



## **MARITAL RAPE – A WOMEN’S EQUALITY ISSUE IN GHANA**

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## **Table of Contents**

- 1 Introduction – Legal Treatment of Marital Rape in Ghana and Women’s Inequality
- 2 General Indicators of Women’s Inequality and Violence against Women in Ghana
- 3 The Legal Framework for Addressing Marital Rape in Ghana
- 4 Additional Laws, Policies and Reforms Relating to Marital Rape
- 5 Background to the Legal Treatment of Marital Rape in Ghana – Colonial Influences and Equality Responses
- 6 Customary Law and Legal Pluralism Relating to Marital Rape
- 7 Assessment and Insights from the Canadian Experience with Marital Rape for Ghana
- 8 Conclusion – The Need for Criminalization and Other Remedies for Marital Rape

### **1. INTRODUCTION - LEGAL TREATMENT OF MARITAL RAPE IN GHANA AND WOMEN’S INEQUALITY**

Spousal sexual violence including marital rape, where permissible by law, amount to legal sanctioning of violence against women in one of the most intimate spaces of their lives. This situation has adverse effects on women’s equality in marriage and in the broader society. In Ghana, before 2007, the Criminal Code, 1960 (Act 29) at section 42(g) exempted spouses from revoking consent “given for the purposes of marriage”; and the provision was read to include consent to sex in marriage. This provision meant that husbands could not be held criminally liable for raping their wives, their wives having “perpetually” consented to sex while married.<sup>1</sup> In 2007 the marital exemption was declared unconstitutional through a statute revision<sup>2</sup> and a Domestic Violence law<sup>3</sup> was passed which declared that violence could not be justified on the basis of consent. These changes make it now possible for husbands to be prosecuted for marital rape should they proceed to have sex with their wives without their wives’ consent.

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<sup>1</sup> Ghanaian law recognizes rape as a crime that can only be committed by men against women- see section 97 of the Criminal Offences Act, 1960 (Act 29) Revised 2007.

<sup>2</sup> See section 42(g) of Criminal Offences Act, 1960 (Act 29) Revised 2007.

<sup>3</sup> Domestic Violence Act, 2007 (Act 732).

However, the changes in Ghanaian law have not fully eliminated discrimination against Ghanaian married women because there is still no direct prohibition of marital rape. Statutorily, there is no specific provision prohibiting marital rape. And, although customary law does not indicate clear support for marital rape, some cultural practices and the patriarchal nature of Ghanaian society allow the treatment of women and girls as inferior in status to men and some level of acceptance of marital rape. Women are socialized to be passive and acquiescent sexual partners in marriage.<sup>4</sup> This situation under statutory and customary law has led to the denial of women's full personhood and their treatment as their husband's property.<sup>5</sup> Thus, the source of discrimination at issue in this paper is the lack of full and direct criminalization of marital rape in Ghana. What is significant about Ghana in terms of the legal treatment of marital rape is that the country has made a move towards prohibiting marital rape (through revision of section 42(g) and the passage of a Domestic Violence law) but the issue has not been tackled head on or directly leaving room for continued discrimination against married women. These realities increase the need to apply clear and strong equality analyses that expose the sources of the discrimination at issue, and push for the application of contemporary human rights law to the marital rape situation in Ghana.

This paper analyses the challenges with the current state of Ghana's law on marital rape and its impact on women's equality rights in Ghana. It also considers ways in which to tackle marital rape. The paper is in the following format: First, this introductory part presents the state of the law on marital rape in Ghana, highlighting the source of discrimination and detailing this paper's approach to analyzing the equality challenge posed by marital rape in Ghana. Second, to situate the marital rape issue, information on Ghanaian women's socio-economic status, poverty rates and data on violence against women are presented as indicators of women's general inequality in Ghana. Also, the paper's conceptual framework for analysis of marital rape in Ghana is set out. Third, the paper identifies and analyzes Ghanaian laws relating to sexual violence and marital rape. Fourth, additional laws, policies and reforms relating to marital rape under the country's constitution and in the trial process are discussed. Fifth, the background to the legal treatment of marital rape in Ghana focusing on colonial influences and equality responses is analyzed. This segment highlights the historical background of the earlier identified laws relating to marital rape, and how women are disadvantaged by the perpetuation of sexist myths and stereotypes under the law. Sixth, customary law and legal pluralism in Ghana and their impact on marital rape is analyzed. Seventh, the paper provides an assessment of why and how substantive equality analysis should be applied to Ghanaian law on marital rape, drawing on Canada's experience with the application of such analysis in its criminalization of marital rape. Eighth and final is identification and assessment of the value of strategies for reform such as public legal education, law reform and litigation.

## **2. GENERAL INDICATORS OF WOMEN'S INEQUALITY AND VIOLENCE AGAINST WOMEN IN GHANA**

This part of the paper provides a background on Ghana focussing on data on general indicators of women's socio-economic status and violence against women as background of the context in which Ghanaian women experience marital rape.

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<sup>4</sup> See generally Peter K. Sarpong, *Ghana in Retrospect, Some aspects of Ghanaian Culture* (Accra: Ghana Publishing Corporation, 1974) at 70 on the socialization of boy and girl children in Ghanaian societies.

<sup>5</sup> See discussion on Ghanaian law relating to marital rape *infra*.

Ghana covers an area of about 238,537 square kilometres in the tropical zone in West Africa.<sup>6</sup> Ghana is divided into ten administrative regions, with Accra, the capital city, as the largest urban area in the country. Although English is the official language of Ghana, there are approximately seventy-nine indigenous languages and dialects actually spoken, each language associated with a particular ethnic group.<sup>7</sup> The predominant ethnic group in Ghana is the Akan.<sup>8</sup> Ghana's peoples share common beliefs and practices but each ethnic group is distinct in terms of language and custom.

Some progress has been made in advancing women's equality rights generally in Ghana. Increasingly, the activities of mostly women led rights organisations have led to laws and policies in Ghana aimed at promoting women's rights. Thus far child marriages,<sup>9</sup> child labour,<sup>10</sup> *trokosi*,<sup>11</sup> widowhood rites<sup>12</sup> and intestate succession<sup>13</sup> are some of the issues that have been tackled by legislation.<sup>14</sup> However, more remains to be done to ensure the human rights of Ghanaian women because, "... most Ghanaian women still live in poverty, depend on men, and are surrounded by attitudes and codes that tolerate oppressive behaviour or allow serious violations of women's rights to be "settled" without justice or accountability."<sup>15</sup>

Moreover, in terms of their human rights, the experiences of women who are not privileged are more complex than that of their privileged or mainstream counterparts. Women

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<sup>6</sup> Ghana shares borders with La Cote d'Ivoire to the west, Burkina Faso to the north and Togo to the east. On the south side is the Gulf of Guinea within the Atlantic Ocean.

<sup>7</sup> See Raymond G. Gordon Jr., ed., *Ethnologue: Languages of the World*, 15<sup>th</sup> ed. (Dallas, Texas: SIL International, 2005), online: <[http://www.ethnologue.com/show\\_country.asp?name=ghana](http://www.ethnologue.com/show_country.asp?name=ghana)>.

<sup>8</sup> In the 2000 Population and Housing Census the Akan group made up 49.1% of Ghana's population, followed by the Mole Dagbani, 16.5%, Ewe, 12.7% and Ga-Dangme, 8%. The Guan made up 4.4%, the Gurma, 3.9%, the Grusi, 2.8%, the Mande-Busanga, 1.1% and others, 1.5%, of the population. The Akan group primarily inhabit most of southern Ghana. The Ewe and Ga-Dangbe ethnic groups live in the eastern part of Ghana, and the small ethnic group of Guans are in south western Ghana. Living in the northern part of Ghana are mainly the Mole-Dagbani, Gurma and Grusi peoples: Ghana Statistical Service (GSS), *2000 Population and Housing Census, Summary Report of Final Results* (Accra: GSS, 2002).

<sup>9</sup> The Children's Act, 1998 (Act 560 ) at section 14 has fixed the minimum age of marriage at eighteen years with the exception of children between sixteen and eighteen years who obtain parental consent. Also, there is a Girl Child Education Unit within the Ministry of Education which promotes enrolment of girls in school and works to ensure that girl children stay in school.

<sup>10</sup> *Ibid.* at section 12 which protects children from exploitative child labour and sections 87-92 which regulate children's work in Ghana's formal and informal sectors.

<sup>11</sup> *Trokosi* is a form of religious bondage involving mostly young virgin girls, who are sent to live and serve in the shrine of a fetish priest as reparation for crimes committed by members of their families: see Robert Kwame Ameh, "Reconciling Human Rights and Traditional Practices: The Anti-Trokosi Campaign in Ghana" (2004) 19(2) C. J.L.S. 23 and Hilary Gbedemah, "Trokosi: Twentieth Century Female Bondage-A Ghanaian Case Study" in Johanna Bond, ed., *Voices of African Women: Women's Rights in Ghana, Uganda, and Tanzania* (Durham, North Carolina: Carolina Academic Press, 2005) at 83. In 1998, the Criminal Code (Amendment) Act of 1998 (Act 554) clause 17 amended the Criminal Code, 1960 (Act 29) by inserting clause 17 as section 314A to ban the practice of "customary servitude" (*trokosi*). The 1992 Constitution, at Article 14, provides that "[e]very person has a right to personal liberty" and at Article 16, provides that, "No person shall be held in slavery and servitude or be required to perform forced labour."

<sup>12</sup> Act 554, *ibid.*, makes widowhood practices that adversely affect women's rights illegal.

<sup>13</sup> The Intestate Succession Law, 1985 (P.N.D.C.L. 111) was passed to ensure that spouses', especially women's, property rights are respected upon their spouses' death intestate.

<sup>14</sup> Other issues tackled are stiffer sentences for defilement, rape and incest and the introduction of sexual assault as a new offence under the Criminal Code (Amendment) Act, 1998 (Act 554).

<sup>15</sup> Takyiwaa Manuh, "African Women and Domestic Violence", World Changing, 1 December 2007. Online: <http://www.worldchanging.com/archives/007653.html> accessed on 29/12/09.

living with disabilities, rural women, uneducated women and women in polygamous marriages tend to have unique challenges; these women because they are often poor and stigmatized rarely challenge abuse of their rights. For example, the poor and uneducated women and girls kept in shrines under the *trokosi* practice only experienced a significant change in their lives with the passage of law prohibiting such servitude, public education and financial support for survivors of the practice. On their own these disadvantaged women could not assert their right to be free of such servitude.

