



MARITAL RAPE- COMPARATIVE LEGISLATION IN CANADA, GHANA, KENYA and MALAWI*

Heading	Canada	Ghana	Kenya	Malawi
Name of the Act	Criminal Code- (Post-1983 Amendments)	Criminal Offences Act, 1960 (Act 29) (Revised 2007)	Sexual Offences Act, 2006	Penal Code (s.132) and the Prevention of Domestic Violence Act [2006]
Long Title or name of the section			Long Title: An Act to make provision about sexual offences [...] and the protection of <i>all</i> persons from harm from unlawful sexual acts, and for connected purposes [emphasis added by VV]	
Rape/Sexual Assault	<p>s. 265 A person commits an "assault" when:</p> <p>(a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;</p> <p>(b) he attempts or threatens, by an act or gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or</p> <p>(c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.</p> <p>(2) This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats</p>	<p>s.98 of Act 29 - Definition of rape:</p> <p>"The carnal knowledge of female not less than 16 years without her consent."</p>	<p>Rape is defined in s.3(1) in combination with s. 43(1) and there is a separate offence of "sexual assault" in s.5 which does not exclude marital "sexual assault"</p> <p>RAPE</p> <p>s.3(1) A person commits the offence termed rape if-</p> <p>a) he or she intentionally and unlawfully commits and act which causes penetration with his or her genital organs</p> <p>b) the other person does not consent to the act</p> <p>c) the consent is obtained by force or by means of threats or intimidation of any kind</p> <p>(2) In this section the term</p>	<p><i>Penal Code s.132</i></p> <p>Any person who has unlawful carnal knowledge of a woman or girl without her consent or with her consent if such consent is obtained by force or means of threat or intimidation of any kind or by fear or of bodily harm or by means of false representations as to the nature of the act or in the case of a married woman by impersonating to be her husband.</p>



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	<p>to a third party or causing bodily harm and aggravated sexual assault.</p> <p>s. 272(1) Every person commits an offence who, in committing a sexual assault,</p> <p>(a) carries, uses or threatens to use a weapon or an imitation of a weapon;</p> <p>(b) threatens to cause bodily harm to a person other than the complainant;</p> <p>(c) causes bodily harm to the complainant; or</p> <p>(d) is a party to the offence with any other person.</p> <p>s. 273(1) Every one commits an aggravated sexual assault who, in committing a sexual assault, wounds, maims, disfigures or endangers the life of the complainant.</p>		<p>“intentionally and unlawfully” has the meaning assigned to it in s.43</p> <p>s.43(1)- An act is intentional and unlawful if it is committed</p> <p>a) in any coercive circumstance;</p> <p>b) under false pretences or by fraudulent means</p> <p>c) in respect of a person who is incapable of appreciating the nature of an act which causes the offence</p> <p>[...]</p> <p>SEXUAL ASSAULT</p> <p>5. (1) Any person who unlawfully -</p> <p>(a) penetrates the genital organs of another person with -</p> <p>(i) any part of the body of another or that person; or</p> <p>(ii) an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;</p> <p>(b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body, is guilty of an offence termed sexual assault.</p>	
<p>Assault and other relevant offences (defilement)</p>		<p>Section 86 of Act 29 defines assault and battery as, “a person</p>	<p>Defilement is prohibited under section 8 of the <i>Sexual Offences Act</i>: 8. (1) A person who commits</p>	



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		<p>makes an assault and battery on another person if, without the other person's consent, and with the intention of causing harm, pain or fear, or annoyance to the other person, or of exciting the other person to anger, that person forcibly touches the other person,"</p> <p>s. 101 of Act 29 provides for defilement of a child under 16 years of age:</p> <p>S. 101(1) For the purposes of this Act, defilement is the natural or unnatural carnal knowledge¹ of a child under sixteen years of age.</p>	<p>an act which causes penetration with a child is guilty of an offence termed defilement.</p> <p>(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.</p> <p>(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.</p> <p>(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.</p> <p>(5) It is a defence to a charge under this section if -</p> <p>(a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and</p>	

¹ Act 29 defines unnatural carnal knowledge at section 104(2) as "sexual intercourse with a person in an unnatural manner or, with an animal."



