

The Right to Say No

Marital Rape and Law Reform in Canada,
Ghana, Kenya and Malawi

Edited by
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Normative and International Human Rights Law Imperatives for Criminalising Intimate Partner Sexual Violence: The Marital Rape Impunity in Comparative and Historical Perspective

VASANTHI VENKATESH AND MELANIE RANDALL

I. Introduction

Marital rape (including other forms of sexual violence in intimate relationships) is a prevalent problem throughout the world. Some studies suggest that as many as one in three women has experienced sexual and/or physical violence perpetrated by a husband or other male intimate.¹ Yet many of the world's countries still fail to criminalise sexual assault in marital relationships (also described as intimate partner sexual violence, IPSV) or fail to criminalise it adequately.

The marital rape exemption has a long and varied social and legal history. Its entrenchment is inextricably linked to women's subordinate status in societies at large, and to women's subordination in marriage specifically. As entrenched as impunity for IPSV has been in so many jurisdictions, the marital rape exemption has not remained uncontested. On the contrary, it has been vigorously condemned by women's rights movements around the world. This condemnation has also been central to the repudiation of associated legal constructs of gender inequality, such as the doctrine of coverture, which obliterates married women's independent and autonomous separate legal existence, and constructs them as their husband's

¹ See eg World Health Organization, 'Violence against women: Intimate Partner and Sexual Violence against Women,' Fact Sheet, www.who.int/mediacentre/factsheets/fs239/en/ (November 2016).

property.² Yet so powerful and embedded are the taboos and privacy surrounding sexuality and marriage that even in some countries where extensive legal reforms have been made to end domestic and other forms of violence against women, the idea (and reality) persists that sexual assaults perpetrated by spouses should remain beyond the reach of the criminal law.

Human rights and women's groups in countries where marital rape retains its criminal immunity have been relying on international human rights law, inter alia, to demand its criminalisation in order to fulfil their state's obligations under international law.³ The demand for an end to the marital rape exemption in criminal law is more than a demand for a penal remedy. It is fundamentally a demand for women's legal equality and autonomy, rights that centrally define international human rights law. The existence of a criminal remedy for sexual assault in marriage is a crucial form of state condemnation of and protection from gendered violence. But too many states still fail to provide it, either by retaining spousal immunity for sexual assault or by treating it as a less serious legal wrong. Criminalising sexual assault in marriage and providing legal remedies for this form of gendered violence is fundamental to achieving women's equality and other human rights. While this has been recognised by many of the world's states, too many others remain resistant and lag behind, insulating sexual violence against women by their spouses from legal sanction.

In this chapter we provide a big-picture perspective on the long and bumpy road taken by many of the world's countries in moving towards legal recognition that sexual assault can occur in a marital relationship and in the provision of a criminal law remedy for this form of gendered violence. We begin the chapter by articulating our arguments about why engaging the power of criminal remedies is necessary to the struggle to end sexual violence against women in marriage, particularly with reference to criminal law's importance in expressing fundamental social norms. Section II moves to a critical review of the historical origins and ideological justifications underpinning the marital rape exemption in diverse societies. We show how similar themes occur across very different social regimes.

This is followed in section III by a global, comparative analysis of the marital rape exemption and the criminalisation of marital rape in various countries of the world. We provide an overview of the historical and uneven progress towards

² See eg J Ross, *Making Marital Rape Visible: A History of American Legal and Social Movements Criminalizing Rape in Marriage* (PhD Dissertation, University of Nebraska-Lincoln, 2015) digital-commons.unl.edu/historydiss/85; JE Hasday, 'Contest and Consent: A Legal History of Marital Rape' (2000) 88 *California Law Review* 1373; JS Mill, *The Subjection of Women* (London, Longmans, Green, Reader and Dyer, 1869).

³ See eg Advocates for Human Rights, 'Marital and Intimate Partner Sexual Assault' [2013] Stop Violence Against Women—A Project of the Advocates for Human Rights, www.stopvaw.org/marital_and_intimate_partner_sexual_assault; M McWilliams and FD Ni Aolain, 'Moving Slowly to Regulate and Recognize: Human Rights Meets Intimate Partner Sexual Violence' Transitional Justice Institute Research Paper no 16-10 (2016), papers.ssrn.com/sol3/papers.cfm?abstract_id=2765432.

providing criminal legal remedies for women sexually assaulted by their husbands or intimate partners in different legal systems around the world. In this section we also analyse and critique the two most comprehensive and recent databases of marital rape legislation around the world, provided by the World Bank and the United Nations, respectively.

Section IV provides an overview of the major human rights instruments and sources of legal authority that require states to criminalise sexual assault in marriage, including the instruments aimed at securing women's equal rights and ending gendered violence.⁴ We conclude the chapter by reiterating our argument that international human rights law and the due-diligence standard provide powerful normative bases on which women's movements and other social justice supporters can organise to end impunity for sexual violence in intimate relationships.

A. Why Are Criminal Remedies Essential for Ending Marital Rape?

A great deal of the advocacy undertaken by those seeking to end violence against women has focused on engaging state power to criminalise acts of physical and sexual abuse of women that had previously been seen to be 'normal' or legitimate. The appeal to criminal law represents a utilisation of both its expressive and remedial functions to put a stop to this kind of discrimination and inequality in women's lives, particularly in women's intimate lives.

Criminalising behaviour that has previously been condoned or considered acceptable in oppressing members of subordinated groups has long been a part of the struggle to achieve equality. As Cass Sunstein has pointed out, 'a large point of law may be to shift social norms and social meaning'.⁵ This applies to law's changing grasp of various forms of what is now recognised as discrimination and harassment. For example, Sunstein notes that: 'Antidiscrimination law is often designed to change norms so as to ensure that people are treated with a kind of dignity and respect that discriminatory behaviour seems to deny'.⁶

Criminal law has an especially important role to play in shifting social norms towards equality and in condemning behaviours and actions, such as sexual

⁴ A detailed exposition of these arguments is advanced in the following articles: M Randall and V Venkatesh, 'The Right to No: The Crime of Marital Rape, Women's Human Rights, and International Law' (2015) 41 *Brooklyn Journal of International Law* 153; M Randall and V Venkatesh, 'Criminalizing Sexual Violence against Women in Intimate Relationships: State Obligations under Human Rights Law' (2015) 109 *AJIL Unbound* 189; M Randall and V Venkatesh, 'Why Sexual Assault in Intimate Relationships Must Be Criminalized as Required by International Human Rights Law: A Response to the Symposium Comments' (2016) 109 *AJIL Unbound* 342.

⁵ CR Sunstein, 'On the Expressive Function of Law' (1995) 144 *University of Pennsylvania Law Review* 2021, 2043.

⁶ *ibid.*, 2044.

assaults, which undermine equality, bodily integrity and dignity. As Sunstein elaborates: ‘There are many areas in which law is used in an expressive way, largely in order to manage social norms. The criminal law is a prime arena for the expressive function of law.’⁷

Criminalising domestic violence, for example, has been a crucial dimension of the work to end this form of violence against women in intimate relationships. Criminalising the use of physical violence against wives provides, in theory at least, a way for individual women to seek state protection against this harm. It also simultaneously represents a rejection of traditional patriarchal ideas, which had previously legitimated men’s use of force against their wives as a form of discipline and domination. Similarly, ending the marital immunity for sexual assault in criminal law is crucial both at the micro level, to give individual women the option of criminal remedies for their experiences of this form of violence, and at the macro level, to shift norms towards recognising women’s full equality and autonomy rights in private relationships.