In terms of women's socio-economic status in Ghana, although women form a little more than half of Ghana's population,<sup>16</sup> they do not enjoy a high economic status. Women account for about 50% of the labour force and are found in almost all sectors of the economy, however, majority of Ghana's women are found in farming and other informal sector activities such as wholesale and retail trade. Few women are found in administrative and managerial jobs (only 1% of Ghana's economically active women are in public administrative positions).<sup>17</sup> Ghanaian women are concentrated at the lower levels of economic activity and so do not significantly influence policy decisions. Amu has attributed women's low economic status to their low access to education and other economic resources and their generally low self-esteem, attributable to the way females are socialized in Ghanaian society.<sup>18</sup>

A study of the relationship between women's contributions to household expenditure and their involvement in conjugal decision-making in Ghana, utilizing data from the Ghana 2003 Demographic and Health Survey (DHS)<sup>19</sup>, showed that "a woman's contribution to household expenditures, in some instances, increases her participation in conjugal decision-making in Ghana."<sup>20</sup> Warren's finding corresponded with previous studies that had investigated links

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<sup>16</sup> Ghana's population was 18.9 million as at the 2000 census, with women making up about 50.52% of the population.

<sup>17</sup> Nora Judith Amu, *The Role of Women in Ghana's Economy*, Friedrich Ebert Stiftung, Ghana, online: <http://library.fes.de/pdf-files/bueros/ghana/02990.pdf> (accessed on 14/02/10), citing the Ghana Statistical Service (2000): Population and Housing Census. Summary Report of Final Results.

<sup>18</sup> Ibid.

<sup>19</sup> Ghana Statistical Service, Noguchi Memorial Institute for Medical Research, & ORC Macro. (2004). *Ghana Demographic and Health Survey 2003*. Calverton, Maryland.

<sup>20</sup> Hannah Warren, "The relationship between women's contribution to household expenditures and their participation in conjugal decision-making in Ghana" (2009) 98 *Radical Statistics* 50 at 55. Warren analyzed respondents to the Ghana 2003 DHS data set on women categorized as married or living with their partner; this comprised of 3,694 respondents in total. She focused on the following questions in the Ghana 2003 DHS in relation to women's participation in household decisions; 1) Making large household purchases; 2) Making household purchases for daily needs; and 3) Visits to family or relatives. The DHS questions focused on who 'has the final say' in these decisions; the possible responses including: 1) 'Respondent'; 2) 'Husband/ partner'; 3) 'Respondent and husband/ partner jointly'; 4) 'Someone else'; and, 5) 'Respondent and someone else jointly' (see supra note 13 at 348). It must be noted that Warren's conclusion holds a caution(at p.60):

Based on data from the Ghana 2003 DHS data set a statistically significant relationship was found to exist between women's contribution to household expenditures and their participation in conjugal decision-making in Ghana, using a chi-square test. However, as the Cramer's V statistic revealed this relationship was found to be only small to medium. While this corresponds to findings in existing studies and structural and resource theory explanations, a range of other factors which may influence women's participation in conjugal decision-making, and may therefore account for the small to medium relationship found, have been highlighted. *In order therefore to provide a comprehensive picture of factors affecting women's conjugal decision-making a number of other aspects would need to be taken into account, including other resource contributions and 'cultural' factors such as different gender ideologies.*(emphasis added)

between various factors and women's participation in domestic decision-making and or different modes of conjugal decision-making.<sup>21</sup> Relating this research finding to the issue of marital rape and women's equality, it appears that if Ghanaian women with high education and financial contributions to their households comparable to that of their spouses share in household decision-making, they would also be better able to negotiate sex and seek redress where their sexual rights are abused.

A 1998 national survey on violence against women stated, "violence is a reality for a substantial number of women."<sup>22</sup> Seventy-two per cent of respondents to the survey reported that wife beating was a common practice in their community. Other violent acts identified by the respondents in their communities were rape, defilement, widowhood rites, forced marriages and female circumcision.<sup>23</sup> On rape the following was reported,

Female respondents were asked whether any man had forced sex on them. Likewise male respondents were asked whether they have forced and had sex with any woman (whether a wife or a girlfriend) against her wishes. Eight percent (8%) of the females said they have had that experience before and 5% of the men also said they had forced sex on their wives and girlfriends. According to the males, this happens when women/girls always request for money from them and deny them sex in return. It is also meant to settle a quarrel between them. In certain cases respondents claimed that some girls challenge men by saying they are

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<sup>21</sup> She referred to older and recent studies by Oppong [C. Oppong, *Conjugal Power and Resources: An Urban African Example*, (1970). 32(4) *Journal of Marriage and the Family* at 676-680; C. Oppong, (1974). *Marriage Among a Matrilineal Elite: A family Study of Ghanaian Senior Civil Servants*. Cambridge: Cambridge University Press; and C. Oppong (2005). *Conjugal Resources, Power, Decision Making and Domestic Labour: Some Historical and Recent Evidence of Modernity from Ghanaian Families*. Accra: University of Ghana, Legon.] in this observation at page 51:

Oppong concluded that the more equal the spouses' contributions in each of these areas the more likely they were to share in household decision-making (Oppong, 1970, 1974, 2005); with the relationship between decision-making input and both the comparative educational levels and financial contributions of spouses being statistically significant at the one percent level (Oppong, 1970:678). Correspondingly, 'husband-dominated' couples, in terms of decision-making, were more common in instances in which 'the wives' contributions were comparatively low.'(Oppong 2005:22)

In terms of recent literature on the same issue, Warren observed at 52;

A number of sources of recent literature on Ghana have also suggested links between modes of conjugal decision-making and/or women's participation in household decisions and various factors. For example: Gadzekpo (1999) and Ampofo (1999) claim that women who earn an income have a greater influence in household decision-making; Cusack (1999:165) argues that 'Women themselves perceive that their status within the household alters and their inputs into household decision-making multiply the more they contribute to the financial running of the household and/or the greater their economic independence'; Agyeman and Casterline (2002) suggest the importance of resource inputs in relation to women's household decision-making; and according to Awumbila (2001:41): 'Recent evidence indicates that women's position in household decision-making is increasingly being positively related to their educational, occupational and financial resources and how these are used in providing [for] the needs of the household'.

<sup>22</sup> M. Pappoe and E. Ardayfio-Schandorf, *The Dimensions and Consequences of Violence against Women in Ghana*, National Council for Women and Development (1998).

<sup>23</sup> Ibid.

sexually weak and some wives deny husbands sex sometimes. On the question of what action was taken after these acts, 59% said they never reported these actions to anybody.<sup>24</sup>

It is noteworthy that more than half of rape cases go unreported.

Results of another survey published the following year indicated that one third (33 per cent) of all women were experiencing physical violence at the hands of current or previous partners at the time of the survey.<sup>25</sup> In terms of sexual violence, the study yielded the following findings: 20% of women said their first experience of sexual intercourse was by force and 33% of women indicated that they had been fondled and touched against their will. Other findings of the study were that both psychological and economic abuses were high in Ghana: 20% of women interviewed indicated that their male partners had prevented them from seeing family and friends and 33% had their partners preventing them from speaking to other men. 10% of women interviewed had their earnings taken away from them by their male partners while 8% were prohibited from going to work, selling or making money.<sup>26</sup>

Further, Ghana's 2003 Demographic and Health Survey indicated that 19.8 per cent of men, and surprisingly 34 per cent of women, consider it acceptable for a husband to beat his wife, if she goes out without telling him. Respondents indicated that "to protect their family" women are often expected to silently endure abuse and to report husbands or other family members to the authorities may mean being ostracized.<sup>27</sup> The Special Rapporteur on Violence Against Women has also reported the following on Ghana:

There is also a widespread belief that a husband is entitled to sexual intercourse from his wife at his behest and may enforce this entitlement by force. According to the 2003 Survey, 10.1 per cent of men and 19.9 per cent of women considered it justified if a husband beat his wife for refusing to have sex with him. Ghanaian law, which for so long explicitly protected this male prerogative, has been amended. The Statute Law Revision Commissioner, in exercise of his powers under the laws of Ghana to remove unconstitutional provisions, removed section 42 (g) from the Criminal Offences Act, 1960, (Act 29), whereby a married woman was deemed to have given her blanket consent to her husband using force in sexual relations, thereby preventing the prosecution of marital rape. According to the Government, current laws in Ghana do not support rape in marriage.<sup>28</sup>

Currently, the Domestic Violence Victims Support Unit (DOVVSU) of the Ghana Police Service publishes yearly statistics of the types of cases reported to, and prosecuted by, the unit. In 2008 statistics from DOVVSU indicated that there were 708 defilement cases recorded against girls and 5 cases against boys from January to December 2008. In the case of rape, 227 females

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<sup>24</sup> Ibid.

<sup>25</sup> Kathy Cusack and Dorcas Coker-Appiah, eds.1999. *Breaking the Silence and Challenging the Myths of Violence against Women and Children in Ghana*: Accra: Gender Research and Human Rights Documentation Centre. The study was grounded on women's lived experiences and was a catalyst for advocating for a law on domestic violence.

<sup>26</sup> Ibid.

<sup>27</sup> Ghana 2003 Demographic and Health Survey cited in Yakin Ertürk, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural, Including the Right to Development*, Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences, online: <http://www2.ohchr.org/english/issues/women/rapporteur/annual.htm> at 13.

<sup>28</sup> Yakin Ertürk Report, *ibid.* See also discussion *infra* on the law relating to marital rape in Ghana.

were raped by men. 3,881 women reported cases of non-maintenance as against 517 such reports by men. There were also 9 cases of females who suffered compulsory marriages during year 2008.<sup>29</sup>

The data available so far indicates that Ghanaian women have significant socio-economic challenges, and are also challenged in terms of the full exercise of their sexual rights. This is a situation which adversely impacts women's human rights in the broader Ghanaian society, and makes it important to tackle marital rape as a way of eliminating discrimination against women.

## 2.1 Framework for tackling marital rape in Ghana:

The conceptual framework of substantive equality and non-discrimination, legal pluralism and decolonization informs analysis of marital rape in the Ghanaian context in this paper. Ghana has enacted various laws, including the supreme law of the land-the Constitution, with provisions aimed at achieving equality for all persons, especially women and children, in Ghanaian society. The substantive equality question though is; are Ghana's laws having a "real" positive impact on Ghanaian women's lived experiences? In the specific case of marital rape, the law's failure to explicitly prohibit marital rape does not support women.<sup>30</sup> The current state of the law does not eliminate continued tolerance of the idea of a man owning his woman and his entitlement to sex with her at all times. This situation is because a wife still needs to prove she has revoked her consent to force, including sexual force, presumably given upon marriage. Wives exposure to such sexual violence is sex discrimination and an expression of values which disadvantage women both in marriage and in their status in the broader society. In fact, security of the person and bodily integrity upheld by the 1992 Constitution are not effective in the lives of married women so long as they remain vulnerable to marital rape. The Ghanaian wife's human and equality rights - her dignity, respect and health- are all adversely affected by marital rape. As McKinnon's work has shown, sexuality and gender are key sites of inequality<sup>31</sup>, and thus not explicitly tackling marital rape under Ghanaian law allows for the perpetuation of male biased sexual myths and stereotypes against women. As the general indicators noted above show, Ghanaian women generally have a lower socio-economic status compared to their male counterparts. Historically, Ghanaian women have been disadvantaged through cultural practices like polygamy, *trokosi* and widowhood rites and societal norms. Against this background Ghanaian women tend to be placed second to their male counterparts when it comes to family and community leadership.