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			<p>(b) the accused reasonably believed that the child was over the age of eighteen years.</p> <p>(6) The belief referred to in subsection (5) (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.</p> <p>(7) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the Borstal Institutions Act and the Children's Act.</p> <p>(8) The provisions of subsection (5) shall not apply if the accused person is related to such child within the prohibited degrees of blood or affinity.</p>	
<p>Marital rape exception in sexual assault/rape provisions</p>	<p>Pre 1983:</p> <p>s. 143 A male person commits rape when he has sexual intercourse with a female person <i>who is not his wife</i> without her consent, or with her consent if the consent is extorted..., is obtained by impersonating her husband, or is obtained by false and fraudulent representations as to the nature and quality of the act.</p>	<p>Pre 2007:</p> <p>s. 42 of the then Criminal Code, 1960 headed, "Use of force in case of consent," provided at section 42(g) that:</p> <p>A person may revoke any consent which he has given to the use of force against him, and his consent when so</p>	<p>[Note: This does not apply to s.5 "sexual assault"]</p> <p>s.43(1)- An act is intentional and unlawful if it is committed</p> <ul style="list-style-type: none"> d) in any coercive circumstance; e) under false pretences or by fraudulent means f) in respect of a person who is incapable of appreciating the nature of an act which 	



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	<p>Post- 1983 [no exception]</p> <p>s. 278. A husband or wife may be charged with an offence under section 271, 272 or 273 in respect of his or her spouse, whether or not the spouses were living together at the time the activity that forms the subject-matter of the charge occurred.</p>	<p>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 judgement or decree of a competent court.</p>	<p>causes the offence</p> <p>[...]</p> <p>(5) This section shall not apply in respect of persons who are lawfully married to each other</p>	
Consent	<p>s. 273.1(1) Subject to subsection (2) and subsection 265(3), "consent" means, for the purposes of sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question.</p> <p>(2) No consent is obtained, for the purposes of sections 271, 272 and 273, where the agreement is expressed by the words or conduct of a person other than the complainant;</p> <p>(a) the complainant is incapable of consenting to the activity;</p> <p>(b) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;</p> <p>(c) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity;</p> <p>or</p> <p>(d) the complainant, having consented to engage in sexual activity, expresses, by words or</p>	<p>Post 2007 Revision of the Criminal Code:</p> <p>s.42(g) of Criminal Offences Act:</p> <p>“a person may revoke a consent which that party has given to the use of force against that person, and the consent when so revoked shall not have effect or justify force (the exemption to this provision regarding marriage has been omitted in the reinstatement as being unconstitutional)</p> <p>→ This section did not exist before 2007</p>	<p>s.42 [a] person consents if he or she agrees by choice, and has the freedom and capacity to make that choice</p>	



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	<p>conduct, a lack of agreement to continue to engage in the conduct. (3) Nothing in subsection (2) shall be construed as limiting the circumstances in which no consent is obtained.</p> <p>s. 273.2 It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where: (a) the accused's belief in consent arose from the accused's: (i) self-induced intoxication, or (ii) recklessness or wilful blindness; or (b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.</p>			
Sentence	<p>s. 271(1) Every one who commits a sexual assault is guilty of</p> <p>(a) an indictable offence and is liable to imprisonment for a term not exceeding ten years; or (b) an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.</p> <p>s. 272 (2) Every person who commits an offence under subsection (1)</p>	<p>Penalty for Rape - Criminal Offences Act (Act 29) Chapter 6, s. 97, rape is a “first degree felony and [an accused person] is liable on conviction to a term of imprisonment of not less than five years and not more than twenty-five years.”</p> <p>Penalty for Defilement - s. 101(2)-A person who</p>	<p>RAPE s. 3 (3) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life.</p> <p>SEXUAL ASSAULT s. 5 (2) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years</p>	



