



THE LEGAL TREATMENT OF MARITAL RAPE IN CANADA, GHANA, KENYA AND MALAWI – A BAROMETER OF WOMEN’S HUMAN RIGHTS¹

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1. Introduction:

The criminalization of marital rape² constitutes an historic opportunity to enact laws which effectively combat violence against women.³ Legal impunity for marital rape constitutes state endorsed violence against women. The legal treatment of marital rape is an issue of priority concern for the African and Canadian Women's Human Rights Project (ACWHRP): marital rape is not illegal in ACWHRP's African partner countries. The legal treatment of marital rape is of significance in Canada because of the problematic treatment of the legislative provisions that apply to rape since its criminalization in 1983, for example, interpretations of consent that include "presumed consent". 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.

The objective of this paper is to develop a substantive equality analysis that exposes the discrimination inherent in the failure to criminalize marital rape, and the discrimination inherent in legal treatments of marital rape that fail to protect and promote women's human rights. A further objective is to develop a comparative analysis of the legal treatment of marital rape that exposes the similarities and differences in the legal treatment of marital rape in ACWHRP's partner countries; examine causal factors of the legal treatment of marital rape, and assess whether or not the legal treatment of marital rape is destined to exhibit the same outcomes in the different country contexts. By studying countries at different stages of legal development in the treatment of marital rape, the intention is to test hypotheses and theories that allow for innovative and diversified thinking about the source of the discrimination at issue, and to explore options for reform that contribute to advancing women's human rights and their freedom from violence.

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. However, marital rape claims continue to receive disadvantageous treatment in Canada⁴, indicative of the distance that exists between the symbolism and substance of human rights. In ACWHRP's African partner countries of Ghana, Kenya and Malawi, the legal treatment of marital rape also disadvantages women, so that women are denied the equal protection of the law of rape. This reality leaves men unaccountable for their violence, leaves women vulnerable to further violence,

² 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.

³ While a criminal justice response to marital rape is the focus of this paper, marital rape is not only a criminal law issue, and the criminal justice system is not the only means through which the needs of abused women can or should be addressed. Indeed the pigeon-holing of domestic violence as strictly a criminal justice issue detracts from the other socio-political and economic factors that contribute to women's inequality and domestic violence. 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 L. Martin and Janet E. Mosher, "Unkept Promises: Experiences of Immigrant Women with the Neo-Criminalization of Wife Abuse" (1995) 8(1) *CJWL* 3) While it is important to maintain an awareness of the reality that spousal violence involves more than just a criminal justice response, it is also important to be vigilant with respect to the ways in which the criminal law continues to disadvantage women, for example through the treatment of marital rape.

⁴ Disadvantageous in comparison to the legal treatment of gender neutral crimes.

and demonstrates a failure on the state's part to fulfill its obligations to protect and promote women's equality under existing human rights guarantees.

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 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. However, sexual assault law will never be consistent with women's human rights unless customary laws that disadvantage women are understood as being discriminatory in terms of both their origins and consequences. Customary laws must not be shielded from challenge or reconsideration merely because they are ancient or long standing. Indeed, the state must be wary of arguments which are rooted in past misogyny or which describe as "long-accepted", "fundamental" or "settled", doctrine and jurisprudence which is of recent origin and may be either unsettled or inconclusive.⁵ In the current Canadian context, 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.⁶

The development of a substantive equality analysis that exposes the root sources of the discriminatory legal treatment of marital rape will contribute to building the case for state accountability for marital rape and women's inequality. An analysis that exposes the root source of the discrimination will facilitate reform efforts to address the cause of the problem, rather than the symptoms of the problem (for example, codifying the criminalization of marital rape to include definitions of consent that protect women's human rights, vs. codification that reproduces or perpetuates sex discrimination).⁷ This paper develops a substantive equality analysis of the legal treatment of marital rape.

⁵ Celestine Nyamu, "How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?" *Harvard International Law Journal*, 41(2), 2000, 381 at 395.

⁶ Catharine A. MacKinnon, "Defining Rape Internationally: A Comment on *Akayesu*" in *Are Women Human: And Other International Dialogues* (2006: The Belknap Press of Harvard University Press, Cambridge, Massachusetts) at 237.

⁷ It is recognized that the law is not the panacea of all of the inequalities that contribute to women's oppression, and additional strategies for change need to be adopted in order to achieve social reform. However, the law remains an important and necessary site of struggle (see Susan B. Boyd and Amy Bartholomew, "Toward a Political Economy of Law" in Wallace Clement and Glen Williams, eds., *The New Canadian Political Economy* (Kingston: McGill-Queen's University Press, 1989); Stephen Brickey and Elizabeth Comack, "The Role of Law in Social Transformation: Is A Jurisprudence of Insurgency Possible?", (1990) *5Canadian Journal of Law and Society* 47;

Critical to any substantive equality analysis is an understanding that inequality, including marital rape, is experienced differently by different women. Human rights law does not easily address complaints involving multiple grounds of discrimination. This is because the claimants' distance from the dominant norm, i.e. non-disabled, economically and politically privileged men, from which they are judged, is so great.⁸ Dianne Pothier makes the point that grounds, or categories, of discrimination serve the very functional and practical purpose of providing a link to history and context, thereby ensuring that any irrelevant distinctions imposed upon a ground are confronted.⁹ Without the benefit of the conceptual tool of grounds, discrimination based on different existing grounds would not disappear, it would just be ignored.¹⁰ The challenge lies in how to ensure that the history and context associated with the different grounds, and especially that associated with the experience of multiple grounds of discrimination, is used to destabilize the perspective of the dominant norm in order to expose the inequality at play. Canadian legal feminists have an ignominious history of failing to develop intersectional discrimination analyses as part of their equality claims.¹¹ African legal feminists also provide reminders of the need to develop intersectional analyses, so as not to exclude the most disadvantaged women from equality reform initiatives.¹² This paper includes a consideration of the intersectional discrimination experienced by women in the marital rape context, and attempts to maintain an awareness of the different marital rape experiences of different women.

This paper examines the following: how marital rape contributes to and results from women's inequality; how equality theory can expose the discrimination that characterizes marital rape law; how the relevant marital rape legislative provisions in ACWHRP's partner countries violate women's human rights guarantees; how the discriminatory roots of the historical rationales for the marital rape exemption contribute to the discriminatory treatment of marital rape claims; how equality jurisprudence can support the case for the equal legal treatment of marital rape claims; and an assessment of the destiny of the legal treatment of marital rape.

Diana Majury, "The *Charter*, Equality Rights, and Women: Equivocation and Celebration", (2002) 40 *Osgoode Hall L.J.* 297; Susan D. Philips, "Legal as Political Strategies in the Canadian Women's Movement: Who's Speaking? Who's Listening?" in *Women's Legal Strategies in Canada*, Radha Jhappan, ed. (Toronto: University of Toronto Press, 2002) 379; Radha Jhappan, "Introduction: Feminist Adventures in Law" in *Women's Legal Strategies in Canada*, Radha Jhappan, ed. (Toronto: University of Toronto Press, 2002) at 9; Fareda Banda, *Women, Law and Human Rights: An African Perspective* (Portland, Oregon: Hart Publishing, 2005) at 310.

⁸ Nitya Duclos, "Disappearing Women: Racial Minority Women in Human Rights Cases" (1993) 6:1 *C.J.W.L.* 25; Nitya Iyer, "Categorical Denials: Equality Rights and the Shaping of Social Identity" (1994) 19 *Queen's Law Journal* 179

⁹ Dianne Pothier, "Connecting Grounds of Discrimination to Real People's Real Experiences" (2001) 13 *C.J.W.L.* 37; see also Colleen Sheppard, "Grounds of Discrimination" Towards and Inclusive and Contextualized Approach" (2001) 80 *Cdn. Bar Review* 893

¹⁰ *Ibid* at 43

¹¹ Sheila McIntyre, "Feminist Movement in Law: Beyond Privileged and Privileging Theory" in *Women's Legal Strategies in Canada*, Radha Jhappan, ed. (Toronto: University of Toronto Press, 2002) at 61; Lise Gotell, "Towards a Democratic Practice of Feminist Litigation? LEAF's Changing Approach to *Charter* Equality" in *Women's Legal Strategies in Canada*, Radha Jhappan, ed. (Toronto: University of Toronto Press, 2002) at 141 and 145-146; Marlee Kline, "Race, Racism and Feminist Legal Theory", 12 *Harv. Women's L.J.* 115 (1989).

¹² Fareda Banda, *Women, Law and Human Rights: An African Perspective* (Portland, Oregon: Hart Publishing, 2005) at 172; Celestine Nyamu, "How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?" *supra* at ??.

2. Marital Rape Contributes to and Results From Women's Inequality:

Legal impunity for marital rape means that men can rape their wives without facing legal prosecution. Legal impunity for marital rape means that women are treated as chattels, leaving them vulnerable to other kinds of violence. This fosters a broader social acceptance of violence against women and legitimizes sexual assault as a form of political violence or social punishment. Legal impunity for marital rape fosters a culture in which violence against women is state-endorsed or at least quietly accepted. Diana H. Russell demonstrated in her 1990 study entitled "Rape in Marriage" that the main difference between rape and marital rape is that wives suffer *additional* feelings of betrayal, inability to trust and isolation.¹³

Treating married women as chattel under the law reinforces their treatment as chattel in other contexts, outside of marriage. For example, during the 2007 post-election violence in Kenya, women were raped as a form of political aggression; when women are treated as non-persons in marriage and are not protected against rape, it results in devaluation that leaves them vulnerable to rape in other contexts. When married women are treated as property under the law, it creates a climate of state-endorsed violence. It is not difficult to appreciate how the disrespect for women in the context of marriage acts to support a climate in which women's bodies are used as "battlefields", as Sally Armstrong has described the mass rape of women in the Congo.¹⁴ On June 19, 2008, the UN Security Council declared rape a strategy of war and, therefore, an issue of international security. Resolution 1820 states that sexual violence is used "as a tactic of war to humiliate, dominate, instil fear in, disperse and/or forcibly relocate civilian members of a community or ethnic group." Sexual violence in marriage and its sanctioning by the state is also used as a tactic of oppression to humiliate, dominate, and instil fear in women. Rape in any context must be legally prohibited: otherwise it creates an exemption in which silence and state acquiescence feeds the violence.

Some of the realities of marital rape as it affects women include:

- a) Marital rape adversely affects the lives of all women;
- b) Marital rape reflects and reinforces women's social, economic and political inequality;
- c) Inequalities based on race, culture, Aboriginal status, immigration/refugee status, class, age, urban vs. rural status, and disability compound women's vulnerability to violence such as marital rape;
- d) Women receive unequal treatment in the legal system based on sex;
- e) Inequalities based on race, culture, class, age, urban vs. rural status, and disability compound the unequal treatment women receive by and within the legal system once they have experienced rape;
- f) Discriminatory myths about sexual violence and about women's sexuality continue to shape the social attitudes and values which produce violence against women and

¹³ Diana H. Russell, *Rape in Marriage* (Indiana Press: Indianapolis, 1990) as cited in Joanna Burke, *Rape: Sex, Violence, History*, op cit at 321.

¹⁴ Sally Armstrong, "Hope on the Horizon", *Chatelaine*, May, 2010 available at: http://en.chatelaine.com/english/weekend/article.jsp?content=20100309_102300_0028&page=1

which deprive women of their guaranteed human rights to equal protection and benefit of criminal law and, therefore to full equality.¹⁵

Statistics clearly demonstrate the following:

- a) The victims of marital rape in Canada are overwhelmingly female. The perpetrators of marital rape are overwhelmingly adult males¹⁶;
- b) According to government research, 75% of women in Malawi are raped by their husbands; in Ghana, 72% of respondents surveyed reported that wife abuse was common in their communities; in Kenya among married, divorce or separated women approximately 74.5% report experiencing sexual assault by spouse (specific statistics for the prevalence of marital rape/sexual assault in Canada are not available).¹⁷

Women's sexual victimization is inextricably related to their unequal status within society. Women are victimized because of their unequal status, and men are enabled because of their power. In turn, women's unequal status is further entrenched by their victimization. Moreover, some women are especially vulnerable. The following are a few examples:

- a) Women with disabilities in Canada have been found to be anywhere from two times to ten times more vulnerable to sexual abuse than women who are not disabled¹⁸ (statistics for Kenya/Ghana/Malawi are not available);
- b) Young women in Canada are particularly vulnerable to sexual assault, especially by those known to them (aggregated statistics for Kenya, Ghana and Malawi are not available)¹⁹;
- c) The vulnerability of a woman to sexual assault can be heightened by her membership in a particular social, racial, or occupational group. Women additionally disadvantaged by low household income or low education are at greater risk of becoming victims of violent crime.²⁰

¹⁵ LEAF factum in *Steven Seaboyer v. Her Majesty the Queen et al*, Supreme Court of Canada, available at: http://leaf.ca/legal/facta/1992-seaboyer_supreme-court-canada.pdf#target

¹⁶ Rebecca Kong, Holly Johnson, Sara Beattie and Andrea Cardillo, *Sexual Offences in Canada* (Ottawa: Statistics Canada, 2003) at 6; on-line: <http://dsp-psd.pwgsc.gc.ca/Collection-R/Statcan/85-002-XIE/0060385-002-XIE.pdf>.

¹⁷ Malawi: Update to MWI23160.E of 22 February 1996 on Spousal Abuse and Police Protection; Reports of Forced Marriage, Immigration and Refugee Board of Canada, November 2, 2002

<http://www.unhcr.org/refworld/country,,IRBC,,MWI,,3f7d4dd831,0.html> Malawi Ministry of Health, New African 1 Apr. 2002; M. Pappoe and E. Ardayfio-Schandorf, *The Dimensions and Consequences of Violence against Women in Ghana*, National Council for Women and Development (1998); Federation of Women Lawyers – Kenya, “Gender Based Domestic Violence in Kenya”, 2008 at p. 26-27.

¹⁸ Dick Sobsey. “Patterns of Sexual Abuse and Assault”. *Sexuality and Disability* 9:1991 243 at 248-9; Marika Morris. 2002. Violence Against Women and Girls – A Fact Sheet. Ottawa: Canadian Research Institute for the Advancement of Women. online: Canadian Research Institute for the Advancement of Women http://www.criaw-icref.ca/Violence_fact_sheet_a.htm; Helen Meekosha, “Body Battles: Bodies, Gender and Disability” in *The Disability Reader*, Tom Shakespeare, ed. (New York: Cassell, 1998) at 177.

¹⁹ Statistics Canada, 2005, “Children and Youth as Victims of Crime” *The Daily* 20 April.

²⁰ Amnesty International, 2004, *Stolen Sisters Campaign: A Human Rights Response to Discrimination and Violence Against Indigenous Women in Canada*, available at: http://www.metrac.org/programs/info/prevent/www.amnesty.ca/resource_centre/reports/view.php?load=arcview&article=1895&c=Resource+Centre+Reports; P. Kholsa, “If Low Income Women of Colour Counted in Toronto” 2003 at p. 59; Y. Jiwani, *Mapping Violence: A Work in Progress*, 2002 available at: <http://www.harbour.sfu.ca/freda/articles%20/fvpi.htm>.

There are many unanswered questions about how marital rape and the unequal legal treatment of marital rape claims affect women in different circumstances. For example, how they affect women in polygamous relationships. How they affect disabled women, including women with HIV/AIDS.²¹ How they affect urban vs. rural women? There is no research on the effects of marital rape and the unequal treatment of marital rape in these contexts in ACWHRP's partner countries.²² The fact that this research is missing speaks to the exclusion of women outside the dominant norm from analyses developed to date. These research gaps need to be filled, and the equal legal treatment of marital rape needs to be extended to women outside of the dominant norm, as well as mainstream women.

With the criminalization of marital rape, women achieve formal equality under the law and in their marriages – women are recognized as autonomous persons, not property. The criminalization of marital rape helps to establish a culture of accountability for women's human rights, and to improve the physical safety and security of women. It contributes to the creation of societies that respect women's rights, and helps to reduce the vulnerability of women to other forms of violence. It protects women from a form of violence that has serious health consequences, including the spread of HIV/AIDS. Ending marital rape immunity means that in taking marriage vows, women are not required by law to cede control over their own bodies. In short, married women should always have the right to say “no” to sex at any time, in any context, for any reason.