Further, Ghana's legal system is made up of different legal systems that together form the basis of the country's law.<sup>32</sup> Ghana's codified law include laws with colonial origins; these are laws inherited from the British which combine British laws and British views of customary law of the indigenous people. However, law recognized as customary law by the colonialists has been described thus; "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

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<sup>29</sup> Ghana News Agency, "Domestic violence is still a problem in Ghana – Director" citing statistics from DOVVSU for 2008, online: <http://topics.myjoyonline.com/news/200903/27318.asp> accessed on 02/04/10.

<sup>30</sup> See discussion on Ghanaian law on marital rape infra.

<sup>31</sup> See among Catherine Mackinnon's many works, *Feminism Unmodified: Discourses on Life and Law*. Cambridge: Harvard University Press, 1987; *Toward a Feminist Theory of the State*. Cambridge: Harvard University Press, 1989.

<sup>32</sup> See 1992 Constitution, Article 11.



agendas.”<sup>33</sup> There is also continued development of customary law in Ghana which combines customary and religious norms and practices from specific Ghanaian societies. In practice legal pluralism in Ghana has two strands – the statutory and customary law recognized by the state and law as the people live it, whether or not this is recognized by the state.<sup>34</sup> Ghana’s pluralistic legal system has some positive impacts on women’s rights but also tends to be problematic for Ghana’s women.<sup>35</sup>

The framework of decolonization calls for confronting the issue of marital rape from the perspective that Ghana carries a colonial legacy which continues to oppress Ghanaian women even in this post-independence era.<sup>36</sup> Colonization generally involves dislocation and devaluation of the way of life of the original peoples inhabiting a land by outside peoples.<sup>37</sup> The colonial laws Ghana inherited from the British is law influenced by British values and culture imposed on the Ghanaian people.<sup>38</sup> Until the recent amendment of the law, Ghana’s allowance of use of force in marriage reflected law that had its roots in inherited British common law. The Ghanaian law reflected an era in Britain when women were not regarded as persons once married; by marriage spouses became one legal personality, and the “one person” created was the husband.<sup>39</sup> Thus, it was difficult to imagine the husband raping his wife, she being himself. Although these ideas long lost validity in Britain so that marital rape was no longer countenanced in that society,<sup>40</sup> Ghana, until recently, maintained these relics in its laws. Identification of such colonial baggage and its deconstruction offers an opportunity to develop laws that originate from Ghana’s peoples, and which with education<sup>41</sup>, can promote the rights of Ghanaian women.<sup>42</sup>

Analysing marital rape in Ghana through the conceptual lenses of substantive equality and non-discrimination, legal pluralism and decolonization, allows for effective legislation and implementation of a marital rape law which would ensure women’s equality in Ghana.

### **3. THE LEGAL FRAMEWORK FOR ADDRESSING MARITAL RAPE IN GHANA**

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<sup>33</sup> Brian Tamanaha, “Understanding Legal Pluralism: Past to Present, Local to Global” (2008) 30 Sydney L. Rev. 375 at 384.

<sup>34</sup> See Bernice Sam, Customary Law and Women’s Rights in Ghana, paper prepared for ACWHRP.

<sup>35</sup> Ibid.

<sup>36</sup> Ghana was under British rule officially from 1844 to 1957 when Ghana gained its independence.

<sup>37</sup> See Hilary Weaver, “The Colonial Context of Violence: Reflections on Violence in the Lives of Native American Women” (2009) 24 J Interpersonal Violence 1552 at 1553

<sup>38</sup> See generally Siegfried Wiessner, “Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis” (1999), 12 Harv. Hum Rts. J 57 at 14.

<sup>39</sup> See Sir William Blackstone, *Commentaries on the Laws of England* 1 (Oxford: Clarendon Press, 1765-1769) at 430 where the author described the marital status of men and women under the common law as follows,

By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs everything...

<sup>40</sup> See Nancy Kaymar Stafford, “Permission for Domestic Violence: Marital Rape in Ghanaian Marriages” 29 Women’s Rights Law Report 63 at 63-64 for history of the background to marital rape from British common law and *R. v. R.*, (1992) 1 A.C. 599, 614 (H.L.) at 623 where the following declaration was made, “...in modern times the supposed marital exception in rape forms no part of the law of England.”

<sup>41</sup> See discussion *infra* on public education.

<sup>42</sup> See generally Krysta Cochrane, “Resolving Violence Against Women in Intimate Relationships through International Guidance and Self-Determination” Term Paper, University of British Columbia, 2010 [unpublished].

Ghanaian law does not fully criminalize marital rape. The current laws that can be linked to marital rape are the Criminal Offences Act, 1960 (Act 29)(Revised 2007) and the Domestic Violence Act, 2007(Act 732). Relevant case law, highlighting the issue of consent, is also analyzed in this segment.

The long title of Ghana's Criminal Offences Act (Act 29) reads, "[a]n Act to consolidate and amend the law relating to criminal offences." Chapter 6 of Act 29 deals with sexual offences. The first provision of the chapter, section 97, provides that rape is a "first degree felony and [an accused person] is liable on conviction to a term of imprisonment of not less than five years and not more than twenty-five years." Thus, the penalty for rape under Ghanaian law is severe. The next section, section 98, defines rape as "the carnal knowledge of a female of not less than sixteen years without her consent." Carnal knowledge has been explained as referring to sexual intercourse.<sup>43</sup> The definition of rape reflects a position in Ghana that only females can be raped. Further, the phrase "without her consent" draws into the application of this provision, provisions in Act 29 dealing with consent. The rape provision does not make any distinction among women, it is applicable to all females above sixteen, married or unmarried, and neither are perpetrators of the offence of rape defined to exclude spouses.

Section 101 of Act 29 provides for defilement of a child under sixteen years of age thus,

- (1) For the purposes of this Act, defilement is the natural or unnatural carnal knowledge<sup>44</sup> of a child under sixteen years of age.
- (2) A person who naturally or unnaturally carnally knows a child under sixteen years of age, whether with or without the child's consent, commits a criminal offence and is liable on summary conviction to a term of imprisonment of not less than seven years and not more than twenty-five years.

Thus, Ghanaian law distinguishes between rape of a female above sixteen years of age and 'rape' of a child less than sixteen years of age. The punishment is more severe for defilement than for rape, and for defilement consent of the victim is irrelevant.<sup>45</sup>

Sections 14, 31(j) and 42 of Act 29 deal with consent. Section 14 is headed consent and is stated as relevant for construing provision of the Act,

where it is required for a criminal act or criminal intent that an act should be done or intended to be done without a person's consent, or where it is required that for a matter of justification or exemption that an act should be done with a person's consent.

Subsections (a) to (h) of section 14 detail various circumstances under which consent is void, such as below age sixteen for sexual offences, insanity, deceit and authority exercised otherwise than in good faith. These provisions are relevant for establishing consent in rape cases.

Section 31 of Act 29 details various grounds on which application of force or harm against a person is justified, and of particular interest in considering marital rape is section 31(j). The section reads,

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<sup>43</sup> P.K. Twumasi, *Criminal Law in Ghana*, Ghana Publishing Corporation, 1985 at 281.

<sup>44</sup> Act 29 defines unnatural carnal knowledge at section 104(2) as "sexual intercourse with a person in an unnatural manner or, with an animal."

<sup>45</sup> See *Republic v. Yeboah* [1968] GLR 248.

Force may be justified in the case and in the manner, and subject to the conditions provided for in this Chapter, on the grounds

(a)...

...

(j) of the consent of the person against whom the force is used.

Thus, in a case of marital rape, sexual force or harm used by a spouse against his wife can be argued as justified on the basis of the consent of the wife to the force used against her. However, section 32 of Act 29 does provide for general limits of justifiable force or harm and the subsequent provisions from section 33 to 45 specify the use of in particular circumstances all requiring that the force should not exceed the limits prescribed in the sections or what is reasonably necessary for the purpose for which the force is permitted.

Section 42, and its subsection 42(g), is of particular interest among the provisions on justifiable force in terms of their relation to the issue of marital rape. Section 42 of the Act which is headed, “[u]se of force in case of consent,” 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*).

Prior to the revision of Act 29 in 2007, section 42(g) under the then Criminal Code, 1960 read,

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. A spouse’s right to sex was considered part of the “purposes of marriage”, and therefore, in Ghana, a husband could rape his wife. In short, there was no crime of rape within marriage.<sup>46</sup> Currently, the revised section 42(g) carries no explicit marital exemption and a wife can revoke her consent to sex with her husband. However, consent can still be used as a defence to marital rape if a woman is understood to have failed to revoke her consent (the onus appears to be on the woman to revoke her consent), in which case marital rape will not be understood to constitute a criminal offence. Given the traditional tolerance of marital rape in Ghana, the judiciary’s interpretation of a married woman’s revocation of consent to sex when it arises in a marital rape case may be problematic.<sup>47</sup>

Thus, uncertainty remains as to whether women will be protected from marital rape by the current wording of section 42(g) of the Criminal Offences Act. A court ruling on the provision would be useful because the definition of consent for wives and non-wives could be

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<sup>46</sup> See Stafford, *supra* note 40 at 63 footnote 3.

<sup>47</sup> As at the time of writing, no case of marital rape decided under section 42(g) of the Criminal Offences Act as revised in 2007 had been located.

problematic, and there is the question of when married women ever consented to “the use of force” in the first place? Also wives may still be understood, in general or specifically pursuant to customary law, to have consented to sex and forced sex unless Ghana’s legislature explicitly revokes such consent. Ultimately, the Ghanaian wife is still vulnerable when it comes to marital rape.

The Domestic Violence Act, 2007 (Act 732) also contains provisions relating to marital rape.<sup>48</sup> The long title of the Act 732 is “[a]n Act to provide protection from domestic violence particularly for women and children and for connected purposes.” Thus, though applicable to all, the Act developed out of particular concern to protect women and children from domestic violence.<sup>49</sup> Providing both civil and criminal remedies, Act 732 is divided into three parts, the first part of the Act 732 makes provision for the following: meaning of domestic violence; meaning of domestic relationship; prohibition of domestic violence; number of acts which would amount to domestic violence, filing of complaints to the Police, Police Assistance, Arrest by Police and Arrest by Police Officer Without Warrant.

