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**TITLE: A CRITICAL ANALYSIS OF THE CONCEPT OF  
MARITAL RAPE**

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## DECLARATION

I, **Mchizanthaka Zulu**, do hereby declare that I am the sole author of this Obligatory Essay, that during the period of registered study at the University of Zambia for this module, I have not been registered for any other academic award or qualification, nor has any of the material used been wholly or partly submitted for any other award. The dissertation is a result of my own work, and where other people's research has been used, I have dully acknowledged my borrowing of their work.

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## **ABSTRACT**

The purpose of the research is to critically analyze the concept of marital rape, particularly in developing countries that have not yet adopted the concept as a crime in their criminal justice system. The research focuses on looking at the factors that influence marital rape and why many legal systems refuse to adopt it till this day. It further goes on to look at what rights women have been afforded in the various legal systems.

This research was purely literature based; analysing various views on marital rape by critics, academics, scholars, etc. I have analysed both local and international literature in the form of textbooks, journals and reports from both organisations and independent authors.

It was clear during my research that while parts of the international community is slowly coming to terms with adopting the concept of marital rape, Many developing countries still refuse to criminalise the concept. One of the reasons for this is the cultural norms of the community influenced by the patriarchal society; and the other is the lack of faith in the justice system of the victims.

# **TABLE OF LEGISLATION**

## **International Instruments**

The United Nations Committee on the Elimination of All Forms of Discrimination  
Against Women.

## **Zambian Legislation**

The Constitution of Zambia, Chapter 1 of the Laws of Zambia

The Penal Code Chapter 87 of the Laws of Zambia

The Zambian Constitution's Bill of Rights

## **TABLE OF CASES**

<i>R v Clarence</i> .....	[1888] 22 QBD 23, [1886-90] All ER 113
<i>R v Clarke</i> .....	[1949] 2 All ER 448
<i>R v Miller</i> .....	[1954] 2 All ER 529
<i>R v O'Brien</i> .....	[1974] 3 All ER 663
<i>R v Steele</i> .....	(1976) 65 Cr App R 22
<i>R v R</i> .....	[1991] 1 All ER 747
<i>R v C and Another</i> .....	[1991] 1 All ER 755
<i>Forum for Women, Law and Development v. Ministry of Law</i> ... Sup. Ct. 2058 (2001-2002)	.....55 Nepali

## **ACRONYMS**

VSU-Victim Support Unit

GIDD- Gender in Development Division

YWCA- Young Women Christian Association

NGOCC- Non- Governmental Organisations Coordinating Council

CEDAW- Convention on the Elimination of All Forms of Discrimination against Women

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# **CHAPTER ONE**

## **1.1 INTRODUCTION**

This is a research into the offence of marital rape under Zambian law. The definition of rape has been varied according to a particular society. However, the most commonly adopted definition by many states under common law has been ‘sexual intercourse by a man with a woman, not his wife, by force and against her will.’ This definition will inevitably call to attention the disturbing notion of the marital exemption to rape. The marital exemption simply states that regardless of the degree of force used on a non-consenting wife, a husband cannot be found guilty of raping his own wife. The research will focus on the possibilities of conceptualising the offence of marital rape as a starting point in the process of criminalising the offence in Zambia.

This research report is divided into five chapters. The first chapter of my research will introduce my research question. This section will look at the statement of problem, which will define rape, emphasising the role that force and consent play in the crime. I will explain the purpose of my study, which will take the form of research questions and a lay out of my objectives. The significance of the study will point out the importance of critically analysing the concept of marital rape in the Zambian legal system. The research methodology includes both a review of literature and some field work. The literature review covers material obtained from books and reports discussing marriage, sexual violence in and out of marriage, the effects that sexual violence has had on its victims and the response from society.

The second chapter of my research will tackle the definitions of marriage, sexual violence, the laws governing these two subjects and the gap in the law. It will be an incorporation of both case law and literature review. A chronological study of English cases (i.e. R v Clarke [1949] 2 All ER 448, R v Miller [1954] 2 All ER 529) will be taken, looking at how law has created, argued with and in some situations developed the conception of marital rape since Hale CJ's influential suggestions of the marital rape exemption to rape cases in 1736.

The third chapter will contain theories I have considered during my research which tackle human rights, particularly the rights of women in both the home and society. It will focus on how marriages are perceived in both Zambian and international societies. It will include information on the prevalence of sexual violence in and outside marriages faced by many women in Zambia. I will further discuss possible remedies to the problems facing conceptualising marital rape in Zambia.

The fourth chapter will look at and analyse the existing Zambian legal framework on rape, domestic violence and the possible way in which marital rape is somewhat catered for. Scrutiny will be made of the steps (if any) the Zambian legal system is taking to criminalise marital rape.

The fifth and last chapter will contain a detailed conclusion and recommendations.

## **1.2 STATEMENT OF PROBLEM**

In Zambia, the poor Human Rights situation affects families and especially children and women. Domestic violence against women, especially wife beating and rape are prevalent. In Zambia, there is no specific law for domestic violence. Violence against women in the home is usually prosecuted under the general assaults statutes. According to the Bureau of Democracy, Human Rights and Labour, the police unit tasked with tracking abuses (the Victim Support Units [VSU]) recorded 2,841 cases of assault against women in 2003. From this figure, there were 599 convictions and 71 acquittals in assault cases. Although the Victim Support Units were responsible for handling cases involving, wife beating, property grabbing and maltreatment of widows, the police still encouraged reconciliation rather than legal pursuits of reports of domestic violence.

Although the existence of the Victim Support Unit is an indication of political will to address gender based abuses, there are serious problems that undermine its ability to carry out its functions effectively. Like any other institution in Zambia, the unit lacks resources as earlier stated. The Head of the community service department of the Zambian Police (of which the VSU is a part) and Zambian activists told the Human Rights Watch that the unit lacks paper and sexual crime forensic kits. A nurse counsellor in Kafue told the Human Rights Watch that she tried to help women patients who had visible signs of physical violence to report their husbands to the Victim Support Unit, but the VSU officers would respond that they had no transport or were short staffed, and thus unable to help the women.

Zambia has a number of governmental policies that specifically address gender-based abuses. The National Gender Policy (2000) outlined concrete measures for the government to address gender-based violence. The government made a commitment to:

- Promote awareness through campaigns to change harmful and negative cultural practices of society especially by health and media personnel, the police and other security and defence agencies toward gender issues;
- Encourage the victims, through the appropriate mechanisms, to report cases of all forms of violence and sexual abuse to the relevant law enforcement agencies;
- Establish a mechanism to co-ordinate the effort of the police, social welfare workers and legal personnel in dealing with cases of gender violence;
- Expand and strengthen the operations of the police victim support unit to effectively cover the entire country;
- Build capacity among law enforcement agencies to handle cases of gender violence by increasing their skills in counselling, psychology, social work, gender and human rights;
- Establish and encourage institutions dealing with rehabilitation of victims of gender violence;
- Promote and conduct awareness campaigns targeted at women and men on the existence of legal provisions in the penal code, Intestate Succession Act, and other laws protecting women and those with disabilities against violence, sexual harassment and abuse; and

- Improve women's participation in law enforcement and crime prevention.<sup>1</sup>

The strategic plan of action for the National Gender Policy (2004-2008) lists as government priorities the establishment of mechanisms to coordinate efforts to address gender based violence, to “strengthen, and enact gender discriminatory laws and procedures” to “facilitate reporting of all forms of gender violence”, and to build the capacity of the law enforcement agencies to handle cases of violence.

Zambia has a Gender in Development Division (GIDD), which operates under the cabinet office, although in 2006, the then president appointed a cabinet level minister of gender and development. The GIDD is responsible for co-ordinating the implementation of the gender policy, and has a very limited capacity in terms of financial and human resources. The budget allocated to GIDD in 2007 was K3.43 billion out of a total budget of K12.04 trillion. The Minister of finance told the Human Rights Watch that GIDD received relatively fewer resources because resources earmarked for gender-related projects are also allocated to other ministries such as the ministry of education, to cover girls education, for example. Still, the mere .04 percent of the total national budget allocated specifically for gender is unacceptably low.