Equality within the institution of marriage is a prerequisite of equal citizenship. The recognition of the right of married women to live lives free of sexual violence constitutes an historic landmark achievement in the advancement of women's rights. However, based on the Canadian experience with the criminalization of marital rape, criminalization is not a panacea for the discriminatory legal treatment of marital rape claims. Low reporting and prosecution rates for marital rape in Canada since the criminalization of marital rape provide evidence of this reality, as does continuing problems with the judicial treatment of marital rape claims.²³ Nor can the criminalization of marital rape alone be expected to bring an end to the experience of marital rape. The criminalization of marital rape is however necessary if women are to achieve full legal personhood.

²¹ In Kenya, section 24 of the 2006 *Prevention and Control Act*, criminalises deliberate or reckless transmission of HIV through sexual contact. No prosecutions have yet been made under section 24 of the *Prevention and Control Act*, however it is interesting to consider how a husband's deliberate or reckless infection of his wife might be addressed with respect to dealing with non-consensual sex that led to infection.

²² Elizabeth Archampong, “Marital Rape – A Women's Equality Issue in Ghana” ACWHRP background paper, September, 2010; Seodi White, “Criminalisation of Marital Rape in Malawi: The Law, the Realities, and the Perceptions” ACWHRP background paper, February, 2010; Patricia Nyundi and Jane Serwanga, “The Legal Impunity for Marital Rape in Kenya: A Women's Equality Issue” ACWHRP background paper, July, 2010.

²³ Jennifer Koshan, “The Legal Treatment of Marital Rape and Women's Equality: An Analysis of the Canadian Experience” September, 2010 at 6-7.

3. Equality Law Exposes the Discrimination Associated with Marital Rape Law:

i) 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.²⁴ 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 representative analyses of the law that are relevant to all women.²⁵ This goal is achieved by developing intersectional discrimination analyses.²⁶ Equality theory seeks to expose biases in the law that operate 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

²⁴ 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 Comack, "Theoretical Excursions", in *Locating Law: Race/Class/Gender Connection*, Elizabeth Comack ed. (Fernwood Publishing Company: Halifax, 1999) at 19.

²⁵ 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. See: Anita Silvers, "Reprising Women's Disability: Feminist Identity Strategy and Disability Rights" (1998) 13 *Berkeley Women's Law Journal* 81; Helen Meekosha, "Body Battles: Bodies, Gender and Disability" in *The Disability Reader*, Tom Shakespeare, ed., (New York: Cassell, 1998) 161; Alison Sheldon, "Personal and Perplexing: Feminist Disability Politics Evaluated" (1999) *Disability and Society* 14 at 643; Angela Harris, "Race and Essentialism in Legal Theory" (1990) 42 *Stanford Law Review* 581; Kimberle Crenshaw, "Mapping the Margins: Intersectionality, Identity, Politics and Violence Against Women of Colour" (1991) 43 *Stanford Law Review* 1241; Diana Fuss, *Essentially Speaking: Feminism, Nature and Difference* (New York: Routledge, 1989); Angela Harris, "Race and Essentialism in Legal Theory" (1990) 42 *Stanford Law Review* 1241; bell hooks, *Ain't I a Woman* (London: Pluto Press, 1982).

²⁶ The notion of intersectional discrimination is best understood by way of a metaphor relating to a traffic intersection. In this metaphor, race, gender, disability, class and other forms of discrimination or subordination are the roads that structure the social, economic or political terrain. It is through these thoroughfares, which intersect and overlap, that dynamics of disempowerment travel. (see Kimberle Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" (1989) *U. Chic. Legal F.* 139). In addressing discrimination on multiple grounds, for example, gendered disability discrimination, it needs to be clear that the multiple characteristics of a single identity are not experienced in an additive fashion. This reality needs to be incorporated into equality rights analyses dealing with intersectional discrimination in a substantive fashion, from the perspective of the non-essential woman, to ensure the maximization of the potential of equality rights initiatives for women outside of the norm. (Adrien Katherine Wing, "Brief Reflections Toward a Multiplicative Theory and Practice of Being" 1990-1 *Berkeley Women's Journal* 6:181; Dianne Pothier, "Connecting Grounds of Discrimination to Real People's Real Experiences" 2001 *Canadian Journal of Women and the Law* 13:1; Fiona Sampson, "Beyond Compassion and Sympathy to Respect and Equality: Gendered Disability and Equality Rights Law" in *Critical Disability Theory: Essays in Philosophy, Politics, Policy and Law*, Dianne Pothier and Richard Devlin, eds. (Toronto: UBC Press, 2006) at 276).

men, for whatever reasons, or how existing legal standards and concepts might disadvantage women.²⁷

Equality theorists challenge the legitimacy of the ‘official’ version of the law as an impartial and objective means of resolving conflict.²⁸ 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 practised within society at large. Equality theory explores the ways that the law reflects and reinforces the social, economic, and political structures that oppress women within society.²⁹ 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.”³⁰ 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.³¹ 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. 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 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

²⁷ Katharine T. Bartlett, “Feminist Legal Methods” in *Feminist Legal Theory Foundations*, D. Kelly Weisberg, ed. (Philadelphia: Temple University Press, 1993) 550 at 551.

²⁸ Elizabeth Comack, “Theoretical Excursions”, in “*Locating Law: Race/Class/Gender Connection*”, Elizabeth Comack ed. (Fernwood Publishing Company: Halifax, 1999) at 19; Mary Jane Mossman, “Feminism and Legal Method: The Difference It Makes” (1986) 3 *Australian Journal of Law and Society* 30.

²⁹ Kathleen A. Lahey, “Celebration and Struggle: Feminism and Law” in Angela Miles and Geraldine Finn, eds., *Feminism: From Pressure to Politics* (Montreal: Black Rose Books, 1989) 99 at 102.

³⁰ Catharine MacKinnon, “Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence.” 1983 *Signs* 8:635 at 644.

³¹ 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.

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.

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 men³², 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”.³³

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.³⁴ Formal equality theory asserts a neutral standard that fails to take into consideration the power imbalances that have resulted from years of oppression. When 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.

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.³⁵ 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.”³⁶ 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

³² Robert Sharpe et al., *The Charter of Rights and Freedoms, supra*, Chapter 15 “Equality”, available at: <http://ql.quicklaw.com/servlet/qlwbic.qlwbi?qlsid=C1ZIAObvMHODJXdx&qlcid=00005&qlvrb=QLCMD&C=CS+SHAR+393+>

³³ Catharine MacKinnon, “Reflections on Sex Equality Under the Law” (1991) *Yale Law Journal*, 1281

³⁴ Shelagh Day, “The Process of Achieving Equality.” *Human Rights in Canada: Into the 1990’s and Beyond* Ryszard Cholewinski, ed. (Ottawa: M.O.M. Printing, 1990) at 18

³⁵ Judy Fudge, “The Public/Private Distinction: The Possibilities of and the Limits to the Use of *Charter* Litigation to Further Feminist Struggles”, 1987, *Osgoode Hall Law Journal* 25:3 485. at 497.

³⁶ *Ibid* at 532

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."³⁷

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.³⁸ 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.³⁹

ii) 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 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

³⁷ Radha Jappan, “The Equality Pit or the Rehabilitation of Justice” *Canadian Journal of Women and the Law* 1998 10: 60 at 72.

³⁸ Radha Jappan, “The Equality Pit or the Rehabilitation of Justice” *Canadian Journal of Women and the Law* 1998 10: 60 at 72-74; Fiona Sampson, “Beyond Compassion and Sympathy to Respect and Equality: Gendered Disability and Equality Rights Law” in *Critical Disability Theory: Essays in Philosophy, Politics, Policy, and Law*, Dianne Pothier and Richard Devlin eds., (Vancouver: University of British Columbia Press, 2006) 267 at 269.

³⁹ 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 (for a discussion of how contextualization can be done well or badly see Dianne Pothier and Richard Devlin, “Redressing the Imbalances: Rethinking the Judicial Role After *R. v. R.D.S.*” 1999-00, *Ottawa Law Review* 31:1 at 16-25.) 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”. (Diane Pothier, “But It's For Your Own Good” in *Poverty Rights, Social Citizenship and Governance*, Margot Young, Shelagh Day, Gwen Brodsky and Susan Boyd, eds. (Vancouver: UBC Press, 2006) at ??5) 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.

exercise of power and control of men over women that is justified based upon sexist social constructions of women as inferior to men.⁴⁰

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:

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.⁴¹

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.⁴² 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.⁴³ Disabled women have also

⁴⁰ The cross-cultural legitimacy of this theory is affirmed in: Peggy Reeves Sanday, "The Socio-Cultural Context of Rape: A Cross-Cultural Study", in *Gender Violence: Interdisciplinary Perspectives*, Laura L. O'Toole and Jessica R. Schiffman, eds. (New York: New York University Press, 1997) at 52; Fareda Banda, *Women, Law and Human Rights: An African Perspective* (Portland, Oregon: Hart Publishing, 2005) at 171-172; Hope Bagyendera Chigudu, "Characteristics of a Good Wife", *ARISE*, Oct.-Dec. 1991, as cited in Victoria Mwaka et al., *Women in Uganda: A Profile*, 12 (1994).

⁴¹ Diana Majury, "Seaboyer and Gayme: A Study InEquality" in *Confronting Sexual Assault: A Decade of Legal and Social Change*, Julian V. Roberts and Renate M. Mohr, eds. (Toronto: University of Toronto Press, 1994) 268 at 268-269.

⁴² Kimberle Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Colour" (1991) 43 *Stanford Law Review* 1241; Kimberly Crenshaw, "Whose Story Is It, Anyway Feminist and Anti-racist Appropriations of Anita Hill" in Toni Morrison, ed., *Race-ing Justice, En-gendering Power: Essays on Anita Hill, Clarence Thomas, and the Construction of Social Reality* (Toronto: Random House, 1992) at 402; Colleen Sheppard, "Women as Wives: Immigration Law and Domestic Violence" (2000), 26 *Queen's L.J.* 1; Fiona Sampson, "Beyond Compassion and Sympathy to Respect and Equality: Gendered Disability and Equality Rights Law" in *Critical Disability Theory: Essays in Philosophy, Politics, Policy, and Law*, Dianne Pothier and Richard Devlin eds., (Vancouver: University of British Columbia Press, 2006) at 267.

⁴³ Kimberly Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Colour", *supra*; Patricia Monture-Angus, "Standing Against Canadian Law: Naming Omissions of Race, Culture, and

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.⁴⁴

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 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.⁴⁵ 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 victims⁴⁶, 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.⁴⁷ These rape mythologies are alive and well in the context of marital rape complaints.

Marital rape is a form of violence against women that reinforces women's inequality in the institution of marriage and in greater society. The abandonment of married women by the law is facilitated by the artificial characterization of the family as private space, still understood as beyond the reach of rape law. Married women also become invisible in the context of rape because the sexual relations that exist within a marriage are admittedly sometimes difficult to categorize, and the boundaries of sexual relations between married persons may be more difficult to understand than those that exist between strangers. However, this reality does not justify the state's abandonment of married women, or the treatment of married women as property, assigning them separate and disadvantageous status to non-married women. If the law exempts marital rape from criminalization, it is saying that married women are not full persons, worthy of the law's protection. If marital rape is criminalized but the legal treatment of marital rape fails to protect and promote women's rights, it tells women and society that criminalization is of only limited symbolic value, and has no meaningful practical significance.

Marital rape happens within the context of the family. The sanctity of marriage, and the value of family, is a dominant rationale for the tolerance of marital rape. In the Western context, the

Gender" in *Locating Law: Race/Class/Gender Connections*, Elizabeth Comack ed.. Halifax: Fernwood Publishing, 1999 at 76.

⁴⁴Fiona Sampson, "Beyond Compassion and Sympathy to Respect and Equality: Gendered Disability and Equality Rights Law" in *Critical Disability Theory: Essays in Philosophy, Politics Policy and Law*, Dianne Pothier and Richard Devlin, eds. (Vancouver: University of British Columbia Press, 2006 267 at 267-270.

⁴⁵ 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.

⁴⁶ It is unclear how a claim will be determined to have been "false", for example, if a simple acquittal will suffice.

⁴⁷ 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

family is traditionally the site of significant oppression for women. In the Western context feminists challenge the family as an institution that imposes a disproportionate burden on women, and is seen as a major cause of their disempowerment.⁴⁸ At the same time, the family has the potential to play an empowering role in women's lives. Fareda Banda notes that in the African context, women's status in the family as mothers can actually confer power and authority on them, and that for many women in Africa motherhood is central to their identity.⁴⁹ Fareda Banda notes that "The concept of 'family' has, within the African context, always been complex."⁵⁰ However Bernice Sam writes definitively that "traditional marriage and divorce systems in Ghana have placed women in an unequal and disadvantaged position for decades."⁵¹ Christine Chinkin has noted that regardless of the type of society, the "location of women within a devalued private sphere is general."⁵² Religion also operates to reinforce the sanctity of marriage and the devaluation of women in marriage. Kulsum Wakabi has argued, in writing about domestic violence in Uganda, that religion contributes to the prevalence of domestic violence and women's oppression in that country.⁵³

When the law fails to address marital rape, it means that wives are denied equality on the basis of family status (i.e. if they were raped by a stranger, the law would address the violence), and they are denied equality as women who are victims of a specific form of a gendered crime. As a result, men are empowered and achieve increased dominance and control over their wives individually and women collectively. The failure of the law to protect and promote women's equality rights in the marital rape context reinforces the hierarchy of "good" victims vs. "bad" victims. In the marital rape context "good girls" may be understood to be women who comply with the concept of presumed consent upon marriage and do not say "no" to their husbands; "bad girls" are women who say "no" to their husbands and assert their sexual autonomy, and challenge the construct of the wife as chattel, whose dignity and security of the person are not valued and not legally protected. When the legal treatment of marital rape results in legally condoned violence, with the result that women are treated as a form of property, it reinforces women's inequality in society and in other areas of the law. For example, it may be difficult to argue successfully that women are entitled to own property, when they are still treated as property themselves under the law. This allows for the devaluation of women in law, and allows for the reduction of their autonomy and independence in society.

In the context of marital rape, if a woman is subject to compounded discrimination as a result of multiple identity features that distinguish her from the dominant norm, this experience may make

⁴⁸ Dorothy E. Chunn, "Feminism, Law and 'the Family': Assessing the Reform Legacy", in Elizabeth Comack, "Theoretical Excursions", in *Locating Law: Race/Class/Gender Connection*, Elizabeth Comack ed. (Fernwood Publishing Company: Halifax, 1999) at 236.

⁴⁹ Fareda Banda, *supra* at 91-92.

⁵⁰ Fareda Banada, *supra* at 85.

⁵¹ Bernice Sam, "Discrimination in the Traditional Marriage and Divorce System in Ghana: Looking at the Problem from a Human Rights Perspective." In *Voices of African Women: Women's Rights in Ghana, Uganda, and Tanzania*, Johanna Bond, ed. (Durham, North Carolina: Carolina Academic Press, 2005) 205 at 205.

⁵² C. Chinkin, "Gender, Inequality and Human Rights Law" in *Inequality, Globalization, and World Politics A*. Hurrell and N. Woods, eds., (Oxford: Oxford University Press, 1999) 95 at 105 as cited in Fareda Banda, *supra*, at 90.

⁵³ Kulsum Wakabi, "Domestic Violence: Strategies for Combating Wife Battery in Uganda" in *Voices of African Women: Women's Rights in Ghana, Uganda, and Tanzania*, Johanna Bond, ed. (Durham, North Carolina: Carolina Academic Press, 2005) 132 at 136-137.

access to justice even more difficult for her to achieve. Victims of marital rape, for example, who are disabled, or are members of racial, cultural or religious minorities, may find their evidence devalued because of myths and stereotypes associated with their status. The application of the concept of “presumed consent” may be heightened in such a context. For example, stereotypes of disabled women as undesirable sexual partners and spouses could lead decision makers to conclude that disabled women are desperate to marry and therefore inclined to consent to sex out of desperation to maintain an intimate relationship. Women from diverse religious communities may be presumed to have consented to religious tenets that include perpetual consent to sex upon marriage. Such problematic assumptions could lead law enforcement personnel and judicial decision makers to discredit the evidence of victims of marital rape, and apply their own pre-conceived ideas about the sexual autonomy of these women. The application of intersectional discrimination analyses in cases involving compounded discrimination would help to expose any reliance on problematic myths and stereotypes, and help to achieve equality.

