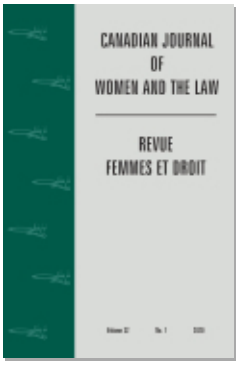
The Right to Say No: Marital Rape and Law Reform in Canada, Ghana, Kenya and Malawi ed. by Melanie Randall, Jennifer Koshan, and Patricia Nyaundi (review)



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Melanie Randall, Jennifer Koshan, and Patricia Nyaundi, eds, *The Right to Say No: Marital Rape and Law Reform in Canada, Ghana, Kenya and Malawi* (Oxford: Hart Publishing, 2017)

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This is a rare and valuable book for its in-depth exploration of the vast, but under-researched, calamity that is marital rape. In the foreword, Fiona Sampson, chief executive officer of Equality Effect, describes her organization's role in facilitating the research and collaborations behind the book, in its long and fierce campaign to abolish men's impunity for marital rape. Equality Effect has also engaged in advocacy in coalition with many of the organizations whose efforts are chronicled in the book to generate public education and support court challenges to laws entrenching women's inequality in Ghana, Kenya, and Malawi. It is refreshing to see such an academic book so clearly ground its origins in front-line women's advocacy both in African nations and in Canada.

Its introduction in Chapter 1 ("Marital Rape and Law Reform: A Comparative Analysis of the Right to Say No") previews the chapters to follow and binds them together through the book's three overarching themes. Men's impunity to commit marital rape is understood as a women's equality issue: both a contributor to, and measure of, women's social, economic, and political inequality. At the same time, this form of violence against women is subject to state obligations, imposed through both domestic laws and constitutions and international instruments, to prevent, condemn, and redress this crime. And, finally, it is the women's movement—feminist grassroots organizations, activists, and researchers—whose work has led the way to legal reforms around the world. The strategies and leadership of the women's anti-violence movement are thus critical to future endeavours regarding marital rape.

Melanie Randall's Chapter 2, "Martial Rape and Sexual Violence against Women in Intimate Relationships: The Less Recognised Form of Domestic Violence," reports on what we know about marital rape, thanks to feminist researchers. Although marital rape sits at the intersection of domestic violence and sexual assault, these are seen as distinct forms of violence. Marital rape is rarely the focus of policy development aimed at either form of violence against women—hence, the title of the chapter. Marital rape is probably the most under-reported of any of these crimes, not least because the normalization of husbands' sexual entitlement and wives' duty to submit makes it difficult for women themselves to name the wrong, much less report it. Even with these limitations, Randall reports that, on average, half of women who experience spousal violence are also raped and that 92 percent of women who experience marital rape also experience other serious forms of domestic violence and threat, with grave mental health consequences for these women. She argues

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convincingly that we need to understand the scope and nature of marital rape in order to respond to it with law and policy.

Chapter 3, "Normative and International Human Rights Law Imperatives for Criminalising Intimate Partner Sexual Violence: The Marital Rape Impunity in Comparative and Historical Perspective," by Vasanthi Venkatesh and Melanie Randall, casts a wide net. This chapter provides a sweeping overview of the origins of the marital rape exemption in states around the world, its common law, civil law, and statutory forms, and its demise—partial or full—through law reform and judicial interpretation, starting in the 1970s. This comparative account is challenging for the authors, not only because the legal systems have been rendered complex by colonization and the imposition of colonial law alongside religious and customary regimes but also because even the United Nations (UN) and World Bank global databases on marital rape legislation are incomplete and contradictory.

It was surprising to read that, beyond an explicit legislative exemption, the marital rape impunity is also read into statutes that prohibit "unlawful" intercourse; constituted through limits that permit criminalization only for legally separated spouses, where bodily harm is caused or the husband has a sexually communicable disease; punished through lower sentencing ceilings; and enacted through laws that allow a rapist to avoid prosecution by marrying his victim or that prohibit a woman from filing criminal complaint against her husband. It was also troubling to learn that thirty-five US states and the District of Columbia continue to provide some form of spousal immunity for sexual assault. The more hopeful aspect of this chapter is found in the review of international (and regional) instruments generated through global organizing and transnational feminist advocacy that advance women's equality rights and impose positive state obligations to criminalize marital rape as a form of violence against women. The chapter also describes the bodies and procedures set up to enforce these instruments, such as the UN special rapporteur on violence against women and state obligations to periodically report on their progress in addressing violence against women. In turn, nationally based women's organizations have been able to draw from these instruments and obligations to create legal change in their own jurisdictions.