In 2000 the Zambian government drafted the national plan to end Gender Based Violence, in line with the SADC Addendum on the Prevention and Eradication of Violence against Women and Children. The plan outlined legal, social economic, cultural, and political factors, as well as education, awareness and training as key areas for action. However, this plan remained in draft until the year 2007 when GIDD decided

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<sup>1</sup> Republic of Zambia, National Gender Policy(Lusaka: Gender in Development Division, 2000), pp.65-66

to revisit it. In 2007, a number of non governmental organisations like the Young Women Christian Association (YWCA), and the Non-Governmental Organisations Coordinating Council (NGOCC), to end Gender Based Violence to the Gender and Development Division for government endorsement and incorporation in the National Plan to End Gender Based Violence.<sup>2</sup>

Legal responses to sexual violence often shift when in a domestic setting, suggesting that forced sex within a marriage amounts to something other than rape. After being perceived for a long time as a crime of sexual passion, marital rape is now viewed in many jurisdictions as an act of violence worthy of prosecution.<sup>3</sup> However, rape committed in a marriage setting still falls into a gray area in the Zambian legal system.

The offence of rape requires sexual intercourse between the parties to be forceful and non-consensual. This has for a long time been deemed to only cover forced intercourse that has unlawfully taken place outside a marriage. By legal definition, a husband cannot rape his wife because the criminal offence of rape is ordinarily defined as forced sex on a non-consenting person other than the wife of a defendant. Common law seems to approve the requirement that rape can only be committed against the will of the victim; necessitating proof of the infliction, or threat of real physical violence and a correspondingly high level of physical resistance.

The Zambian legal system has adopted English laws by incorporating most of the English common law into the system as precedent. Although the Zambian legal system has been gradually creating its own laws, English case law is still referred to when deciding cases.

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<sup>2</sup> Human Rights Watch, *hidden in the Mealie Meal*, pp63-65

<sup>3</sup> Eskow, *The ultimate weapon? Demythologizing Spousal Rape and Reconceptualising its Prosecution*, (Stanford Law Review 48 1996), p.678-679

The concept of the marital rape exemption came from Sir Matthew Hale, an eighteenth century English Chief Justice who stated that husbands cannot be guilty of raping their lawful wives because by their mutual matrimonial consent and contract a wife gave herself up to her husband and thus could not retract her consent. <sup>4</sup>

This means that under the Zambian legal system, a husband cannot be found guilty of rape where he has sexual intercourse with his wife without her consent. He may however, be found liable for an offence with a lesser sentence, i.e. Indecent Assault.

Today, however, the status of women has changed; with modern marriages being regarded as a partnership of equals rather than as man owning property. Estimates of the prevalence of marital rape suggest that in the late 1990's between 10 to 14 percent of women were victims of rape or attempted rape by a current or former spouse.<sup>5</sup> These estimates clearly indicate that the spousal exemption laws affect a significant number of women. However, like all the other efforts ever made to improve the rights and protection of women, the process of removing the marital rape exemption seems to be taking several years. It is hoped that through legislative changes or judicial decisions, the Zambian legal system will either completely or partially abolish the marital rape exemption.

### **1.3 PURPOSE OF THE STUDY**

This section falls into two parts. The first part is a list of my research questions followed by the second part laying out the objectives of the study.

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<sup>4</sup> Hale, *The History of the Pleas of the Crown*, (S. Emlyn [e.d.] (1778), p.629

<sup>5</sup> Lawrence, Ganong and Warzinik, *Family Life in Twentieth Century America*, (Westport, Connecticut. London: Greenwood Publishing Group 2007), p.265



## **Research Questions**

- What does the institution of marriage entail under the statutory and customary law of Zambia?
- What is the legal definition of sexual violence?
- What law regulates sexual violence in Zambia and on an international level?
- What gap exists between the regulating law and the problem of sexual violence in marriage?

## **Objectives**

- To identify the various aspects of a criminal offence of marital rape; and determine the viability of such an offence under Zambian law.
- To challenge the traditional notion that marriage represents a complete and irrevocable agreement by the woman to provide sexual services to the husband upon demand.

### **1.4 SIGNIFICANCE OF STUDY**

The significance of this study is to uncover the gap or loophole in the crime of rape under the Zambian legal system. It seeks to incorporate sexual violence taking place in marriages into the legal definition of rape. This will enable and encourage society to publicly address the problem of the subordination of women through sexual violence taking place in the 'domestic sphere.

## **1.5 METHODOLOGY**

The research will take a legal pluralist approach. For the definition of rape, reference will be made to the *Zambian constitution*, *Penal Code*, and other statutes. The literature review will encompass *Zambian literature* and *international literature* in the form of commentaries, textbooks, journals and reports from organizations and independent authors.

The research will further take the *feminist theory* approach by looking at the role played by cultural differences in developing the law on marital rape. The view of the radical feminists will also be considered when discussing subordination and dominance in a ‘patriarchal society.’

Courts will be visited in the search for records of any cases brought in that would have otherwise been associated with marital rape; with much interest to being accorded to the judgments given in those cases.

An inquiry will be made into any cases that may have been brought to organisations dealing with domestic violence, i.e. the *Victim Support Unit*, *The Women’s Legal Clinic* and the *Young women’s Christian Association*.

A brief look at the *Zambian tradition* will tell us how a married woman is viewed; her expectations and rights in a marriage setting. This will be accompanied with a survey taken showing how many women agree with the argument of adopting marital rape as a crime and how many have experienced the “offence.”

## CHAPTER TWO

Marriage is defined in a variety of ways by different sectors of society, i.e. a definition coined by lawyers, homosexuals, and those lacking cultural knowledge maybe quite different. Creating a definition of marriage that will cover all cross-cultural variations would be almost impossible because there will always be a society that fails to fit into the definition. However, most anthropologists will agree that marriage partly entails the following in most societies.<sup>6</sup>

- A culturally defined relationship between a man and woman from different families, which involves and regulates sexual intercourse and legitimizes the birth of children.
- A set of rights that the couple and their families obtain from each other, which include rights over children born to the woman. Some of the mentioned rights and obligations referred to above will of course involve sex between the parties.

Let us briefly look at the interplay between marriage and sex in an African setting. The sexual relationship in African marriages is said to be a relationship of possessor and possessed. The main duty of the woman, who in this case is the possession, is to obey her possessor. This means that the woman has no sexual freedom to express her sexuality. Her role is that of gratifying her husband.

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<sup>6</sup> Peoples and Bailey, *Humanity: An Introduction to Cultural Anthropology*, (Wadsworth: Cengage Learning, 2008), p.3 & 4

However, a look at two groups of African peoples will serve to illustrate the complexity of what happens in reality.

## **2.1 The maasai**

According to the maasai, marriage is a lifelong partnership between a man and a woman. The society is patrilineal, in that the woman is expected to leave her maternal home and join the household of the groom. The groom pays the dowry and assumes the headship of the family, while the wife is responsible for the household.<sup>7</sup>

The ritual sequence of a bride's removal from her father's village to her husband's follows the classic stages of a rite of passage, with separation, transition and integration. However, there is a notable absence of any symbolic union between bride and groom, and the clear emphasis is on a transfer of control over the bride.

Some years after the children are born, but traditionally before any of them are initiated, a final ceremony is performed to complete the marriage. This is a re-enactment of the earlier removal of the bride. There is a similar blessing in her mother's hut and procession back to her husband's village, though without the taunting and gifts when she arrives. There is a general spirit of celebration and even pride on both sides which replaces the earlier embarrassment of the husband and desolation of the bride. She has now firmly established herself and her family's reputation in her husband's homestead, and she commands respect, especially on this occasion. During this re-enactment, formal bride wealth is paid. In this at least there is an expression of a marriage union: the legs of the cattle of this payment are tied to the necks, forcing them to lie down immobile, just as

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<sup>7</sup>J. Bryson, *A Theology of Sexuality and Marriage*, (Uzima Publishing House), pp.42-44.

the marriage itself is figuratively bound in a permanent knot. It can now be claimed to be a marriage for which the legs of the cows have been tied, and the wife has been led with cattle. This proudly emphasises the mutual trust that has been built up and the marriageability of both parties in a society where many marriages do not survive the trial period. She is no longer a trial wife whose legitimate position is in question. Her husband may now speak of her warmly as his properly bestowed wife for whom he has had to beg and to pay bride wealth; She really is his possession.<sup>8</sup>

## **2.2The Nandi People of East Africa**

For this tribe, the sexual aspect of a relationship is the bond in marriage, be it for pleasure or for procreation. The sexual relationship is in this case completely controlled and managed by the wife. Although every woman is expected to satisfy her husband's sexual needs, a husband is expected to respect his wife's wishes at all times. In certain circumstances, a husband is expected to psychologically switch off his sexual urge when it is considered unreasonable to expect a wife to have sexual intercourse with him, i.e. in cases of a wife being in her late pregnancy stages.