In the context of marital rape, formal equality would provide for the criminalization of marital rape and the legal treatment of marital claims that recognizes the detrimental impact of marital rape as a tool of oppression. The sexist myths and stereotypes that are recognized as offensive and inappropriate in the context of non-marital rape, for example “she asked for it” or the myth that women enjoy rape, would similarly be recognized as offensive in the marital rape context. By treating marital rape the same as non-marital rape, wives would receive the same legal protection against rape as unmarried women. The legal prohibition of rape is half way there. With the achievement of formal equality between marital rape claims and rape claims originating outside of marriage, all women would be treated the same, and all women would be afforded the protection of the law against rape. The elimination of the distinction between married and non-married women in the rape context would provide married women with the security of already existing rape laws.

There are also substantive equality arguments that support the criminalization of marital rape and the treatment of marital rape claims that recognize the dignity and equality of women. To get an equality of results for married women who are raped, their rape claims must be recognized by the law, and their claims must be treated so as to ensure that they are not re-victimized through the legal process. For example, the introduction of past sexual history evidence must be avoided, and reliance on assumptions about continuous consent in marriage must be avoided. Women experience an unequal and disproportionate burden of marital rape – therefore women’s guaranteed human rights to equal treatment and benefit of the law and equal security of the person must guide the development of marital rape law. Marital rape law must be developed in a way that confronts it as a practice of inequality. Substantive equality relating to marital rape law means the law must endorse the recognition of women as autonomous agents.

The criminalization of marital rape and equal judicial treatment of marital rape victims alone will not achieve the elimination of marital rape and full substantive equality for women, as demonstrated by the Canadian experience.⁵⁴ The criminalization of marital rape has valuable symbolic value, and can have a deterrent and educational effect that can contribute to the reduction of marital rape. However, the criminal justice system deals with marital rape as

⁵⁴ See Jennifer Koshan, “The Legal Treatment of Marital Rape and Women’s Equality: An Analysis of the Canadian Experience” September, 2010.

experienced by individual women, not as a societal problem. The elimination of marital rape will require a reduction of the structured inequalities of sex, class, race, and disability on a societal basis.⁵⁵ There are a wide range of advancements that must be made to achieve the elimination of marital rape and true substantive equality for women. Some of these changes include changes to the law enforcement and judicial systems to ensure that marital rape law reform is effective. For example, ensuring that law enforcement personnel understand the gendered nature of the crime of marital rape and are sensitive to the needs of marital rape victims; ensuring that law enforcement personnel treat marital rape as a crime, and do not either directly or indirectly discourage women from filing complaints because they consider it a private matter. With respect to access to justice, victims of marital rape need to be able to access courts (this may mean, for example, that they need a transportation subsidy, and/or the assistance of interpreters), and they may need support to attend court (this may mean child care and/or an independent women's advocate to represent victims in court). Outside of the legal system, the social conditions that allow for the prevalence of marital rape need to be addressed. Women's socio-economic and political disadvantage must be resolved, so that the conditions that create a climate in which marital rape and the oppression of women thrive, are quashed. In addition to the criminalization of marital rape and equal legal treatment of marital rape victims, these changes could provide for real substantive equality for married women.

4. Description and Analysis of Relevant Marital Rape Legislative Provisions:

i) British Common Law -

Sir Matthew Hale stated in Britain in the seventeenth century, "the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and the contract the wife hath given up herself in this kind unto her husband, which she cannot retract."⁵⁶ Hale believed that "matrimonial consent" was irrevocable. He made this assertion without citing any supporting authority. Despite this legal deficiency, his contention became the common law of England.⁵⁷ Rebecca Ryan writes that to comprehend the original rationale of the rape exemption, it is necessary to appreciate how the legal scholars who supported the rationale viewed the marriage contract. Ryan cites Blackstone discussing the marital contract under the heading of "private economical relations," likening "husband and wife" to other private relationships such as "master and servant".⁵⁸ The British legal system defined the husband as superior and the wife as subordinate, regardless of the individual parties involved.⁵⁹ It is this British common law legacy that was incorporated into the legal systems in each of ACWHRP's partner countries.

⁵⁵ Christine Alder, "Violence, Gender and Social Change" in *Gender Violence: Interdisciplinary Perspectives*, Laura L. O'Toole and Jessica R. Schiffman, eds. (New York: New York University Press, 1997) at 435.

⁵⁶ Sir Matthew Hale, *The History of the Pleas of the Crown* (1763) at 629, as cited in Theresa Fus, "Criminalizing Marital Rape: A Comparison of Judicial and Legislative Approaches " (2006) 39 *Vanderbilt Journal of Transnational Law* 481 at 483.

⁵⁷ Theresa Fus, *supra* at 483.

⁵⁸ Rebecca M. Ryan, "The Sex Right: A Legal History of the Marital Rape Exemption" 20 *Law and Social Inquiry* 942 1995 at 943.

⁵⁹ *Ibid* at 994.

In Britain, the judiciary in the early 1990's was faced with a landmark marital rape case that supported the elimination of the marital rape exemption.⁶⁰ The case was decided just following the release by The Law Commission of a paper that affirmed that the common law still granted marital immunity, but proposed that "the present marital immunity be abolished in all cases."⁶¹ The paper concluded with a request to codify abolition of spousal immunity with an Act of Parliament.⁶² In 1992 the marital rape exemption in Britain was abolished via legislative reform.⁶³ While it was predicted that the criminalization of marital rape would result in a wave of prosecutions, the predicted wave did not materialize. By most accounts, marital rape remains the most difficult form of abuse to prosecute successfully.⁶⁴

The repeal of the marital rape exemption in Britain was a result of the feminist movement pushing its theory of sexual politics into legal discourse. Rebecca Ryan writes that the feminist movement officially discredited "an exemption that had long since lost its theoretical foundation in name but not in the minds of postwar legal scholars."⁶⁵ This progress was achieved, in part, by likening the institution of marriage to slavery.⁶⁶ The history leading up to the repeal of the exemption in Britain saw the emergence of the wife as a separate legal entity in other contexts as well, for example with respect to economic and property rights.⁶⁷ Feminists worked to break the taboo around speaking out against marital rape; prior to the initiation of the campaign to criminalize marital rape in the 1970's, marital rape was considered a private matter that was not discussed in public.⁶⁸ Feminists are credited with influencing the repeal of the marital rape exemption by introducing a theory of power and oppression into understandings of gender relations, and challenging traditional legal understandings of marriage and the treatment of wives as property.⁶⁹

ii) Domestic Criminal Law Marital Rape Provisions -

The specifics of the relevant criminal law marital rape provisions for each of ACWHRP's partner countries are identified in chart-form in Appendix "A" attached. Also included in Appendix "A" are the relevant legislative exemptions relating to marital rape; the sentencing provisions associated with rape and sexual assault; consent provisions associated with rape and sexual assault; domestic violence related legislative provisions (which are misdemeanours or provide civil remedies, but are not criminal offences); legislative provisions relating to consent; constitutional provisions relating to equality, Indigenous rights, customary law, religious rights and legal pluralism; Constitutional interpretation provisions; HIV/AIDS related legislative provisions; and identification of how customary law applies to the civil and/or criminal contexts.

⁶⁰ *R. v. R.* [1992] 1 AC 599.

⁶¹ The Law Commission working paper, "Rape Within Marriage", September, 1990 as cited in Teresa Fus *supra* at 485.

⁶² *Ibid.*

⁶³ Joanna Bourke, "Rape: Sex, Violence, History" (Great Britain: Virago Press, 2007) at 328.

⁶⁴ *Ibid.*

⁶⁵ Rebecca M. Ryan, "The Sex Right: A Legal History of the Marital Rape Exemption" 20 *Law and Social Inquiry* 942 1995 at 943.

⁶⁶ *Ibid* at 954.

⁶⁷ *Ibid* at 949.

⁶⁸ Joanna Bourke, "Rape: Sex, Violence, History" (Great Britain: Virago Press, 2007) at 317.

⁶⁹ *Op cit* at 980-982, and 985-988.

A review of the above noted provisions allows for some interesting parallels to be drawn amongst and between the different countries, and provides some insight into the colonialist origins and legacies of the legal impunity for marital rape. It should be noted that all of ACWHRP's partner countries are former British colonies that inherited their legal systems and criminal codes from Great Britain. The colonization of the domestic laws of ACWHRP's partner countries is a legacy that is still alive and well, and the disadvantageous effect of this colonization continues to be experienced by the women of these countries. Clare McGlynn and Vanessa Munro have stated that Sir Mathew Hale's influence on marital rape law continues to inform investigative and prosecutorial perspectives in most jurisdictions in the world.⁷⁰ Originally marital rape was exempted from prosecution in all four of ACWHRP's partner countries. Canada's exemption was repealed in 1983, as discussed below. Ghana's exemption was recently repealed, however the exemption was replaced by a confusing and problematic concept of revocation of consent, as discussed below. Kenya and Malawi still exempt marital rape from criminal prosecution, as discussed below.

a) Canada –

In Canada, marital rape was criminalized in 1983 (at this time the legislative terminology was changed from “rape” to “sexual assault”). Prior to 1983 rape was explicitly defined in the *Criminal Code* to exclude marital rape from criminal sanction. In Canada the law of rape and sexual assault evolved to focus on protecting women from physical injury. However, respect for a woman's ability to consent or demonstrate non-consent was an area of the law that remained undeveloped, and continues to be a problem.⁷¹ Amendments were made to the *Criminal Code* in Canada in 1992 that address consent.⁷² These revisions should be sufficient to ensure that consent is interpreted and applied in marital rape cases to protect women's equality rights. Unfortunately despite the 1992 amendments regarding consent and the accused's belief in consent, judges are still accepting arguments that marriage or spousal relationships result in presumed or continuous consent to sex or belief in consent, and acquitting on that basis.⁷³

The introduction of the *Canadian Charter of Rights and Freedoms* in 1982 provided the impetus for the criminalization of marital rape in Canada.⁷⁴ The equality rights provision of the *Charter* was implemented in 1985, three years after the *Charter's* introduction. The feminization of the law was a focus for feminist legal advocates leading up to the introduction of the *Charter*. In the three years between the introduction of the *Charter* and the implementation of the equality provisions, the state was responsible for ensuring the reform of any laws not in compliance with

⁷⁰ Clare McGlynn and Vanessa E. Munro, “Rethinking Rape Law: An Introduction” in *Rethinking Rape Law: International and Comparative Perspectives*, Clare McGlynn and Vanessa E. Munro, eds. (Routledge: New York, 2010) at 1.

⁷¹ Jennifer Koshan, “The Legal Treatment of Marital Rape and Women's Equality: An Analysis of the Canadian Experience” September, 2010 at 34-41.

⁷² Bill C-49, S.C. 1992, c.38.

⁷³ Jennifer Koshan, “The Legal Treatment of Marital Rape and Women's Equality: An Analysis of the Canadian Experience” September, 2010 at 34-41; Melanie Randall, “Sexual Assault in Spousal Relationships, “Continuous Consent”, and the Law: Honest But Mistaken Judicial Beliefs” (2008) 32 *Manitoba Law Journal* 144 at 192.

⁷⁴ Lise Gotell, “Canadian Sexual Assault Law: Neoliberalism and the Erosion of Feminist-Inspired Law Reforms” in Clare McGlynn and Vanessa E. Munro, “Rethinking Rape Law: An Introduction” in *Rethinking Rape Law: International and Comparative Perspectives*, Clare McGlynn and Vanessa E. Munro, eds., (New York: Routledge, 2010) at 210.

the equality provisions of the *Charter*. The feminist movement in Canada played a central role in both the development and introduction of the *Charter*'s equality provisions, and the equality audit of government laws for compliance with the *Charter*.⁷⁵ Jennifer Koshan has written about the contribution of feminists to the reform of sexual assault law and marital rape:

Reform efforts around sexual violence were led by women in Canada in the 1970s and 1980s.⁷⁶ Snider notes that women were mobilized by studies showing police “suspicion and hostility” towards rape victims, as well as “relatively light sentences” for rape.⁷⁷ Women sought not only the abolition of the marital rape immunity, but also the repeal of laws requiring corroboration and recent complaint in the case of sexual offence prosecutions, protections against being questioned on their sexual history and reputation, and overall, a tighter response to sexual violence against women.⁷⁸

Just preceding the repeal of the marital rape exemption in Canada, married women had achieved legal equality of property rights in marriage. Matrimonial Property Rights Acts were passed in most provinces in Canada near the end of the 1970's, which provided for the equal division of property on the dissolution of marriage. Passage of these Acts followed a public uproar in response to the Supreme Court of Canada decision in *Murdoch v. Murdoch* in which Mrs. Murdoch was denied any interest in the family farm following 25 years of marriage.⁷⁹ This was the legal context out of which the repeal of marital rape exemption developed.

b) Ghana –

The presumption under Ghanaian law is that a woman consents to sex with her husband unless she revokes such consent. Rape is prohibited under s.97 of the *Criminal Offences Act* in Ghana. Under s. 98 of the Act, rape is defined as “The carnal knowledge of a female not less than 16 years without her consent”. Prior to its revision in 2007, the *Criminal Code*, 1960 provided, at section 31, for numerous grounds justifying the use of force, including at Article 31(j), “the

⁷⁵ Diana Majury, “Strategizing in Equality” in Martha Fineman and Nancy Sweet Thomadsen, eds., *At The Boundaries of the Law: Feminism and Legal Theory* (New York: Routledge, 1991) at 320; Diana Majury, “Women’s (In)Equality before and after the *Charter*”, in *Women’s Legal Strategies in Canada*, Radha Jhappen, ed. (Toronto: University of Toronto Press, 2002) 101 at 110.

⁷⁶ See Marilyn Stanley, *The Experience of the Rape Victim with the Criminal Justice System Prior to Bill C-127. Report No. 1* (Ottawa: Department of Justice, 1985). Stanley cites a number of studies conducted by women documenting low rates of reporting, founding, arrest and conviction for sex crimes prior to 1983 (see Lorenne Clark and Debra Lewis, *Rape: The Coercive Price of Sexuality* (Toronto: Women’s Educational Press, 1977); Julie Brickman, “Winnipeg Rape Incidence Project: Final Results” (1980, unpublished)); Dianne Kinnon, *Report on Sexual Assault in Canada* (Ottawa: Canadian Advisory Council on the Status of Women, 1980). Stanley’s report does not deal specifically with marital rape. One source that was noticeably silent on marital rape was the *Report of the Royal Commission on the Status of Women in Canada* (Ottawa: Information Canada, 1970).

⁷⁷ Snider (1985), *supra* at 340. At the same time some women argued that the maximum sentences for rape were too high and should be aligned with penalties for offences like aggravated assault. See Leah Cohen and Connie Backhouse, “Desexualizing Rape: A Dissenting View on the Proposed Rape Amendments” (1980) 2(4) *Canadian Woman Studies* 99 at 100.

⁷⁸ Jennifer Koshan, “The Legal Treatment of Marital Rape and Women’s Equality: An Analysis of the Canadian Experience” September, 2010 at 12.

⁷⁹ [1975] 1 S.C.R. 423.

consent of the person against whom the force is used.” Section 42 of the *Criminal Code* provided additional guidance on the consent to use of force provision, stating at section 42(g) that:

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 judgement or decree of a competent court.* (emphasis added)

This provision meant that a spouse could not at any time in a marriage claim that she had revoked her consent to sex. This clause acted as a marital rape exemption. A spouse’s right to sex was considered part of the “purposes of marriage,” and therefore, in Ghana one spouse could not rape the other. In short, there was no crime of rape within marriage.⁸⁰

A Domestic Violence Bill Coalition arose out of the women’s movement in Ghana that sought, among other things, to repeal the marital rape exemption in the *Criminal Code*.⁸¹ The Coalition was made up of gender activists, lawyers, academics, professionals and women-focused non-governmental organizations who together advocated for a domestic violence law. The Coalition decried the state’s failure to sanction perpetrators of domestic violence, and it drew on the equality rights guarantees in the 1992 Ghanaian Constitution and CEDAW to argue for the removal of the marital rape exemption from Ghanaian law.⁸² The Coalition used strategies such as lobbying members of parliament, media interviews, public demonstrations, public education at the grassroots, and photo exhibitions showing pictures of abused women and children. It faced opposition from the government, the media, Ghana’s male-dominated society, and Parliament.

Ultimately, the Domestic Violence law was passed, but without the significant change the Coalition had sought - the removal of the marital rape exemption. In May 2006, after many years of government stalling and persistent advocacy by the Coalition, the Domestic Violence Bill finally went before the Ghanaian Parliament.⁸³ The bill originally defined sexual abuse such that it prohibited marital rape and sought to repeal section 42(g) of the *Criminal Code*.⁸⁴ However, that definition of sexual abuse in the bill was removed by Parliament in the Act as passed on

⁸⁰ See Nancy Kaymar Stafford, “Permission for Domestic Violence: Marital Rape in Ghanaian Marriages” 29 Women’s Rights Law Report 63 at footnote 3.