The definition of domestic violence in Act 732 takes cognisance of the definition provided in CEDAW General Recommendation 19. It covers physical, sexual, economic, psychological violence and sexual harassment.<sup>50</sup> Force within marriage is prohibited under Act 732 at section 4; “the use of violence in the domestic setting is not justified on the basis of consent.” Act 732 takes cognisance of the Ghanaian family context by including in a domestic relationship nuclear and extended families. A single act or multiple acts constitute domestic violence.<sup>51</sup> Sanctions for domestic violence may combine a fine, a term of imprisonment of not more than two years and/or compensation for the victim.<sup>52</sup>

The second part of Act 732 has provisions on Protection Order and Jurisdiction of the Court, Application for Protection Order, Conduct of Court Proceedings, Interim Protection Order, Grant of Protection Order, and Reference to Family Tribunal and Power to Discharge Protection Order. Grant of a Protection Order in the Ghanaian context is novel and could be controversial.<sup>53</sup> A court can make an order to prevent the perpetrator of violence from coming within 50 meters of the victim and from contacting the victim by phone or any other form of communication.<sup>54</sup> Or a court may make an order requesting the perpetrator to vacate the matrimonial home for a period of time.

It will require time and education for the public to fully understand these protection orders more so when matrimonial homes are often perceived by family members as the property of the man who may also be the perpetrator. In such a situation there are likely to be skirmishes between wives and in-laws or wives and step children. Additionally, naming ceremonies, funerals and festivals are events where people meet, shake hands and hug and for those situations such protection orders may not work. A protection order which orders a communication gag between couples may also affect their children.

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<sup>48</sup> Discussion of the Domestic Violence Act is drawn from Bernice Sam’s ACWHRP paper on Ghanaian Customary Law and Women’s Rights.

<sup>49</sup> See discussion on the development of the Domestic Violence Act, *infra*.

<sup>50</sup> Domestic Violence Act, 2007 (Act 732) section 1.

<sup>51</sup> *Ibid.* section 5.

<sup>52</sup> The sentences provided in Act 732 are stiffer than that found in the Criminal Offences Act for assault and battery. Assault is a misdemeanour that attracts a sentence of 6 months. Act 732 makes the minimum sentence for domestic violence a minimum of 2 years.

<sup>53</sup> Domestic Violence Act, 2007, Sections 11-22.

<sup>54</sup> Domestic Violence Act, Section 15.

A Victims of Domestic Violence Support Fund is also established under Act 732 which could receive voluntary contributions from individuals,<sup>55</sup> organisations and the private sector or the state. Parliament and the Finance Ministry are also mandated to approve an amount of money from government for the Fund. The Fund will be used to provide for basic material support of victims of domestic violence, tracing the families of victims of domestic violence and for any other matter connected with the rescue, rehabilitation and reintegration of victims of domestic violence.<sup>56</sup> Shelters will be constructed out of the Fund as well as training those who will be providing services at the shelter.

Although the intentions behind this provision are laudable, implementation may be problematic for the following reasons. Domestic violence is insidious and affects women in rural and urban areas therefore modalities or criteria of who qualifies to access the Fund will therefore be very important and must be subject to scrutiny by advocates. A similar fund in the past failed because voluntary contributions were not forthcoming.<sup>57</sup> A Board comprising government and civil society members is also established under Act 732 to manage the Fund.

Part Three of the Act covers miscellaneous provisions including relation of Act 732 to the Criminal Offences Act, promotion of reconciliation by Court, publication of proceedings, criminal charges and protection, civil claim for damages, procedure rules for domestic violence, regulations and interpretations.<sup>58</sup> The relationship of Act 732 to the Criminal Offences Act, is that where an act committed within the domestic setting is an offence which under the penal law attracts a sentence of more than three years, the police is expected to bring the action under the Criminal Offences Act and not Act 732.<sup>59</sup> Examples include rape, defilement, incest, serious bodily harm, causing harm with a weapon, manslaughter and murder. Thus, a marital rape charge would come under the Criminal Offences Act, it being an aggravated offence attracting a sentence beyond three years. The Ministers of Justice and of Women's Affairs are given the power through a legislative instrument to make regulations for necessary forms, training of law enforcement agents and the courts, education and counselling for victims and perpetrators, modalities for free medical treatment for victims among others.<sup>60</sup>

#### **4. ADDITIONAL LAWS, POLICIES AND REFORMS RELATING TO MARITAL RAPE**

In addition to the statutory laws examined above there are other laws and aspects of law which impact marital rape in Ghana. The legal issues analyzed in this section are the 1992 Constitution of the Republic of Ghana, consent in rape cases and spousal privilege. These are

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<sup>55</sup> Domestic Violence Act, 2007 Section 29 establishes a Victims of Domestic Violence Fund

<sup>56</sup> CEDAW Article 16; General Recommendation 19, para. 24 (k); Domestic Violence Act 2007, Section 31

<sup>57</sup> Women in Local Government Fund set up in 2006 to support women contesting the local election had so little money from the private sector and from government that each woman contestant received US\$20..

<sup>58</sup> Domestic Violence Act, 2007 Sections 23 to 43

<sup>59</sup> Domestic Violence Act, Section 23 provides:

Relation of Act to Criminal Code

**23.** The punishment provided for in of this Act applies only to offences which under the Criminal Code 1960, (Act 29) are misdemeanours and shall not apply to any offence that is aggravated or the punishment for which under the Criminal Procedure Code, 1960 Act 30 is more than three years imprisonment and in any other case the provisions of Act 30 in relation to punishment for the specific offence shall apply.

<sup>60</sup> Ibid, section 41. CEDAW Articles 5 & 16; General Recommendation 19, para 24 (b) &(k)

aspects of Ghanaian law which will impact the effectiveness of marital rape prosecutions because they are laws, precedents and rules of evidence on which the implementation of any marital rape law will rely in going through the trial process.

#### 4.1 Constitutional Law:

Ghana operates a plural legal system combining received English law from Ghana's colonial era under the British and customary law based on the culture and customary practices of Ghana's various traditional societies. The country has been a relatively stable democratic country since 1992 when it returned to constitutional rule under the 1992 Constitution of the Republic of Ghana.<sup>61</sup> The Ghanaian constitution contains several provisions which are relevant for addressing the women's inequality issue of marital rape.

First, legal pluralism in Ghana is provided for in Article 11 of the 1992 Constitution thus:

- (1) The Laws of Ghana shall comprise :
  - a. This Constitution;
  - b. Enactments made by or under the authority of Parliament established by the Constitution;
  - c. Any Orders, Rules and Regulations made by any persons or authority under a power conferred by this Constitution;
  - d. The existing law; and
  - e. The Common law
- (2) The common law of Ghana shall comprise the rules of law generally known as the common law, the rules generally known as the doctrine of equity and *the rules of customary law including those determined by the Superior Court of Judicature*
- (3) For the purposes of this article, "*customary law*" means *the rules of law which by custom are applicable to particular communities*. [Emphasis added]

The above article acknowledges the co-existence of statutory law and a common law of Ghana which includes customary law. Although a person can only be convicted of a criminal offence when the offence is defined and its penalty prescribed in a written law,<sup>62</sup> and customary law is limited to private matters, traditional communities and families have been known to deal with criminal matters.<sup>63</sup> The source of the restriction of customary law to the civil context is the colonial era when the British colonialists established courts which took over the prosecution of criminal matters from traditional courts. Since marital rape has been outside the domain of Ghana's judicial system the 2007 revision of the Criminal Offences Act and those who have experience marital rape had only their community leaders and families to turn to, it remains to be seen if the customary law processes such persons experienced would now be replaced by the judicial process.

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<sup>61</sup> Prior to 1992, Ghana had a history of military governments which came into power through coup d'états and brief constitutional governments which never really gain stability before being overthrown.

<sup>62</sup> Article 19(11) of the 1992 Constitution of Ghana.

<sup>63</sup> There are often news reports of communities and families that have resolved criminal cases under customary law, ignoring the criminal process prescribed for such cases. See "Scandal at School... Proprietor of Great Lamptey Mills held for impregnating 16 year old (Lead Story)" by Albert K. Sali at <http://tettehmoako.blogspot.com/2009/09/scandal-at-school-proprietor-of-great.html>. In this case the family initially settled the matter at home.

Second, Chapter 5 of the 1992 Constitution protects the fundamental human rights and freedoms of every person in Ghana. All government organs, agencies and natural and legal persons are required to respect and uphold, and the courts enforce, these rights without discrimination.<sup>64</sup> The chapter also provides for the protection of the right to life<sup>65</sup> and the personal liberty of every person.<sup>66</sup> Article 15 of the 1992 Constitution provides that, “the dignity of all persons shall be inviolable,” and it denounces “torture or other cruel, inhuman and degrading treatment.” Article 16 of the 1992 Constitution provides protection against slavery or servitude and forced labour. Further, Article 17 of the 1992 Constitution states categorically that, “all persons shall be equal before the law,” and that there shall not be discrimination on grounds including gender, ethnic origin, religion and social or economic status. The same article enjoins Parliament to enact laws that further protect peoples’ rights. On cultural rights and practices, the 1992 Constitution provides at Article 26 that,

- (1) Every person is entitled to enjoy, practice, profess, maintain and promote any culture, language, tradition or religion subject to the provisions of this Constitution.
- (2) All customary practices which dehumanize or are injurious to the physical and mental well-being of a person are prohibited.

Thus, while the Constitution promotes cultural rights it makes it clear that such practices are subject to it as the supreme law of the land. The above noted human rights provisions of Ghana’s current constitution have enough to tackle the discriminatory nature of marital rape because of the clear stance on equality, human dignity and the denouncement of discrimination. Commenting on the progressive nature of the 1992 Constitution, one scholar has noted that the constitution was drawn up by a consultative committee which consulted contemporary constitutions the world over, and came up with provisions that “renounce all forms of violence against women and children, including violent traditional practices and rituals.”<sup>67</sup>

Third, under the directive principles of state policy at Chapter 6 of the 1992 Constitution, there are objectives which specifically relate to women. The state’s political objectives include state prohibition of discrimination and prejudice on grounds such as gender.<sup>68</sup> Article 39 on cultural objectives encourages “the integration of appropriate customary values” into national life while abolishing “traditional practices which are injurious to the health and well-being of the person.” It is pursuant to these directives that Ghana’s Parliament has enacted law that advance women’s rights.<sup>69</sup> Thus, the directive principles of state policy also offer an opportunity to lobby the Ghanaian state to effectively tackle marital rape as a way of preventing discrimination and a rejection of practices that are injurious to women.

## 4.2 Consent

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<sup>64</sup> 1992 Constitution of Ghana, Chapter 5, Article 12.

<sup>65</sup> Ibid. Article 13.