Criminalisation is, and should be, only one aspect of the multiple kinds of state and social responses to gendered violence which feminist human rights scholars and activists pursue. Calls for criminalisation are necessarily situated within a broader agenda for structural change and for an improvement in the social, economic and political conditions which allow for gendered violence in the first place. Julie Goldscheid has pointed to the range of responses which should be undertaken in order to require that states address gendered violence.⁸ As she explains:

International human rights laws’ due diligence framework requires a range of responses that include the obligation to prevent, protect, and provide redress, along with the obligation to prosecute and punish. Explicitly framing states’ obligations in terms of that more comprehensive approach would reach broadly to address the cultural and social barriers that allow marital rape to continue without sanction.⁹

Drawing on international human rights law as a source of authority for challenging the marital rape exception in criminal law allows feminist and other social justice organisations, working within their specific national and local contexts, to seek greater state action and accountability in ending this form of violence against women and violation of women’s human rights.

The very fact that so much IPSV remains unreported and unremedied, and its victims unassisted, makes the law even more essential. Likewise, it further creates the need to intensify efforts to make the law more responsive, effective and just. Due diligence to criminalise marital rape does not stop at the level of statutory reform. It also requires proper and fair enforcement of the law. For example,

⁷ *ibid.*

⁸ J Goldscheid, ‘Considering the Role of the State: Comment on “Criminalizing Sexual Violence against Women in Intimate Relationships”’ (2015) 109 *AJIL Unbound* 202.

⁹ *ibid.*, 202.

there are multiple evidentiary difficulties in proving lack of consent in criminal proceedings and these are compounded in cases of spousal sexual assault.¹⁰

Struggles for women's human rights that engage criminal law as part of the strategy to eradicate gendered violence have been of central importance to the women's movement and to the move towards gender equality. This is not the same as suggesting criminal law is the *only* important strategy for challenging violence against women. Nor is it an unambivalent embrace of criminal law or the criminal justice system. Instead, it is a recognition that a state's criminal law power is an essentially important resource to be drawn upon, both conceptually and concretely, to shift social norms and practices such that sexual violence in intimate relationships is no longer seen to be acceptable. Engaging criminal law to end IPSV is especially critical at the normative level given the long-entrenched ideological and historical origins and justifications of it, a subject we address next.

II. Historical Origins and Ideological Underpinnings of the Marital Rape Exemption

Historically, in many societies, women have had no remedy against sexual coercion by their husbands.¹¹ Women's vulnerability to sexual violence in intimate relationships, and the lack of a legal remedy for it, has been inextricably connected to the social, economic and political subordination of women historically, and in most societies.

There have been exceptions. For example, there were (and there still are) matrilineal and polyandrous societies across the globe in which women had a much higher social status than they have had in patriarchal social formations, and in which violence against women was not condoned.¹² Women who were wealthy and privileged generally enjoyed some legal emancipation in certain periods and in certain societies and could take legal action against their husbands with

¹⁰ For an analysis in the Canadian context, see M Randall, 'Sexual Assault in Spousal Relationships, "Continuous Consent", and the Law: Honest but Mistaken Judicial Beliefs' (2008) 32 *Manitoba Law Journal* 144; J Koshan, 'The Judicial Treatment of Marital Rape in Canada: A Post-Criminalisation Case Study', chapter 9 in this volume.

¹¹ MJ Anderson, 'Lawful Wife, Unlawful Sex—Examining the Effect of the Criminalisation of Marital Rape in England and the Republic of Ireland' (1998) 27 *Georgia Journal of International and Comparative Law* 139, 141–46.

¹² A Smith, *Conquest: Sexual Violence and American Indian Genocide* (Cambridge, MA, South End Press 2005) 18–21; M-B Watson-Franke, 'A World in which Women Move Freely without Fear of Men: An Anthropological Perspective on Rape' (2002) 25 *Women's Studies International Forum* 599; C Noble and C Bettman, 'Culture, Social Discourse and Domestic Violence: What Is the Connection?' [2003] *Women Against Violence: An Australian Feminist Journal* 42.

adequate support. This was the case, for example, in ancient Rome, medieval Europe and the Ottoman period.¹³ Another notable example is found in the Brehon law in Ireland, based on ancient Celtic law, which offered more protection to women from spousal violence than the English common law or Christian ecclesiastical law.¹⁴

Additionally, the property, contractual and other rights that women possessed also played an important role in determining remedies for women facing domestic violence and marital rape. For example, Irish women under Brehon law and women in several Arab societies had inheritance rights and could independently hold property. They could also lawfully divorce or separate from their husbands on the basis of ill-treatment.¹⁵

Similarly, in many pre-colonial Namibian communities, women contributed to the bulk of subsistence agriculture and had access to property and the economy. Divorce was easily obtained, men had lesser control over their wives, and women played important roles as healers, leaders and rulers. Violence against women within the household was much more circumscribed by the laws in these places.¹⁶

Religious legal systems have also always had several interpretive lineages. For example, some Koranic and Talmudic interpretations have emphasised the legal equality of men and women in marriage, interpretations which have been used by courts and governments to provide legitimacy to gender justice claims.¹⁷

Nevertheless, and despite these exceptions, it is safe to say that for the most part sexual assault in marital relationships has been condoned throughout history and husbands have had enforceable 'rights' to sexual intercourse with their wives. While some customary legal systems insist that wives have a symmetrical expectation of sexual intercourse, this apparent equality has often only been used as a ground for divorce or compensation.¹⁸ Furthermore, norms like these that

¹³ Anderson (n 11) 143; F Zarinebaf-Shahr, 'Women, Law, and Imperial Justice in Ottoman Istanbul in the Late Seventeenth Century' in A El Azhary Sonbol (ed), *Women, the Family, and Divorce Laws in Islamic History*, 1st ed (Syracuse, NY, Syracuse University Press 1996) 87–89.

¹⁴ Anderson (n 11) 160.

¹⁵ *ibid*, 143; A El Azhary Sonbol, 'Law and Gender Violence in Ottoman and Modern Egypt', in *Women, the Family, and Divorce Laws in Islamic History* (n 13) 281.

¹⁶ H Becker, 'A Concise History of Gender, "Tradition" and the State in Namibia' in C Keulder (ed), *State, Society, and Democracy: a Reader in Namibian Politics* (Windhoek, Namibia, Gamsberg Macmillan 2000) 177–78.

¹⁷ Egypt Supreme Constitutional Court Case No 8 of Judicial Year 17 (18 May 1996) (holding that veiling is not mandatory under Islam and that a ban on a woman's right to wear a *niqab* was permissible); *Cohen v The State of Israel*, Criminal Appeal 91/80, 35 (3) PD (1980) 281 (holding that the criminal law exception for marital rape is incompatible with Jewish law). See also W Goldstein, *Defending the Human Spirit: Jewish Law's Vision for a Moral Society* (Jerusalem, Feldheim Publishers 2006) 166–75; CB Lombardi and NJ Brown, 'Do Constitutions Requiring Adherence to Shari'a Threaten Human Rights—How Egypt's Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law' (2005) 21 *American University International Law Review* 379, 425–528; N Abiad, *Sharia, Muslim States and International Human Rights Treaty Obligations: A Comparative Study* (London, British Institute of International and Comparative Law 2008) 161–75.