⁸¹ See Bernice Sam, “*Advocacy for a Domestic Violence Act using CEDAW*”, Women in Law and Development (WILDAF), 2009 [unpublished paper].

⁸² Ibid.

⁸³ See Gilbert Boyefio, “Domestic Violence Act In” The Statesman Newspaper, 24/04/2007, online at: http://www.thestatesmanonline.com/pages/news_detail.php?newsid=3314§ion=1 and Takyiwaa Manuh, “The Passage of Domestic Violence Legislation in Ghana” online at: <http://www.research4development.info/PDF/Outputs/WomenEmp/GhanaDV.pdf> accessed on 24/02/09 where both authors noted the challenges the Domestic Violence Bill faced for several years before its first reading by Parliament in May 2006.

⁸⁴ This following passage in the draft Domestic Violence Bill defined domestic violence to cover marital abuse thus, “[s]exual abuse, namely the forceful engagement of another person in a sexual contact *whether married or not* which includes sexual contacts that abuses, humiliates or degrades the other person or otherwise violates another person’s sexual integrity....” [emphasis mine]. Parliament removed this wording before the bill’s passage, replacing it with this definition of sexual abuse in section 1(b)(ii) of the Domestic Violence Act, “sexual abuse, namely the forceful engagement of another person in a sexual contact which includes sexual contact that abuses, humiliates or degrades the other person or otherwise violates another person’s sexual integrity....”

February 22, 2007. *The Domestic Violence Act, 2007, Act 732 (DVA)*, section 4 provides that, “the use of violence in the domestic setting is not justified on the basis of consent”. The Act thus prohibits the use of consent as a defence to domestic violence, which includes sexual abuse, but does not specifically refer to marital rape. Violations of the *Domestic Violence Act* constitute only misdemeanours, they are not criminal offences.

Several months after the passage of the *Domestic Violence Act*, a further legislative change occurred in Ghana leading to the removal of the marital rape exemption under section 42(g) of the *Criminal Code, 1960*. The government of Ghana appointed Justice Crabbe (a retired Supreme Court judge) under the authority of the Laws of Ghana (Revised Edition) (Amendment) Act 2006, Act 711 as a Statute Law Revision Commissioner to prepare a revised edition of all Ghanaian Acts and subsidiary legislation in force as at 1st January 2005. Upon Justice Crabbe’s completion of the task, he submitted a set of revised laws to the Minister of Justice. These laws were approved by the Ghanaian Parliament. After the revised laws received Parliamentary approval, the President by Executive Instrument 2007 E.I. 3 stated the effective date for the volumes as 16th April 2007. Thus, based on this instrument the laws currently in force are the Laws of Ghana (Revised Edition). Relevant for the purposes of this paper is the fact that, as part of the statute revision, a new section 42(g) appeared in the *Criminal Offences Act* (formerly known as the *Criminal Code* CHECK) that removed the marital rape exemption with a brief parenthetical note that acknowledged the marital rape exemption as unconstitutional.

It is not clear whether Parliament actually considered the fact that by approving the revised laws of Ghana it had also struck a blow against the marital rape exemption in section 42(g). This is noteworthy given that the same Parliament had earlier rejected a definition of sexual abuse in the draft Domestic Violence Bill, which effectively sought to repeal section 42(g) of the *Criminal Code*. Section 98 of the *Criminal Code* still defines rape as “...the carnal knowledge of a female of not less than sixteen years without her consent.” Section 42, which is headed, “[u]se of force in case of consent,” now provides at section 42(g) that, “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 exception to this provision regarding marriage has been omitted in the reinstatement as being unconstitutional).” It seems therefore that consent can still be used as a defence to marital rape if a woman is understood to have failed to revoke her consent (with the onus apparently the woman to do so), in which case marital rape will not constitute a criminal offence.

Unfortunately, section 42(g) of the *Criminal Offences Act* leaves women vulnerable to the presumption that they have consented to marital rape unless they can prove that they somehow revoked their consent prior to the sexual attack in question. Judges may interpret “revocation of consent” in a way that would make it difficult for a married woman to prove revocation.⁸⁵ Customary law does not apply in the criminal context in Ghana, so it could not be argued that customary law mandates an understanding of marriage that presumes consent, and that consent cannot be revoked. However, judicial interpretation of “revocation of consent” could still incorporate traditional understandings of marriage and presumed consent (certainly in Canada this

⁸⁵ As at the time of writing, there are no reported marital rape cases decided under the revised section 42(g) of the Criminal Offences Act, and no known unreported cases.

is the case⁸⁶). Narrow interpretations of s. 42(g) will disadvantage women and leave them without the protection of the law. Only the repeal of section 42(g) in its entirety will result in the meaningful criminalization of marital rape and the protection of women's rights.⁸⁷

c) Kenya –

In Kenya, the *Sexual Offences Act* prohibits acts that include “rape”⁸⁸ but marital rape is excluded under section 43 of the *Sexual Offences Act*. Section 43(5) of the *Sexual Offences Act* reads: “This section shall not apply in respect of persons who are lawfully married to each other.” The criminal law in Kenya requires proof of lack of consent in order to establish rape. Under customary law in Kenya, marriage results in presumed and perpetual consent to sex. Therefore customary law also provides for legal impunity for marital rape in Kenya, in addition to the explicit marital rape exemption included in the *Sexual Offences Act*. However, because customary law is only supposed to apply to civil law and not criminal law in Kenya, it would prove difficult to raise the customary law presumed consent argument in the Kenyan criminal law context.

d) Malawi -

In Malawi the *Penal Code* prohibits acts that include “unlawful carnal knowledge”.⁸⁹ As in Kenya, the criminal law in Malawi mandates proof of lack of consent in order to establish rape. Under customary law in Malawi, marriage results in presumed and perpetual consent to sex. Because customary law applies to both civil law and criminal law in Malawi, it is possible that the customary law understanding of presumed and perpetual consent could be relied upon to argue that the law that prohibits rape does not apply in the context of marital rape. Indeed, while there is no explicit marital rape exemption in Malawi, and the issue has not been litigated, the consent related provisions in the criminal law in Malawi are understood to provide for legal impunity for marital rape.

Seodi White writes, “... it is difficult to charge a husband with the offence under the *Penal Code* in Malawi because rape as an offense can only be committed by a person who has *unlawful* carnal knowledge with the victim. Culturally and to a certain extent legally, it is ‘lawful’ for a husband to have carnal knowledge with his wife (impliedly no matter by what means), so long as it is in line with the order of nature.”⁹⁰ White attributes the legal treatment of marital rape in Malawi to the British common law legacy established by Sir. Mathew Hale, that upon marriage a wife enters

⁸⁶ Jennifer Koshan, “The Legal Treatment of Marital Rape and Women’s Equality: An Analysis of the Canadian Experience” September, 2010 at 19

⁸⁷ Elizabeth Archampong and Fiona Sampson, “Marital Rape in Ghana – Legal Options for Achieving State Accountability” *Canadian Journal of Women and the Law*, forthcoming at 2-5; and Elizabeth Archampong, “Marital Rape – A Women’s Equality Issue in Ghana” ACWHRP background paper, September, 2010 at 28.

⁸⁸ *Sexual Offences Act*, 2006, section 3. Rape is defined in section 3 of the *Sexual Offences Act*, 2006 as an intentional and unlawful act which “causes penetration with his or her genital organs”, without consent.

⁸⁹ *Penal Code*, section 132.

⁹⁰ Seodi White, “Criminalisation of Marital Rape in Malawi: The Law, the Realities, and the Perceptions” ACWHRP background paper at 10.

into a contract of consent that cannot be retracted; a contract that basically provides for a “licence to rape”.⁹¹

On 26th April 2006, The Malawi National Parliament passed an Act named the Prevention of Domestic Violence Act (PDVA) “to make provision for the prevention of domestic violence, for the protection of persons affected by domestic violence and for matters connected therewith”.⁹² WLSA-Malawi was the main proponent that supported and facilitated the passage of this legislation. In advocating in support of the legislation, a concerted effort was made by WLSA-Malawi to have marital rape recognized as a form of domestic violence. During the campaign to pass the PDVA, White notes that the majority of the public response to the idea of recognizing marital rape as a form of domestic violence was negative.⁹³ This opposition was grounded in traditional British conceptions of marriage and consent that have been incorporated into customary law in Malawi.⁹⁴ It is this perception of marriage and consent that continues and results in an understanding that marital rape is not “unlawful”, and creates the legal impunity for marital rape in Malawi.

In Canada and Malawi, the law as currently drafted, on its face, should allow for the successful prosecution of marital rape and the protection of women from this harm. In Canada the criminalization of marital rape was achieved by introducing a gender neutral scheme of sexual assault offences that applied to all spouses, and abolishing spousal privilege and corroboration laws. However, interpretations of consent, evidentiary laws and sentencing norms sometimes operate to the disadvantage of women, so that the equality potential of the criminalization of marital rape has not been fulfilled in Canada. In Malawi, there has never been an explicit legislative marital rape exemption; it is the operation of customary law, and the interpretation of consent and “unlawful” that results in the legal impunity for marital rape. In Kenya there is an explicit exemption for marital rape, and additionally, the issue of consent can be complicated by interpretations of customary law that provide for a presumed consent to sex by women upon marriage. In Ghana it was recognized that the marital rape exemption violated constitutional equality guarantees, so the exemption was abolished in 2007. However the new provisions relating to consent, in the context of customary law, may mean that marital rape is exempted from the criminal law rape provisions. While it is only Kenya that has an explicit legislative exemption for marital rape, in all of ACWHRP’s partner countries, the understanding of consent may result in legal impunity for marital rape, and inequality for women.

iii) Customary Law and Marital Rape -

Customary law may be defined as the unwritten laws and practices of small-scale communities which dates back from pre-colonial times, but has undergone transformations due to colonialism and capitalism.⁹⁵ It is localized in nature and is as diverse as the communities involved, although there is general consensus on certain fundamental principles.⁹⁶ Customary law is also

⁹¹ *Ibid* at 10.

⁹² *Prevention of Domestic Violence Act, 2006.*

⁹³ Seodi White, *supra* at 12; Fareda Banda, *supra* at 173.

⁹⁴ *Ibid* at 12.

⁹⁵ Winnie Kamau, “Customary Law and Women’s Rights in Kenya” ACWHRP background paper, September, 2010 at 4.

⁹⁶ These include the centrality of the family, supremacy of the group over the individual and importance of kinship ties. Some anthropologists have raised the question of whether the unwritten customs and practices of pre-industrial

characterized by dynamism and flexibility of custom. The fluid nature of customary law, and the fact that it is unwritten, poses a challenge in determining its content in any particular case.⁹⁷ Customary law is an integral part of the legal systems in each of ACWHRP's African partner countries. The practice of customary law is central to the identity of persons in these countries, and also critical to their sense of agency and autonomy as citizens of post-colonial states. Customary law also has a significant practical relevance in ACWHRP's African partner countries as most people in these countries access justice through customary law mechanisms, state law mechanisms being too expensive and inaccessible for most people. Customary law is also of critical importance to Canada's Aboriginal peoples; the recognition and application of indigenous norms in Canada constitutes an important element of the decolonization process for Aboriginal persons.⁹⁸

Traditionally customary law has provided for the human dignity of all persons. Customary law in Africa has however provided for the objectification of women through practices such as dowry and widow cleansing, although these practices originally reflected the value of women, rather than their co-modification as chattel. The understanding that women are a form of property, restricts the autonomy of women and results in customary law interpretations of consent that leave women vulnerable to marital rape. Helene Combrinck states that "customary law regards all sex within marriage as consensual. This has resulted in marital rape proving to be a major area of controversy in virtually every Anglophone country where women's rights activists have advocated for law reform. The conceptual impossibility of a man raping his wife, originating from customary law, has been reinforced by the 'marital rape exemption' from common law"⁹⁹ Combrinck seems to take the position that the allowance for marital rape in customary law predated the introduction of the marital rape exemption in formal law through the colonization process. It is difficult to establish absolutely whether or not impunity for marital rape under customary law predated colonization, and indeed the history of colonization and its impact is different in different regions and different countries. Whether impunity for marital rape predated colonization or not, the treatment of married women under customary law and colonial law certainly dovetailed to ensure that women were treated as chattels in marriage and denied the protections of rape law.

With the introduction of colonial imperialism, colonized peoples were introduced to new patriarchal value systems and practices. Colonialism either reinforced pre-existing customary law conceptions of impunity for marital rape, or introduced the patriarchal values that support marital rape exemptions to African law and society, and they were then incorporated into customary law. The influence of patriarchy, regardless of its original source, on marital rape and customary law

small-scale societies can be regarded as law: see for instance A.S. Diamond, *Primitive Law* (London: Watts, 1935) and A.R. Radcliffe-Brown, *Structure and Function in Primitive Society: Essays and Addresses* (Glencoe, Ill.: Free Press, 1952). Others, such as Malinowski and Gluckman were much more prepared to accept that such customs and practice constitute law. As cited in Winnie Kamau, *supra* at 2.

⁹⁷ Winnie Kamau, *supra* at p. 4.

⁹⁸ Mary Eberts and Patricia Monture, "Is 'Customary Law' a Solution or a Continuing Problem of Colonial Oppression of Aboriginal Women in Canada", ACWHRP background paper, February, 2010; Jennifer Koshan, "The Legal Treatment of Marital Rape and Women's Equality: An Analysis of the Canadian Experience" September, 2010 at 62-64.

⁹⁹ Helene Combrinck, "Rape Law Reform in Africa: 'More of the Same' or New Opportunities?", in Clare McGlynn and Vanessa E. Munro, "Rethinking Rape Law: An Introduction" in *Rethinking Rape Law: International and Comparative Perspectives*, Clare McGlynn and Vanessa E. Munro, eds., *supra* at 124.

continues to have a negative impact on women's equality, beyond just the interpretation of legislative rape provisions and the application of marital rape exemptions. For example, in Malawi in *R v Mwasomola* a customary law court held that a man who killed his wife because she refused to consent to sex, was guilty only of manslaughter because his wife's refusal to have sex with her husband amounted to provocation.¹⁰⁰ Marriage in this case was understood to result in presumed and perpetual consent, an understanding of marriage that mirrors the patriarchal devaluations of women embedded in British common law. The British legal legacy that was imposed through the colonization of the law in ACWHRP's partner countries, can certainly be understood to have influenced customary law. Brian Tamanaha has concluded that "what was identified as customary law was not in fact customary or traditional at all, but instead were inventions or selective interpretations by colonial powers or sophisticated Indigenous elites who created customary law to advance their interests or agendas."¹⁰¹

Whether or not customary law allowed for the legal impunity for marital rape prior to colonization, it is open to that interpretation today in ACWHRP's partner countries, particularly with respect to understandings of consent. This may be the result, at least in part, of the introduction of sexist myths and stereotypes that justified an abuse of power by a colonized group that was itself disempowered by the colonizing peoples, and the creation of a hierarchy of rights holders.¹⁰² Bernice Sam has noted that in Ghana today, upon marriage, families advise husbands not to physically abuse their wives, and that traditional societies had sanctions to deal with perpetrators of domestic violence.¹⁰³ However, Sam writes that these customary law sanctions do not now tend to be enforced against husbands who commit acts of domestic violence against their wives. This situation prevails because factors such as patriarchy, gender stereotypes and gender roles support the impunity for marital rape in Ghanaian traditional societies.¹⁰⁴

Under customary law in each of ACWHRP's African partner countries, consent to sex is presumed once a woman marries. This presumption is based upon her status as property under customary law, resulting from laws associated with the practice of dowry and succession. The legal theory attached to the justifications for a presumption of consent under customary law is reminiscent of that associated with the discriminatory marital rape logic of Sir Mathew Hale, articulated in seventeenth century Britain. While practices of dowry and succession that exclude women may have pre-dated colonialism, and impunity for marital rape may also have pre-dated

¹⁰⁰ 4 African Law Reports 659 as cited in Ngeyi Kanyongolo, "Customary Law and Women's Rights: The Case of Malawi" at 17.

¹⁰¹ Brian Tamanaha, "Understanding Legal Pluralism: Past to Present, Local to Global" (2008) 30 Sydney L. Rev. 375 at 384 as cited in Krysta Cochrane unpublished paper entitled "Resolving Violence Against Women in Intimate Relationships through International Guidance and Self-Determination", April, 2010; see also Celestine Nyamu, "How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?" Harvard International Law Journal, 41(2), 2000, 381 at 391.