According to the Nandi people, sexual relationships are considered a must in a marriage. Failure to have sex is considered abnormal and a problem that needs to be addressed in order for couples not to be denied their basic rights. Any sexual disagreements are usually the result of a man failing to perform his responsibilities towards his wife.

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<sup>8</sup> Paul Spencer, *The Maasai of Matapato: a study of rituals of rebellion*, (Routledge: Taylor and Francis Group, 2004). p.33

Looking at the above two different African tribes, it is comforting to note that Africa does not completely disregard the rights of the woman in both society and the home.

The Marriage bond is meant to reduce and not eliminate any conflicts over sexual access. It defines and limits adult sexual access to certain individuals. According to Alan Soble<sup>9</sup> when getting into a marriage each party consents at the very beginning to an entire series of sexual acts that can constitute the entire sexual life of a person. This means that there is a presumed continuous consent to sex at the very exchange of vows. At this point, each party owns the body and sexual powers of the other, making marital rape conceptually impossible. What then constitutes sexual violence in a marriage?

Rape has been defined under common law by many states as sexual intercourse 'by a man with a woman, not his wife, by force and against her will.' This definition proclaims three interesting features: (1) the marital exemption, (2) the need for force, and (3) the no-consent rule. Therefore, to start with a man cannot rape his wife regardless of the degree of force he uses on her or her lack of consent. Secondly, the threat or use of force is required. The absence of the threat or the use of physical force did not amount to rape whether or not the sexual act was committed against the woman's expressed consent. Lastly, the two phrases 'force' and 'against her will' were deemed to be jointly sufficient but independently necessary conditions.<sup>10</sup>

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<sup>9</sup> Soble and Power, *The Philosophy of Sex: Contemporary Readings*, (Lanham Md: Rowman and Littlefield, 2007), p.470

<sup>10</sup> Wertheimer, *Consent to Sexual Relations*, p.11, (Cambridge: At The University Press, 2003), p.11

### **2.3 THE MARITAL EXEMPTION**

According to Owen J., the consequence of the statement made by Hale CJ in 1736 is that a husband cannot be brought within the ambit of criminal law even if he brutally forces sexual intercourse on an unwilling and protesting wife. This is so despite her objections and no matter what medical advice she has received as to whether she should submit to such intercourse or not. According to Hale CJ.:

The husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.<sup>11</sup>

This statement was made at a time when marriage was indissoluble. Hale was explaining the common law as it seemed to him at that time. He was writing it in a book without any reference to a particular set of circumstances presented to him in a prosecution. Research shows that no particular repetition had been made of this statement for a while. This is because there had been no serious discussion on the matter that ensued in the years that followed Hale CJ.'s statement as it was regarded as a subject the very mention of which was a disgrace to human nature.<sup>12</sup>

Looking at the criminal practitioners' book *Archbold on Criminal Pleading, Evidence and Practice*<sup>13</sup>, it is clear that the statement made by Hale CJ. was to be followed by practitioners whether or not he was right. The significance being that there would not be a prosecution for marital rape for many years despite any brutality which might include forcible sexual intercourse.

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<sup>11</sup> Hale, *The History of the Pleas of the Crown*, p.629, (S. Emlyn [e.d.] 1778)

<sup>12</sup> [1991] 1 All ER 748

<sup>13</sup> Butler and Mitchell, *Archbold: Criminal Pleading, Evidence and Practice*, 38<sup>th</sup> ed. (London: Sweet and Maxwell 1973), p.341

However, looking at the case of *R v Clarence*<sup>14</sup> it appears that certain judges i.e. A L Smith J. accepted or indicated that there were circumstances in which the wife could in law be raped. On the other hand, others like Hawkins J. indicated that she could not. Those indicating that she could not be raped based their argument on the fiction that a wife consented to sexual intercourse at any time, whether or not she is willing. Additionally consent could not be withdrawn by her but only by the state.

The case of *R v Clarke*<sup>15</sup> as decided by Byrne J. was the first clear departure from the bald statement of Hale CJ. However, it can be argued that it was still in accordance with the statement because Byrne J. still insisted that it is an un-retractable consent. The only new addition to the law was the consideration of the effect of a court order. Byrne J. held:

The position, therefore, was that the wife, by process of law, namely, by marriage, had given consent to the husband to exercise the marital right during such time as the ordinary relations created by the marriage contract subsisted between them, but by a further process of law, namely, the justices' order, her consent to marital intercourse was revoked.

Looking at the above passage, the judge clearly gave the impression that the consent given at the onset of the marriage could not be personally revoked by the wife. Rather, consent could only be revoked by the court to which an application was made. This meant that a wife could only attain a release by going to obtain a court order. This in turn meant that a simple petition for a divorce could not amount to a revocation of the consent as was held in *R v Miller*.<sup>16</sup> In this case Lynskey J. introduced the need for a

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<sup>14</sup> [1888] 22 QBD 23, [1886-90] All ER 113

<sup>15</sup> [1949] 2 All ER 448

<sup>16</sup> [1954] 2 All ER 529



decree nisi or a decree absolute to be pronounced for a marriage and its 'obligations' to be terminated.

The decision of Lynskey J. was upheld by Park J. in *R v O'Brien*<sup>17</sup> where he stated: 'In my judgment, a decree nisi effectively brings a marriage to an end.' By this statement, Park J was showing a fine draconian attitude towards the law, the relevance of which is that the common law is meant to be the collective common sense of the judges.

Geoffrey Lane LJ. in *R v Steele*<sup>18</sup> posed a very interesting question to be considered by the court in deciding whether or not the marital exemption was valid in a prosecution:

Have the parties made it clear, by agreement between themselves, or has the court made it clear by an order or something equivalent to an order, that the wife's consent to sexual intercourse with her husband implicit in the act of marriage, no longer exists?

From his judgment it was clear that an implied consent could be revoked by a court order, an agreement between the parties, or by something equivalent to a court order. This provides that at the very least, an agreement between the parties to terminate consent should be sufficient to rule out the marital exemption. This new provision was a clear development in the common law department of marriage and marital exemptions. It was this development in the law that helped Owen J. to reach a conclusion in the later case of *R v R* that the withdrawal of cohabitation by one party coupled with an implied agreement to start divorce proceedings was sufficient to revoke the implicit consent

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<sup>17</sup> [1974] 3 All ER 663

<sup>18</sup> (1976) 65 Cr App R 22

given by the wife to sexual intercourse.<sup>19</sup> Therefore, forced sex in those circumstances could not fall under the marital exemption rule.

In the case of *R v R*<sup>20</sup>, a husband and wife separated after five years of marriage. This was due to complaints from the wife of being forced to have sexual intercourse. The court stated that it is implied or presumed that a wife consents to sexual intercourse at the onset of the marriage. An agreement takes place between the parties that is sufficient to displace the marital exemption to the law of rape. Such an agreement may be done informally or be implied by conduct. It was further held that a wife could unilaterally withdraw her implied consent by a withdrawal from cohabitation. Such a withdrawal can be accompanied by a clear indication that her consent to sexual intercourse has been terminated

The judgement in *R v R* was later upheld in *R v C and Another*.<sup>21</sup> The court held that there is no marital exemption to the law of rape. A husband could be convicted of the rape of his wife if she does not consent to intercourse. This was regardless of whether he is living with or apart from his wife. This was a case in which two defendants, (one being the husband of the victim), abducted the wife and committed various sexual assaults which formed the basis of the charges against them. The Husband and wife were living apart at the time, although they did not formally agree to separate. In this case, Simon Brown J referred to Owen J's ruling in the previous case of *R v R*. He first refers to the suggestion that there is need for a court order or an express or clear written separation agreement, which he considers to be a practicality and not a principle. He argues that it makes no jurisprudential sense to expect wives who are withdrawing from

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<sup>19</sup> [1991] 1 All ER 752

<sup>20</sup> [1991] 1 All ER 747

<sup>21</sup> [1991] 1 All ER 755

cohabitation as a way of anxiously running away from their husbands unwarranted sexual attentions, to immediately obtain a written separation agreement. As such an agreement would have to be obtained from husbands who might not be prepared to enter into it. Questions thus arise: Is it acceptable for a husband to physically impose his will on his wife, irrespective of the nature and extent of her resistance simply because they remain formally in a state of marriage? What is precisely encompassed in an 'implied agreement to a separation? What is a clear indication that consent to sexual intercourse has been terminated?