¹⁸ L Ahmed, *Women and Gender in Islam: Historical Roots of a Modern Debate* (New Haven, Yale University Press 1992) 91–93; K Ali, 'Progressive Muslims and Islamic Jurisprudence: The Necessity

suggest a formal mutuality between men and women in marriage must be read through the lens of the immense power that men carried as heads of household and as primary actors in the economic and political arenas. In patriarchal systems around the world and throughout history, the husband has been seen as the head of the household and to wield authority over it. Christian norms, for example, explicitly make men the authority in the family, and have reified patriarchal practices across the globe lasting for millennia.¹⁹ The sections which follow articulate the thematic justifications which have been deployed in and through the various legal legitimations of men's rights to sexual access to their wives, consensual or forced.

Throughout history, the marital rape exemption has persisted through various legal doctrines that sought to uphold particular ideological constructs of women and marriage. While much has changed in the legal characterisations of women, their bodies and their degrees of autonomy across the world, it is important to understand the contingent and ideological nature of traditional patriarchal historical constructs and how these have ensured that vestiges from the past persist and maintain dominance structures that continue to inhibit women's rights today. Some of these fundamentally masculine-dominant ideas are outlined in the following sections.

A. Women as Private Property of Men

In general, rape laws were originally designed to protect male property interests in women and to protect the 'honour' of the family or social group from defilement by other men. In this way, women were constructed as the private property of their husbands and fathers. In Europe, for example, the father's interest in ensuring a virginal daughter for marriage, as opposed to justice for women victims, was the motivation for laws penalising rape.²⁰ After marriage, the woman became the property of the husband in accordance with common law doctrines such as coverture and the idea that women were chattels.

This socially construed legal framework made prosecuting a man for marital rape impossible as he had full legal rights over his own property, which included the body of his wife. Countries where marriage involves financial or commodity transactions such as bride-price or dowry continue to perpetrate the characterisation

for Critical Engagement with Marriage and Divorce Laws' in O Safi (ed), *Progressive Muslims: on Justice, Gender and Pluralism* (Oxford, Oneworld 2003) 171–72; P Caplan, *The Cultural Construction of Sexuality* (London, Tavistock, 1987) 222.

¹⁹ Anderson (n 11) 143–46.

²⁰ MD Schwartz, 'The Spousal Exemption for Criminal Rape Prosecution' (1982) 7 *Vermont Law Review* 33; MDA Freeman, 'But If You Can't Rape Your Wife, Whom Can You Rape? The Marital Rape Exemption Reexamined' (1981) 15 *Family Law Quarterly* 1.

of women as chattels or property, ideas that continue to be upheld in criminal and family law in these countries.²¹

B. Coverture and the Erasure of a Woman's Legal Personhood

In various legal doctrines such as coverture, or *femme couverte* in English common law and 'marital power' in Roman-Dutch law, a woman had no legal identity outside of her husband's and was treated in law as a perpetual minor. This is a derivative of the Judaeo-Christian doctrine of the husband and wife constituting 'one flesh.'²² William Blackstone justified this notion in his influential legal treatise, in which he stated: 'By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into her husband's legal existence.'²³ On this view, once unified by marriage, the wife cannot enter into any independent legal transaction and her husband could not possibly be charged with rape of his wife as she and her husband were one; he could not rape himself.

Blackstone also used the coverture doctrine to legitimate a husband's 'chastisement' and physical violence towards his wife, as well as the perpetual 'minor' legal status of women.²⁴ In his words: '[A man could] give his wife moderate correction, for, as he is to answer for her misbehaviour, the law thought it reasonable to intrust [*sic*] him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his apprentices or children.'²⁵ Blackstone's views remained influential through the eighteenth, nineteenth and even the twentieth century.

Reforms in both the United States and England in the 1800s led to the passage of several Married Woman's Property Acts that legally separated the identities of the spouses and abolished many of the common law restrictions on married women's rights. Husbands and wives could even sue one another over civil claims such as negligence, or petition the criminal law of assault.²⁶ Marital rape was nevertheless deemed an exemption, as is elaborated in the next section.

²¹ F Banda, "If You Buy a Cup, Why Would You Not Use It?" Marital Rape: The Acceptable Face of Gender Based Violence: Comment on "Criminalizing Sexual Violence against Women in Intimate Relationships" (2016) 109 *AJIL Unbound* 321. See also chapters 6, 7 and 8 in this volume.

²² NF Cott, *Public Vows: A History of Marriage and the Nation* (Cambridge, MA, Harvard University Press 2000) 11.

²³ W Blackstone, *Commentaries on the Laws of England* (Chicago, University of Chicago Press 1979) 430.

²⁴ *ibid*, 430–33.

²⁵ *ibid*, 432.

²⁶ KM Schelong, 'Domestic Violence and the State: Response to and Rationales for Spousal Battering, Marital Rape and Stalking' (1994) 78 *Marquette Law Review* 79, 91; MJ Anderson, 'Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offenses by Intimates' (2002) 54 *Hastings Law Journal* 1465, 1482; RB Siegel, 'The Rule of Love: Wife Beating as Prerogative and Privacy' (1995) 105 *Yale Law Journal* 2117, 2129–30.

Similarly, under the French *dotal* system, wives had no legal capacity and were considered to be under ‘perpetual tutorship’. They could not even appear in any legal proceedings without permission from their husbands.²⁷ It was only in 1938 that the incapacity of married women was revoked in France, but property law changes took several more decades of reform.²⁸ In Spain, women had no legal capacity until reforms slowly began in 1958.²⁹

England, France and Spain, as well as the Netherlands, were all colonising nations which imposed their laws through their colonial empires. In many postcolonial countries, these colonial-era laws and doctrines continue to exist without much progressive change and they continue to pose significant barriers for reforming sexual assault and other laws entrenching gender inequality.³⁰

C. Privacy Rights over the Household

By the early nineteenth century, especially during the American Revolution, a nascent right to privacy within the family institution emerged in America. This right asserted an insulated private sphere which a government could not penetrate with its policies.³¹ As Ruth Bloch explains, the household shrouded in a mantle of privacy rights ‘worked to reinforce the unequal relationships between masters and slaves, parents and children, husbands and wives.’³²

Before the Revolution, although ‘reasonable chastisement’ by husbands was legally allowed, women could get some protection against this violence by using criminal law to make a ‘breach of peace’ claim. Breach of peace was understood as an action against the sovereign as opposed to assault, which was a lesser, civil claim between individuals and which afforded women no reprieve.³³

After the American Revolution, assault was reclassified as a crime, which could be used by wives as well. Several laws were passed to recognise divorce, thus desanctifying marriage. Nevertheless, despite the increase in available remedies for women, Bloch argues that the Revolution also brought about notions of privacy of the household, a concept ideologically favoured by judges and legislatures. As a result, marital violence, including marital rape, was delegated as a private act beyond the reach of the law.³⁴

²⁷ A Tunc, ‘Husband and Wife under French Law: Past, Present, Future’ (1956) 104 *University of Pennsylvania Law Review* 1064.

²⁸ See L Neville Brown, ‘The Reform of French Matrimonial Property Law’ (1965) 14 *American Journal of Comparative Law* 308.