¹⁰² Louise du Toit, "A Phenomenology of Rape: Forging a New Vocabulary for Action" in *(Un)Thinking Citizenship: Feminist Debates in Contemporary South Africa*, Amanda Gouws, ed. (Lansdowne, South Africa: UCT Press, 2005) 253 at 260.

¹⁰³ Bernice Sam, "The Relationship Between Customary Law and Women's Rights in Ghana" ACWHRP background paper, August, 2010 at 14.

¹⁰⁴ *Ibid*; see also Peter K. Sarpong, *Ghana in Retrospect, Some aspects of Ghanaian Culture* (Accra: Ghana Publishing Corporation, 1974) at 70 where the author has observed that in Ghanaian traditional societies, wives are expected to obey their husbands and cook, clean, bear children and satisfy their husbands sexually. The family of both a husband and wife would deem the wife to have failed in her duties, and deserving reprimand, including being divorced by her husband, should the wife fail in any of these duties.

colonialism, the patriarchal manifestations of those practices in the present day were certainly reinforced by the British colonial legacy in Africa.

d) Constitutional Law, Equality Law and Customary Law -

The Constitutions of each of the subject countries of this analysis provide protections for the equality rights of women.¹⁰⁵ They also provide for the protection of legal pluralism. In Canada the Constitution provides for the protection of religious rights and Aboriginal rights. In Ghana, Kenya and Malawi, the Constitutions provide protection for customary law (in Kenya and Ghana customary law is only applied and protected under the Constitution with respect to civil law, so it should not be an issue in the criminal context in which marital rape arises). Such legal complexity allows for rich and diverse cultures. However, such legal complexity also creates a challenge when the diversity of protected rights come into conflict, such as in the context of marital rape.

Women's human rights are protected under the Constitutions of ACWHRP's partner countries, and are also protected under the international and regional human rights instruments that each of ACWHRP's partner countries has signed. The protection of human dignity and principles of fairness and justice are also inherent to the practice of customary law in ACWHRP's partner countries. However, the issue of cultural relativism and human rights may still be raised as a defence against the valuation of a human rights analysis in the resolution of women's rights vs. customary rights. This issue will be addressed in more detail in the ACWHRP customary law comparative paper, however, it is also addressed briefly here as it is a critical part of the marital rape puzzle.

The Constitutions in ACWHRP's partner countries provide mechanisms through which women's rights can trump customary law. For example, in Kenya, constitutional protections of customary law do not apply if the customary law is "repugnant", and customary law is not supposed to be inconsistent with written law.¹⁰⁶ In Ghana it has been decided that where customary law is "obsolete, unreasonable, repugnant to equity, good conscience and natural justice ... and not in step with modern notions" the courts should apply statutory law.¹⁰⁷ In Ghana customary law does not apply in the criminal law context, and under the Ghanaian Constitution, "acts which are repugnant to natural justice and morality" are superseded by the Constitution.¹⁰⁸ In Malawi customary law applies in the criminal law context, however not if it is found to be "repugnant".¹⁰⁹ Customary laws that operate to deny women their guaranteed equality rights and allow for violence against women could be interpreted as "repugnant", and therefore denied constitutional protection. Such an interpretation would allow for women's human rights protections to trump customary law protections. However, how "repugnance" is interpreted is key. During the colonial period, the measure of repugnance in Malawi was the English legal and moral sense of

¹⁰⁵ See footnotes # 127, 160 161 and 162.

¹⁰⁶ *Judicature Act*, s. 3(2).

¹⁰⁷ *Abangana v. Akogo* [1977] GLR 382. Judgement of Justice Edward Wiredu.

¹⁰⁸ Article 26 of the 1992 Constitution.

¹⁰⁹ *In the matter of Kaluwa and Faiti*, as cited in Ngeyi Kanyongolo, "Customary Law and Women's Rights in Malawi" ACWHRP background paper, August, 2010 at 8.

repugnance.¹¹⁰ How repugnance gets defined and measured today could be an issue open to claims of cultural relativism, thereby further complicating the reconciliation of women's human rights and customary law. However, there is useful case law making clear that where customary law results in harm to women, such laws are considered "repugnant" – this case law could be helpful in establishing the right to the criminalization of marital rape. In Canada, there are no explicit constitutional mechanisms for balancing women's rights and arguments based on cultural or religious norms, however, courts have generally rejected cultural defences in sexual violence cases. Canadian courts and governments have yet to fully grapple with the implications of Indigenous sovereignty over interpersonal violence.¹¹¹

5. The Discriminatory Roots of the Historical Rationales for the Marital Rape Exemption:

i) Britain and Canada – The marital rape exemption in Britain and Canada was justified under three separate theories: the implied consent theory, the unities of person theory, and the property theory.¹¹² The implied consent theory is the rationale originally asserted by Sir Mathew Hale. The unity of person theory does not recognize the wife as a separate being capable of being raped. This theory stems from the belief that when two people marry, they become one. The being of the woman is incorporated into that of the husband such that the existence of the woman is effectively suspended during marriage. Marital rape is thus impossible because a husband is not capable of raping himself.¹¹³ Under the property theory, by marriage a woman becomes the property or chattel of her husband. Under this view, sexual intercourse can never be rape because the husband is merely "making appropriate use of his property."¹¹⁴

Jennifer Koshan identifies additional rationales for the marital rape exemption. Koshan writes that the rationales for the marital rape exemption also "focused on the evidentiary problems inherent in proving lack of consent in an ongoing marriage relationship, the alleged propensity of women to lie about rape to gain an advantage in divorce or matrimonial property proceedings, the importance of maintaining marital privacy and harmony, and the argument that marital rape was less serious than rape outside of marriage, and could in any event be sanctioned via criminal charges for assault and battery."¹¹⁵ The context within which marital rape rationales developed is also relevant. At the time that the rationales were developed in Britain, married women had no right to hold property, they had no right to sue in tort, and they had no personhood in law.

¹¹⁰ Benda-Beckmann F, *Legal Pluralism in Malawi: Historical Developments 1858 – 1970 and Emerging Issues 2007* as cited in Ngeyi Kanyongolo, "Customary Law and Women's Rights in Malawi" ACWHRP background paper, August, 2010 at 7.

¹¹¹ Jennifer Koshan, "The Legal Treatment of Marital Rape and Women's Equality: An Analysis of the Canadian Experience" September, 2010 at 3, 16 and 64

¹¹² Theresa Fus, Criminalizing marital rape: a comparison of judicial and legislative approaches. *Vanderbilt Journal of Transnational Law* March 01, 2006 at 1; see also Rebecca M. Ryan, "The Sex Right: A Legal History of the Marital Rape Exemption" 20 *Law & Soc. Inquiry*, 941, 1995; Joanna Bourke, *Rape: Sex, Violence, History* (Virago Press: Great Britain, 2007) at 307-316.

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

¹¹⁵ Jennifer Koshan, "The Legal Treatment of Marital Rape and Women's Equality: An Analysis of the Canadian Experience" September, 2010 at 11.

Marital rape exemptions, and the justifications supporting them, were developed at a time when women were excluded from the framing of criminal laws.

ii) Ghana, Kenya and Malawi: The rationales in support of the marital rape exemption in Ghana, Kenya and Malawi can be attributed to the same sexist rationales as supported the original development of the marital rape exemption in Britain, and later Canada. The construct of women as sexual property is the primary rationale justifying non-consensual sex in marital relationships in Africa.¹¹⁶ Traditionally in ACWHRP's African partner countries, customary law discouraged marital rape but did not prohibit it *per se*. Customary law leaders today usually exempt marital rape from the treatment they would apply to non-marital rape; the historical rationales for this exception seem to mirror the Western based rationales for impunity for marital rape. The same rationales identified by Koshan above relating to evidentiary problems, are also invoked in ACWHRP's African partner countries. For example, the rationale that the criminalization of marital rape will result in marital disharmony, and threaten the institution of marriage, is an argument raised in the customary law context to justify the maintenance of the legal impunity for marital rape.¹¹⁷

At the time that the law was colonized in ACWHRP's African partner countries, women's socio-political status in those countries, was similar to that of women in Britain when the marital rape exemption was first developed there – women were considered legal non-persons.¹¹⁸ Women's socio-political status in ACWHRP's African partner countries remains inferior to that of men today. During the time that the marital rape exemption was developed in Britain, reproduction was highly valued by society, and the right of a wife to say “no” was not respected, despite the fact that maternal mortality rates were high.¹¹⁹ Women's lives were defined by inequality in terms of social, political and economic relations. A similar situation currently exists in ACWHRP's partner countries.¹²⁰ In Britain, an artificial and self-serving division between the private and the public operated to define the issue of marital rape as a private issue, beyond the reach of the law.¹²¹ A similar situation currently exists in ACWHRP's African partner countries. The abolition of the marital rape exemption was opposed in Britain because it was thought that the ability to prosecute marital rape would threaten the institution of marriage (as though marital rape itself didn't constitute such a threat, and turn marriage into an institution of rape).¹²² A similar situation currently exists in ACWHRP's African partner countries.¹²³ Before the criminalization of marital rape, a man could be prosecuted for hitting his wife, but not for raping her. The same situation currently exists in ACWHRP's African partner countries.

¹¹⁶ Fareda Banda, *supra* at 172.

¹¹⁷ See for example, Seodi White, *supra* at 13-14.

¹¹⁸ For example, women won the right to vote in Ghana in 1954, in Kenya in 1946, and in Malawi in 1961.

¹¹⁹ Joanna Bourke, *Rape: Sex, Violence, History* (Virago Press: Great Britain, 2007) at 317.

¹²⁰ Elizabeth Archampong, “Marital Rape – A Women's Equality Issue in Ghana” ACWHRP background paper, September, 2010 at 3-8; Malawi CEDAW Report, United Nations, Committee on the Elimination of Discrimination Against Women, June 28, 2004; Kenya CEDAW Report, United Nations, Committee on the Elimination of Discrimination Against Women, October 16, 2006; Ghana CEDAW Report, United Nations, Committee on the Elimination of Discrimination Against Women, April 18, 2005.

¹²¹ *Op cit.*

¹²² *Ibid* at 322-323.

¹²³ Seodi White, *supra* at 13-14.

There are striking similarities and parallels between the historical rationales for the marital rape exemption in Britain and ACWHRP's partner countries, and also striking similarities in the contexts in which these rationales were grounded. The pervasive influence of British patriarchy and British colonialism has resulted in the on-going oppression of women in ACWHRP's partner countries. Canada has had a head start on de-colonizing its law, having entered into Confederation approximately 100 years before Ghana, Kenya and Malawi achieved independence.¹²⁴ Canada's experience with the criminalization of marital rape, having grown out of the same legal legacy as that inherited by ACWHRP's African partner countries, acts as a potential harbinger of things to come for ACWHRP's African partner countries. Understanding the historical origins of the legal treatment of marital rape, helps in understanding the current sexist treatment of marital rape claims in ACWHRP's partner countries, and makes it easier to anticipate the advantages and challenges of criminalizing marital rape based on the Canadian experience. The need to expose the source of the discriminatory rationales for the unequal legal treatment of marital rape claims is clear. There is also a need to provide comprehensive reform that addresses the discriminatory rationales for marital rape at every stage of the criminal justice process. In the Canadian context, the discrimination associated with the legal treatment of marital rape has shifted from legal impunity to the treatment of claimants' evidence and defences of consent. Law reform initiatives in the African context can anticipate this problem and avoid it, benefitting from the lessons learned in the Canadian context.¹²⁵

6. Equality Jurisprudence Can Support the Case for the Equal Legal Treatment of Marital Rape:

The need for, and obligation of, states to provide for the equal legal treatment of marital rape claims can be established through reliance on domestic equality jurisprudence.¹²⁶ The following analysis will consider how the equality jurisprudence of ACWHRP's partner countries can be used to support the equal legal treatment of marital rape.

i) Canada:

The Supreme Court of Canada's treatment of equality claims has been mixed.¹²⁷ Canada's Supreme Court initially made some promising headway in the treatment of equality claims

¹²⁴ Canada entered into Confederation in 1867; Ghana gained independence in 1957; Kenya gained independence in 1963; Malawi gained independence in 1964.

¹²⁵ Jennifer Koshan, "The Legal Treatment of Marital Rape and Women's Equality: An Analysis of the Canadian Experience" September, 2010 at 65-66.

¹²⁶ Under International Human Rights Law, it is generally accepted that a state has an obligation to protect and fulfill human rights guarantees. The due diligence standard of state responsibility for human rights abuses committed by non-state actors, including husbands, is well established. There are also multiple international and regional human rights mechanisms and law that can be referenced to interpret domestic human rights guarantees and support the argument that the state must protect against marital rape. Analyses of how these legal arguments and instruments could be used to support a claim for the equal treatment of marital rape law are developed in the ACWHRP background paper, "International Human Rights Law and Marital Rape" by Vasanthi Venkatesh. An analysis of how conflicts between Constitutional customary law protections and women's human rights protections can be resolved is developed in the ACWHRP background paper, "Comparative Customary Law" by Vasanthi Venkatesh.

¹²⁷ Section 15 of the *Canadian Charter of Rights and Freedoms* reads:

when Canada's new constitutional equality provisions were first introduced in 1985. More recently, the Supreme Court has adopted a more conservative and regressive approach to its treatment of equality claims. Women seeking to achieve equality relating to the legal treatment of sexual violence claims have met with mixed results at the Supreme Court of Canada. The Canadian *Charter* gives governments the mandate and obligation to make laws more responsive to the various realities of women's lives, such as sexual violence¹²⁸; unfortunately the Supreme Court of Canada has been somewhat reticent about enforcing these obligations. There is a disparity between the potential of the *Charter* to advance women's equal treatment under the law and women's everyday fear of assault, fear in the assault and fears of the response of the criminal justice system to the assault, including how marital rape cases will be treated by the criminal justice system. Women's guaranteed *Charter* rights to equality and life, liberty and security of the person need to be used to interpret and support the law so that it protects women from the sexual violence they are forced to experience and conditioned to fear. While some progress has been made in certain cases to achieve this goal, the project is far from complete.

Claims for women's equality in the context of sexual violence do not generally involve direct *Charter* challenges. In other words, the cases do not claim that the treatment at issue involves a direct breach of the equality provisions of the *Charter*.¹²⁹ The cases generally arise in the context of accused men challenging sexual assault laws within the criminal justice system and usually involve a balancing of the rights of the accused and the claimant. Constitutional equality jurisprudence provides interpretive guidance in addressing claims for the equal treatment of cases involving violence against women. The principles developed in the equality law context certainly inform the consideration of claims for equal treatment of sexual assault claims. And it is

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.

(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.

The guaranteed rights set out in the *Charter*, including the s. 15 equality rights, are subject to the limitations found in s.1 of the *Charter*. Section 1 of the *Charter* reads:

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.

¹²⁸ Sheilah L. Martin, "Some Constitutional Considerations on Sexual Violence Against Women", (1994) 32 *Alta. L. Rev.* (No. 3) 535.

¹²⁹ An exception are cases brought in the civil context as opposed to the criminal law context, for example, *Doe v. Metropolitan Toronto (Municipality) Commissioners of Police* (1998) 39 O.R. (3d) 487, online: QL (O.R.). The *Doe* case dealt with claims of discriminatory police treatment, in violation of s.15 of the *Charter*, in the 1986 rape of Jane Doe in Toronto, Canada. The trial judge, McFarland J., accepted that rape is a form of violence and an act of power and control, and reviewed the oppressive impact that rape and the fear of rape has on women (*Doe* at para. 8-9). She accepted that women do not report rape because they feel re-victimized by the justice system (*Doe* at para. 10). She also noted studies demonstrating police adhere to sexist rape myths, myths that are prevalent in society in general, and must be considered as part of the context in which the plaintiff's claim was based (*Doe* at paras. 11-13). McFarland J. found that the government's failure to address women's safety and security concerns with the police treatment of sexual assault contributed to the violation of Jane Doe's *Charter* right to equality, resulting in legal liability for damages suffered (*Doe* at para. 37, 164-166 and 169-170). The case was not appealed. When a case dealing with similar issues was appealed to the Supreme Court of Canada by the claimant in the case who had been unsuccessful in the lower courts, the Supreme Court dismissed the appeal with costs (*Mooney v. British Columbia (Attorney General)*, March 3, 2005, 30546).

interesting to note a similar vacillation by the Court, both respect to its treatment of equality claims brought as direct *Charter* challenges, and its treatment of women's equality in the context of sexual violence claims.