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	<p>[sexual assault] is guilty of an indictable offence and liable</p> <p>(a) if a restricted firearm or prohibited firearm is used in the commission of the offence or if any firearm is used in the commission of the offence and the offence is committed for the benefit of, at the direction of, or in association with, a criminal organization, to imprisonment for a term not exceeding 14 years and to a minimum punishment of imprisonment for a term of</p> <p>(i) in the case of a first offence, five years, and</p> <p>(ii) in the case of a second or subsequent offence, seven years;</p> <p>(a.1) in any other case where a firearm is used in the commission of the offence, to imprisonment for a term not exceeding 14 years and to a minimum punishment of imprisonment for a term of four years; and</p> <p>(b) in any other case, to imprisonment for a term not exceeding fourteen years.</p> <p>s. 273 (2) Every person who commits an aggravated sexual assault is guilty of an indictable offence and liable</p> <p>(a) if a restricted firearm or prohibited firearm is used in the commission of the offence or if any firearm is used in the commission of the offence and the offence is</p>	<p>naturally or unnaturally carnally knows a child under sixteen years of age, whether with or without the child's consent, commits a criminal offence and is liable on summary conviction to a term of imprisonment of not less than seven years and not more than twenty-five years.</p>	<p>but which may be enhanced to imprisonment for life.</p>	



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	<p>committed for the benefit of, at the direction of, or in association with, a criminal organization, to imprisonment for life and to a minimum punishment of imprisonment for a term of</p> <p>(i) in the case of a first offence, five years, and</p> <p>(ii) in the case of a second or subsequent offence, seven years;</p> <p>(a.1) in any other case where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; and</p> <p>(b) in any other case, to imprisonment for life</p>			
<p>HIV/AIDS specific provision</p>	<p>Criminal Code</p> <p>s.268</p>	<p>No HIV/AIDS specific provision in the Criminal Offences Act.</p>	<p>2006 Prevention and Control Act</p> <p>s.24 An infected person who knowingly and recklessly places another person at risk of being infected with HIV/AIDS is guilty of an offense unless that other person knew that fact and voluntarily accepted the risk of being infected.</p> <p>[Note: Is marriage a voluntary acceptance of risk? Especially when taken together with the marital rape provision?]</p>	



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<p>Domestic Violence Provisions</p>		<p>Domestic Violence Act- 2007 (Act 732)</p> <p>s.4- “The use of violence in the domestic setting is not justified on the basis of consent.”</p> <p>Prohibition of domestic violence</p> <p>s. 3. (1) A person in a domestic relationship shall not engage in domestic violence.</p> <p>(2) A person in a domestic relationship who engages in domestic violence commits an offence and is liable on summary conviction to a fine of not more than five hundred penalty units or to a term of imprisonment of not more than two years or to both.</p> <p>(3) The Court may in addition to imposing a fine or a prison term, order the offender in a case of domestic violence to pay compensation to the victim as the Court may determine.</p> <p>(4) When a cause for complaint has arisen between persons in a domestic relationship and the persons do not cohabit, none of those persons shall enter into the residence of the other person without that other person's permission.</p>	<p>2007 Domestic Violence (formerly Protection) Bill</p> <p>s.3 defines domestic violence [includes sexual abuse but not marital rape]</p>	<p>Prevention of Domestic Violence Act</p> <p>Sexual Abuse includes sexual contact of any kind that is made by force or threat, or the commissioning of or an attempt to commit any of the offences under Chapter XV of the penal code</p>



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		<p>Meaning of domestic relationship s. 2. (1) A domestic relationship means a family relationship, a relationship akin to a family relationship or a relationship in a domestic situation that exists or has existed between a complainant and a respondent and includes a relationship where the complainant <i>(a)</i> is or has been married to the respondent; <i>(b)</i> lives with the respondent in a relationship in the nature of a marriage even if they are not or were not married to each other or could not or cannot be married to each other; <i>(c)</i> is engaged to the respondent, courting the respondent or is in an actual or perceived romantic, intimate, or cordial relationship not necessarily including a sexual</p>		



equality effect

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		<p>relationship with the respondent;</p> <p><i>(d)</i> and respondent are parents of a child, are expecting a child together or are foster parents of a child;</p> <p><i>(f)</i> and respondent are family members related by consanguinity, affinity or adoption, or would be so related if they were married either customarily or under an enactment or were able to be married or if they were living together as spouses although they are not married;</p> <p><i>(g)</i> and respondent share or shared the same residence or are cotenants;</p> <p><i>(h)</i> is a parent, an elderly blood relation or is an elderly person who is by law a relation of the respondent;</p> <p><i>(i)</i> is a house help in the household of the respondent;</p> <p>or</p> <p><i>(j)</i> is in a relationship determined by the court to be a domestic relationship.</p>		