²⁹ LA Sponsler, ‘The Status of Married Women under the Legal System of Spain’ (1982) 3 *Journal of Legal History* 125.

³⁰ See eg V Venkatesh, ‘Pluralistic Legal Systems and Marital Rape: Cross-National Considerations’, chapter 5 in this volume.

³¹ RH Bloch, ‘The American Revolution, Wife Beating, and the Emergent Value of Privacy’ (2007) 5 *Early American Studies: An Interdisciplinary Journal* 223.

³² *ibid.*, 226.

³³ *ibid.*, 230–33.

³⁴ *ibid.*, 244–49.

D. Protection of Men's Honour and the Attribution of Women's Shame

Male-dominant and misogynist concepts of 'honour' have often been used and continue to be used to justify acts of violence against women. Indeed, this has been captured by the term 'honour-based violence'.³⁵ Notions of honour in some patriarchal societies, as in some religious interpretations, are tied to the strict and oppressive regulation of women's lives, bodies and sexuality.

Historically and in some countries still today, if an unmarried woman is raped, marriage to her rapist is mandated to rescue her 'honour' and absolve her family of the loss of a virginal daughter.³⁶ One rationale is that the raped woman has been 'spoiled' for use by her future husband who is supposed to be entitled to exclusive sexual access to a woman.

In more than a dozen countries, including those in the Middle East–North Africa (eg Jordan and Tunisia) and in Africa (Angola, Cameroon, Equatorial Guinea and Eritrea), a rapist can still escape punishment if he marries his victim.³⁷ In the European Community, until September 2015, Bulgaria's penal code allowed a rapist to escape punishment, even when it was *statutory rape*, if it was followed by marriage.³⁸ Despite the changes made in 2015 to the law, spousal rape remains rarely prosecuted in Bulgaria, indicating the continued influence of the patriarchal values behind the repealed law. In many countries, such provisions were repealed only in the last two decades.³⁹ In Argentina, this legal doctrine, also

³⁵ See generally D Tokiharu Mayeda and R Vijaykumar, 'A Review of the Literature on Honor-Based Violence' (2016) 10 *Sociology Compass* 353; AK Gill, 'Introduction: "Honour" and "Honour"-Based Violence: Challenging Common Assumptions' in AK Gill, C Strange and K Anton Roberts (eds), *'Honour' Killing and Violence: Theory, Policy and Practice* (Basingstoke, Palgrave Macmillan, 2014); A Akpınar, 'The Honour/Shame Complex Revisited: Violence against Women in the Migration Context' (2003) 26 *Women's Studies International Forum* 425.

³⁶ See eg Tsun-Yin Luo, "'Marrying my Rapist?'" The Cultural Trauma among Chinese Rape Survivors' (2000) 14 *Gender & Society* 581; N Shalhoub-Kevorkian et al, 'Towards a Cultural Definition of Rape: Dilemmas in Dealing with Rape Victims in Palestinian Society' (1999) 22 *Women's Studies International Forum* 157; RA Van Cleave, 'Sex, Lies, and Honor in Italian Rape Law beyond Prosecution: Sexual Assault Victim's Rights in Theory and Practice Symposium' (2004) 38 *Suffolk University Law Review* 427, 433; CE Neumann, *Sexual Crime: A Reference Handbook* (Santa Barbara, ABC-CLIO, 2010) 94 (stating that in 2010, 19 states in Latin America allowed statutory rape charges to be dropped after marriage with the victim); C Sims, 'Justice in Peru: Victim Gets Rapist for a Husband', *New York Times*, 12 March 1997, www.nytimes.com/1997/03/12/world/justice-in-peru-victim-gets-rapist-for-a-husband.html.

³⁷ The World Bank Group, 'Women, Business, and the Law Indicator Data—Protecting Women from Violence', wbl.worldbank.org/data/exploretopics/protecting-women-from-violence.

³⁸ Penal Code, Bulgaria, amend SG 43/20 May 2005, Art 158; United States Department of State, '2015 Country Reports on Human Rights Practices—Bulgaria' (US Department of State 2016) 20 www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2015&dldid=252831.

³⁹ MMcDaniel and Women Under Siege, 'From Morocco to Denmark: Rape Survivors around the World Are Forced to Marry Attackers—Women Under Siege Project' (2 May 2013) www.womenundersiegeproject.org/blog/entry/from-morocco-to-denmark-rape-survivors-around-the-world-are-forced-to-marry.

called *Avenimiento*, was removed from the penal code only in 2012.⁴⁰ Several other Latin American countries, such as Guatemala (2006),⁴¹ Costa Rica (2007)⁴² and Brazil (2005),⁴³ repealed their provisions only in the late 2000s.

E. Extension of Immunity for Sexual Assault to Any Male Intimate

Although many of the justifications for the marital rape exemption come from the patriarchal social construction of marriage, the exemption is often extended to all socially sanctioned relationships between men and women. For example, those US states that still maintain some form of marital rape exemption also extend it to other intimate partner relationships.⁴⁴ Intimate relationships for the purposes of the exemption are limited to cohabitants in some states, while others also include ‘voluntary social companions’.⁴⁵ Delaware’s code from 1986 to 1988 exempted from first-degree rape all perpetrators who were ‘voluntary social companions’ or who had sexual intercourse with the victim in the previous 12 months.⁴⁶ Rape shield laws and evidentiary requirements continue to codify implied consent in intimate relationships, even in countries which have long removed the marital rape exemption.⁴⁷

In countries where extramarital relationships are not socially accepted, justifications to provide immunity to the perpetrators differ substantively from arguments in favour of the marital rape exemption, but are rooted in similar patriarchal constructions of a woman’s lack of autonomy. In countries where only marital relationships are exempted from rape laws, one would logically expect extramarital relationships to be included within the definition of rape. Yet, women victims in such cases are constructed as promiscuous and without ‘honour’, and usually have even less access to justice than raped women who are spouses; the latter can at least rely on divorce and domestic violence civil protections, if not the criminal law.⁴⁸

⁴⁰ ‘Congress Pass Important Bills in First Session of the Year’, *Argentina Independent*, 15 March 2012, www.argentinaindependent.com/currentaffairs/latest-news/newsfromargentina/congress-pass-important-bills-in-first-session-of-the-year/.

⁴¹ US Department of State, ‘2006 Country Reports on Human Rights Practices—Guatemala’ (US Department of State, 2007) Human Rights Report, www.state.gov/j/drl/rls/hrrpt/2006/78893.htm.

⁴² Division for the Advancement of Women, ‘Beijing at Ten and Beyond—Violence Against Women’ (UN Women, 2005) 4, [www.un.org/womenwatch/daw/beijing/beijingat10/D.%20Violence%20against%20women%20\(Sep%2009\).pdf](http://www.un.org/womenwatch/daw/beijing/beijingat10/D.%20Violence%20against%20women%20(Sep%2009).pdf).

⁴³ Organizing Committee of the CEDAW Shadow Report by Civil Society, ‘Brazil and Compliance with CEDAW: Shadow Report of Civil Society to the Sixth National Report of Brazil on CEDAW, 2001–2005 Period’ (Agende Action on Gender Citizenship and Development, 2007) 8, para 10, www.wunrn.com/wp-content/uploads/2007_5614271f1511c.pdf.

⁴⁴ Anderson (n 26) 1522–27.