Section 15 of the *Canadian Charter of Rights and Freedoms* came into effect in April, 1985. Section 15's dual purpose is to prevent discrimination **and** to promote equality. In the Supreme Court of Canada's first decisions involving the application of s. 15, it was decided that the purpose of the *Charter's* equality rights guarantees was "to remedy historical disadvantage."¹³⁰ The major goal for equality rights advocates was to ensure that the *Charter's* equality guarantees provided for substantive equality, rather than just formal equality. In the early s.15 cases, *Andrews* and *Turpin*¹³¹, the Supreme Court reached the important conclusion that the *Charter's* equality guarantees provide for substantive equality rather than just formal equality. The Court decided that "equality may well require differentiation in treatment".¹³² The Court found that in determining whether there is discrimination it is important to look at:

The larger social, political and legal context. ... Accordingly, it is only by examining the larger context that a court can determine whether differential treatment results in inequality or whether, contrariwise, it would be identical treatment which would in the particular context result in inequality or foster disadvantage.¹³³

The endorsement of contextualized analyses represented a significant advancement for equality rights law. As discussed above, a contextualized approach allows equality claimants to educate the judiciary about their actual experiences, contributing to the broadening of the theoretical base of the legal concept of equality, and providing for improved legal reasoning grounded in more informed understandings of experiences of discrimination.

In subsequent cases, the Court adopted a number of other important interpretative principles that contributed to the early equality rights progress that was made under s. 15 of the *Charter*. For example, the Court decided that *Charter* rights must be given large and liberal interpretations that are purposive and meaningful.¹³⁴ Unfortunately, starting in 1995, the Supreme Court started to shift its approach to equality and it became more regressive in its decision making. The Court often reverted to a formal equality and a de-contextualized approach to equality claims. The result was that the scope of s. 15 was restricted, and the ability to access justice for disadvantaged persons was limited.¹³⁵ This regressive decision making developed in the context of equality

¹³⁰ *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *R. v. Turpin*, [1989] 1 S.C.R. 1296.

¹³¹ *Ibid.*

¹³² *Andrews*, *supra* at 165.

¹³³ *Turpin*, *supra* at para. 45.

¹³⁴ *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at 156-157.

¹³⁵ Beverley Baines, "Equality, Comparison, Discrimination, Status", in Fay Faraday, Margaret Denike and M. Kate Stephenson, eds., *Making Equality Rights Real: Securing Substantive Equality under the Charter* (Toronto: Irwin Law, 2006) 73; Daphne Gilbert, "Time to Regroup: Rethinking Section 15 of the *Charter*" (2003), 48 McGill L.J. 627; Daphne Gilbert and Diana Majury, "Critical Comparisons: The Supreme Court of Canada Dooms Section 15" (2006), 24 Windsor Y.B. Access Just. 111; Debra M. McAllister, "Section 15 — The Unpredictability of the Law Test" (2003-2004), 15 N.J.C.L. 3; Sheila McIntyre, "Deference and Dominance: Equality Without Substance", in Sheila McIntyre and Sanda Rodgers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham, Ont.: LexisNexis Butterworths 2006) 95; Mayo Moran, "Protesting Too Much: Rational Basis Review Under Canada's Equality Guarantee", in Sheila McIntyre and Sanda Rodgers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham, Ont.: LexisNexis Butterworths, 2006) 71;

claims that made significant demands on the public purse, for example, claims for equal access to government benefits, pay equity claims, and claims for equal access to health services.¹³⁶ The Court's more recent deference to government policy and practice, and its concern with the cost of human rights, can be understood to constitute an inappropriate politicisation of the Court, in line with the adoption of conservative fiscal values of the Canadian government and some international governments.

There has been some promising progress in Canada in the context of sexual assault law. This progress may have been shaped by the Supreme Court's early progress in the context of its equality analyses relating to s. 15 equality claims. The Court's thinking relating to sexual violence also followed advances made in the human rights context that recognized the social construct of sex discrimination, and its disadvantageous impact on women.¹³⁷ There are examples of jurisprudence in which the Supreme Court of Canada has recognized sexual assault as an equality issue which engages women's autonomy. In these cases the Court has rejected traditional social constructions of gender in which discriminatory thinking about women and rape were reproduced. The Court has favoured more equitable understandings of women's experience of sexual assault, in which the experience is understood in terms of power and control. The Court in these cases came to recognize that gender is an inequality, constructed as a socially relevant differentiation in order to maintain the inequality of women. While the Supreme Court has not been unanimous or unconditional in its recognition of women's equality rights in the context of sexual assault, it has advanced its thinking to include at least a limited recognition and endorsement of women's equality rights.¹³⁸

The Supreme Court of Canada has found that s. 15 of the *Charter* entitles a sexual assault claimant to the equal benefit and protection of the *Criminal Code*. The claimant's right to the fair administration of justice in the context of sexual assault trials is now well established.¹³⁹ It is also well established that the right of the accused to make full answer and defence does not include the right to information that would only distort the truth-seeking goal of the trial process. The Supreme Court stated in *R. v. Osolin*:

The provisions of ss. 15 and 28 of the *Charter* guaranteeing equality to men and women, although not determinative should be taken into account in determining the reasonable limitations that should be placed upon the cross-examination of a complainant.... A complainant should not be unduly harassed and pilloried to the extent of becoming a

Sophia Reibetanz Moreau, "Equality Rights and the Relevance of Comparator Groups" (2006), 5 J.L. & Equality 81; Dianne Pothier, "Equality as a Comparative Concept: Mirror, Mirror, on the Wall, What's the Fairest of Them All?", in Sheila McIntyre and Sanda Rodgers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham, Ont.: LexisNexis Butterworths, 2006) 135.

¹³⁶ *Egan v. Canada*, [1995] 2 S.C.R. 513; *Law v. Canada* [1999] 1 S.C.R. 497; *Newfoundland (Treasury Board) v. N.A.P.E.*, [2004] 3 S.C.R. 381; *Auton v. British Columbia*, [2004] 3 S.C.R. 657.

¹³⁷ *Brooks v. Canada Safeway* [1989] 1 S.C.R. 1219.

¹³⁸ Women's equality groups have done a good job of advocating for the deconstruction of the relevant power differentials and the advancement of women's equality rights in the criminal justice context. For example, the judiciary has been educated about how the introduction of socially constructed rape myths into evidence law disadvantages women as primary witnesses in sexual assault cases, and has upheld legislation designed to protect women's equality rights in sexual assault cases (*R. v. Mills* [1999] 3 S.C.R. 668, and *R. v. Darrach* [2000] 2 S.C.R. 443).

¹³⁹ *R. v. Mills* [1999] 3 S.C.R. 668.

victim of an insensitive judicial system.... (*R. v. Osolin* 1993: 669-70; see also *R. v. Mills* 1999: 668 at para. 90)

Elsewhere the Supreme Court has held that “[t]he accused is not permitted to ‘whack the complainant’ through the use of stereotypes regarding victims of sexual assault.”¹⁴⁰

The Supreme Court took a strong stand against the introduction of sexist myths and stereotypes into sexual assault cases in its 1999 decision in *R. v. Ewanchuk*. The accused in *Ewanchuk* tried to argue the novel defence of ‘implied consent’, based upon sexist myths and stereotypes about women’s willingness to engage in sex. The Court’s decision included recognition of how the social construction of gender contributes to the idea that women do not have the right to full control over their bodies, and the right to refuse sex. The Court found that no such defence of “implied consent” existed and shut down the myths and stereotypes advanced by the accused, which had also been endorsed by a majority of the Alberta Court of Appeal. L’Heureux- Dubé, J. stated in *Ewanchuk* that:

Complainants should be able to rely on a system free from myths and stereotypes, and on a judiciary whose impartiality is not compromised by these biased assumptions. The (*Criminal*) Code was amended in 1983 and in 1992 to eradicate reliance on those assumptions; they should not be permitted to resurface through the stereotypes reflected in the reasons of the majority of the Court of Appeal. It is part of the role of this Court to denounce this kind of language, unfortunately still used today, which not only perpetuates archaic myths and stereotypes about the nature of sexual assaults but also ignores the law.

In "The Standard of Social Justice as a Research Process" (1997), 38 *Can. Psychology* 91, K. E. Renner, C. Alksnis and L. Park make a strong indictment of the current criminal justice process, at p. 100:

The more general indictment of the current criminal justice process is that the law and legal doctrines concerning sexual assault have acted as the principle [sic] systemic mechanisms for invalidating the experiences of women and children. Given this state of affairs, the traditional view of the legal system as neutral, objective and gender-blind is not defensible. Since the system is ineffective in protecting the rights of women and children, it is necessary to re-examine the existing doctrines which reflect the cultural and social limitations that have preserved dominant male interests at the expense of women and children.¹⁴¹

L’Heureux- Dubé J.’s strong and clear articulation of the need for the law to operate in support of women’s equality rights represents a positive example of how the truth of women’s experiences can be recognized by the law. However, the public criticism aimed at L’Heureux- Dubé J. following the release of this decision made it clear that true equality for women in Canada remains an elusive goal.¹⁴²

¹⁴⁰ *Ibid* at para. 90.

¹⁴¹ *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 at paras. 95 and 96.

¹⁴² See Constance Backhouse, “The Chilly Climate for Women Judges: Reflections on the Backlash from the *Ewanchuk* Case”, (2003) 15 *CJWL* at 167.

While the Supreme Court has made some useful progress recognizing women's equality rights in the context of sexual assault, progress that could be applied to argue in support of the equal treatment of marital rape claims, the Court's analyses have not been entirely unproblematic. It is important to be aware of weaknesses in the Court's sexual violence decisions. For example, in *R. v. Mills* the Court did recognize that complainants must be treated with dignity and respect when they come forward after a sexual assault¹⁴³, and the Court recognized the role that sexist myths and stereotypes play in applications for personal records¹⁴⁴. However, the Court's equality analysis in *Mills* appears almost as an after thought. The Court's primary concern in *Mills* with respect to the claimant's rights, is its concern with the claimant's privacy "interest" (not a recognized "right" *per se*).¹⁴⁵ The Court's equality analysis is thin and undeveloped compared to the Court's analysis of the accused's right to make full answer and defence, and its analysis of the claimant's privacy interests. While the Court's decision in *Mills* represents an improvement on its earlier decisions dealing with access to personal records¹⁴⁶, there are some fundamental problems with the decision. The Court's decision on the balancing of the parties' interests was left open to an interpretation that could easily be applied to the detriment of the claimant through the application of sexist myths and stereotypes by trial judges. The Court relies on the concepts of probative value and relevance in its analysis, concepts that can be value laden and can operate to the disadvantage of women.¹⁴⁷

The disadvantage for women resulting from the application of theoretically neutral legal concepts, such as relevance, is well established. Mary Jane Mossman and Brett Dawson have both examined the disadvantage historically experienced by women through the application of concepts such as relevance.¹⁴⁸ In *Mills* the Supreme Court did repeatedly state that the right to make full answer and defence does not include the right to information that would only distort the truth-seeking goal of the trial process.¹⁴⁹ However, this limitation on the accused's rights was repeatedly linked to the concept of relevance, or irrelevance¹⁵⁰, which means that the delineation of the boundaries of full answer and defence can be easily blurred, putting the claimant's equality rights at risk. The Court did state that "Equality concerns must also inform the contextual circumstances in which the rights of full answer and defence and privacy will come into play" and that in this respect, an appreciation of myths and stereotypes that operate in the context of sexual violence is essential.¹⁵¹ However, the analysis was not developed as to why equality "concerns" (rather than 'rights') must inform the rights of full answer and defence and privacy, leaving the claimant's equality rights at risk.

¹⁴³ *Op Cit* at para. 91.

¹⁴⁴ *Ibid* at para. 90.

¹⁴⁵ Lise Gotell has argued that the Court's focus on privacy interests in *Mills* undermines the protections that the legislative regime sought to erect; see Lise Gotell, "The Ideal Victim, the Hysterical Complainant, and the Disclosure of Confidential Records: The Implications of the Charter for Sexual Assault Law", (2002) 40 Osgoode Hall L.J. 251.

¹⁴⁶ See *R. v. O'Connor* [1995] 4 S.C.R. 411.

¹⁴⁷ *Mills*, *supra* at paras. 74, 76, 89, 90 and 94.

¹⁴⁸ Mary Jane Mossman, "Feminism and Legal Method: The Difference it Makes" (1986) 3 Australian Journal of Law and Society 30; B. Dawson, "Sexual Assault Law and Past Sexual Conduct of the Primary Witness: The Construction of Relevance" (1987-88), CJWL 310.

¹⁴⁹ *Mills*, *supra* at paras. 74, 76, 89, 90 and 94.

¹⁵⁰ *Ibid* at paras. 74 and 89.

¹⁵¹ *Ibid* at para. 90.

To ensure that sexual assault law, including marital rape law, reflects the realities of women's experiences, the courts need to recognize the risks associated with a reliance on concepts such as relevance, including the potential to reinforce the traditional sexist status quo. Courts also need to develop thoroughly the equality rights analyses applied to sexual assault law, and to provide trial judges with clear instructions about how to weigh the different rights at issue, and to ensure transparency of the value preferences that inform the decision making process. The value of the Supreme Court of Canada's equality analysis in *Mills* was diminished because it failed to recognize the biases that can be imported into an analysis through the use of legal principles such as relevance, and because it failed to provide clear direction with respect to how equality rights analyses concerning records applications should be applied by trial judges.¹⁵²

When the issue of records disclosure in a sexual assault case came before the Supreme Court again in 2002 in *R. v. Shearing*¹⁵³, a majority of the Supreme Court of Canada framed the issue as an issue of privacy and did not include an equality analysis in its reasoning. The result was a gender neutral analysis that worked to reduce the important relevance of women's lived experiences in the context of sexual assault. This decision represents a retreat from the Court's reasoning in *Mills*, and confirms that women's equality relating to sexual assault law is still not guaranteed in Canada.

In assessing the potential for Canadian law to contribute to the advancement of women's rights in the context of the legal treatment of marital rape, the Supreme Court's problematic treatment of gendered disability and race should also be noted. The Court's decision in *R. v. Parrott*¹⁵⁴ provides a classic example of the failure to understand the experience of gendered disability, and the judiciary's failure to protect the equality rights of disabled women. The crimes at issue in *Parrott* (assault causing bodily harm, sexual assault and kidnapping of a 38 year old woman with Downs syndrome from the hospital where she was a resident patient¹⁵⁵), were all crimes of gendered disability. The accused targeted the claimant specifically because she was a disabled woman, and the experience of gendered disability was therefore central to the case. However the Court did not appreciate the relevance of the multiple axes of identity that defined the claimant in *Parrott*, and which entitled her to equality rights guarantees pursuant to s. 15 of the *Charter*. The Court in *Parrott* segregated the claimant's personal characteristics into independent, free-standing categories, which did not represent the reality of her experience.¹⁵⁶

The equality rights issue in *Parrott* was the claimant's entitlement to the equal benefit and protection of the provisions of the *Criminal Code*, specifically sections 279(1) and 272(1)(c) prohibiting kidnapping and sexual assault causing bodily harm. To ensure the claimant's equal

¹⁵² The problem with leaving decisions about records applications to the discretion of trial judges where discriminatory myths and stereotypes can factor into the judicial reasoning about these applications is studied by Jennifer Koshan in her article, "Disclosure and Production in Sexual Violence Cases: Situating *Stinchcombe*" (2002) 40 *Albt. L. Rev.* 655. Koshan concludes that the risk of trial judges deciding these cases on case by case base, is the reason why an absolute ban on records production is the preferred option in terms of providing for women's equality in this context.

¹⁵³ *R. v. Shearing*, [2002] 3 S.C.R. 33.

¹⁵⁴ *R. v. Parrott*, [2001] 1 S.C.R. 178.

¹⁵⁵ *Ibid* at para. 31.

¹⁵⁶ Fiona Sampson, "Beyond Compassion and Sympathy to Respect and Equality: Gendered Disability and Equality Rights Law" in *Critical Disability Theory: Essays in Philosophy, Politics, Policy and Law*, Dianne Pothier and Richard Devlin, eds., (Vancouver: UBC Press, 2004) 267 at 272-277.

benefit and protection of these laws, the evidentiary rulings made in the case had to respect the equality rights guarantees in s.15 of the *Charter*. The claimant had the right to be protected from an application of evidence rules that advance discriminatory thinking about disabled women, and/or that unfairly disadvantage her because she is a woman with a disability. Unfortunately the Supreme Court did not recognize these rights.¹⁵⁷ In its decision in *Parrott*, the Court didn't get the gendered disability equality analysis wrong – it just didn't get it at all.