<sup>66</sup> Ibid. Article 14.

<sup>67</sup> Rosemary King, “Is it time for a progress report on violence against women in Ghana?” 7(2) Human Rights Review at 75, 2006.

<sup>68</sup> 1992 Constitution, Article 35.

<sup>69</sup> See examples of such law supra, notes 3-7.

Analysis of the issue of consent in the Ghanaian context is relevant in light of the revised marital rape law in Ghana. Since a wife can now revoke consent she has given for the purposes of marriage under the revised section 42(g) of the Criminal Offences Act, cases of marital rape will dwell on proof of revocation of consent to sex in marriage. This situation makes it important to ensure that the issue of consent does not become a challenge for Ghanaian wives when they file marital rape complaints. Although Ghanaian law now makes it possible to file a marital rape complaint, a wife who files such a complaint would be confronted with a customary practice that implies consent to sex upon marriage. She faces a society in which it is basically understood that wives have agreed to “perpetual consent” upon marriage. This presumed state of consent does not make meaningful the formal right to revocation of consent provided under the law, especially when conditions of inequality exist for women in the broader society. The paucity of marital rape cases means it is not yet clear how the cultural attitude of implied consent would play out in the courts, and how a wife would prove revocation of consent to sex (would she need to swear an affidavit, does she need a witness, etc).

However, an examination of Ghanaian reported cases on rape in general, with a focus on the issue of consent, is insightful for considering the effectiveness of the marital rape law. A search for cases on sexual offences in two major Ghanaian law reports, the Ghana Law Reports (GLR) and the Supreme Court of Ghana Law Reports (SCGLR)<sup>70</sup> yielded only seven (7) cases in the GLR series and no reported case in the SCGLR series. Of the cases located only three (3) were rape cases involving females over sixteen years of age, the rest were cases of defilement.<sup>71</sup> In the earliest of the three cases, *State v Gyimah*,<sup>72</sup> the evidence adduced at the trial proved that there was full penetration and the only issue for consideration of the court was whether or not there was consent. The accused’s defence was that the sexual intercourse took place with the full and free consent of the complainant, and that the complainant had been his girl friend with whom he had had sex several times. The court found that the accused and the complainant had been caught in the act by the complainant’s mother, and it was only upon her mother’s arrival on the scene that the accused started shouting and crying. When asked what she was doing in the accused’s room the complainant did not answer her mother, meanwhile two men who had been outside the room and the landlord too had heard no shouts until the complainant’s mother appeared on the scene. The accused claimed that the story of rape was concocted by the complainant and her parents after he declined to comply with their demand for money as compensation and in order to refrain from reporting the matter to the police. Justice Lassey acquitted and discharged the accused, holding that there was no evidence of the complainant fighting back and the doctor had found her hymen broken but no recent injury.

The Gyimah case appears to be one in which the complainant, in order to hide her shame at being caught in a sexual act by her mother, accused her boyfriend of raping her. However, the court’s reliance on the lack of evidence of the complainant fighting back as indicative of consent

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<sup>70</sup> The GLR spans the years 1959 to 1996 while the SCGLR spans the 2000s.

<sup>71</sup> It appears there is low reporting of rape cases and even lower prosecution rates of rape cases hence the limited cases on rape in the law reports. The coming of DOVVSU has not changed this situation because their highest records for report and prosecution of sexual offences are defilement cases. There is great public abhorrence of rape of children and such cases receive significant media and public attention compared to rape cases involving women; as for marital rape, it remains below the radar. In an email enquiry to a state prosecutor at the Attorney-General’s office about whether there has been any cases of marital rape since the removal for the marital rape exemption in 2007, her reply was “No, and which Ghanaian woman would report such a case.”[email on file with author]

<sup>72</sup> [1963] 2 GLR 446.



can be problematic in cases where a complainant does not fight back out of fear of the accused, and only starts to fight when others arrive on the scene.

In *Republic v. Dapaah*<sup>73</sup> the sole issue was whether or not the complainant had consented. The facts were that the accused on the pretext of giving the complainant money to buy something for him, pulled her into his room and forcibly had sexual intercourse with her twice, threatening her with a knife. Three witnesses testified that they heard the complainant pleading with the accused to let her go as “he was killing her” and they intervened. The accused maintained that the complainant was a girl friend with whom he had had sexual intercourse several times previously. The court found as a fact that the complainant was not a girl friend and on the issue of consent held that the evidence of the witnesses corroborated the complainant’s version. In the words of Justice Campbell, “the evidence that she was heard crying and shouting in the room, corroborated as it is by the evidence of the third, fourth and fifth prosecution witnesses is evidence that she could not have been consenting to what was being done to her in the room.”<sup>74</sup> Just as in the Gyimah case, the court relied on the extent of resistance put up by a complainant to determine whether or not there was consent in a rape case. Also significant for the courts in the two cases above was whether or not the complainant’s version of events was corroborated by witnesses.<sup>75</sup>

The third case identified, *Hanson v the Republic*<sup>76</sup> focussed on the issues of corroboration and misdirection on identity. In that case, the complainant, the wife of a private in the Army, alleged that on the pretext of giving her a lift, the accused drove her out of the barracks and had sex with her against her will, and then drove her back to the barracks. The accused’s appeal against his conviction for conduct prejudicial to good order and discipline by a court martial was allowed on the following basis; that the prosecution had not proved beyond reasonable doubt that the complainant had sexual intercourse with a certain man as there was no proof of penetration; corroboration though not essential in practice was looked for and the summing up on it was defective; and it was not clear that that evening the accused drove through the gate of the barracks with the complainant. Thus, the court in this case allowed the accused’s appeal mainly because there were no witnesses to support the complainant’s version of events.

These cases reflect the traditional problem with prosecuting sexual offences when the cases are reduced to his word against her word. It is likely that this traditional problem will be imported into marital rape situations due to the need to prove revocation of consent. As it currently stands it is complicated, and women are unlikely to be informed of and understand the law in a way that would ensure they assert their rights. More specific and clear legal provision is required for the law to be a meaningful way of ensuring women's equality.

#### 4.3 Spousal Privilege

Ghana’s Evidence Decree, 1975 (NRC 323) provides that all persons, with certain exceptions, are competent to be witnesses.<sup>77</sup> The Decree also provides, with certain exceptions,

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<sup>73</sup> [1968] GLR 513.

<sup>74</sup> Ibid.

<sup>75</sup> Twumasi, supra note 36 at 285 observed that although there is no legal provision requiring corroboration in Ghanaian law, the practice is that the courts look for corroboration in sexual offence cases. In this regard the Ghanaian courts draw on the common law’s use of corroboration.

<sup>76</sup> [1978] GLR 477.

<sup>77</sup> Evidence Decree, NRC 323, section 58.

that a person cannot refuse to be a witness.<sup>78</sup> These provisions make a spouse a competent witness for the defence, and a competent and compellable witness for the prosecution. However, section 110 makes confidential communications between married spouses (in both monogamous and polygamous marriages) privileged. Application of these provisions in marital rape prosecutions that involve wives testifying against their husbands is yet to be tested. The challenge would be with getting wives to testify, defying societal pressure not to testify, and the courts giving significant weight to such testimonies. It is important that Ghanaian law and practice effectively eliminate spousal privilege for effective criminalization of marital rape.

## **5. BACKGROUND TO THE LEGAL TREATMENT OF MARITAL RAPE IN GHANA – COLONIAL INFLUENCES AND EQUALITY RESPONSES**

As noted earlier Ghanaian legislation on marital rape has a history rooted in a colonial and cultural view of the marital relationship that does not countenance a revocation of consent to sex under any circumstance. The new section 42(g) of the Criminal Offences Act may have improved the law but not to an extent that guarantees that marital rape is now a thing of the past. An insightful social context accompanied the law reform efforts advanced in relation to domestic violence in general and marital rape in Ghana; this social context involved strong opposition to prohibiting marital rape in Ghanaian society and an innovative advocacy process that led to the passage of the Domestic Violence Act.

During the process of the passage of the Domestic Violence Act, those opposed to a law on marital rape argued that it was a development that contradicted Ghanaian culture and they accused advocates of the criminalization of marital rape of seeking to import foreign ideas into Ghanaian culture.<sup>79</sup> For instance, Dr. Edward Mahama, a medical practitioner and presidential candidate of the Peoples' National Convention (PNC) party said "if we talk about marital rape, it means we are going into the bedroom, and we have no right to go there." He added that, "you cannot legislate on such issues." Prof. Evans Atta Mills, who has since been elected President of Ghana, called for protection of the "sanctity" of marriage. Chiefs in the Upper East Region at a meeting concluded that the Domestic Violence Bill was, "meant only for urban dwellers" and that "the proposed law on marital rape [was] anti-Ghanaian."<sup>80</sup> On one hand, the concerns expressed about the impact that criminalizing marital rape would have on Ghanaian marriages and society need due consideration given that what happens in Ghanaian homes has for a long time remained a "private" matter.<sup>81</sup> It is hard for traditionalists, and mostly men, to envisage husbands being held accountable for sexual violence committed against wives.<sup>82</sup> On the other hand, failure to tackle the issue of marital rape ignores the fact that violence occurs in Ghanaian marriages, and that marital rape adversely affects women's lives. Ignoring the issue of marital

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<sup>78</sup> Ibid, section 88.

<sup>79</sup> See Stafford, *supra* note 40.

<sup>80</sup> Ibid.

<sup>81</sup> Prior to the establishment of the Domestic Violence Victims Support Unit (DOVVSU) in the Ghana Police Service and the passage of the Domestic Violence Act, 2007, the police mostly asked those with complaints arising from domestic settings to "go and settle the matter at home." This situation meant complainants' had recourse only to family elders who very often failed to effectively protect women and children from violence and abuse.

<sup>82</sup> Many a husband have forced themselves on their wives even when their wives have told them they do not want to have sex, and to think that such "normal" incidents in marriage can lead to prosecution under a marital rape law is a cause of concern for most husbands.

rape reinforces married women's inequality; it attacks the security of their person and their right to equal self determination.