⁴⁵ *ibid.*, 1521–22.

⁴⁶ *ibid.*

⁴⁷ See eg Randall (n 10). For a discussion of these issues in Canadian law, see also Koshan (n 10).

⁴⁸ See eg N Shalhoub Kevorkian, ‘Reexamining Femicide: Breaking the Silence and Crossing “Scientific” Borders’ (2003) 28 *Sigms* 581, 587–596.

Such social norms also seep into the decisions by the police and judiciary, making it almost impossible to pursue criminal action.⁴⁹

F. Instrumentalist and Procedural Justifications for the Marital Rape Exception

One line of argument for maintaining the marital rape exemption in criminal law is based on the claim that criminal laws are themselves not the right forum for addressing marital rape. On this view, criminal law hinders possible reconciliation and needlessly permits state intervention into the privacy and sanctity of family life. The claim is further made that women sexually assaulted in marriage can use alternative remedies that are available in law such as assault and battery, or can pursue civil claims under domestic violence regulations.⁵⁰

Along similar lines, arguments in favour of keeping a marital rape exemption are also based on the idea that it is necessary to protect men from malicious accusations or threats of criminal complaints by their wives and that protecting men from criminal liability for marital rape maintains peace and harmony in the household.⁵¹ This viewpoint prioritises men's immunity over women's sexual safety in marital relationships and further entrenches the rape myth that women are likely to fabricate claims of sexual assault.

G. Marriage as a Contractual 'Sacrament'

The view of marriage as a contractual sacrament in which wives were, as part of the contract, to service husbands sexually, made marital rape impossible in some nations. Under Imperial Chinese law, for example, the fathers of the bride and groom were contracting parties to a marriage and marriage symbolised 'submission of maturing children to family roles and filial duty'.⁵² The wife's consent played no role and no Chinese jurist even thought it necessary to ponder the concept of absence of consent and marital rape at any point.⁵³ In Western legal systems, consent of the wife may be required for a marriage to be legitimate, but

⁴⁹ For discussions of these dynamics, see Koshan (n 10). See also M Randall, 'Marital Rape and Violence against Women in Intimate Relationships: The Hidden Form of Domestic Violence', chapter 2 in this volume.

⁵⁰ Schwartz (n 20) 46–48, 54; L Weintraub Siegel, 'The Marital Rape Exemption: Evolution to Extinction' (1995) 43 *Cleveland State Law Review* 351, 362–64.

⁵¹ For discussion of this argument in the Malawian, Kenyan and Ghanaian contexts, see S White and N Kanyongolo, 'Sexual Violence in Intimate Relationships: The Case of Malawi', chapter 6 in this volume; W Kamau and others, 'Dismantling Barriers to Women's Equality: Making the Case for the Criminalisation of Marital Rape in Kenya', chapter 7 in this volume; R Aku Sitsofe Morhe, 'Marital Rape and the Law in Ghana', chapter 8 in this volume.

⁵² M Harvey Sommer, *Sex, Law, and Society in Late Imperial China* (Redwood City, CA, Stanford University Press 2000) 39.

⁵³ *ibid.*

once a marriage is legitimated, the husband and wife were bound together in a sacrament 'before God', owing to each other a 'marital debt' of sexual service marked by 'continuous' consent.⁵⁴ These are paradigmatic examples of an underlying notion that marriage is a social institution where sexual intercourse is to be freely expected and available to husbands on demand, and one in which wives must have a lowered expectation of sexual autonomy. This viewpoint is often evident in the statements of media, legislators and the judiciary who oppose lifting the marital rape exemption.⁵⁵

For example, when challenged by her government's reluctance to criminalise marital rape, the Indian Women and Child Development Minister recently opined that:

The concept of marital rape, as understood internationally, cannot be suitably applied in the Indian context due to various factors, including levels of education, illiteracy, poverty, myriad social customs and values, religious beliefs, [and] the mindset of the society to treat the *marriage as sacrament* [emphasis added].⁵⁶

In another example, a decade after South Africa criminalised marital rape, in an infamous case of marital rape which came before the High Court, the judge decided that the victim 'must have come knowing that this [sexual intercourse] was either likely to happen or was going to happen ... given the nature of their relationship'. The judge further stated that 'this rape should therefore be treated differently from the rape of one stranger by another between whom consensual intercourse was almost unthinkable'.⁵⁷

The recurring rationales legitimating men's rights to sexual access to their wives thematically relate to various expressions of gender inequality. As will be seen from the analysis below, the marital rape exemption has existed in law (and has also been contested) over many historical epochs, and in most of the world's nations.

III. Comparative Analysis of the Marital Rape Exemption around the World

Recent and increasing attention to the problem of gendered violence in general, and marital rape in particular, has led to attempts to document what countries around the world are doing, and still need to do, to remedy it. There is no accurate

⁵⁴ *ibid.*

⁵⁵ For a discussion of this phenomenon in the Malawian context, see White and Kanyongolo (n 51). See also Morhe (n 51) and Kamau et al (n 51) for discussion of marital rape and the law in Ghana and Kenya, respectively.

⁵⁶ "Concept of Marital Rape Can't Be Applied in Indian Context": Maneka Gandhi, *Indian Express*, 11 March 2016, indianexpress.com/article/business/budget/imarital-rape-concept-maneka-gandhi-indian-context/.

⁵⁷ *S v Moipolai* (CA 53/2004) [2004] ZANWHC 19. See also *S v Modise* (113/06) [2007] ZANWHC 73.

international database on marital rape legislation, although the UN and the World Bank have each constructed helpful global databases on marital rape legislation.⁵⁸ These two databases provide essential information giving an international snapshot of law reform on gendered violence, but they are constructed around some methodological and definitional differences. Both the databases also have some limitations.

The definition of what constitutes criminalisation also appears to differ between reports and databases, leading to inconsistent statistics. For example, according to the UN Gender Statistics database, only 52 countries have laws on marital rape, which excludes several countries that are known to have criminalised marital rape such as the United Kingdom, Israel, Spain and the Netherlands.⁵⁹ The reason for this discrepancy is that the database only includes ‘instances where the law explicitly criminalises marital rape, without qualifications’, since explicit criminalisation is considered to be the ‘best practice’.⁶⁰ Explicit criminalisation means that a country has legislated to state expressly that rape or sexual assault in a marriage is subject to criminal penalty; though not having this kind of ‘explicit’ criminalisation does not, in theory, preclude the prosecution of a husband for raping a spouse under the country’s general rape laws. Explicit criminalisation includes countries such as Canada where the criminalisation of marital rape is stated in the amending legislative act or bill, if not in the penal code.⁶¹

Even while using the definition of *explicit* criminalisation, there are still many discrepancies between various reports on which countries prohibit marital rape. The UN Gender Statistics surprisingly includes Malaysia and the United States (where only some states explicitly criminalise marital rape), which are excluded in the explicit criminalisation category in the World Bank database. According to the World Bank database, there are 77 countries in which legislation has ‘explicitly criminalised marital rape’.⁶² This includes several countries, such as Bolivia,

⁵⁸ World Bank Group (n 37); UN Women and United Nations Statistics Division, ‘Gender Statistics—Existence of Laws on Domestic Violence’, unstats.un.org/unsd/gender/Data/Violence%20against%20women.xlsx.