## **2.4 FORCE AND CONSENT**

Some rape laws completely disregard the need for consent and emphasize the requirement that the defendant should have used force against the victim's body. This force needs to be coupled with proof of resistance on the part of the woman. However, critics have argued that the requirement for force is particularly paradoxical in states where the law defines rape as 'sexual intercourse against the victims will'. A good example of such states was Scotland until 2002. Prior to 2002 in Scotland, having sex with an unconscious or sleeping woman was not rape because in her current state she did not refuse consent. Although the term 'will' is generally attached to questions of 'intentions' and 'desires', the laws relying on the 'against the will' formulation still lean back to an inquiry into the amount of force that was used against the victim's body. Therefore, because of the problematic focus on force as evidenced through a rape victim's body, feminists have pressed for change in emphasis from body to mind. This

takes the form of legally acknowledging that the crime of rape should be fixated on ‘the right to choose for one’s self whether and how to be sexually intimate.’<sup>22</sup>

In the early nineteenth century, violence and physical force were considered to be necessary constituents of rape. However, having these two characteristics present did not necessarily turn a consensual sexual encounter into a coerced one.<sup>23</sup> Thus, when considering what turns sexual intercourse into rape, we need to look beyond the legal definition. This is because the legal definition does not provide sufficient details for a clear distinction between “a man’s seductive pressure and a woman’s inability to refuse”. There is therefore a need to include social and cultural practices when looking into the definition of rape. The placing of rape in such a large context will reveal the complexity in making boundaries between force and consent in sexual relations.<sup>24</sup>

The line that separates rape from other types of sexual activities is a very thin one, this is due to the fine distinction between consensual and forced sex. Another reason for this thin line is the assumed female passivity and male aggression by society. Society and culture, for instance, dictate that men should be the ones to initiate sexual activity. As a result, these assumptions by society of how the initiation of sex ought to be can make the defining of sexual violence and rape very complicated. Another complication in the

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<sup>22</sup> Hunter and Cowan, *Choice and Consent: Feminist Engagement with Law and Subjectivity*, (Oxon: Routledge Taylor and Francis Group, 2007), p.94

<sup>23</sup> Block, *Rape and Sexual Power in Early America*, (North Carolina: At the University Press, 2006), p.16

<sup>24</sup> Blackstone, *Commentaries on the Laws of England*, volume IV, 210

definition of rape is that not all unwanted sex is non consensual. Most women and girls have agreed to consensually having unwanted sex with a relationship partner or spouse.<sup>25</sup>

The fact that sexual violence and rape occur in courtship and marriage leads to complex objective studies in the matter. This is because in dating, courtship and marriage sexual relations are naturally expected to be one of the automatic outcomes. Therefore, when addressing sexual violence in this context, the problem does not become ‘the fact of sexual intercourse’ itself, but rather ‘the form of the act of sexual pursuit’.<sup>26</sup> So, it is agreed that sexual pursuit and consent in marriage and courtship are seen as bilaterally expected, produced and enjoyed. However, it should also be noted that these relationships also form an environment in which sexual pursuit is usually coerced and forced. This therefore provides a warning to society to be careful in defining what is meant by terms of sexual violence like rape, coercion and consent.<sup>27</sup> It has been argued that in the legal monogamous marriage, women are assumed to exchange their sexual and domestic services in exchange for economic security. Ironically, the male sexual control over women resulting from this scenario has been compared to slavery by many critics. This slavery brings into a woman’s life various types of degradation and afflictions. A woman suffers psychological and physical problems and illnesses that affect them for the rest of their lives in most cases.

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<sup>25</sup> Blackstone, volume IV, 210

<sup>26</sup> Spitzberg and Cupach, *The Dark Side of Close Relationships*, ( Hillsdale, NJ: Lawrence Erlbaum Associates, 1998), p.181

<sup>27</sup> Spitzberg and Cupach , 1998, p.181

# **CHAPTER THREE**

## **3.1 Introduction**

This chapter is an analysis and application of the various theories discovered during my research. It will also tackle various Human Rights that favour victims of sexual violence. These rights will be considered in the attempt to conceptualise marital rape.

The home, a place meant to be the loving environment, can also be one of the most violent places that society has to offer. Around the world, gender violence takes place in about 85% of societies. Recent studies of intimate violence in developing countries showed that about a third of women in Nicaragua and Egypt and close to half of the women in Zambia, Peru and Colombia have been beaten by their spouses.<sup>28</sup>

In countries like Zambia marital rape is currently underreported due to cultural norms, social stigma and the fact that most countries lack a supportive justice system. Social norms in most parts of Zambia dictate that women are inferior to men and customary law refuses to recognise marital rape in most situations.

Most relevant to the problem of marital rape in Africa is that most African countries have multiple legal systems: statutory law, customary law, civil law and religious law. In Cameroon for example, marital rape is recognized as an offence under statutory law. It is however, tolerated under customary law because it is culturally accepted that consent to marriage constitutes unlimited consent to sexual intercourse. A further example can be

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<sup>28</sup> M. Newman, *Sociology: Exploring the Architecture of Everyday Life*, (Pine Forge Press), p.240

obtained from the Muslim community. Although rape is considered a punishable offence in every Muslim society; under dominant interpretations of *sharia* law, forced sex within a marriage is not an offence.<sup>29</sup>

Other countries, especially in Africa still refuse to adopt laws that will criminalize marital rape; for instance, in Kenya marital rape is not considered possible by most of Kenya's largest ethnic groups. This is despite the issue of marital rape becoming extremely contentious in Kenya and a few other African countries. In 1994, the Kenyan Attorney General raised the possibility of making marital rape a crime; the response was very controversial with religious leaders accusing him of interfering with the institution of marriage and inciting women against their husbands. The argument by religious leaders was that 'The Bible is very clear on the issue. The woman's body belongs to her husband and the man's to his wife'. Other marriage counsellors had the view that they could not legislate for matters in the bedroom, especially within a marriage.<sup>30</sup>

The marital exemption in Africa is said to protect the marriage from 'intrusions' of criminal law which are to be avoided so as to avoid a marriage ending in a divorce. Thus, the exemption is said to uphold the sanctity of marriage, since to allow the woman to charge her husband with rape is likely to wreck the marital relationship.

When being prepared for marriage, a woman is counselled not only to persevere in marriage but also to submit to her husband in all matters, including sexual relations. She

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<sup>29</sup> Nicky Ali Jackson, *Encyclopedia of domestic Violence*, published by CRC Press, p2. 2007

<sup>30</sup> Green, *Gender Violence in Africa: African Women's Responses*, (New York: St. Martin's Press, 1999), p.10-12

is instructed not to deny her husband's advances and is cautioned that sexual intercourse is for her husband's pleasure and procreation. These perceptions persevere despite the developments that society has undergone. Thus, the issues of negotiating sexual intercourse are not considered important and are never brought up in the counselling of a new wife. This is because it is assumed that by agreeing to marry a man, the woman has consented to having sex with him at all times. In most African societies, a woman cannot deny her husband sexual intercourse even when she knows that he has been unfaithful. In many cases women are forced to have intercourse with their husbands despite knowing that they are carriers of sexual infections.<sup>31</sup>

Critics have argued that the exemption allows that, although it is a crime to beat up and rape a woman who refuses to have sex with a man, it is not a crime if that man happens to be her husband. Where the exemption is accepted, married women do not have the right to make choices about their actions or their bodies.<sup>32</sup>

There are various reasons why women are found vulnerable under customary law. We will start with what is popularly known in the Southern African region as *lobola*. The payment of *lobola* encourages men to feel that they now own their wives' reproductive organs. A man who has paid *lobola* will most likely demand and even force sexual relations with his wife. This is because he feels that he has earned that right by virtue of having paid that *lobola*. This is compounded with the fact that most men generally believe women will never voluntarily consent to sexual relations; so they do not bother considering their opinions on the matter.

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<sup>31</sup> Green, *Gender Violence in Africa: African Women's Responses*, pp.10-12

<sup>32</sup> Green, *Gender Violence in Africa: African Women's Responses*, pp.10-12



There is also the fact that under customary law, women are not recognized as having any rights. This means that men can force their wives into various forms of degradations and not face a penalty. Therefore, except for South Africa and Zimbabwe which have some semblance of laws prohibiting marital rape, the general rule in Southern Africa is that women are not protected from marital rape.<sup>33</sup>

### **3.2 CULTURAL NORMS**

Although cultural norms of sexual violence and stressful living conditions may influence the individual's use of violence, the wider cultural norms and social conditions are mediated by the norms of a particular institution. In the case of marriage for instance, norms promoting male dominance in heterosexual relationships and male's rights to use force have a direct influence on how people behave in marriage.<sup>34</sup> Marital rape is a clear product of cultural norms that devalue women and give cultural permission for it to occur. Until recently, women who were raped were assumed to be 'asking for it'; and in some sub-cultures it was considered normal for a husband to hit his wife for a while to keep her in line.