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		<p>(2) A Court shall in a determination under paragraph (i) of subsection (1) have regard to</p> <p>(a) the amount of time the persons spend together,</p> <p>(b) the place where that time is ordinarily spent,</p> <p>(c) the manner in which that time is spent, and</p> <p>(d) the duration of the relationship.</p> <p>(3) A person is in a domestic relationship where</p> <p>(a) the person is providing refuge to a complainant whom a respondent seeks to attack, or</p> <p>(b) the person is acting as an agent of the respondent or encourages the respondent.</p>		



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<p>Remedies under Domestic Violence provisions (protection orders/restraining orders, etc)</p>		<p>In addition to s.3 (noted above) which makes domestic violence a criminal offence, the DV Act also provides the following remedies;</p> <p>Protection Orders 11. (2) The Court may in the exercise of its jurisdiction issue a protection order.</p> <p>Application for protection order 12. (1) A person referred to in this Act as the applicant, may apply to a Court for a protection order to prevent</p> <ul style="list-style-type: none"> (a) another person, referred to in this Act as the respondent, (b) a person associated with the respondent, or (c) both a respondent and a person associated with the respondent from carrying out a threat of domestic violence against the applicant or to prevent the respondent, an associated respondent or both from further committing acts which constitute domestic violence against the applicant. 		



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		<p>s. 12(3) The application shall be made ex-parte, unless the Court otherwise orders it to be on notice.</p> <p>Occupation order 20. (1) Where the Court in issuing a protection order considers it expedient to issue an occupation order, the Court may issue the order requiring the respondent to vacate the matrimonial home or any other specified home.</p> <p>Reconciliation S. 24 provides for reconciliation in cases which are not aggravated.</p>		



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Title and Year of Constitutional Document	Charter / Constitution Act 1982	Constitution of the Republic of Ghana 1992	Constitution of Republic of Kenya 2010	Constitution of the Republic of Malawi 1994
Constitution- Gender Equality Rights	<p>7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.</p> <p>15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.</p> <p>(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.</p>	<ul style="list-style-type: none"> Article 15 that “[t]he dignity of all persons shall be inviolable.” Article 15(2) that “[n]o 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.” Article 17(1) of the Constitution provides that “all persons are equal before the law,” 17(2) that there should not be discrimination against any person on grounds of “gender, race, colour, ethnic origin, religion, creed or social or economic status.” Article 26(2) “[a]ll customary practices which dehumanize or are injurious to the physical and mental well-being of a person are prohibited.” 	<p>27. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.</p> <p>(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.</p> <p>(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.</p> <p>(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.</p> <p>(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).</p> <p>(6) To give full effect to the realisation of the rights</p>	<p>PRINCIPLE OF NATIONAL POLICY</p> <p>13. The State shall actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving the following goals –</p> <p><i>(a) Gender Equality</i></p> <p>To obtain gender equality for women with men through -</p> <ol style="list-style-type: none"> full participation of women in all spheres of Malawian society on the basis of equality with men; the implementation of the principles of non-discrimination and such other measures as may be required; and the implementation of policies to address social issues such as domestic violence, security of the person, lack of maternity benefits, economic exploitation and rights to property. □ <p>EQUALITY</p> <p>20. – 1. Discrimination of persons in any form is prohibited and all persons are, under any law, guaranteed equal and effective protection against discrimination on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, property, birth or other status.</p> <p>2. Legislation may be passed addressing inequalities in society and prohibiting discriminatory practices and the propagation of such practices and may</p>