⁵⁹ UN Women and UN Statistics Division, *ibid.*

⁶⁰ Examples of ‘explicit’ criminalisation include: providing that sexual assault provisions apply ‘irrespective of the nature of the relationship’ between the perpetrator and complainant, or stating that ‘no marriage or other relationship shall constitute a defence to a charge of sexual assault under the legislation’, or where ‘a marital (or equivalent) relationship may be explicitly cited in the law as an aggravating factor’. *ibid.*, fn iv.

⁶¹ Bill C-127, ‘Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof’, SC 1980-81-82-83, c 125 (1983) (Can), s 246(8); Criminal Code of Canada, RSC 1985, c C-46, s 278; Koshan (n 10).

⁶² World Bank Group (n 37). Unlike the UN reports, the World Bank’s determination of whether marital rape is criminalised or not is based on a more sophisticated questionnaire with four questions related to marital rape: (a) Does the legislation explicitly criminalise marital rape? (b) If not, can a woman otherwise file a criminal complaint against her husband for rape? (c) Is the husband exempt from facing criminal penalties for rape (marital rape exemption)? (d) Are perpetrators exempt from facing criminal charges for rape if they marry the victim? See methodology and data notes at World Bank Group, ‘Women, Business and the Law 2016: Getting to Equal’ (International Bank for Reconstruction and Development/The World Bank, 2015) wbl.worldbank.org/-/media/WBG/WBL/Documents/Reports/2016/Women-Business-and-the-Law-2016.pdf, 70.

Indonesia, Italy, Uzbekistan and Taiwan, which are not included in the UN Gender Statistics database. Also, the UN Secretary General's Violence against Women study declared in 2006 that marital rape was prosecutable in at least 104 states, evidently not limiting its analysis to just the 32 states where marital rape was explicitly deemed a 'specific criminal offence' at that time.⁶³

Only 39 countries, according to the World Bank database, do not criminalise marital rape in any form. These countries, according to the methodology of the World Bank, do not have 'explicit' legislation criminalising spousal rape, nor do they allow women to file complaints against their spouses for rape, or they have explicit exemption for husbands from facing criminal penalties, or laws that exempt perpetrators from criminal penalties if they marry the victim. Most of these countries have an explicit marital rape exemption. There are 11 countries in this category from Sub-Saharan Africa, including Kenya and Malawi. However, Ghana is considered to have criminalised marital rape, albeit not explicitly.⁶⁴

A. Limitations of the Data and Some Notes on Method

As useful as the World Bank data is, there are several concerns with the data (as well as with the data in the UN reports), which we outline below.

First, as noted above, there are errors in the 'explicit criminalisation' classifications. Additionally, the methodology claims that under 'explicit' criminalisation, the database only includes countries that (a) explicitly provide for penal punishment *and* (b) do not exclude spousal prosecution under any circumstances, even where there is no evidence of divorce or separation. Yet, there is no information on whether marital rape is criminalised as part of the penal code provision on rape or whether it is part of separate domestic violence legislation, with lesser penalties or civil remedies for sexual assault in a marital relationship.

One glaring example is that of Nigeria. The World Bank database states that marital rape is explicitly criminalised in Nigeria, pointing to a 2007 Domestic Violence regulation. But the regulation did not change the criminal law definition of rape. Marital rape continued to be exempted by the penal codes in the northern and southern regions as well as in the sharia criminal law-administered region.⁶⁵ It was only in 2015 that Nigeria passed the Violence Against Persons (Prohibition)

⁶³ UN Women and UN Secretary General, 'Ending Violence against Women: From Words to Action. Study of the Secretary-General' (United Nations, 2006) www.un.org/womenwatch/daw/vaw/publications/English%20Study.pdf.

⁶⁴ World Bank Group (n 37). See also chapters 6–8 in this volume.

⁶⁵ E Ekhtor, 'Women and the Law in Nigeria: A Reappraisal' (2015) 16 *Journal of International Women's Studies* 285; T Monisola Ola and J Olusegun Ajayi, 'Values Clarification in Marital Rape: A Nigerian Situation' (2013) 9 *European Scientific Journal, ESJ* eujournal.org/index.php/esj/article/view/2199.

Act 2015, which significantly broadened the definition of rape. However, there still remain some doubts about whether marital rape is criminal, since the legislation did not explicitly remove the marital rape exemption. In any case, the World Bank does not rely on the new legislation to classify Nigeria.⁶⁶

Indonesia is also included among the explicit criminalisation countries in the World Bank database. However, the marital rape exemption continues to exist in its penal code,⁶⁷ although the Domestic Violence Eradication Act of 2004 made marital rape an offence punishable with imprisonment for 4–12 years or a fine not exceeding 36 million rupiahs.⁶⁸ The World Bank database does not account for this inconsistency. Bhutan is included in both the UN and World Bank databases as having explicitly criminalised marital rape, which it did in its 2004 penal code, but it is classified as only a ‘petty misdemeanour’.⁶⁹ The code thus still distinguishes rape based on one’s marital status.

In other examples, neither database includes Israel or the United Kingdom, even though the judiciary explicitly ruled against and overturned the marital rape exemptions in these countries.⁷⁰ Judicial decisions thus appear as less significant compared to legislation, an approach that belies a contextual understanding of various legal systems.

Latin America (including Mexico) and the Caribbean (LAC) form the largest bloc with explicit criminalisation (around 62.5 per cent). Only about half of the Organisation for Economic Co-operation and Development (OECD) countries have explicitly criminalised marital rape (17 out of 32 countries). No Muslim or Arab country in the Middle East–North Africa has explicitly criminalised marital

⁶⁶ C Anarado, ‘Why Nigeria’s New Violence Against Persons (Prohibition) Act Is Only the Beginning’ (15 June 2015) venturesafrica.com/why-nigerias-new-violence-against-persons-prohibition-act-is-only-the-beginning/.

⁶⁷ Penal Code of Indonesia (Amended by Law No 27 of 1999) 1982, Art 285: ‘Any person who by using force or threat of force forces a woman to have sexual intercourse with him *out of marriage*, shall, being guilty of rape, be punished with a maximum imprisonment of twelve years’ (emphasis added). See also Shaina Greiff, ‘No Justice in Justifications: Violence against Women in the Name of Culture, Religion, and Tradition’ (Women Living Under Muslim Laws (WLUML)—Violence is Not our Culture (VNC) Campaign, 2010) www.academia.edu/download/8810108/sksw%20policy%20briefing%20series%201_no%20justice%20in%20justifications_greiff.pdf, 18.

⁶⁸ Law of the Republic of Indonesia No 23 of Year 2004, Regarding Elimination of Violence in Household (2004) www.wcwonline.org/pdf/lawcompilation/Indonesia-Regarding-Elimination-of-Violence-in-Household.pdf, Arts 8(a) and 46. Art 8(a) defines sexual violence as ‘forcing sexual intercourse carried out against an individual living within the scope of the household’ where Art 2(1a) defines ‘scope of household’ as including the husband and the wife. Art 46 provides that: ‘Anyone committing sexual violence act as referred to in Article 8(a) shall be punished with imprisonment of not longer than 12 (twelve) years or fine of not more than Rp36,000,000.00 (thirty-six million rupiah).’

⁶⁹ Penal Code of Bhutan 2004, s 199 (a defendant is guilty of marital rape where they engage in sexual intercourse with their spouse without consent or against the will of the other spouse). Under s 200, the offence is a petty misdemeanour.

