P, 'Criminalisation Of Marital Rape In Ghana: The Perceptions Of Married Men And Women In Accra' 84

5.5.2 b) Appropriate Naming of the Offense

The term marital rape creates a legal difficulty since it is difficult to link rape to a marriage. In a focus group study conducted in Ghana, a focus group member believed that non-consensual sexual acts in marriage equals a crime but only had challenge with the name. She supposed that an appropriate name to make it distinct was desirable though she could not suggest one when she was asked to. In her response though, she remarked as follows ‘I think every act of sex should be consensual if not it qualifies as rape and rape is criminal but why don’t you give it a suitable name. I know that rape of a child is defilement and rape of a relative is incest so rape of a wife should have a name that makes it distinct so that we can easily identify with it and accept it as criminal.’¹⁹⁷

Cusack¹⁹⁸ citing Marilyn Frye explicates the difficulty that has been encountered in naming non-consensual sexual activities for what they are. Despite the victims knowing that the acts are criminal, they could not do anything much. Of the six members of the focus group conducted in Ghana, two of the forbearers (33%) recounted their experience as related to the sexual abuses they suffered in the hands of their husbands as they assert that non-consensual sexual acts in marriage is without a shadow of doubt, criminal.¹⁹⁹

5.5.3 c) Research on Domestic Violence

Domestic violence based researches must be of great interest to the government of Kenya. The government of Kenya must imperatively fund a periodic comprehensive national study on DV as

¹⁹⁷ Makafui Adodo-Samani P, ‘Criminalisation Of Marital Rape In Ghana: The Perceptions Of Married Men And Women In Accra’ 80

¹⁹⁸ Cusack, K. (1999b). Introduction. In Coker-Appiah, D. & Cusack, K. (Eds.). *Breaking the Silence and Challenging the Myths of Violence Against Women and Children in Ghana*. Accra: Gender Studies & Human Rights Documentation Centre. 7-13.

¹⁹⁹ Makafui Adodo-Samani P, ‘Criminalisation Of Marital Rape In Ghana: The Perceptions Of Married Men And Women In Accra’ 80

this will help to identify and be informed about contemporary DV issues and problems that have bedeviled the nation. This will be in view of gaining better knowledge and getting understanding in order to help tackle them more effectively. Applied researches that will seek to inform this kind of study must also be sponsored by government to lead to the generation of custom made interventions that are needed to improve the Kenyan socio-domestic life as a whole.²⁰⁰

5.5.4 d) Reconciliation of custom and modernity

In ACWHRP's African partner countries, and in the Aboriginal context in Canada, there is a common need to reconcile the application of customary law, indigenous norms and formal law in the marital rape context. As a starting point however, it seems a mistake to view women's rights and customary law as competing rights. A legal challenge of the state's failure to fulfill its obligations to advance women's human rights in the context of marital rape may be relatively easy to imagine, especially in contexts where customary law does not apply to the criminal context, for example in Ghana and Kenya. However, because of the significance of the role that customary law plays in ACWHRP's African partner countries, and in the Aboriginal context in Canada, adopting a dialogue approach to the issue of the reconciliation of rights seems like the preferred approach (preferable to immediately advancing a legal challenge in which it is argued that women's rights trump customary rights as a result of the harm experienced by women under customary law). The preferred approach to the reconciliation of conflicts between customary law and human rights law seems to be the approach recommended by Celestine Nyamu. Celestine Nyamu's recommended approach to conceptualizing and remedying cultural justifications for practices that reinforce gender hierarchy in the Third World includes the strategy of 'critical

²⁰⁰ Makafui Adodo-Samani P, 'Criminalisation Of Marital Rape In Ghana: The Perceptions Of Married Men And Women In Accra'82

pragmatism’,²⁰¹ or the concrete engagement with the politics of culture.²⁰² Nyamu recommends the appropriation of openings present in local culture, while simultaneously working to change the larger social matrix of national legislation, constitutions and administrative institutions. More specifically, Nyamu recommends that constitutional frameworks that shield customary laws from questioning should be challenged, ‘in order to create room for more voice and inclusiveness in the shaping and articulation of community norms’.²⁰³ The strategy recommended by Nyamu could help to garner support for law reform efforts in support of women’s freedom from violence and the equal legal treatment of marital rape claims.²⁰⁴

5.5.5 e) Adequate facilities to stakeholders

The police, courts, and the social welfare societies must be adequately resourced with both personnel and contemporary technologies to tackle or deal with sexual violence related issues. Continual in-service training for staff of any organ who works in collaboration with the authorities is imperative to ensure proper coordination of gender issues. A national sexual violence crisis center /intervention services must be provided where victims can seek free psychological counseling and medical interventions. Special toll free telephone lines must be provided at sexual violence crisis response centers; empathic treatment of victims by all and sundry; and government funded research into sexual violence to know where Kenya stands.²⁰⁵

²⁰¹ The term ‘critical pragmatism’ is borrowed from scholarship exploring the critical potential of pragmatism as a legal framework that can be used to articulate the interests of less powerful social groups; see Nyamu C, ‘How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?’ 41 *Harvard International Law Journal*, 2 (2000), 11; Kline M, ‘Race, Racism and Feminist Legal Theory’ 12 *Harv Women’s Law Journal* (1989) 115.

²⁰² Nyamu C, ‘How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?’ 41 *Harvard International Law Journal*, 2 (2000) 14.

²⁰³ Nyamu C, ‘How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?’ 41 *Harvard International Law Journal*, 2 (2000), 12

²⁰⁴ Fiona S, *The Legal Treatment of Marital Rape In Canada, Ghana, Kenya And Malawi - A Barometer Of Women’s Human Rights* 2010 46.

²⁰⁵ Makafui Adodo-Samani P, ‘Criminalisation Of Marital Rape In Ghana: The Perceptions Of Married Men And Women In Accra’85.

The staff in the relevant agencies must be trained in the art of asking questions pertaining to all facets of DV and specifically about sexual abuse because victims will usually not volunteer such information for the reason that shame and humiliation characterize issues bothering around sexual abuse. The art of asking question is essential as not many women will readily volunteer information if bluntly asked ‘has your spouse ever raped you‘? The police personnel must be re-oriented and specially trained on sexual abuse issues the reason being that they are also Kenyans who have gone through the same processes of socialization as a victim and will probably not name rape as rape because it involves an intimate partner or acquaintance and as such calls for re-socialization in the training processes.²⁰⁶ Because societal attitudes are slow to change, radically, archaic traditional practices which are gender based must be defied and side stepped to put in place pragmatic policies that shields against DV generally in order to nib it in the bud.

²⁰⁶Makafui Adodo-Samani P, ‘Criminalisation Of Marital Rape In Ghana: The Perceptions Of Married Men And Women In Accra’ 85.

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