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			<p>guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.</p> <p>(7) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.</p> <p>(8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.</p> <p>¹</p>	<p>render such practices criminally punishable by the courts. □ □</p> <p>□</p> <p>FAMILY AND MARRIAGE</p> <p>22. - 1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.</p> <p>2. Each member of the family shall enjoy full and equal respect and shall be protected by law against all forms of neglect, cruelty or exploitation.</p> <p>3. All men and women have the right to marry and found a family.</p> <p>4. No person shall be forced to enter into marriage.</p> <p>5. Sub-sections (3) and (4) shall apply to all marriages at law, custom and marriages by repute or by permanent cohabitation.</p> <p>6. No person over the age of eighteen years shall be prevented from entering into marriage.</p> <p>7. For persons between the age of fifteen and eighteen years a marriage shall only be entered into with the consent of their parents or guardians.</p> <p>8. The State shall actually discourage marriage between persons where either of them is under the age of fifteen years.</p> <p>RIGHTS OF WOMEN</p> <p>s. 24. -1. Women have the right to full and equal protection by the law, and have the right not to be discriminated against on the basis of their gender or marital status which includes the right -</p> <p>a. to be accorded the same rights as men in</p>



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				<p>civil law, including equal capacity -</p> <ul style="list-style-type: none"> i. to enter into contracts; ii. To acquire and maintain rights in property, independently or in association with others, regardless of their marital status; iii. to acquire and retain custody, guardianship and care of children and to have an equal right in the making of decisions that affect their upbringing; and iv. To acquire and retain citizenship and nationality <p>b. on the dissolution of marriage -</p> <ul style="list-style-type: none"> i. to a fair disposition of property that is held jointly with a husband; and ii. to fair maintenance, taking into consideration all the circumstances and, in particular, the means of the former husband and the needs of any children. <p>2. Any law that discriminates against women on the basis of gender or marital status shall be invalid and legislation shall be passed to eliminate customs and practices that discriminate against women, particularly practices such as -</p> <ul style="list-style-type: none"> a. sexual abuse, harassment and violence; b. discrimination in work, business and public affairs; and c. deprivation of property, including property obtained by inheritance
<p>Constitutional- Indigenous Rights/ Customary Law/ Cultural Rights/ legal pluralism</p>	<p>s. 2. Everyone has the following fundamental freedoms: (a) freedom of conscience and religion; ...</p>	<ul style="list-style-type: none"> • Article 17(2) provides that there should not be discrimination against any 	<p>S.1 (4) Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency,</p>	<p>CULTURE AND LANGUAGE s. 26. Every person shall have the right to use the language and to participate in the cultural life of his or her choice.</p>



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	<p>s. 35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.</p> <p>(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.</p> <p>(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.</p> <p>(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.</p>	<p>person on grounds of "gender, race, colour, ethnic origin, religion, creed or social or economic status."</p> <ul style="list-style-type: none"> Article 26(2) "[a]ll customary practices which dehumanize or are injurious to the physical and mental well-being of a person are prohibited." 	<p>and any act or omission in contravention of this Constitution is invalid.</p>	
<p>Constitutional-Preamble/ Interpretation/ hierarchy/ international law/</p>	<p>s.1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.</p>			<p>INTERPRETATION</p> <p>11, - 1. Appropriate principles of interpretation of this Constitution shall be developed and employed by the courts to reflect the unique character and supreme status of this Constitution.</p> <p>2. In interpreting the provisions of this Constitution a court of law shall -</p> <p>(a) Promote the values, which underlie an open and democratic society;</p> <p>(b) Take full account of the provisions of Chapter III and Chapter IV; and</p> <p>(c) Where applicable, have regard to current norms of public international law and comparable foreign case law.</p> <p>3. Where a court of law declares an act of executive or a law to be invalid, that court may apply such interpretation of that act or law as is consistent with this Constitution.</p>



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				4. Any law that ousts or purports to oust the jurisdiction of the courts to entertain matters pertaining to this Constitution shall be invalid.



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Customary Law	Applies in the criminal law sentencing context; starting in 2011 will apply in the federal human rights context	Applies only in the civil law context	Applies only in the civil law context	Applies in the civil and criminal law context

- This chart was originally compiled by Vasanthi Venkatesh in February, 2010, using the information provided by the ACWHRP consultants attending the ACWHRP customary law and marital rape workshop.