⁷⁰ *R v R* [1992] 1 AC 599 (HL); *Cohen v The State of Israel*, Criminal Appeal 91/80, 35 (3) PD (1980).

rape, although eight countries in this region allow for criminal rape complaints to be filed by wives, according to the World Bank.⁷¹ Only 14 out of 47 countries in Sub-Saharan Africa have explicit criminalisation, while 36 countries allow criminal complaints to be filed.⁷²

Secondly, using data on whether a woman can otherwise file a criminal complaint against her husband as a proxy for non-explicit criminal prosecution can also lead to discrepancies. For example, the database claims marital rape is criminalised in China, albeit not explicitly, since China allegedly allows wives to file a complaint. However, other reports and news articles assert that marital rape is not illegal in China even though the penal code does not have an explicit exemption.⁷³ In fact, even China's most recent domestic violence bill does not include any mention of marital rape.⁷⁴

Third, the World Bank database is unable to reconcile the multiple criminal law regimes that can exist in federal states such as the United States. The United States is rightly excluded from the countries that have explicitly declared marital rape to be a crime in their legislation because the treatment of marital rape differs significantly from state to state. In some states, marital rape is given a lesser penalty and has higher evidentiary requirements of proof.⁷⁵ However, this analysis is absent in the database and the report relies on the laws in New York State, which has one of the most equitable treatments of marital rape, thereby obscuring the inconsistencies throughout other jurisdictions in the country.

Lastly, in general, the World Bank's methodology (and that of the UN) appears limited to a plain reading of statutes and legislation. We are therefore left with no information as to how consent is actually interpreted, for example, or if or how the judiciary has actually ever applied the law.

⁷¹ World Bank Group (n 37). The countries are Algeria, Djibouti, Egypt, Kuwait, Morocco, Qatar, UAE and Yemen. Women can file a complaint in Iraq, Tunisia and Libya as well; however, the penal codes allow men to be exempt from criminal charges of rape if they marry their victims. The marital rape impunity thus exists in these three countries.

⁷² World Bank Group (n 37).

⁷³ R de Silva de Alwis and J Klugman, 'Freedom from Violence and the Law: A Global Perspective in Light of the Chinese Domestic Violence Law, 2015' (2015) 37 *University of Pennsylvania Journal of International Law* 1.

⁷⁴ Al Jazeera Staff, 'China Makes Domestic Abuse a Crime', *Al Jazeera*, 1 March 2016, www.aljazeera.com/news/2016/03/china-outlaws-domestic-abuse-160301053424903.html; Joy Chia, 'How China's New Anti-Domestic Violence Law Could Save Lives', *Open Society Foundations*, 17 May 2016, www.opensocietyfoundations.org/voices/be-effective-china-s-new-anti-domestic-violence-law-needs-civil-society-s-support.

⁷⁵ Anderson (n 26) 1470–73; M Lee Woolley, 'Marital Rape: A Unique Blend of Domestic Violence and Non-Marital Rape Issues' (2007) 18 *Hastings Women's Law Journal* 269, 281–84; J Klarfeld, 'A Striking Disconnect: Marital Rape Law's Failure to Keep Up with Domestic Violence Law' (2011) 48 *American Criminal Law Review* 1819, 1833–36; M Held and J McLaughlin, 'Rape & Sexual Assault' (2013) 15 *Georgetown Journal of Gender and the Law* 155, 159–60.

B. Classifying Legal Systems

In our comparative analysis of the status of the marital rape exemption in the world's countries, we have grouped countries based in part on the structure of their legal systems (whether rooted in common law or civil law legal structures), and in part on their status as 'originating' common/civil law nations or as nations who have received these legal systems and traditions through colonial imposition.

The classification of legal systems created by the University of Ottawa's JuriGlobe project identifies countries and areas of the world as follows: civil law systems and mixed systems with civil law; common law systems and mixed systems with common law; customary law systems and mixed systems with customary law; Muslim law systems and mixed systems with Muslim law; and mixed systems. This classification shows that, except for five countries which have customary or Islamic law mono-systems, the rest of the world is governed by civil and/or common law systems or systems mixed with civil and/or common law.⁷⁶ The civil/common law distinction is important in classifying the trajectories towards criminalisation of marital rape and it can address the deficiencies in the databases that incorporate only a superficial understanding of marital rape laws.

However, a classification that differentiates only on the basis of civil or common law will also be deficient, as colonisation and regional contexts play an important role in how gender equality reforms are instituted.⁷⁷ Overseas colonies of European countries were given their civil or common law system 'exogenously' during the colonial period.⁷⁸ Many of these countries have mixed legal systems where their colonial occupier's legal system was mixed with local religious or customary legal systems; nevertheless, the meta-structure provided by the common law or civil law (as the case may be) plays a significant role in determining the conditions and development of legal reforms. To understand the development of marital rape and other laws, therefore, not only is the legal system relevant but so too is a country's colonial history.⁷⁹ Other recent studies have also incorporated colonial history to further classify legal systems.⁸⁰ Postcolonial countries are therefore classified as countries which 'received' a European civil or common law system. There are a few countries, such as Nepal, Thailand, Turkey and Japan, where the local ruling regime independently adopted foreign common law or civil legal systems; these countries are also included in the 'received' category.

⁷⁶ World Legal Systems Research Group, 'Customary Law Systems and Mixed Systems with a Customary Law Tradition' (University of Ottawa-JuriGlobe) www.juriglobe.ca/eng/sys-juri/class-poli/droit-coutumier.php.

⁷⁷ See Venkatesh, chapter 4 in this volume.

⁷⁸ DM Klerman et al, 'Legal Origin or Colonial History?' (2011) 3 *Journal of Legal Analysis* 379, 380.

⁷⁹ Venkatesh (n 30).

⁸⁰ Klerman et al (n 78).

Countries such as England, France, Germany and the Netherlands are classified as ‘origin’ countries, where the legal system arose endogenously.⁸¹ Settler countries such as the United States, Canada, Australia and New Zealand are also included in this ‘origin’ legal system category, as the national legal system was developed and continues to be developed by settler colonial governments who were never replaced by Indigenous governments.

Recognising the limitations of the databases, in this chapter we organise our analysis around classifications of types of legal systems, and whether or not these legal systems have been borrowed or imposed through colonial histories. Within this classification we select a few representative countries to demonstrate how language in the penal code, structural aspects of the legal system, and colonial contexts matter to whether or not, and how, marital rape is criminalised, which allows for a more contextualised and in-depth analysis.

C. The Marital Rape Exemption in the Common Law

(i) *Common Law ‘Originating’ Countries*

Lord Matthew Hale published a famous dictum in 1736 on marital rape that still manifests itself in several common law jurisdictions to this day. Without citing any authority, Hale proclaimed that: ‘The husband cannot be guilty of a 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.’⁸² Although marital rape was largely condoned at that time, scholars have pointed out that Hale, even for his time, was a particularly misogynistic man whose decisions on the whole were ‘strikingly antagonistic to the interests of women.’⁸³

Hale’s dicta on the marital rape exemption, and his assertion that women give continuous consent to their husbands upon marriage, became further solidified in the late nineteenth century.