Similarly, the Supreme Court failed to appreciate the gendered race issues central to the 2005 appeal of *R. v. Edmondson*. *Edmondson* dealt with the sexual assault of a 12 year old Aboriginal girl in rural Canada by several white men. Only one of the three men charged was convicted¹⁵⁸, and he received a minimal sentence – 2 years of home detention; he spent no time in jail. The Supreme Court refused to hear the Crown's appeal of the *Edmondson* case. As is normal practice, the Court did not provide reasons for its refusal to hear the appeal. Clearly the Court did not appreciate the discrepancy in the sentencing in the case, and did not appreciate how the issue of gendered racism had factored into the results in the case as it found no need to review the lower courts' decisions, including the trial judge's victim blaming rationale informed by gendered racism¹⁵⁹. The Court's failure to grant an appeal in *Edmondson* demonstrates its failure to appreciate the disadvantage experienced by women outside of the dominant norm within the criminal justice system, and how gendered racism operates in sexual assault law to contribute to the perpetuation of the devaluation of Aboriginal women. The Supreme Court of Canada's decisions in *Parrott* and *Edmondson* demonstrate the challenges with advancing intersectional equality analyses, and making sexual assault law accessible to women outside of the dominant norm.

iii) Equality Jurisprudence in Kenya, Malawi and Ghana:

The equality law jurisprudence in ACWHRP's African partner countries is not yet well developed, as the constitutional equality provisions in these countries were introduced more recently than the Canadian equality provisions. This creates a strategic advantage in that the jurisprudence has not developed to the disadvantage of equality claimants, and the existing equality guarantees are still open to a broad and purposive judicial interpretation. Protection against sex discrimination was added to the Kenyan Constitution in 1997¹⁶⁰; it was included in the Malawian Constitution in

¹⁵⁷ The majority of the Supreme Court found in favour of the accused in *Parrott*. The Court held that the claimant's hearsay evidence was inadmissible and that she should have been made to testify at the voir dire, to determine whether she was capable of testifying at the trial. The Court did not appreciate the equality rights issues implicated by forcing the claimant to testify in this case, which would have exposed her to further disadvantage associated with her gendered disability status.

¹⁵⁸ The Crown refused to appeal the decision against one of the co-accused despite the fact that the defence of mistaken belief in consent was left with the jury when there was no evidence to support that defence, as required by the Supreme Court of Canada in *Ewanchuk*. (see Lucinda Vandervort, "Legal Subversion of the Criminal Justice Process? Judicial, Prosecutorial and Police Discretion in *R. v. Edmondson, Kindrat and Brown*." in *Sexual Assault Law, Practice and Activism in a Post-Jane Doe Era*", Elizabeth Sheehy, ed. (forthcoming 2011: University of Ottawa Press, Ottawa).

¹⁵⁹ Lise Gotell, "Rethinking Affirmative Consent in Canadian Sexual Assault Law: Neoliberal Sexual Subjects and Risky Women" 41 *Akron Law Review* 2008 865 at 891-893.

¹⁶⁰ Kenya's 1997 Constitutional equality provision is found in section 82 and reads: (1) Subject to subsections (4), (5) and (8), no law shall make any provision that is discriminatory either of itself or in its effect. [FN: 9 of 1997, s. 9,]

1994¹⁶¹, and it was included in the Ghanaian Constitution in 1992¹⁶². The constitutional equality provisions in each of these countries prohibit discrimination on the basis of sex (Kenya and Malawi)

(2) Subject to subsections (6), (8) and (9), no person shall be treated in a discriminatory manner by a person acting by virtue of any written law or in the performance of the functions of a public office or a public authority.

(3) In this section the expression “discriminatory” means affording different treatment to different persons attributable wholly or mainly to

their respective descriptions by race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex

whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made

subject or are accorded privileges or advantages which are not accorded to persons of another such description.

(4) Subsection (1) shall not apply to any law so far as that law makes provision—

(a) with respect to persons who are not citizens of Kenya;

(b) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law;

(c) for the application in the case of members of a particular race or tribe of customary law with respect to any matter to the exclusion of

any law with respect to that matter which is applicable in the case of other persons; or

(d) whereby persons of a description mentioned in subsection (3) may be subjected to a disability or restriction or may be accorded a

privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to persons of any

other such description, is reasonably justifiable in a democratic society.

On August 4th, 2010 a new Constitution was approved by referendum in Kenya; the Constitution was promulgated on August 27, 2010. The new equality provisions are found in section 27 and read:

(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

(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.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

(6) To give full effect to the realisation of the rights 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.

(7) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.

(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.

¹⁶¹ Malawi’s Constitutional equality provision is found in section 20 and reads:

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.

2. Legislation may be passed addressing inequalities in society and prohibiting discriminatory practices and the propagation of such practices and may render such practices criminally punishable by the courts.

or gender (Ghana). Until August, 2010 Kenya's Constitution included a provision that exempted from the equality guarantees laws relating to adoption, marriage, divorce, burial, and devolution of property on death. This provision was excluded from the new Constitution approved by referendum on August 4, 2010.

In Kenya there is High Court jurisprudence dealing with the issue of sex discrimination that establishes useful precedent that could be relied upon in a challenge to support the equal legal treatment of marital rape. The relevant Kenyan High Court jurisprudence relates to estate distribution cases that discuss the issue of discrimination within the context of discriminatory inheritance practices under Kenyan customary law; all of the cases were decided in favour of the principle of equality and allowed the female beneficiaries the right to inherit.¹⁶³ In considering this issue, the Court cited to CEDAW and other human rights treaties and principles, as well as to Kenya's constitutional equality provisions.¹⁶⁴ The High Court states in *In Re Estate of Solomon Ngatia Kariuki (Deceased)* that Kenya must be "in sync[h] with the modern world" with respect to gender equity and equality.¹⁶⁵ In *Re the Estate of Lerionka Ole Ntutu [Deceased]* the High Court noted that prohibition against sex discrimination was added to the Kenyan Constitution in 1997 in order to comply with international obligations:

In the circumstances, one can safely presume that the said amendment was found to be necessary after Kenya was exposed to international laws, its values and spirit. Kenya was aware of the discriminatory treatment of women in all aspects of customary and personal laws. Hence Kenya knowingly and rightly took a bold step to eliminate the discrimination of all manners and types against women. That is where the country's aspiration has reached and has rightfully intended to stay.¹⁶⁶

In re Estate of Grace Nguhi Michobo [Deceased] [2004] (High Court of Kenya at Nairobi) the High Court concluded that:

to prevent a daughter from inheriting solely ... based on her gender..., this would go against the very grain of equal treatment of all human beings before the law which is a fundamental right under our constitution. It will also be against the principles of equality and elimination of discrimination against women as expanded in the United Nations

¹⁶² Ghana's Constitutional equality provisions are found in sections 15 and 17 and read:

15 "[t]he dignity of all persons shall be inviolable,"

15(2) "[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."

17(1) ... "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."

¹⁶³ *In Re Estate of Solomon Ngatia Kariuki (Deceased)* [2008] eKLR (High Court of Kenya at Nyeri); *In Re the Estate of Lerionka Ole Ntutu [Deceased]* [2008] eKLR (High Court of Kenya at Nairobi); *In re Estate of Grace Nguhi Michobo [Deceased]* [2004] (High Court of Kenya at Nairobi); *Festus Madegwa Ashimolela & another v. Zembeter Akala Samuel* [2006] eKLR (High Court of Kenya at Kakamega).

¹⁶⁴ *In Re Estate of Solomon Ngatia Kariuki (Deceased)* [2008] eKLR (High Court of Kenya at Nyeri) at p. 10; *In Re the Estate of Lerionka Ole Ntutu [Deceased]* [2008] eKLR (High Court of Kenya at Nairobi) at p. 4, 5 and 6; *In re Estate of Grace Nguhi Michobo [Deceased]* [2004] (High Court of Kenya at Nairobi) at p. 10; *Festus Madegwa Ashimolela & another v. Zembeter Akala Samuel* [2006] eKLR (High Court of Kenya at Kakamega) at p. 3.

¹⁶⁵ *In Re Estate of Solomon Ngatia Kariuki (Deceased)* [2008] eKLR (High Court of Kenya at Nyeri) at p. 10.

¹⁶⁶ *In Re the Estate of Lerionka Ole Ntutu [Deceased]* [2008] eKLR (High Court of Kenya at Nairobi) at p.6.

Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) which Kenya signed and ratified in 1984.¹⁶⁷

In *Festus Madegwa Ashimolela & another v. Zembeter Akala Samuel* [2006] eKLR (High Court of Kenya at Kakamega) the High Court concluded:

The Luhya custom which was cited as the authority for the proposition that Luhya married women are not allowed to inherit has no place in Kenya's modern society as it is repugnant to justice. It is also discriminatory because if married sons can inherit there is no reason or rhyme (sic) why married daughters cannot also inherit. That custom is out of step with modernity as it does not have regard to gender parity.¹⁶⁸

While sexual assault has not been recognized as a form of sex discrimination in Kenya, progress has been made in the family law context recognizing marital rape as a form of cruelty justifying the dissolution of a marriage. In *Esther Nangwana Nandi versus John Chewe Bobo*¹⁶⁹ the petitioner – wife sought dissolution of her marriage on the grounds of cruelty and adultery because the respondent had assaulted her, locked her out of their matrimonial home, and forced her to have sex with him while he was drunk. The High Court found that the respondent's behaviour constituted cruelty that endangered the petitioner's life and health. In *Nandi v. Bobo* the court demonstrated that it had no hesitation in finding that in the absence of consent sex, even within a marriage, was an act of cruelty by the respondent and hence a ground for divorce.¹⁷⁰

In Malawi there is useful High Court case law addressing the issue of sex discrimination in the context of the dissolution of marriage and maintenance, *Peng Aichun Vaux v. John Vaux*.¹⁷¹ In *Vaux* the husband was accused of violent and threatening behaviour towards his wife, threatening to beat her, grabbing her around the neck, taking money from her purse, and shouting at her in front of their child. The Court granted the dissolution of the marriage and in so doing cited the *Declaration on the Elimination of Violence against Women* and other human rights principles. The Court held:

The *Declaration on the Elimination of Violence against Women* provides in Article 1 that:

'For the purposes of this Declaration, the term 'violence against women' means any act of gender- based violence that results in, physical, sexual or psychological harm or suffering to women including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.'

¹⁶⁷ *In re Estate of Grace Nguhi Michobo [Deceased]* [2004] (High Court of Kenya at Nairobi) at p. 10.

¹⁶⁸ *Festus Madegwa Ashimolela & another v. Zembeter Akala Samuel* [2006] eKLR (High Court of Kenya at Kakamega) at p. 3.

¹⁶⁹ Nairobi High Court Divorce Cause No. 84 of 2005.

¹⁷⁰ Patricia Nyundi and Jane Serwanga, "The Legal Impunity for Marital Rape in Kenya: A Women's Equality Issue" ACWHRP background paper, July, 2010 at 8.

¹⁷¹ *Peng Aichun Vaux v. John Vaux* (High Court of Malawi Lilongwe District Registry) (2007).

The petitioner testified that she suffered diverse acts of violence including violence and threats of violence as a result of her marriage to the respondent. No doubt the respondent took advantage of the unequal power relations between him and the petitioner which resulted in psychological suffering to the petitioner. ... The evidence on record clearly shows that the respondent had no respect for the equal rights of the petitioner as an equal partner in the marriage relationship. Women, as provided by Article 3 of the same, are:

‘entitled to the equal enjoyment and protection of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.’

The rights and freedoms include:

- ‘a) the right to equality;
- b) the right to liberty and security of the person;
- ...¹⁷²

A lower court decision in Malawi provides useful precedent for the principle that sexual assault constitutes sex discrimination. *Phiri v. Smallholder Coffee Farmers Trust*¹⁷³ is a case of workplace sexual assault. The petitioner, a woman, was employed at the defendant company with a man who attempted to rape her in the workplace. The defendant company held a conduct hearing and accused the petitioner of misconduct for revealing to the public a private workplace event. The Court overturned the company’s findings and held that sexual harassment was a form of discrimination based on gender and sex. The Court concluded:

It has been said that sexual harassment is a form of discrimination on the basis of gender. It is on the basis that sexual harassment tends to prevail against women more than men and this is because of gender roles created in the workplace. This court shares the view that sexual harassment is a form of discrimination on the basis of gender and sex.¹⁷⁴

The Court in *Phiri* went on to find that:

Victims of sexual harassment fear that they would be labelled women of low morals and that they provoked the perpetrator to behave in the manner that he did. They refrain from reporting the matter to the authorities for fear of such repercussions.¹⁷⁵

The Court in *Phiri* held that the dismissal of the petitioner from her job was unfair, that the defendant violated the petitioner’s personal dignity, and that the dismissal had breached the petitioner’s matrimonial peace and harmony as her husband no longer trusted her.¹⁷⁶

¹⁷² *Peng Aichun Vaux v. John Vaux* (High Court of Malawi Lilongwe District Registry) (2007) at p. 3.

¹⁷³ *Phiri v. Smallholder Coffee Farmers Trust (Industrial Relations Court of Malawi, Mzuzu Registry)* (2007).

¹⁷⁴ *Phiri v. Smallholder Coffee Farmers Trust (Industrial Relations Court of Malawi, Mzuzu Registry)* (2007) at p. 2.

¹⁷⁵ *Phiri v. Smallholder Coffee Farmers Trust (Industrial Relations Court of Malawi, Mzuzu Registry)* (2007) at p.4.

¹⁷⁶ *Phiri v. Smallholder Coffee Farmers Trust (Industrial Relations Court of Malawi, Mzuzu Registry)* (2007) at p. 4.

iii) *The Application of Equality Jurisprudence to Achieve the Equal Legal Treatment of Marital Rape:*

In all of ACWHRP's partner countries there is useful jurisprudence that could be relied upon to support the equal legal treatment of marital rape claims; there are also weaknesses with the established jurisprudence that need to be addressed. Madame Justice Claire L'Heureux-Dubé, formerly of the Supreme Court of Canada, has provided strong and clear articulation of the need for sexual assault law to operate in support of women's equality rights –women's experiences of marital rape similarly need to be recognized as grounded in inequality, and need to be recognized as the result of systemic power differentials that disadvantage women.

The original equality principles established in the Canadian jurisprudence provide a useful reference for analysing the equality claims of sexual violence victims, including marital rape claims. The need to include contextual analyses, as determined in the early Canadian *Charter* jurisprudence, is critical to ensuring that women's lived experiences are at the heart of any consideration of violence based equality claims. This analysis should help courts to understand the discriminatory nature of the experience, and it should help to identify the root source of the discrimination. The principle of applying a broad and purposive approach to equality claims is also useful to the progressive development of sexual violence claims. Such an approach should help to direct the Court to consider the context of the experience as endemic to the problem, and to direct the Court to address the systemic nature of the problem. Recognition of the fact that to achieve meaningful, substantive equality, it may be necessary to require differential treatment rather than treating all parties the same, is important in the sexual violence context. If sexual assault victims are treated the same as victims of gender neutral crimes it would deny claimants the accommodation that is often necessary to ensure that they are not re-victimized by the process or by the myths and stereotypes applied in that process. The fact that crimes of sexual violence demand separate treatment under criminal codes emphasizes the unique and differential nature of the crime.

In all of ACWHRP's partner countries, a victim of marital rape could argue that the state's failure to provide for equal treatment of marital rape claims violates her constitutional right to equal treatment under the law. Married women are entitled to the equal benefit and protection of the law. Marital rape law should be premised on recognizing and protecting women's equality and sexual autonomy, as the courts have done in different related contexts in Canada, Kenya and Malawi; if the law fails in this respect, it constitutes an unjustifiable violation of the human rights guaranteed all women. This is true at all stages of the law making, enforcement and application process, and imposes obligations on legislators, police, prosecution and defence lawyers, and judges.

The Canadian and Malawian recognition of sexual violence as a form of sex discrimination provides a strong foundation for the recognition of marital rape as a form of sex discrimination – there is no non-discriminatory reason to exclude marital rape from the protection of the criminal law. Marital rape, once recognized as a form of sex discrimination, attracts the protection of equality guarantees that can be applied to support the recognition of women's sexual autonomy in marriage, and a woman's right to exercise full control over her body. The Kenyan case law recognizing marital sexual violence as a form of cruelty could be used as precedent to argue that there has been acknowledgement by the civil division of the Kenyan High Court that there can be

non-consensual sexual relations between a married couple, and that such violence constitutes cruelty and therefore sex inequality. It could be argued that the state's failure to protect against such cruelty by failing to criminalize marital rape constitutes a violation of the constitutional equality rights of women.