In Chapter 4, "Pluralistic Legal Systems and Marital Rape: Cross-National Considerations," Vasanthi Venkatesh leads the reader through a sophisticated and nuanced exploration of pluralistic legal systems, whereby colonial law and customary legal systems and religious codes live together, in order to assess the potential for criminalizing marital rape. Using specific examples from around the world, she illustrates the destruction inflicted upon customary laws and practices through colonial law as well as the imposition of patriarchal norms and capitalistic and individualistic values that have had negative impacts on communal structures and women's roles. In the post-colonial period, many new states reconstructed and applied "customary law" while simultaneously "ossifying patriarchal norms" and restricting

the jurisdiction of traditional courts.[1] Venkatesh is careful to trace multiple jurisdictions' unique history in terms of incorporating traditional legal systems into national legal systems, while identifying "common historical trajectories that have led to the strengthening of gendered policies and practices, which pose barriers for groups fighting for gender equality and against gender violence."[2]

Avoiding dichotomous thinking whereby women's rights and cultural rights to self-determination are seen as inherently and inevitably in conflict, this chapter also shows how intertwined these rights struggles are through an examination of the *African Charter's* draft protocol and sub-regional agreements and state constitutions that promote women's equality and condemn violence against women.[3] Women's rights to equality and freedom from violence have also been articulated from the bottom up by local women activists, whose strategies draw upon women's roles in cultural structures and practices, thus "vernacularizing" these norms. The chapter makes the case for criminalizing marital rape as a critical strategy in opposing men's violence against their female partners, while simultaneously engaging in broader social justice movements that expose and condemn state and racist violence and working within customary legal systems where possible to pursue women's rights.

In Chapter 5, "The Criminalisation of Marital Rape and Law Reform in Canada: A Modest Feminist Success Story in Combating Marital Rape Myths," Jennifer Koshan leads off the second part of the book, which focuses on individual country studies. She recounts the law reform process by which Canada shed the marital rape exemption in 1983, describing the widespread feminist mobilization for rape law reform based on women's equality rights that extended to the criminalization of marital rape. There was some opposition to this reform—including by the Criminal Lawyers' Association—but it prevailed handily. Koshan reviews the law of sexual assault in Canada, putting the reform in context and showing how other legal developments—for example, the law on admissibility of women's past sexual history—undercut the criminalization of marital rape. She concludes with ideas about strategies to fully implement the reform in Canada, including constitutional challenges to prosecutorial decisions and complaints against lawyers and judges pursuant to codes of conduct, and with lessons learned from Canada that may assist with the push for criminalization in other jurisdictions.

Malawi is the next country considered, in Chapter 6, "Legislating against the Odds: Lessons Learned from Efforts to Legislate against Marital Rape in Malawi,"

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1. Vasanthi Venkatesh, "Pluralistic Legal Systems and Marital Rape: Cross-National Considerations" in Melanie Randall, Jennifer Koshan & Patricia Nyaundi, eds, *The Right to Say No: Marital Rape and Law Reform in Canada, Ghana, Kenya and Malaw*i (Oxford: Hart Publishing, 2017) 89 at 105.
2. *Ibid* at 101.
3. *African Charter on Human and Peoples' Rights*, 27 June 1981, 1520 UNTS 217 (entered into force 21 October 1986).

by Ngeyi Kanyongolo and Seodi White. This chapter describes a long-term campaign by the Women and Law in Southern Africa Research and Educational Trust (WLSA) that commenced in 1999 in response to their research that revealed state failure to act with respect to domestic violence, including marital rape, and the WLSA's experience of being overwhelmed by help requests from women suffering domestic violence. In 2000, the WLSA held a roundtable, released a video documentary, organized a march, and launched a campaign, thrusting domestic violence into the public sphere. It then released an issues paper in 2001, held consultative workshops, published a discussion paper reporting on the consultations, and drafted a prototype used to craft legislation on domestic violence that was introduced in 2004.

However, their community work revealed a lack of public consensus about domestic violence and particularly the criminalization of marital rape, which in turn allowed the government to shelve the bill. Only a series of high-profile attacks on women by husbands and subsequent public pressure prompted the government to enact the domestic violence law in 2006, but without a clear repudiation of the marital rape exemption. The authors note that, even if the government had explicitly criminalized marital rape in legislation, countervailing cultural laws and traditional beliefs would have stymied its implementation. They therefore call for engagement and dialogue with the lived experience of women in Malawi and suggest that the crisis of HIV/AIDS may reignite dialogue on martial rape.

Winnifred Kamau, Patricia Nyaundi, and Jane Serewanga examine Kenya's situation in Chapter 7, "Dismantling Barriers to Women's Equality: Making the Case for the Criminalisation of Marital Rape in Kenya." Kenya also witnessed law reform in 2006, including a new sexual offences law, but it specifically exempted legally married persons. Although customary law in this country does not apply to criminal matters and is subject to the constitution, traditionalists were able to insist that criminalization of marital rape would run counter to African culture and values. The authors show how other laws—penal provisions regarding assault, new criminal prohibitions regarding the transmission of HIV/AIDS, and new civil law regarding domestic violence—are all inadequate to the task of confronting marital rape. The only glimmer of hope they draw is from Kenyan family law, which has resolved that cruelty as a ground for divorce includes marital rape (contrary to the situation in Malawi). Drawing upon international, regional, and constitutional obligations regarding violence against women and women's equality, they recommend the criminalization of marital rape, the development of civil remedies and dispute resolution mechanisms, the pursuit of a constitutional challenge to the exemption, training, and education of police, lawyers, and judges, and public education via traditional and community groups and structures whereby elders can assist in leading social change.