The other interesting social context which accompanied the passage of the Domestic Violence law was the formation of a Domestic Violence Bill Coalition which advocated for a domestic violence law that sought among other things to repeal the marital rape clause in the Criminal Code.<sup>83</sup> The Domestic Violence Bill Coalition built on the following basis: Although the criminal laws of Ghana contain many provisions that sanction the use of violence, some of them are narrow and may lead to biased interpretations based on gender. For instance, the rape clause is narrowly premised upon vaginal penetration and force, thus rendering women's experiences of rape without any force invisible.<sup>84</sup> Prior to the Domestic Violence Act, there were contradictions in the way violence was perceived at the individual and community levels which reflected women's acknowledgment of and struggles with social conditioning that invariably blames or stigmatises them for violence. These tensions also reflected society's own struggle to deal with a problem that was so normalized that avenues for redress often punished a woman's deviance while leaving the perpetrator unpunished. At the individual level though women perceived violence as wrong, they nevertheless blamed themselves for abuse inflicted on them. Violence was justified as acts that result from women's failure to do what was expected of them as wives, as in-laws, as mothers or as widows. Thus, although communities condemn violence, their treatment of women who experience violence tends to condone violence. During traditional marriage ceremonies, the father of the bride would admonish the groom that if the bride reported any form of abuse by the groom, that will be the end of the marriage. Cruelty is therefore one reason for dissolution of marriage in Ghana. Yet in cases where women reported abuse to informal traditional mechanisms such as before the family or traditional leaders, the perpetrators were not punished; rather wives were encouraged to remain in abusive relationships and were even blamed for the violence.<sup>85</sup>

The presence of domestic violence was generally accepted, while no one questioned the sociological patterns arising from the types of violence, the causes and the gender of victims and perpetrators were generally ignored. There was an absence of documentation, sparse literature, statistics or information to support any kind of advocacy to draw attention to the nuances of domestic violence. It was therefore important to deconstruct the private-public debate and to name and document all forms of violence against women as a social issue. Armed with facts and figures, it would be easier to challenge the law and the attitudes of law enforcement agents and to call the State and people to action.

An absence of data or statistics on violence against women was going to make convincing law makers that a law was needed on domestic violence difficult. There were small studies on violence, however comprehensive nationwide study on violence against women and girls by Gender Studies and Human Rights Documentation Centre (Gender Centre) in 1999 that was grounded in women's lived experiences was the catalyst for advocating a law.<sup>86</sup> These

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<sup>83</sup> This section of the paper is extracted from Bernice Sam, "*Advocacy for a Domestic Violence Act using CEDAW*", 2009, WILDAF, an unpublished paper.

<sup>84</sup> Criminal Code, 1960 (Act 29), Section 99 states 'Whenever upon the trial of any person for an offence punishable under this Code, it is necessary to prove carnal knowledge, the carnal knowledge shall be deemed complete upon proof of the least degree of penetration only.'

<sup>85</sup> Sam B, Insaadoo M, A Quick Guide to Violence against Women and Property Rights of Spouses, 2003 at 79.

<sup>86</sup> Cusack and Coker-Appiah eds., *Breaking the Silence and Challenging the Myths of Violence against Women and Children*, Gender Centre, 1999.

reports sought to name, define and challenge a social phenomenon. While some of the literature debated marital rape and customary practices, others provided recommendations,

Not surprising in a patriarchal society, there was resistance by men, traditional and religious groups and by some women. The fact that the target group for the national research excluded men was questioned by sections of the population who saw the research as discriminatory and pre-judgmental. There were also attempts by other sections of the public to trivialize the problem and label it as foreign ‘*with no significance for Ghanaian women*’.<sup>87</sup> The national research by Gender Studies concluded that violence against women can be physical, psychological, sexual or economic, and that it can stem from traditional practices. Violence against women is not limited to any one social group because it affects women in all classes, of all ethnic groups and of all ages. Violence against women is not a neutral thing—it causes harm and suffering and has multiple ramifications for both the victim and society. Violence against women has a gender bias with men as perpetrators and women the victims. Silence, tolerance and ineffective sanctioning of perpetrators by state and society perpetuates violation of women’s rights and their rights as citizens entitled to be protected by the State.<sup>88</sup>

Increased demand for action by advocates resulted in the criminalisation of female genital mutilation<sup>89</sup>, cruel widowhood practices<sup>90</sup> and ‘*trokosi*’ or slaves of the gods - a type of oblate.<sup>91</sup> Stiffer sentences were provided for defilement, rape, and incest whilst sexual assault was introduced as a new offence.<sup>92</sup> However, section 42 (g) of the Criminal Code that implicitly allows a man to rape his wife was not amended.

In the heat of the debate on first draft of the domestic violence bill in 2006, the Minister for Women and Children, Gladys Asmah publicly decried activities by the Coalition on Domestic Violence Bill, especially the call for repeal of Section 42 (g), that their activities promoted disharmony in marriages.<sup>93</sup> This generated media interest and the minister was criticised for not supporting the law.<sup>94</sup> In the second draft of the bill also in 2006, the Attorney General, who is responsible for drafting all laws, removed the provision repealing the infamous Section 42 (g). The memorandum to the draft bill stated ‘*... the repeal of the provision of the Criminal Code, 1960 (Act 29) which prevents a wife from prosecuting her husband for rape in marriage has been excluded from the bill in response to public opinion.*’<sup>95</sup>

An important group of people who had to be lobbied throughout 2006 were members of Parliament. Ghana’s Parliament then comprised 205 men and 25 women; therefore, a bill aimed to protect women, despite its gender-neutral provisions, was destined to be stiffly objected to. The Domestic Violence Bill Coalition had to strategise carefully in dealing with the Members of Parliament before the Bill was put before Parliament for debate. Meetings were organised for some members of Parliament where pictures of abused women and children were exhibited. Members of Parliament received information and data on violence against women.

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<sup>87</sup> Ibid at 8.

<sup>88</sup> Breaking the Silence and Challenging the Myths of Violence against Women and Children, 1999

<sup>89</sup> Criminal Code (Amendment) Act, 1994 (Act 484).

<sup>90</sup> Criminal Code (Amendment) Law, 1994 (PNDCL 90).

<sup>91</sup> Criminal Code (Amendment) Act, 1998 inserted Section 314 A into the Criminal Code prohibiting customary servitude.

<sup>92</sup> Criminal Code (Amendment) Act, 1998 (Act 554).

<sup>93</sup> Gladys Asmah was the Minister for Women and Children’s Affairs until early 2006.

<sup>94</sup> *16 Days of Activism against Gender Violence in Ghana* by Takyiwa Manuh at [www.opendemocracy.net/articles/5050/Ghana\\_domestic\\_violence](http://www.opendemocracy.net/articles/5050/Ghana_domestic_violence), accessed on 1st January 2010.

<sup>95</sup> Domestic Violence Bill, 2006 Draft prepared by Ghana’s Attorney General’s Department.

A new minister for the Ministry for Women and Children's Affairs was appointed at a cabinet reshuffle by the President in the later part of 2006. Coming from a civil society/development work background, the new minister, Hajia Alimah Mahama, was amenable to working with the Domestic Violence Bill Coalition. She was confronted with the difficulties of getting support of the male-dominated Parliament. In her negotiations with the Coalition, the Minister argued that in order for the Bill to be accepted by majority of Parliament, the provision that repealed Section 42 (g) should remain out of the 2006 draft. The Coalition insisted it was necessary to reintroduce the provision that repealed Section 42 (g) because it was discriminatory against women. The Coalition argued that the Section 42 (g) contravened Articles 1 and 2 of CEDAW<sup>96</sup>, and also Article 17 of Ghana's 1992 Constitution<sup>97</sup>. The Minister further proposed that Government could work on amending the Criminal Code to repeal Section 42 (g) as a separate action similar to other amendments on some discriminatory customary practices like cruel widowhood rites and female genital mutilation. The Minister's suggestion that the Domestic Violence Bill proceed without a provision repealing the marital rape clause led to a split within the Domestic Violence Bill Coalition with some members for that position while others were against. After several discussions, the Coalition's stance was that repeal of the marital rape clause should be reintroduced in a new draft of the Bill. The compromise position between the Minister and the Coalition was to use acceptable language that still captured marital rape in the next draft of the Bill that would be read for the first time before Parliament.

Ghana's obligation of presenting its 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> periodic reports on CEDAW provided another opportunity for women's rights groups to press forward the demand for a domestic violence bill. In August 2006, at the 36<sup>th</sup> Session of CEDAW which discussed Ghana's periodic reports, women's rights groups also presented a shadow report.<sup>98</sup> A key element of the shadow report was the need for legislation on domestic violence. Representatives of civil society lobbied CEDAW Committee members on four critical issues including passage of a domestic violence law and repeal of Section 42 (g) of the Criminal Code. The CEDAW Committee's concluding comments included language that called on Ghana to legislate on domestic violence.<sup>99</sup>

In December 2006, the Domestic Violence Bill Coalition and other civil society groups were called to a meeting by the Parliamentary joint committees on Constitutional and Legal Affairs, and Gender and Children, which had been given the mandate to discuss the Bill after its first reading in Parliament.<sup>100</sup> The Committees requested contributions from civil society on specific provisions that required strengthening or amendment.<sup>101</sup> NGOs<sup>102</sup> referred to the need for compliance with CEDAW and the Beijing Declaration and Platform for Action.<sup>103</sup> Ghana had taken several measures such as passing laws on inheritance and criminalising certain customary practices that were in conformity with CEDAW Articles 2 in particular 2(f), and 5, therefore a domestic violence law would be another important law to address gender violence.

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<sup>96</sup> CEDAW Articles 1 & 2.

<sup>97</sup> Ghana Constitution, Article 17 prohibits discrimination on the basis of gender.

<sup>98</sup> NGO Shadow Report to 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Periodic Report of Ghana on CEDAW, 2006.

<sup>99</sup> CEDAW/C/GHA/CO/5 <http://www.un.org/womenwatch/daw/cedaw/36sess.htm>

<sup>100</sup> This was the third draft of the Bill.

<sup>101</sup> Some of the groups that made submissions included Ghana Centre for Democracy and Development (CDD-Ghana), The Ark Foundation, Commonwealth Human Right Initiative (CHRI), Concerned Citizens of Ghana, Domestic Violence Bill Coalition, WiLDAF Ghana.

<sup>102</sup> WiLDAF Ghana and the Commonwealth Human Rights Initiative made submissions on Ghana's commitments to international women's rights treaties.

<sup>103</sup> UN Doc A/CONF.177/20, 17 October 1995.

Other arguments were that Ghana had submitted its 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> periodic reports to CEDAW in which the country had outlined the progress made towards having a law on domestic violence; and Concluding Comments from the CEDAW had specifically called on the State to pass a law to address domestic violence. NGOs also urged the Parliamentary Committees to be guided by General Recommendations 12 and 19 of the Committee on Elimination of Discrimination against Women<sup>104</sup> and also UN General Assembly Resolution 48/104<sup>105</sup>. The latter documents provided language that supported provisions in the draft law that the Committees should consider, in particular the definition of domestic violence should be expansive enough to take cognisance of the different types of violence contained in General Recommendation 19.

Another proposal put before the Committee was the need to maintain the language that repealed Section 42 (g) of the Criminal Code without reference to the words ‘marital rape’, a reiteration of the compromise position reached between the Minister for Women and Children’s Affairs and the Domestic Violence Bill Coalition.