The Kenyan High Court's decisions in the cases discussed above could be of general guidance regarding the courts' willingness to cite international human rights instruments, as well as the country's equality provisions in the context of sex discrimination. These cases could be useful as precedent to counter any arguments in favour of legal impunity for marital rape based on customary law that operates to disadvantage women and operates to deny them the equality rights that they are guaranteed under the Constitution. The established case law could be relied upon to support arguments that the unequal treatment of marital rape claims results in denying women the protection of the existing rape law because of their marital status, and that this differential treatment results in disadvantage that violates Kenya's domestic and international human rights commitments.

The *Veux* case from Malawi provides a useful precedent to establish that sexual violence constitutes a form of sex discrimination in violation of International human rights guarantees, and that sexual violence is a result of unequal power relations. It is critical to the development of a substantive equality analysis to recognize the unequal power relations at the heart of any marital rape case. The *Veux* case also provides a useful recognition of the reasons why women fail to report sexual violence, and how victims of sexual aggression are stigmatized in society, thereby compounding the injury of the experience. The *Veux* case could be also used to support the argument that legal impunity for marital rape constitutes a violation of both domestic and international human rights guarantees. Canadian case law in particular could benefit from the inclusion of and reliance upon international law, as incorporated into both Kenyan and Malawian caselaw, to help endorse and affirm the state's existing domestic equality commitments.¹⁷⁷

The development of intersectional discrimination analyses that recognize the compounded discrimination experienced by women who experience multiple forms of disadvantage is missing from the equality jurisprudence in all of ACWHRP's partner countries. There is a critical need to develop this jurisprudence to ensure that women outside of the dominant norm receive meaningful justice, and not just the coattail justice achieved by being tagged on to the equality wins of mainstream women. Coattail justice does not recognize the unique nature of the experience of women outside of the dominant norm and can result in a denial of justice, for example as in the Canadian decisions in *Parrott* and *Edmondson*.

Equality jurisprudence can be relied upon to inform public legal education, law reform and litigation initiatives in support of the equal legal treatment of marital rape. The jurisprudence developed to date in all of ACWHRP's partner countries leaves room for improvement, but there is a jurisprudential foundation in each country upon which a substantive equality argument in support of the legal treatment of marital rape could be built. The courts in Canada have been receptive to claims for women's equality in the sexual assault context when the cases are easy, i.e.

¹⁷⁷ For a discussion of the failure of the Canadian judiciary to incorporate international law into its equality jurisprudence please see Jennifer Koshan, "International Law as a Strategic Tool for Equality Rights Litigation: A Cautionary Tale" in Fay Faraday et al, eds., *Making Equality Real: Securing Substantive Equality Under the Charter* (Toronto: Irwin Law, 2006) 443.

the discriminatory impact is clear; where the cases are difficult and complex, the courts have not recognized the equality issues at stake and have failed to protect women's human rights. This pattern leads to the conclusion that in cases addressing marital rape, especially marital rape claims in which the claimant is a woman outside of the dominant norm, the challenge of achieving meaningful access to justice for the victim may be significant, but it is certainly not impossible. The courts in Ghana, Kenya and Malawi have not yet developed a significant jurisprudence relating to sexual assault and women's human rights, which is an advantage as the case law has not been developed to the disadvantage of women. There is the opportunity to advance successful legal arguments that support the equal legal treatment of marital rape, however the weaknesses of past decisions will need to be critiqued, and the strengths of the existing case law will need to be emphasized and expanded upon.

7. The Destiny of the Legal Treatment of Marital Rape:

The legal treatment of marital rape acts as a barometer of the valuation of women's human rights by society. Unequal legal treatment of marital rape claims leaves women vulnerable to this insidious form of violence, and empowers men to oppress women, both in the home and in broader society. While the equal legal treatment of marital rape claims will not be a panacea for the violence that is marital rape, it is a necessary prerequisite to the achievement of substantive equality for women, and the reduction of marital rape.

This paper has demonstrated that marital rape is a form of violence practiced by men throughout history, and that it is a cross-cultural experience. Some women face compounded disadvantage as a result of marital rape, and all women are disadvantaged by marital rape, regardless of whether they themselves are victims of marital rape. This comparative analysis has identified commonalities in the legal treatment of marital rape in the different ACWHRP partner countries – all countries that were colonized by Great Britain. The different countries achieved independence at different times in history, and their legal systems are in different stages of de-colonization and development with respect to the recognition and enforcement of women's human rights. However, all of ACWHRP's partner countries face on-going challenges with respect to the equal legal treatment of marital rape.

This paper has identified causal factors for marital rape and the unequal legal treatment of marital rape, which are common to ACWHRP's four partner countries. The common causal factor of marital rape itself is the objectification of women as property so as to reinforce the power and control men exercise over women. The common causal factor of the unequal legal treatment of marital rape is the application of legal rules originally designed and enforced by a colonialist, patriarchal government, which worked to deny women's security and autonomy in marriage, under the guise of a "neutral" and "objective" legal system. This is the legal legacy that continues to operate in all of ACWHRP's partner countries today. The commonality of these causal factors leads to the conclusion that the legal treatment of marital rape is destined to exhibit the same outcomes in ACWHRP's different country contexts unless steps are taken to avert the reproduction of these outcomes.

The comparative analysis of the legal treatment of marital rape in ACWHRP's partner countries has demonstrated that consent is the pivotal issue in marital rape claims. Regardless of whether criminalization of marital rape has been achieved, the issue of consent determines how marital rape claims will be treated under the law. In unequal societies, such as those that exist in ACWHRP's partner countries, consent to sex is often assumed – this infringes women's equality and has serious consequences for women's health, sexual and reproductive autonomy, security of the person, and equality. What constitutes communication of consent in marriage can be complicated if stereotypes of wives as chattel and presumptions that marriage results in presumed consent are factored into the analysis so as to influence the woman's credibility. Because of women's inequality the interpretation of consent in marriage remains contested ground. Until women are equal, consent will likely remain a contested issue, and it will be necessary to address legal interpretations of consent that disadvantage women in all of ACWHRP's partner countries. Legal understandings of consent, either in customary law or formal law, that are based on discriminatory rationales such as the social construct of women as property or presumed consent following marriage, must be rejected as they are in violation of the human rights guarantees afforded women.

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). Because of the reality that customary law is where most people access justice in ACWHRP's African partner countries, and because of the centrality of customary law to the lives of colonized peoples, dialogue is the preferred approach to a premature, aggressive law reform or litigation absent the participation of civil society.

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 pragmatism",¹⁷⁸ or the concrete engagement with the politics of culture.¹⁷⁹ 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

¹⁷⁸ 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 Celestine Nyamu, "How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?" *supra* at 11.

¹⁷⁹ Celestine Nyamu, "How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?" *supra* at 14.

be challenged, “in order to create room for more voice and inclusiveness in the shaping and articulation of community norms.”¹⁸⁰ 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.

Past efforts to criminalize marital rape in Ghana, Kenya and Malawi have been unsuccessful.¹⁸¹ The limitations associated with past efforts to achieve criminalization resulted from a failure to address the customary law issue successfully, and to connect persuasively with civil society about the need to criminalize marital rape. A strategy that brings together traditional customary law leaders, feminist legal advocates and academics, and the Law Commissions in each country seems the most effective way to proceed. In consideration of this approach, it is necessary to develop an analysis that makes clear how both customary law and the formal legal system disadvantage women. It is necessary to develop a reform strategy that provides for women’s equality in both the customary law and formal law contexts, and that legitimizes human rights principles in both contexts. A discussion of the arguments that might be incorporated into such a reform effort are developed in the ACWHRP customary law comparative paper.

Because customary law is fluid and evolutionary in nature, it is possible that customary law could be de-colonized so that harmful laws that disadvantage women, such as discriminatory understandings of consent, are abolished. However, in the meantime, customary laws that support the idea of presumed consent in marriage are a reality that must be addressed in any effort to achieve increased equality and security of the person for women. Customary law traditionally provided for reciprocity between the sexes, there was a sense of the whole between the partners in a marriage. However, over time, as discussed above, customary law has developed so that at least indirectly, it supports impunity for marital rape. Customary law has come to reflect the values and justifications incorporated into the formal law through the process of colonization. Tolerance for marital rape was at least reinforced by colonialism, if not a product of colonialism; to allow for the imposition of colonial practices and laws is not consistent with independence. It seems that it is a self-serving invocation of customary law to claim it allows for marital rape.¹⁸² To allow for women’s health, autonomy, security and equality rights to be trumped in favour of customary laws that are not wholly indigenous in nature, and do not operate to honour the traditional values of the colonized peoples, seems an opportunistic and dishonest invocation of the reified value of customary law. If customary law leaders and the state are to support the recovery from colonization, then the sexual servitude which is perpetrated through the legal impunity for marital rape should be rejected.

Reporting of marital rape to the police constitutes a significant concern in all of ACWHRP’s partner countries; low reporting rates are an indicator of problems with the criminal justice system.¹⁸³ In the African context, low reporting rates may be attributed to the fact that marital

¹⁸⁰ *Ibid* at 12.

¹⁸¹ Elizabeth Archampong, “Marital Rape – A Women’s Equality Issue in Ghana” ACWHRP background paper, September, 2010; Seodi White, “Criminalisation of Marital Rape in Malawi: The Law, the Realities, and the Perceptions” ACWHRP background paper, February, 2010; Jane Serwanga and Patricia Nyundi, “The Legal Impunity for Marital Rape in Kenya: A Women’s Equality Issue” ACWHRP background paper, July, 2010.

¹⁸² Celestine Nyamu, “How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries? *supra* at 12.

¹⁸³ “Studies suggest that marital rape is vastly underreported to police. Once again, there are virtually no statistics (in Canada) gathered specifically for this form of violence. However, general statistics on reporting rates for sexual

rape is not criminalized. In the Canadian context, despite criminalization of marital rape, reporting rates for marital rape remain low. Low reporting rates in the Canadian context can be attributed to the treatment that victims of marital rape receive within the criminal justice system. For example, the exposure to re-victimization through cross examination that is grounded in sexist myths and stereotypes and intended to humiliate the victim so that she will abandon her complaint. Low reporting rates in both Canada and Africa may also be attributed to the fact that the justice system is often inaccessible to married women with children. For example, it is a challenge to find affordable day care to facilitate the participation of wives/mothers in the justice system. Low reporting rates in both the Canadian and the African context can also be attributed to remedy – women do not want husbands, who may be the main or sole source of income for the family, incarcerated as a result of a marital rape charge.¹⁸⁴ Research needs to be completed to identify alternative remedies to incarceration, remedies that would encourage victims to report marital rape, and remedies that if applied, would result in meaningful justice for the victims of marital rape. The establishment of alternative remedies for marital rape would constitute a form substantive equality for women. At the same time, the development of such remedies would need to ensure that marital rape was taken seriously, and that relations of dependency that may reinforce women's vulnerability to violence were not perpetuated.

The equal legal treatment of marital rape is necessary to ensure that women achieve meaningful substantive equality as full citizens in contemporary society. A comparative analysis of the development of marital rape law in ACWHRP's partner countries indicates that even after the criminalization of marital rape, equal legal treatment of marital rape claims may well remain an elusive goal. The issue of consent will need to be fully vetted and addressed, before the equal treatment of these claims is achieved. The achievement of this goal may require different strategies in different countries. Both Jennifer Koshan and Lise Gottel write that the opportunities for law reform seem to have temporarily closed in Canada. This is because the context in Canada is now one in which sexual violence as a gender equality issue has disappeared from political agendas.¹⁸⁵ Gotell argues that as a result, the focus should be on ensuring enforcement of existing laws and altering police practices, and the promotion of critical reflection¹⁸⁶ – a goal to which ACWHRP's marital rape project contributes.

In the African context, based on past experience, it seems critical to ensure the support of civil society, to be achieved through public legal education, before an applied effort at law reform or

assault are most likely apt in the context of marital rape as well. Indeed, reporting rates are likely even lower for sexual violence in the context of spousal relationships, particularly if the parties remain together. (Jennifer Koshan, "The Legal Treatment of Sexual Violence in Intimate Relationships: An Analysis of the Canadian Experience" unpublished ACWHRP paper, August, 2010 at 6-7; see also Melanie Randall (2008) at 144) There are no records for the reporting of marital rape in Ghana, Kenya, and Malawi (which makes sense because of the legal impunity for marital rape), however anecdotal evidence indicates that victims of marital rape would be reluctant to report rape because of the inaccessibility of the justice system and concerns about remedy (see also footnote 172 below).

¹⁸⁴ Research conducted as part of WLSA-Malawi's campaign in support of the Prevention of Domestic Violence Act indicated that women were unlikely to report marital rape if it was criminalized and the only remedy was incarceration. Seodi White, "Criminalisation of Marital Rape in Malawi: The Law, the Realities, and the Perceptions" ACWHRP background paper, February, 2010 at 14.

¹⁸⁵ Jennifer Koshan, ACWHRP Canadian Paper ADD PAGE; Lise Gotell, "Canadian Sexual Assault Law: Neoliberalism and the Erosion of Feminist-Inspired Law Reforms" in Clare McGlynn and Vanessa E. Munro, "Rethinking Rape Law: An Introduction" in *Rethinking Rape Law: International and Comparative Perspectives*, Clare McGlynn and Vanessa E. Munro, eds., *supra* at 221.

¹⁸⁶ *Ibid.*

litigation is adopted as a means to secure the criminalization of marital rape. Elizabeth Archampong writes that in the context of Ghana, public education and litigation of the 2007 marital rape revisions are necessary to bring clarity to the current marital rape law.¹⁸⁷ Helene Combrinck has written of the Kenyan context, that as the law reform process in support of the criminalization of marital rape has faltered there, the state's failure to effect change to ensure the prevention of marital rape is open to a court challenge, which may be the only way to effect change.¹⁸⁸ Jane Sewanga and Patricia Nyundi have written that in Kenya increased public awareness is necessary of the harms associated with cultural practices that contribute to the different forms of domestic violence, including marital rape.¹⁸⁹ In the Malawian context, Seodi White writes that direct engagement with customary law and formal legal institutions is a necessary first step, prior to the initiation of litigation to address the legal impunity for marital rape.¹⁹⁰

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. The criminalization of marital rape in Canada meant that married women achieved formal equality with un-married women, and this constituted a significant achievement in the evolution of women's rights. However, the criminalization of marital rape has not resulted in the equal treatment of marital rape claims in Canada, so work remains to be done. In the context of ACWHRP's African countries, the marital rape exemption grew out of the same origins as did the Canadian exemption, and the achievement of women's equality in the context of marital rape remains a work in progress for similar reasons. However, there is cause for optimism. Diana Majury has argued that throughout the evolution of equality rights law, there has almost always been cause for optimism, even if it is buried in the most lonely of judicial dissents, or expressed by the most lonely of minority legislative reformers.¹⁹¹ Majury has expressed faith that the slow incremental process that is law reform, will allow for the evolution of minority opinions in support of equality rights into majority opinions, as more is learned about equality.¹⁹² By working collaboratively and learning from each other's experiences, progress can be made to address the legal impunity for marital rape and advance the rights of victims of violence, and the human rights barometer will rise as a result.

¹⁸⁷ Elizabeth Archampong, "Marital Rape – A Women's Equality Issue" unpublished paper produced for ACWHRP, August, 2010 at 27-28.

¹⁸⁸ Helene Combrinck, "Rape Law Reform in Africa: 'More of the Same' or New Opportunities?" in *Rethinking Rape Law: International and Comparative Perspectives*, Clare McGlynn and Vanessa E. Munro, eds., *supra* at 131.

¹⁸⁹ Jane Serwanga and Patricia Nyundi, "The Legal Impunity for Marital Rape in Kenya: A Women's Equality Issue" ACWHRP unpublished paper, April 2010, at 21.

¹⁹⁰ Seodi White, "Criminalisation of Marital Rape in Malawi: The Law, the Realities, and the Perceptions" ACWHRP background paper, February, 2010 at 19.

¹⁹¹ Diana Majury, "The *Charter*, Equality Rights, and Women's Equivocation and Celebration", *supra* at para. 30.

¹⁹² *Ibid.*