In India, a marriage is equated to a promissory note from the father of the bride to the bride groom. By the very act of giving, the father guarantees the new owner that he can do anything he wishes to do with her. Thus, because the woman is denied all autonomy, her status as property within the marital relationship is formalized by this transfer. Critics have argued that this gives the husband the right to rape. Sex is viewed to be for

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<sup>33</sup> A. Barnes, *The Handbook of women, psychology, and the Law*, published by wiley publishers, pp357-8, 2005

<sup>34</sup> L. O'Toole and J. R. Schiffman, *Gender Violence: Interdisciplinary Perspectives*, published by NYU Press, p450, 1997

procreation only, and for the female partner it is regarded as a function as well. In fact, her status as 'property' inevitably leads to her function as breeder. In the Indian community, existing moral principles confer upon a male spouse a right over the body of his wife. Those who have bestowed the property to him are constantly obligated to ensure that the woman conforms to this moral edict by socializing her in fitting values and norms. By virtue of the function argument, the female body is viewed by society as a machine which the male uses intentionally for procreation and pleasure. Thus, the male is the subject that intentionally uses the functional, strictly deterministic female object. Not only does she become a body to the man, but she herself also internalizes these values and thinks of herself as only a body. Although she becomes a body, she has no control over it owing to her status as property. In fact, she is never considered as the body's owner at all. Research shows that victims of domestic violence are willing to talk about physical violence and not sexual violence or rape within a home.<sup>35</sup>

Domestic violence is more prevalent where the social structure favors male power and the dominant ideology legitimates women's subordination. In Africa, domestic violence emerges from many of the same patterns of economic, political and legal discrimination found worldwide. Women's economic dependence on men makes leaving a violent household difficult or impossible. Domestic violence acts as a form of social control, enforcing women's low status and discouraging them from seeking political change. Legal systems tend to enforce patriarchal norms and provide only limited resources for preventing or punishing violence. The every day experience of domestic violence in Africa also reflects local realities and cultural contexts.

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<sup>35</sup> Shamita Das Dasgupta, *A Patchwork Shawl: Chronicles of South Asian Women in America*, pp135-139, published by Rutgers University Press (1998)

Most critics will argue that the concept of marital rape is clearly one of the biggest problems arising under domestic law in Africa . An accurate assessment of marital rape in Africa requires recognition of Africa’s great cultural diversity, as well as the context of colonialism and international inequality that continues to shape contemporary African societies. The incidence of domestic violence varies across Africa, with Research showing higher rates in Ghana, Senegal, South Africa, Tanzania, Uganda, Zimbabwe, and lower rates in the countries where it is considered socially unacceptable, such as Cote d’Ivoire, Djibouti, Eritrea, Gabon Madagascar, Malawi, Mauritania, Somalia, Swaziland, Togo and Zambia. However, these findings should be considered in the context of underreporting, the culture of silence surrounding domestic violence in many African societies and the incomplete and on going nature of domestic violence research in Africa.<sup>36</sup>

Aspects of culture that shape marital rape include relative acceptance of physical force in marriage, gender role expectations, and family structure. In some predominantly Muslim countries like Senegal, Islam provides a rationale for female battering under the label of “correcting” wives who misbehave. In non-majority Muslim countries like Zambia, comparable legitimation derives from oral tradition and popular culture. In some contexts, a majority of women report that domestic violence is justifiable under certain circumstances. Many Africans through out the continent view marital rape as a private matter subject to local norms and family authority, not public scrutiny and public

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<sup>36</sup> Alan Soble, *Sex from Plato to Pagila: a philosophical encyclopedia*, Volume 1, Published by Greenwood Publishing Group, p.246, 2006

intervention. These beliefs clearly, pose a problem for activists working to change attitudes and laws.<sup>37</sup>

Patterns of family authority provide the structure within which acts of marital rape and responses to it occur. Hierarchical male authority, most common in Africa, makes women's resistance difficult. Some practices encourage the incidence of violence in certain situations. Polygamy, for instance is a significant though minority practice in many African countries, and may create conditions of unique vulnerability for sexually abused women. Women may tolerate the violence for fear of divorce and economic abandonment by a husband with additional wives. The payment of Bride-wealth also encourages marital rape. Originally, this practice symbolised the bond between two families and compensation for a daughter's labour. But in many countries today, bride-wealth constitutes the "purchase" of a woman's body by her husband, thus helping to justify abuse.<sup>38</sup>

It can be argued that rape and sexual assaults are caused by society's normative definition of men as aggressive, dominant and powerful; and of women as passive, submissive and powerless. These cultural norms will have to be eliminated. According to Dworkin, women have been treated under both law and custom as the property of either their fathers or husbands. This automatically means that men have been given legal sexual access to their wives, as women are deemed to be powerless when it comes to saying no. Dworkin further goes on to say that such situations are just part of a pattern of regulation of sexual conduct that normalized coercive relations between the sexes. This is a pattern

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<sup>37</sup> Alan Soble, *Sex from Plato to Pagila: Volume 1*, p.246, 2006

<sup>38</sup> Alan Soble, *Sex from Plato to Pagila, Volume 1*, p.246, 2006

that includes treating compliance as consent, admitting a victims' sexual history in defense of a rape charge, and requiring physical injury as proof. Sexual violence is also normalized by the cultural belief that women want to be raped which is often expressed in pornographic and mainstream portrayals of women as deserving, inviting and enjoying rape. Dworkin insists that in our culture rape becomes the signet of romantic love and so remains our primary model for heterosexual relating.<sup>39</sup>

As earlier stated, rape is one of the most underreported crimes. Researchers feel that as many as 84% victims will not report sexual assaults to the police. The primary reason given for not reporting was cultural norms that stigmatize and blame victims for the assaults. Rape victims are viewed more sympathetically by females than by males; and by those with higher education levels. More than half of sexual assault victims will wait at least a year before reporting the incident, the situation gets worse if the assault was done by a family member. Many are only pushed to get help due to psychological problems like depression and anxiety.<sup>40</sup>

### **3.3 Human Rights**

Gender violence entered into international human rights discourse in force with the United Nations Decade for Women ending in 1985. Although absent from the original Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) in 1979, new language was adopted in 1992 and 2003 declaring gender violence as a human rights violation. In 1998, the United Nations International Criminal Tribunal for

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<sup>39</sup> Alan Soble, *Sex from Plato to Pagila*, volume 1, p.246, 2006

<sup>40</sup> Jerrold S. Greenberg, Clint E. Bruess, Sarah C. Conklin, *Exploring the dimensions of human sexuality*, published by Jones and Bartlett Publishers, p690, 2007

Rwanda ruled that rape is a form of genocide. Later in the same year, the International Criminal Court listed sexual violence as a crime falling under its jurisdiction.

It has been argued that women's sexual rights were a concern of women's rights activists from the beginning of the "women movement" in 1848. Early reformers viewed a woman's right to control her own body as key to her subordination. Accordingly, they waged a vigorous, public and extraordinary frank campaign against a man's right to forced sex in a marriage. In addition to feminist advocacy of the 19<sup>th</sup> century, instructional literature at the time maintained that a wife's right to say no to sex is essential to a happy marriage and urged men to acknowledge women's sexual rights.<sup>41</sup>

In a number of countries, women's right to justice and redress is legislated away. If there are no laws, or laws are perceived to be incapable of delivering justice by victims, women will not report violence and this can in turn, create the false impression of its low prevalence. In Indonesia, for example, marital rape is a legal impossibility because a rape victim is defined as "a woman who is not his wife". In Bangladesh, in order to prove that rape has occurred, forensic investigations are taken to examine if a woman is habituated to sex. A "habituated" woman by definition is not a virgin. Since married women are not virgins, marital rape is yet again rendered legally impossible.