Chapter 8, "Marital Rape under Ghanaian Law," by Renee Aku Sitsofe Morhe, addresses the specific challenges faced by women in Ghanaian society, including those impeding prosecution of domestic violence and marital rape. She writes that Ghanaian legislation and customary law historically have authorized wife rape and that reforms removing a defence of consent to the use of force by a spouse in the

criminal law and prohibiting force in a domestic context, both passed in 2007, nonetheless leave huge barriers to the prosecution of marital rape. This is, first, because not all marital rape involves the use of force and, second, because wives are still deemed to give implied consent upon marriage. Morhe describes the common law exemption for marital rape, the cultural practices of polygamy and child marriage, the pervasiveness of domestic violence, and the imperative of silence, women's poverty, lack of access to inheritance, education, and paid employment as barriers to women's ability to negotiate when and how they have sex with their husbands. She also looks at specific legal barriers to prosecuting marital rape, which include the informal corroboration requirement and the need for wives to prove that they revoked implied consent. She argues that without an explicit law criminalizing marital rape, women will be unable to lay complaints. Further, she urges accompanying reforms to criminal procedure and evidence laws to facilitate prosecution of marital rape, the provision of alternative measures for women unable or unwilling to avail themselves of the criminal law, and the development of domestic violence education programs for every level of society, including professionals.

Finally, in the book's last chapter, "The Judicial Treatment of Marital Rape in Canada: A Post-Criminalisation Case Study," Jennifer Koshan carefully examines approximately four hundred reported cases over thirty years for prosecutions of spousal rape in Canada. Her study registers important legal advances: some successful prosecutions of spousal rape; several appellate decisions where the accused was denied the mistaken belief in consent defence and the courts clearly affirmed that the law of sexual assault applies equally to spouses; other cases where judges specifically reject marital rape myths; "encouraging" results where the defence has sought, but was denied, production of women's confidential records; and some sentencing decisions that recognize marital rape as an issue of women's equality.

But Koshan also identifies many problematic areas. One of the most disturbing is the Supreme Court of Canada's failure to comment on the social problem of marital rape or to repudiate marital rape myths in several cases before it that squarely raised such issues. Another noteworthy trend is found in cases where judges state that the context of a marital relationship is somehow relevant to the issue of consent by resurrecting "implied consent," the complainant's reduced credibility (that is, motive to fabricate where the parties are in a family law dispute or where the complainant did not leave the alleged perpetrator), or the mistaken belief in consent defence, without regard to the failure to adhere to the "reasonable steps to ascertain consent" requirement. Together, these trends suggest that women in relationships are thereby relegated to a lesser form of criminal law protection. She also reports that defence lawyers succeed in their applications to admit the complainant's sexual history as evidence in the majority of cases. Koshan's chapter brings home the point made by the authors of the previous chapters that criminalization is a necessary but insufficient condition for the elimination of marital rape.

A good book should be thought provoking and challenging and leave the reader both engaged and curious. *The Right to Say No* succeeds on all of these fronts.

I enjoyed reading about feminist strategies and campaigns in the focus countries. I found the discussions around cultural and religious laws and practices and how they interact with colonial and state law enlightening and intellectually demanding. The authors' efforts to extend this analysis to Indigenous laws and practices in Canada (in several chapters) marks another significant contribution, among many, in this book. I was left wondering how the law under Ghana's 2007 (incomplete) criminal prohibition of marital rape is shaping up. I also wanted to know what campaigns and constitutional challenges are currently in the works or planned in Ghana, Kenya, and Malawi and whether there is any organization in Canada prepared to assume leadership of the legal and political strategies that Koshan proposes for full implementation of the criminalization of marital rape. I highly recommend this book to feminists and human rights advocates around the world, especially those committed to ending men's violence against women.

About the Contributor / Quelques mots sur notre collaboratrice

Elizabeth Sheehy, LLB, LLM, LLD (*Honoris causa*, LSUC), FRSC, is professor emerita in the Faculty of Law at the University of Ottawa. Her research record includes her most recent books: the edited collection *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (University of Ottawa Press, 2012, available on open access) and *Defending Battered Women on Trial: Lessons from the Transcripts* (UBC Press, 2014), which was awarded the David Walter Mundell Medal 2014 for fine legal writing by the Ministry of the Attorney General of Ontario. In 2018, she received a Persons Award from the Governor General of Canada and was also made a Member of the Order of Ontario.