Also important to the success of the advocacy was a target that donors and government had agreed to meet as a condition to the amount of financial aid that Ghana would receive for the 2007 fiscal year. Under the Growth and Poverty Reduction Strategy (GPRS II - 2006-2009) donors pledge financial support to government budget based on agreed targets against which poverty reduction strategies are measured. A domestic violence law was one such target in the GPRS.<sup>106</sup>

With input from the Parliamentary Committees tasked to review the Bill, a third draft of the Bill was prepared by the Attorney General in 2007. The second and third readings of the third draft of the Bill before Parliament generated interesting discussion and anxiety. Members of the Domestic Violence Bill Coalition were in Parliament wearing red pieces of cloth around their wrists.<sup>107</sup> Male members of Parliament disapproved such civil society action and advised advocates not to intimidate the MPs in the performance of their duties. During debate while some MPs wanted more time to study Bill, other MPs argued that it was unnecessary to delay the process further because domestic violence was a daily occurrence which required the law to deal with it.

Parliament passed the Domestic Violence Act, (Act 732) on 21<sup>st</sup> February 2007. One newspaper captured the moment in Parliament thus

*It was a sight to behold as female members across the political divide who are united by their gender sensitivity, flew their handkerchiefs and embraced each other when the speaker of the House...pronounced the Bill passed at exactly 11.45 a.m. The reaction in Parliament was reflective of national relief from years of an emotionally charged debate during which various organisations, such as the national coalition on domestic violence assumed frontline roles.<sup>108</sup>*

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<sup>104</sup> CEDAW General Resolution 12, UN Doc HRI\GEN\1\REV.1 AT 78 (1994)

<sup>105</sup> Declaration on the Elimination of Violence against Women, UN General Assembly Resolution 48/104, 20 December 1993.

<sup>106</sup> Canada was instrumental in ensuring that this target was included in the GPRS, not surprising since by 2006, Cathy Cusack who was instrumental in the national research on violence against women, was working at the Canadian International Development Agency (CIDA, Ghana) as a gender advisor.

<sup>107</sup> Wearing a red piece of cloth around the wrist or neck signifies that a person is aggrieved or is about to discuss a very important matter. It is usually worn during funerals or public demonstrations.

<sup>108</sup> Emmanuel Adu-Gyamrah, ‘House clears hurdle, Domestic Violence Bill passed at last’ *Daily Graphic*, Thursday 22 February 2007 at 3.

The President assented to the Act in May 2007.

It is noteworthy that barely two months after the passage of the Domestic Violence Act, the marital rape exemption under section 42(g) was amended through a rather less direct legislative process. The government of Ghana under the authority of the Laws of Ghana (Revised Edition) (Amendment) Act 2006, Act 711, appointed a Statute Law Revision Commissioner to prepare a revised edition of all Ghanaian Acts and subsidiary legislation in force as at 1st January 2005. The Commissioner after completion of the task submitted the set of revised laws in bound volumes to the Minister of Justice and these laws were laid before, and approved by, Parliament. After the Parliamentary approval, the President by Executive Instrument 2007 E.I. 3 stated the date that the volumes would come into effect as 16th April 2007. Thus, based on this instrument the laws currently in force are the Laws of Ghana (Revised Edition). As part of the statute revision, the name "Criminal Code" gave way to the "Criminal Offences Act" and in the revised Act, a new section 42(g) appeared in which the Statute Law Revision Commissioner removed the marital rape exemption with an explanation, in parenthesis, that the exemption that allowed for marital rape was unconstitutional. Thus, the same Parliament which chose not to repeal the section 42(g) marital rape exemption by not adopting the definition of sexual offence in the draft Domestic Violence Bill has now repealed that section by approving the Statute Law Revision Commissioner's revision of Ghana's laws.

## **6. CUSTOMARY LAW AND LEGAL PLURALISM RELATING TO MARITAL RAPE**

Generally, Ghanaian families are repulsed by domestic violence<sup>109</sup> and no clear statement of customary law indicates support of domestic violence, including marital rape. As Sam has noted, upon marriage, families advise husbands not to physically abuse their wives, and traditional societies have sanctions to deal with perpetrators of domestic violence.<sup>110</sup> However, these customary law sanctions do not 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 roles support the impunity of marital rape in Ghanaian traditional societies.<sup>111</sup>

In Ghanaian customary marriages the husband is the head of the household and his wife (or wives) defer to his authority. Customary law and practices accepts husbands "disciplining" their wives for failing to follow their directives.<sup>112</sup> A woman marrying under customary law is

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<sup>109</sup> Bernice Sam's paper on Customary Law and Women's Rights in Ghana at 14.

<sup>110</sup> Ibid, and see the author's reference to the Nkyinkyim Project.

<sup>111</sup> 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.

<sup>112</sup> See Rosemary O. Ofei-Aboagye, *Domestic Violence in Ghana: An Initial Step*, (1994) 4 (1) *Columbia J Gend Law* at 1 where the author has noted that in Ghanaian traditional societies wife beating is not a strange occurrence;

advised to obey her husband's directives, and in sexual matters she is advised to be ready to have sex whenever her husband wants to have sex.<sup>113</sup> Thus, although customary law may not necessarily support marital rape, complaints from a wife to her family that she has been raped by her husband tends to attract questions about why she refused her husband sex in the first place and it is implied that her husband had the right to go ahead and have sex with her since she cannot refuse sex as a married women. In Ghana, as in most African countries, a man pays dowry to marry his wife. The practise of dowry creates the impression that husbands have bought and therefore own their wives. Thus, married women often have no say in how they are treated and when their husbands want sex, they have no right to refuse him. Some husbands would rape and beat their wives for refusing to have sex with them.

In fact, a wife's complaint of marital rape against her husband tends to be a "non-issue" under customary law. In "extreme" cases, such as where marital rape is accompanied by other forms of violence, such as use of an offensive weapon and insertion of objects into the wife's genitals, there is a greater likelihood of a customary investigation and imposition of sanctions. Currently, family elders' and community leaders' handling of domestic violence has shifted to the police and the formal justice system with the passage of the Domestic Violence Act and the Criminal Offences Act in 2007. Further, criminal sanctions for acts of domestic violence can only be imposed under statutory law.

## 6.1 Conflict Arising from Ghana's Pluralistic Legal System

This paper has noted that customary law is recognized under Article 11 of the 1992 Constitution as part of the laws of Ghana. However the possibility of conflict between customary law on one hand, and constitutional and statutory law on the other hand, on the issue of marital rape is eliminated by the fact that criminal law matters cannot be resolved under customary law and under Article 26 of the 1992 Constitution, "acts which are repugnant to natural justice and morality" are superseded by the Constitution. In the colonial era, the British interpreted a similar provision they incorporated into Ghanaian law in ways that reflected their definition of what was "right" and therefore acceptable as law. Since independence, Ghanaian courts have interpreted this provision with the aim of ensuring that customary law and practices accord with human rights under the constitution. The argument does arise as to whether what is considered just and moral under Ghanaian customary law must conform to human rights law in order for it to be accepted as law.<sup>114</sup>

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traditional folk tales include stories such as a man beating his wife to maintain law and order, and Ghanaian folk and highlife songs often have themes that encourage husbands' mastery of their wives.

<sup>113</sup> See Beatrice Duncan, Marital Rape as a Form of Domestic Violence and the Need for Law Reform in Ghana, in *Voices of African Women: Women's Rights in Ghana, Uganda and Tanzania*, Johanna Bond (ed.), 2005 at 148.

<sup>114</sup> See H.J.A.N. Mensa-Bonsu, "*Of nuts in the ground not being groundnuts*", 22 *University of Ghana Law Journal* 1 (2002-2004).



Ghanaians predominantly live under customary law and tend to choose to resolve issues in that forum. This situation makes it more likely that wives who have complaints of marital rape would turn to their families or customary leaders rather than the police or the courts. Thus, regardless of the requirement that the police and courts handle cases of domestic violence, including marital rape, the challenge remains as to whether potential complainants would even file such claims in the first place because of their fear of being stigmatized in their local communities, and should they decide to file such claims they may prefer the more familiar and generally less costly avenue of customary law. There is also the challenge of community leaders and elders continuing to handle such cases even though they are no longer empowered to do so under the Domestic Violence Act.

Ghana has faced the above noted challenges in instances where a uniform state law has been passed on particular issues and no choice of law is permissible. For example, the Intestate Succession Law was passed in 1985 with uniform rules of succession applicable to all Ghanaians who die intestate regardless of ethnicity. However, some families and communities continued to apply customary law leading to an amendment of the law in 1991 declaring some forcible acts relating to devolution of property to be criminal.<sup>115</sup> Another example is the Customary Marriage and Divorce (Registration) Law, 1985 (PNDCL 112), which made registration of customary marriage compulsory to enable parties benefit under the Intestate Succession Law. This law was rarely complied with given challenges with procedures for registration especially in the rural areas where most customary marriages are contracted. Eventually, the law was amended removing the mandatory requirement of registration.<sup>116</sup> Thus, although there should be no conflict as to which law is applicable in marital rape cases given the statutory changes effected in 2007, the challenge remains as to what the “lived law” actually is, and/or would be, on marital rape in Ghana.

## **7. ASSESSMENT AND INSIGHTS FROM THE CANADIAN EXPERIENCE WITH MARITAL RAPE FOR GHANA**

A man could rape his wife in Canada without criminal sanction<sup>117</sup> until 1983 when reforms to the Criminal Code led to the criminalization of marital rape.<sup>118</sup> Basically, the marital rape exemption that allowed men to rape their wives was repealed when the offence of rape was replaced with ‘sexual assault’, a gender neutral scheme. Assessment of Canada’s almost three decades experience of criminalization of marital rape is insightful for Ghana, in particular Canada’s challenges with the successful prosecution of marital rape. There are also concerns over the low report rates for spousal sexual violence.<sup>119</sup> Although Canada and Ghana share a common heritage of British colonization and a common law legal system, Canadian society differs from Ghanaian society. Thus, insights drawn from analysis of the Canadian experience

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<sup>115</sup> Intestate Succession (Amendment) Law, 1991 (PNDCL 264)

<sup>116</sup> Customary Marriage and Divorce (Registration) (Amendment) Law, 1991 (PNDCL 263).

<sup>117</sup> *Criminal Code of Canada*, R.S.C. 1970, c. C-34, section 143 defined rape as follows: “[a] male person commits rape when he has sexual intercourse with a female person who is not his wife....”

<sup>118</sup> See Bill C-127, *Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof*, S.C. 1980-81-82-83, c. 125.