The human rights approach to gender violence in Africa has to contend with the charge of many Africans that international standards exhibit western bias and disrespect for African cultures. Activists inside and outside Africa argue that the goal of ending gender violence should be in harmony with African cultural values, and that any disharmony indicates the

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<sup>41</sup> Ola W Barnett, Cindy Lou Miller-Perrin, Robin D Perrin, Family Violence across the Life Span: An Introduction, p12, Sage Publishers 2005

need for change. Ultimately, the effectiveness of national and international struggles in ending domestic violence in Africa must draw on existing cultural resources while working to transform the economic, political and legal context in which African women live.<sup>42</sup>

### **3.4 Justice System**

Africa poses a broad array of non-state dispute resolution mechanisms and formal legal processes that vary from country to country, most of which contain a blend of customary, religious and European law. Traditional sanctions against gender violence remain an invaluable resource in much of Africa, but they have weakened in the face of urbanization, economic crisis, forced migration and war. The common mediation approach to family disputes may backfire when battered women are compelled to respond in a conciliatory manner. In Africa, criminal rape prosecutions are rare, and with a few exceptions, marital rape and domestic violence are not a crime. Where laws against marital rape exist, there are typical problems with both the police and the judicial enforcement. In South Africa, for example, the police systematically treat domestic violence as less serious than other types of assault. In Senegal, judges discourage women from seeking a divorce as a way out of a violent marriage. In countries like Nigeria where Sharia Law plays a major role in family law, prosecutions have been very rare as some legal activists apply Islamic legal principles in domestic violence cases, while others appeal to international human rights laws.<sup>43</sup>

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<sup>42</sup> Suad Joseph, Afsaneh Najmabadi, *Encyclopedia of Women & Islamic Cultures: Family, Law and Politics*, pp126-127 Published by Brill

<sup>43</sup> D. Green, *Gender Violence in Africa: African Women's Responses*, (Palgrave Macmillan), pp. 2 & 3

Exact statistics about the prevalence of violence among intimates are difficult to collect for various reasons. Domestic violence is usually concealed and private, mostly occurring in seclusion, beyond the watchful eyes of relatives and neighbours. Police rules are considered to be very stringent by victims, which discourage them from reporting most incidents of domestic violence- other victims simply find it easier to dismiss such incidents as accidents. The police rationalize their failure to act by arguing that the majority of the battery cases brought to them are later withdrawn by women who invariably reunite with their husbands. Consequently, most police officers tend to adopt the notion that intervention in domestic violence should not be police work. It is often the least liked and most dangerous aspect of their job. One reason for this is that their legal powers concerning domestic violence are often inadequate or unclear.<sup>44</sup> This problem is aggravated by the fact that until recently, police were rarely trained to address family violence.

Even in countries like Zimbabwe, where time is taken to carefully train officers in this area, the police still receive criticism for their mishandling of wife battery cases. In Zimbabwe, although the police are legally competent to make an arrest if they have a reasonable belief that a crime has been committed, they will in practice only make an arrest where the circumstances are impossible to ignore. In other countries, the police will hesitate to make an arrest because it is believed that the impetuous conduct of the wife could impede reconciliation, which is meant to be the desirable goal under the mediation approach taken in most countries. In Zambia for instance, a police response to domestic

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<sup>44</sup> D. Green, *Gender Violence in Africa*, pp. 2 & 3



violence will result in the officers attempting to reconcile the two parties and dissuade women from taking the matter to court.<sup>45</sup>

This just goes to show that the machinery for adjudication is not only minimal and non-punitive, but rather it emphasizes the use of mediation and therapy. This overwhelming popularity of the mediation approach whose aim is to protect the family simply creates a real problem for abused women seeking the justice system to take domestic violence seriously.

In the few cases that do make it to trial, prosecutors tend to charge wife abusers with lesser crimes than they would if the victim was not a wife. Thus, critics argue that such an action can be deemed to somewhat justify the crime purely because it was committed against a wife. Most abuse cases are likely to be put through the family court, where judges most likely acquit, accept minor pleas of guilt for serious offences, or simply hand down unusually lenient sentences for violent acts. This is the case in many countries, wife abusers rarely serve time in prison and are rarely faced with penalties for violating court restraining orders.

In situations where wife abuse is treated as a serious crime, criminal prosecution is always blocked by evidentiary difficulties. . Since marital rape is most likely to occur in a home, proof of rape by a husband is difficult to obtain; the fact that the crimes occur in private means that the victim is actually the only witness. In worse off situations, wives are not considered to be competent witnesses in some countries, and are thus not allowed to give evidence against their husbands. The use of the cautionary rule and the ingrained

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<sup>45</sup> UN 1993

attitudes of largely male judges further reduce the likelihood of achieving a conviction. Additionally, the fact that she may continue to be in contact with the accused before trial commences leaves her susceptible to threats and repeated requests to withdraw her complaint.

Furthermore, in most situations, victims have no confidence that anything is to be gained by going public. They lack faith in the system to provide justice: they find it difficult to trust the police and judicial system, with considerable justification since they have treated women victims of violence with a lack of understanding and compounded their woes. Their problems are treated as personal, unable to be resolved at a public level. Their fate is often accepted as a natural course of events: soldiers are seen as brutal, husbands will beat their wives, and men generally have huge sexual appetites that will lead them to rape.

Marital rape was recognised as a crime in South Africa by the 1993 Prevention of Family Violence Act. While the marital rape provision is an important reform, the difference that it will make in practice to women in abusive relationships is probably limited. Human Rights Watch was told of one conviction for marital rape, but there have been very few prosecutions. In a November 1994 case, a thirty year old man was acquitted in Durban regional court of raping his wife. According to the testimony given by his wife, the husband came home drunk, threatened her with a hammer, hit her and forced her to have sex. The magistrate stated that since the woman did not respond with violence by pushing or fighting off her husband, she must have consented to sex. He also noted that since her testimony was not corroborated, it had to be viewed with caution. The case prompted a

women's organization to write to the local paper's asking: "must women now fight back against drunken, hammer-wielding attackers with equal violence and further risk their lives to prove they are not consenting to rape?"<sup>46</sup>

Even in countries with stronger legal systems, law enforcement institutions have historically responded to intimate partner and sexual violence with bias, neglect and mistreatment. For example, in Britain, researchers noted that police and judges often minimised the criminal nature of gender based violence and expressed bias against victims of sexual abuse until serious reform begun in the 1970's.<sup>47</sup>

According to Amnesty International, domestic violence is a problem the world over and affects one in every three women. This problem is very high in Africa, where both international and regional rights and gender sensitive documents have not been implemented by governments of most countries. Laws are made by the legislature and enforced by the police, and when violators are arrested, the courts interpret the law and assign punishment accordingly. It follows then, that before the police and subsequently the courts can get into the problem of domestic violence, the law must prohibit this behaviour.

However, very few African countries have legislation governing domestic violence available. For example, among West African countries, only Mauritania has specific domestic violence laws in place. Article 297 of the Senegalese penal code, amended in

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<sup>46</sup> Binaifer Nowrojee, Bronwen Manby, Human Rights Watch, *Violence Against Women in South Africa: the State Response to Domestic Violence*, Published by the Human Rights Watch, pp107-108(1995)

<sup>47</sup> World Bank Research Working Paper on Preventing and Responding to Gender Based Violence in Middle and Low Income Countries: a global review and analysis by Sarah Bott, Andrew Morrison, Mary Ellsberg, p,20, Paper no.3618, June 2005.

1999, punishes violence against women by imprisonment of between one to five years. Ghana and Nigeria both have draft legislation designed to make domestic violence illegal in their countries. The rest of the countries in West Africa have yet to draft domestic violence legislation. Without specific domestic violence legislation which prescribes the responsibilities of the officials of the criminal justice system, the victims will continue to suffer.

Commitments on the part of the governments of the various countries to enforcing the provisions of constitutions, and in some cases, civil laws of their respective countries would stem the tide of domestic violence within the African continent. Such commitment would include providing for funds for gender-sensitive training of criminal justice officials and outlining the responsibilities of each part of the criminal justice system.

It has further been argued that some laws in Africa are somewhat narrow and ambiguous. As a result, they are confusing to even the criminal justice officials. For example, rape laws in Liberia, Nigeria and Sierra Leone provide a narrow definition of the crime of rape. It requires penetration of the vagina by a man's penis for the elements of the crime to be complete. Acts of forced oral or anal sex or penetration by foreign objects are not considered rape. According to the Human Rights Watch, the discrepancy in rape laws is worse off in Sierra Leone, where the law holds that unlawful carnal knowledge of a girl over 16 is a felony; but the unlawful carnal knowledge of a girl aged 13, whether with or without her consent is a misdemeanor. To be classified as a crime in both cases, the victim must be a virgin. This is because forced sexual intercourse with a non-virgin is not considered rape in Sierra Leone.

In evaluating how the criminal justice system handles the problem of domestic violence in Africa, it is necessary to point out that several statutes in most African countries discriminate against women. For example, in Cameroon, civil law allows husbands to oppose their wives right to work in a separate profession where the protest is made in the interest of the family. Also, although the Cameroon legal system allows a woman to organize her own business, it also allows her husband to end such commercial activity by simply notifying the clerk of the commerce tribunal of his opposition. These laws effectively subjugate women to the authority of men. These are the type of laws that lead to the tolerating or non recognition of marital rape. In Cameroon, for example, marital rape is recognized as an offence under statutory law, but tolerated under customary law because it is culturally acceptable that consent to marriage constitutes unlimited consent to sexual intercourse. In most West African countries, spousal abuse is not a legal and sufficient ground for divorce. In Nigeria, for example, the Penal Code permits husbands to “correct” their wives as long as such “correction’ does not result in grievous harm. The grievous harm is defined as loss of sight, hearing, power of speech, facial disfigurement, or other life-endangering injuries. Under this kind of discrimination, it should not be surprising that the police in Nigeria as well as in the sub-region do not intervene in “family affairs” except in the case of serious bodily harm or murder.

The law also discriminates against women in the manner in which it punishes people who assault others. For example, the Criminal Code of Southern Nigeria prescribes different sentences for the crime of assault depending on whether the victim is male or female. Whereas assault on a man is a felony punishable by three years of imprisonment, assault of a woman is a misdemeanor and carries a prison term of two years.

In Africa, sentences in rape cases show a conspicuous lack of consistency. The penalties handed down by the courts are erratic and frequently lenient in sexual abuse cases. The lack of clear sentencing guidelines or even a minimum sentence allows the judge wide discretion. In South Africa, for example, in 1994:

- The rape of a prostitute at gunpoint received a U.S. \$2,285 fine.
- A four year long molestation of an eleven year old child received a sentence of 2,000 hours of community service over weekends only.
- The sexual assault of four school girls between the ages of fourteen and seventeen years old received a fine of U.S. \$1,000.
- The rape of a three month old baby received a twenty-five year sentence.

Criminal justice officials in African countries have been accused of maintaining a dismissive, unsympathetic, or nonchalant attitude toward the problem of domestic violence within the region. The human Rights watch has charged that the police do not see domestic violence as a real crime, but as a family matter in which the state has no right to intervene. Court officials are said to be complacent in dealing with victims of abuse who seek their assistance. Judges are said to blame victims of domestic abuse for their own victimization. The criminal justice as a whole in Africa has been accused of discriminating against women. The next chapter considers the Zambian Legislation.

# **CHAPTER FOUR**

This chapter is an analysis of the Zambian legislation on rape and women's rights. It is a consideration of how women in Zambia are really protected from the various forms of abuse, especially marital rape.

## **4.1 Definition of Rape**

Chapter XV, section 132 of the Penal Code of the Republic of Zambia defines rape as follows:

[a]ny person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent, if the consent is obtained by force or by means of threat or intimidation of any kind, or by fear of bodily harm, or by means of false misrepresentations as to the nature of the act, or, in the case of a married woman, by personating her husband, is guilty of the felony termed "rape."

Section 133 goes on further to state:

[a]ny person who commits the offence of rape is liable to imprisonment for life.

Section 134 states that:

[a]ny person who attempts to commit rape is guilty of a felony and is liable to imprisonment for life.

The above statutes are a clear indication that Zambian law explicitly prohibits rape. Rapists are sentenced to hard labour by courts. Between 2003 and 2004, 931 cases of rape and 1,374 cases of defilement were reported. Despite the prevalence of marital rape,

the courts have not tried such cases. Given poor government responses and traditional and cultural inhibitions, most cases of violence against women were usually unreported.

#### **4.2 Fundamental Human Rights**

Art.11 (1) of the Zambian Constitution recognises and declares every person in Zambia to be entitled to the fundamental rights and freedoms of the individual, whatever the sex.

However, the same article states that the entitlement to these rights and freedoms is subject to limitations contained in Part III related to fundamental rights and freedoms.

Art.23(1) prohibits discrimination and Art.23(3) defines discrimination as affording different treatment to different persons wholly or mainly to their respective descriptions by race, tribe, sex, place of origin, marital status, political opinions, colour or creed.

However, art.23 (4) specifically excludes from the application of the non discrimination clause to all laws:

With respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law; For the application in the case of members of a particular race or tribe, of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons.

These exceptions make it possible to unfairly discriminate between people in the area of customary law and family law, which in practice mostly affects women. The United Nations Committee on the Elimination of Discrimination Against Women, which monitors state compliance with the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), has expressed concern at these contradictory provisions. There is currently a fourth constitutional review process under way which is



meant to develop a people driven constitution. The women's movement has also submitted proposals for amendment. One of the submissions proposes an amendment of Art.23 in the Constitution's Bill of Rights by broadening the scope of the non-discrimination clause and removing the derogation clauses under it. The minimum standard document for Women and Children's rights was developed by women's organisations and was used as the basis for the submissions. This document was borrowed from some of the more progressive constitutions in the region such as those of Namibia, Malawi and South Africa. Most submissions relate to human rights contained in the Bill of Rights which is sacrosanct and can only be amended by a referendum. So far, the government has refused to hold a referendum on account of the cost of such an exercise. There is a lot of uncertainty and controversy around the review process and there is fear that this article might not be amended.<sup>48</sup>

#### **4.3 Victim Support Unit**

During the past decade, Zambia has revised its civil and penal codes and implemented a nationwide system of "Victim Support Units" to address violence against women. By 2001, these units had trained officers, many of whom were women, in nearly every police station in the country. Nonetheless, an evaluation by Human Rights Watch (2002) noted the following problems:

- Women and children face serious social and cultural barriers to legal redress. Women are often reluctant to use legal remedies because they do not believe that they are entitled to protection. Another reason for not seeking legal remedies is

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<sup>48</sup> United Nations Human Settlement Programme, Land Tenure, Housing Rights and Gender in Zambia, pp54-55, published by the UN Habitat, 2005.

that they are afraid of further violence from the perpetrator or their families. Additionally, they are pressured to avoid bringing shame upon their family; and sometimes, jailing the perpetrator would mean cutting off the family support.

- Support for new laws has always been low among the police, the judiciary and the general public. This is especially so when laws counter long standing traditions of discrimination against women. Law enforcement institutions simply refuse to enforce the laws.
- The police face a severe lack of resources for investigating and prosecuting cases of violence, due to lack of adequate office space, training, equipment, transportation, forensic tests, etc. As a United States State Department report described: “the VSU has no transportation, no phone- so how can you report to the police”?
- Finally, the VSU has been undermined by bias and corruption in other parts of law enforcement. For example, despite the best efforts of specialised units, the rest of the police force is known for violating human rights. Law enforcement cannot be effective in addressing violence against women as long as the broader police force has a reputation for abuse.

#### **4.4 Judicial System**

The above report highlights the need to go beyond legislative reform by strengthening key law enforcement institutions, including the police, the judiciary, the forensic medical system and legal aid. For example, in Zambia, cases of sexual violence in and outside a marriage are heard by the lower courts, the magistrate and local courts. These courts are

subject to restrictions on their jurisdiction to mete out sentences. Local courts can not impose prison sentences exceeding two years. Zambian women's groups have stressed the importance of stopping lower courts from trying offences for which they do not have jurisdiction to impose "deterrent" sentences and from applying customary civil law to criminal offences that deal with marital rape, as they should be heard in the magistrate courts.<sup>49</sup>

On the other hand, others have argued that local courts can send a matter to the magistrate courts in cases where the prosecution seeks stiffer penalties than those that can be imposed by the lower court. Additionally, where a party is not content with a judgement given in a local court, an appeal can be made to the magistrate court. Depending on the severity of the case, it could then go to the High Court and ultimately to the Supreme Court. However, Magistrate courts are also restricted in their authority to give sentences (depending on the class of court and the type of magistrate, to five or to ten years imprisonment). As with the local courts, this can cause problems. Victims are frustrated with the system because once they go to court they realise that the offences being lodged in will only attract light sentences. This is not only because the law appears to be inadequate, but it is due to having magistrates that do not have the requisite jurisdiction. It has been argued that there is a gap between the maximum sentences provided by the legislation and the jurisdiction of the courts. Therefore, perpetrators of the crime get a message that these are not serious issues and, thus, violence is then perpetrated for the victim at another level as well. Critics insist that this "fault" in the Zambian legal system affirms the offender and states that as a state, violence is tolerated.