<sup>119</sup> See Jennifer Koshan, “The Legal Treatment of Sexual Violence in Intimate Relationships: An Analysis of the Canadian Experience” ACWHRP Paper and Melanie Randall, “Sexual Assault in Spousal Relationships, “Continuous Consent”, and the Law: Honest But Mistaken Judicial Beliefs” (2008) 32 *Manitoba Law Journal* 144.

with the criminalization of marital rape and transferability to the Ghanaian context will be cognisant of the specific circumstance of Ghanaian society.

Among the issues worthy of note in the Canadian experience is the shift from the offence of rape to sexual assault, with marital rape becoming spousal sexual violence. Sexual assault is broader, covering a wider range of sexual abuse.<sup>120</sup> This change is insightful for Ghana in that terminology such as rape and marital rape limit one to vaginal penetration and force, when rape can occur although no such force is evident and objects can be inserted into a victim's genitals as part of sexual violence.

On the issue of consent, Canada has struggled with the challenge posed by "presumed consent" in marital rape cases because consent is prone to discriminatory interpretations.<sup>121</sup> Canada's Supreme Court in *R. v. Ewanchuk*,<sup>122</sup> ruled that courts must find either the complainant consented or that she did not consent, and that no doctrine of implied consent was recognized in Canadian sexual assault law. Given the Canadian experience and Ghana's history of presumed consent to sex in marriage, it is important that Ghanaian law ensure that a wife can revoke such consent with a clear indication of what consent is and what it is not. It is important that Ghana's law clarify the prohibitions related to marital rape and the interpretation and application of consent in the context of rape in order to eliminate the application of discriminatory myths and stereotypes.

Also noteworthy is that the law reforms that led to the criminalization of marital rape did not involve a customary law justification being put forward. Thus, Canadian law failed to recognize the customary law of Canada's aboriginal people. Although the British colonial mentality of not recognizing marital rape among spouses influenced Canadian law, there was no influence of state law from the customary law and practices of Aboriginal communities in Canada; this is likely because the colonizers never left Canada, as they did Ghana.<sup>123</sup> Customary law as noted above has had, and continues to have a strong hold, on the lives of Ghanaians and its tolerance of marital rape is problematic.<sup>124</sup>

Canadian records reflect low rates of reporting spousal sexual violence and challenges with the criminal justice system's treatment of such cases.<sup>125</sup> Thus, although criminalized for almost three decades, it appears women in Canada are still hesitant to report and have prosecuted partners who abuse them sexually. Among the factors identified for the low report of spousal sexual violence in various reports were lack of public education and awareness, victim support services, and training of justice system personnel. Others were the unique vulnerability of marginalized women due to "their systemic inequality and subordination in Canadian society,

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<sup>120</sup> See Koshen, *ibid.*

<sup>121</sup> See *ibid.*

<sup>122</sup> SCC, 1998.

<sup>123</sup> See Jennifer Koshen, "Sounds of Silence: The Public/Private Dichotomy, Violence, and Aboriginal Women" in *Challenging the Public/Private Divide: Feminism, Law and Public Policy*, Susan Boyd, ed., University of Toronto Press, 1997 who has noted the exclusion of Aboriginal women's experiences from feminist law reform efforts relating to violence against women in Canada.

<sup>124</sup> Not all scholars are agreed that customary law tolerates marital rape: see Bernice Sam's paper presented to ACWHRP, *supra*.

<sup>125</sup> See Koshen's paper presented to ACWHRP *supra* note 117, part IV on Government and Other Reports on Spousal Sexual Violence.

their dependence on men, and their isolation, fear of or previous negative experiences with the criminal justice system, fear of record disclosure, pressure from their family, and fear of the perpetrator.”<sup>126</sup> These are challenges Ghanaian women face in dealing with rape in general such that there is low reporting and prosecution of rape cases.<sup>127</sup> Thus, full criminalization of marital rape without tackling factors that inhibit women’s access to justice mean continued low reporting and low prosecution rates of perpetrators of such crimes.

Distrust of the criminal justice system due to its treatment of rape cases generally is a significant hurdle due to a past where the police treated incidents of rape in families as “private matters” both in Canada<sup>128</sup> and Ghana, referring complainants to their family or community heads. Progress is currently being made in Ghana through the establishment of the Domestic Violence Victim and Support Unit (DOVVSU) of the Ghana Police Service in 1998, initially known as Women and Juvenile Unit (WAJU).<sup>129</sup> DOVVSU is becoming a household name in Ghana because it offers support in the form of counselling and services which most women victims welcome while ensuring that perpetrators of sexual violence are arraigned before court. DOVVSU units are not well resourced, lacking support personnel like psychiatrists, psychologists and social workers in most regions and this impedes effective work of the units.

Prosecution of spousal sexual violence cases in Canada faces various challenges such as continued difficulty with consent, even with the ruling in *R. v. Ewanchuk*, and the related issue of the defence of mistaken belief in consent and sexual history or evidentiary issues.<sup>130</sup> These are challenges Ghana has to prepare for to fully criminalize marital rape. The Canadian experience is insightful due to the fact that upon appeal most of these problematic issues are resolved in favour of the victim.<sup>131</sup> It seems that greater work at sensitizing judges in the courts of first instance can lead to application and interpretation of the law in a way that ensures that the status quo is not maintained. As earlier noted, it is anticipated that Ghana’s rule on spousal privilege would be problematic with respect to litigating marital rape claims. In this regard Ghana can draw on what Canada did, which was to include as part of the 1983 marital rape reforms, repeal of the spousal privilege rule in the context of marital rape.

The Canadian literature and cases do not significantly reflect the experiences of racialized women and women with disabilities with spousal sexual assault. This is an area for Ghana to watch, in terms of identifying and dealing with the specific needs of groups of women who might fall through the cracks, in the process of tackling marital rape as a women’s equality issue.

Also insightful is the fact that the Canadian cases tend to reflect a history of violence between the parties in spousal sexual assault cases. This calls for red flags going up early within the criminal justice system to prevent the escalation of such situations. The need to avoid situations where the police receive several complaints from a victim and take no action, or before taking the necessary action to offer the protection or intervention needed, is key to the criminal justice system making a real impact on women’s lives.

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<sup>126</sup> Ibid. at 22.

<sup>127</sup> A search for cases on rape in general from the Ghana Law reports (1959-1996) and the SCGLR which spans the 2000s, yielded only seven cases on rape, most of which were actually defilement cases. Although DOVVSU statistics show increasing reporting of rape cases, most are not successfully prosecuted.

<sup>128</sup> See Koshen, supra note 117.

<sup>129</sup> See official website at: <http://www.ghanapolice.info/dvvsu/dvvsu.htm> accessed on 03/04/10.

<sup>130</sup> See Koshen’s paper for ACWHRP, supra note 117, for detailed discussion of these issues reflected in Canadian case law.

<sup>131</sup> Ibid.

The Canadian experience with criminalization of marital rape holds significant insights for achieving a similar feat in Ghana. Ghana has the advantage of approaching this law reform in a way that ensures that the adverse effects of the challenges faced by Canada are reduced in Ghana's case. Criminal law may be the site of reform but more important is ensuring that the criminal justice system itself is prepared to achieve justice for victims of marital rape and the state provides the necessary support for both the law enforcement agencies and victims of marital rape.

## **8. CONCLUSION – THE NEED FOR CRIMINALIZATION AND OTHER REMEDIES FOR MARITAL RAPE**

Marital rape is no longer explicitly exempted under Ghanaian law; however questions remain as to whether removal of the marital rape exemption has been done in a way that achieves full realization of the rights of married women in Ghana. As noted above the nature of reform achieved so far does not fully criminalize marital rape; a wife consents to sex in marriage and bears the burden of proving that she has revoked her consent. This makes the issue of consent significant in marital rape cases in Ghana, and for this reason strategies adopted for advancing the law on marital rape must ensure that a wife can refuse sex and have her decision respected. The potential strategies for tackling marital rape are discussed under law reform, litigation and public education, all of which are important in advancing women's right to equality.

Law Reform: Legislation specifically targeting marital rape is required. First, the law must clearly criminalize marital rape, sending out a clear message that marital rape is illegal. Second, there legislative reforms must ensure that the issue of consent does not provide an opportunity for maintaining the status quo that a man cannot rape his wife. In this regard, analysis of statutory provisions abolishing marital rape and cases from different countries would be insightful. Third, the procedural and evidentiary aspects of marital rape prosecutions need to be carefully examined and where relevant law is lacking provision made for such laws to ensure that these aspects of the trial process do not frustrate the successful prosecution of perpetrators of marital rape.

Litigation: the removal of the marital rape exemption from Ghanaian law having occurred only recently and the lack of case law precedents provide an opportunity for test case litigation to bring the law of marital rape alive in the court and to set it off on the right foot. In adopting this strategy, ACWHRP partner organizations like WILDAF-Ghana and WIDO-Ghana can identify a client to support, and supported by Ghanaian legal practitioners and academics, draw on the experience of Canadian partners in the ACWHRP project with experience in test case litigation. This will help the Ghanaian team to be efficient and effective manner in tackling the judicial system in this way. Whatever the outcome of such test case litigation, it will pave the way for more cases of marital rape to reach the courts.

Public Education: this strategy is crucial for advancing the argument that to effectively tackle marital rape is to ensure women's equality in Ghanaian society. Public education tends to be effective when it involves dialogue, rather than the mere imposition of ideas on a people.<sup>132</sup>

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<sup>132</sup> See Ameh, supra note 8 at 55 where the author observed that various attempts by the government, individuals and organizations to curb *trokosi* in Ghana; these attempts included media publicity, the government passing a law which criminalized the practice, Christian religious organizations trying to convert communities which practiced *trokosi* to Christianity and non-governmental organisations, women and human rights advocacy groups trying to teach adherents of the practice that they were violating the human rights of the *trokosis*. Ameh contended that all

Education on marital rape as an equality issue is needed at every level of society to ensure the message of achieving full realization of women's rights gets to all. There is also the need for education of the public to support rather than stigmatize women who experience marital rape and to shame perpetrators of this crime. Those in the criminal justice system, especially those involved in prosecuting and adjudicating cases of sexual violence, need to be educated on the adverse effects of marital rape on women's lives and rights. As earlier noted, reform in this area would significantly impact successful prosecution of marital rape cases.

Public education can take various forms, such as presentations to groups and organizations, radio drama, television programmes, postering, texting to mobile phones and community durbars. The following persons and forums also offer good opportunities to present the message on marital rape: church groups, educational institutions, traditional authorities, shelters, mobile legal aid, district and municipal authorities and corporate organisations. ACWHRP can draw on similar initiatives from its partner organizations both in Africa and Canada.

Ultimately, getting Ghanaians to own the process of tackling marital rape is likely to have a lasting and positive impact on women's lives and their status in the broader Ghanaian society.

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these attempts failed, and in the end it was "critical dialogue, sensitivity to the values and needs of all the parties involved that led to the success of the campaign."