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<sup>49</sup> Janet Fleischman, *Suffering in Silence: the links between Human Right abuses and HIV* (Human Rights Watch) pp.61-63, 2002

Under the Penal Code, sexual offences fall under the title “offences against morality”, rather than injuries against the person. Thus, the focus of the provisions is the moral wrong done to society as a whole; rather than the detriment of the individual victim of violence.<sup>50</sup>

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<sup>50</sup> Janet Fleischman, *Suffering in Silence*, pp.61-63, 2002

# **CHAPTER FIVE**

## **5.1 Conclusion**

The last chapter of my research will consist of my conclusion and recommendations. I will start with providing recommendations on improving the Zambian legal system and generally other legal systems that have not yet adopted the concept of marital rape.

It can be argued that there is no rational basis for distinguishing between marital rape and non marital rape. The various rationale which have been asserted in defence of the exemption are either based upon archaic notions about the consent and property rights incident to marriage or are simply unable to withstand even the slightest scrutiny.

Lord Hale's notion of an irrevocable implied consent by a married woman to sexual intercourse has been cited most frequently in support of the marital exemption. However, any argument based on a supposed consent can arguably be said to be untenable. Rape is not simply a sexual act to which one party does not consent. Rather, it is a degrading, violent act which violates the bodily integrity of the victim and frequently causes severe physical and mental harm. To only ever apply consent to such an act is both irrational and absurd. Other than in the context of rape statutes, marriage has never been viewed as giving a husband the right to coerced intercourse on demand. Certainly then, a marriage licence should not be viewed as a licence for a husband to forcibly rape his wife with impunity. A married woman has the same right to control her body as does an unmarried

woman. For a husband feels aggrieved by his wife's refusal to engage in sexual intercourse, he should seek relief in courts governing domestic relations, not in violent or forceful self help.

The other traditional justifications for the marital exemption were the common law doctrines that a woman is the property of her husband and that the legal existence of the woman was incorporated and consolidated into that of the husband. Both these doctrines, of course, have long been rejected by the Zambian constitution. Nowhere under common law or in any modern society should a woman be regarded as a chattel or demeaned by a separate legal identity and the dignity associated with recognition as a whole human being.

Because the traditional justifications for the marital exemption no longer have any validity, other arguments have been advanced in its defence. Some have argued that the marital exemption protects against governmental intrusion into marital privacy and promotes reconciliation of the spouses, and thus the elimination of the exemption would be disruptive to marriages. However, while protecting marital privacy and encouraging reconciliation are legitimate state interests, there is no rationale relation between allowing a husband to forcibly rape his wife and these interests. The marital exemption simply does not further marital privacy because this right of privacy protects consensual acts and not violent sexual assaults. Just as a husband cannot invoke a right of privacy to escape liability for beating his wife, he cannot justifiably rape his wife under the guise of the right to privacy.

Similarly, it is not tenable to argue that elimination of the marital exemption would disrupt marriages because it would discourage reconciliation. Clearly, it is the violent act of the rape and not the subsequent attempt of the wife to seek protection through the criminal justice system which disrupts a marriage. Moreover, if a marriage has reached a point where intercourse is accomplished through sexual assault it is doubtful that there is anything left to reconcile. This, of course, is particularly true if the wife is willing to bring an action against her husband which could result in a lengthy jail sentence.

Another rationale sometimes advanced in support of the marital exemption is that marital rape would be a difficult crime to prove. A related argument is that allowing such prosecutions would lead to fabricated complaints brought by “vindictive wives”. The difficulty of proof argument is based on the problem of showing lack of consent. However, proving lack of consent is often the most difficult part of any rape prosecution, particularly where the rapist and the victim had a prior relationship. Similarly, the possibility that married women would fabricate complaints would seem to be no greater than the possibility of unmarried women doing so. The Criminal Justice system with all its safeguards is presumed to be capable of handling any false complaints. Indeed, if the possibility of fabricated complaints were a basis for not criminalizing behaviour which otherwise would be sanctioned, virtually all crimes other than homicides would go unpunished.

The final argument in defence of the marital rape exemption is that marital rape is not as serious an offence as other rape and is thus adequately dealt with by the possibility of prosecution under criminal statutes, such as assault statutes which provide for less severe

punishment. However, the fact that rape statutes exist, is a fact that the harm caused by a forcible rape is different, and more severe, than the harm caused by an ordinary assault. Short of homicide, one can argue that rape is the ultimate violation of self. Under the Penal Code, assault is generally a misdemeanour unless either the victim suffers “serious physical injury” or a deadly weapon or dangerous instrument is used. Moreover, there is still no evidence to prove that marital rape has less severe consequences than any other rape. On the contrary, many studies show that marital rape is frequently very violent and generally has more severe and traumatic effects on the victim than other types of rape.

To improve the handling of domestic violence by the criminal justice system, any inherent confusion in the law as well as narrow definitions of the crime of rape must be given attention

The Declaration on the Elimination of Violence against Women confirms the shift in the legal definition of rape across the globe to include marital rape as a form of violence against women. Making it clear that such acts are criminal proves a state’s dedication to increasing women’s empowerment in their homes and in society.

## **5.2 Recommendations**

The first step towards addressing marital rape is for the government to pass and enforce specific laws which define and prohibit all forms of sexual violence against women, especially rape and other forms of sexual abuse. Zambia has no specific laws on sexual offences beyond the provisions of the Penal Code. These provisions do not define the offences with sufficient detail and therefore do not send out a strong and clear message



that sexual violence and in particular, marital rape is condemned by the state. Zambia has prepared a Gender violence Bill to address this shortcoming. However, fears are that customary law may hamper any future legislation because under customary law, the right to sue is derived from the family status and can only be claimed by the family.

- To modify rape and sexual violence statutes so that they reflect the view that rape is a crime of violence and not solely a crime of non consensual sexual intercourse. Modern rape laws should not focus on unlawful sexual penetration but on the violation of a victim's sexual privacy because victims can be invaded without being penetrated.
- Marital rape laws, once adopted, should represent great strides in recognizing that rape and sexual assault are different from consensual sex because of the violence, force, or coercion; and should acknowledge the right to say no despite marital status.<sup>51</sup>
- Once adopted, the marital rape statutes should provide for a similar or equal severe penalty like other rape law violations. Generally, marital rape laws should provide women with adequate legal recourse that is provided under other rape, sexual assault or sexual battery assault charges.
- The crime of rape should be defined as a crime of sexual violence; this will help marital rape to be viewed by society as an unacceptable expression of male domination and will help with the "lifting up" of the marital veil of privacy.

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<sup>51</sup> Janet Fleischman, *Suffering in Silence: the links between Human Right abuses and HIV* (Human Rights Watch) pp.5-6, 2002

- Laws can also be explicit, by providing for prosecution of spouses, or simply clearly stating that the marital status is not a defence.
- The law should be reformed so as not to continue viewing husbands and wives as “one” under the law.
- The law should remain silent as to the marital status between the victim and the defendant in sexual offences; this will allow the state to criminalise marital and non marital sexual assault in equal ways.
- Society to find ways of eliminating the power disparity between men and women caused by the greater social and economic power exerted by men in the private sphere; by restructuring gender relations, such as sex inequality in the workplace or in the home; and empower women.
- The governments should show commitment in combating marital rape by:
  1. Providing funds for gender-sensitive training of criminal justice officials and outlining the responsibilities of each part of the criminal justice system.
  2. Building on service models developed for rape victims like opening crisis intervention and victim assistance programs for female victims of marital rape.
  3. Providing shelters for victims and their children who are forced to stay in a violent marriage because they have no where else to live.

- The government should encourage individuals to let go of the social stigma in the African culture associated with being a rape victim, the risk of bringing dishonour on the family of the victim and the perpetrator.<sup>52</sup>
  
- Law reforms should:
  1. Address concerns with evidentiary rules that assume women to be liars, such as the requirement of independent evidence corroborating the victim's story.
  2. Prohibit the judicial system from providing cautionary jury instructions.
  3. Modify or eliminate standards of proof of resistance.
  4. Include the admission of expert testimony on Rape Trauma Syndrome.<sup>53</sup>

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<sup>52</sup> Janet Fleischman, *Suffering in Silence*, (Human Rights Watch) pp.5-6, 2002

<sup>53</sup> Janet Fleischman, *Suffering in Silence*, (Human Rights Watch) pp.5-6, 2002

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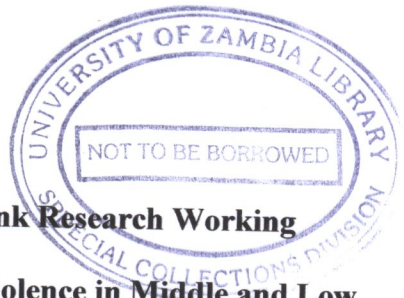
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