Interestingly, in the first few cases when marital rape was raised as an issue in the courts, judges in both the United States and the United Kingdom expressed ambivalence about the persuasiveness of Hale’s dicta.⁸⁴ For example, the 1888 case of *Regina v Clarence*, the first case in the UK where marital rape was properly addressed, involved the accused not revealing his venereal disease to his wife

⁸¹ *ibid*, 380.

⁸² M Hale, *Historia Placitorum Coronae: The History of the Pleas of the Crown*, vol I (London, E and R Nutt, and R Gosling 1736) 629.

⁸³ See eg G Geis, ‘Rape-in-Marriage: Law and Law Reform in England, the United States, and Sweden’ (1977) 6 *Adelaide Law Review* 284, 286.

⁸⁴ See SL Ryder and SA Kuzmenka, ‘Legal Rape: The Marital Rape Exemption’ (1990) 24 *John Marshall Law Review* 393; Freeman (n 20).

during sexual intercourse. Two judges criticised the lack of authority for the marital rape exemption and for Hale's dicta.⁸⁵ Judge Wills argued that there was no 'sufficient authority' and he was not 'prepared to assent' to the proposition that 'between married persons rape is impossible'.⁸⁶ He further stated: 'I cannot understand why, as a general rule, if intercourse be an assault, it should not be rape.'⁸⁷

This time period presented a critical moment where the law could have avoided institutionalising impunity for marital rape. By the nineteenth century, wife-battering was already criminalised in several jurisdictions⁸⁸ and respected thinkers such as John Stuart Mill were condemning marital rape in strong words. Mill famously described a wife as someone who was forever 'chained' to her husband even if he was a brutal tyrant whom she loathed, and the husband as someone who 'can claim from her and enforce the lowest degradation of a human being, that of being made the instrument of an animal function contrary to her inclination'.⁸⁹

Even as early as the nineteenth century, then, there were strong disagreements in legal and political forums in the Anglo-American common law jurisdictions about the marital rape exemption. By this time, women were no longer legally characterised as property or chattels and as having no legal existence outside of their husbands. In other non-criminal areas of law, such as family, property and matrimonial law, there was no presumption of implied consent between spouses.⁹⁰ There was no legal necessity, therefore, for a spousal exemption for rape in the criminal law; indeed, in some ways it was an anomaly at this time. But by the late nineteenth century, courts and legislatures had nevertheless uncritically and wholeheartedly accepted Hale's dicta that codified implied consent in criminal law.⁹¹

In 1976, South Australia claimed to be the first jurisdiction in the common law world to remove the marital rape exemption when it amended the presumption of consent in a marital relationship in its Criminal Code.⁹² However, responding to objections in Parliament, the amendment also included a provision in section 73(5) that limited charges for rape and indecent assault in spousal relationships unless there was accompanying bodily injury, gross indecency, serious

⁸⁵ *Regina v Clarence*, 22 QB 23 (1888).

⁸⁶ *ibid.*, 33.

⁸⁷ *ibid.*

⁸⁸ Bloch (n 31) 246.

⁸⁹ JS Mill, *On Liberty and The Subjection of Women* (New York, H Holt and Co, 1873) 263.

⁹⁰ Freeman (n 20) 14–15; Siegel (n 50) 355.

⁹¹ Freeman (n 20) 11, 21–22.

⁹² South Australia, An Act to amend the Criminal Law Consolidation Act 1935–1975, No 83 of 1976, s 12 (modifying s 73(3) of the Criminal Law Consolidation Act 1935–1976 to include: 'No person shall, by reason only of the fact that he is married to some other person, be presumed to have consented to sexual intercourse with that other person').

and substantial humiliation or threats of the same.⁹³ In the 1980s, all the other Australian jurisdictions amended their laws to end the marital rape immunity,⁹⁴ although it was only in 1992 that the section 73(5) qualifications for marital rape, that required threats or other harm, were removed.⁹⁵

Interestingly, in 2012 the Australian High Court held that even if the marital rape exemption had ever been a part of the common law of the country, it was ended by 1935 when South Australia's Criminal Law Consolidation Act was enacted.⁹⁶ This ruling emerged in an appeal from a man's acquittal for raping his wife in 1963, a crime for which he was charged in 2010. The defendant contended that spousal rape was not an offence in South Australia in 1963. This argument, based on Hale's dicta on irrevocable consent, was soundly repudiated by a majority of Australia's High Court, which dismissed his appeal and found that he could, in fact, be tried and convicted for rape of his wife.⁹⁷

New Zealand specifically and unequivocally abolished spousal immunity in 1985 following Canada in 1983.⁹⁸ Canada's 1892 Criminal Code had codified Lord Hale's conception of implied consent in marriage. The Code defined rape as 'the act of a man having carnal knowledge of a woman *who is not his wife* without her consent, or with consent, which has been extorted by threats or fear of bodily harm'.⁹⁹ Spousal immunity for rape was reiterated in the Canadian Criminal Code of 1970.¹⁰⁰ It was not until 1983 that amendments to the Canadian Criminal Code rejected the idea that marriage confers upon men presumed rights of sexual access to their wives, and removed spousal immunity in sexual assault law.¹⁰¹ While this was a significant success in Canadian law reform, the transition from law on the books to law in practice has been less successful, as judges have, in too many cases, failed to apply the same legally required consent analysis to sexual assault cases between spouses.¹⁰²

In the United Kingdom, the marital rape exemption was reaffirmed in 1976 in the statutory formulation of rape in the Sexual Offences (Amendment) Act,

⁹³ *ibid*, s 12 (modifying s 73(5) of the Criminal Law Consolidation Act 1935–1976). See also JA Scutt, 'Consent in Rape: The Problem of the Marriage Contract' (1976) 3 *Monash University Law Review* 255, 277–283.

⁹⁴ Australian Law Reform Commission and New South Wales Law Reform Commission, 'Family Violence: A National Legal Response' (ALRC and NSWLRC 2010) ALRC Report 114, para 24.59.

⁹⁵ Criminal Law Consolidation (Rape) Amendment Act 1992 (SA). See also Kellie Toole, 'Marital Rape in South Australia: R v P, GA' (2011) 35 *Criminal Law Journal* 237, 241.

⁹⁶ *PGA v The Queen* [2012] HCA 21; 245 CLR 355, 369.

⁹⁷ *ibid*, paras 58–66.

⁹⁸ New Zealand Rape Law Reform (No 2) Act of 1985, The Crimes Amendment Act (No 3) of 1985, NZ Stat. See also SA Adamo, 'The Injustice of the Marital Rape Exemption: A Survey of Common Law Countries' (1989) 4 *American University Journal of International Law and Policy* 555, 568–69.

⁹⁹ Criminal Code, 1892, c 29, s 266, 1892–93 Can Stat 107, 208 (emphasis added).

¹⁰⁰ An Act Respecting the Criminal Law, RSC, c C-34, s 143 (1970).

¹⁰¹ Bill C-127, An Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof, 1st Sess, 32nd Parl (assented to 4 August 1982).

¹⁰² See eg Koshan (n 10); Randall (n 10).

which defined rape as ‘unlawful sexual intercourse’ without consent.¹⁰³ In an early amendment, the Bill in the House of Commons did carry an explicit inclusion of marital rape in the definition of rape, but it was removed in subsequent readings.¹⁰⁴

Soon after the passage of the Sexual Offences (Amendment) Act, the English courts had to decide what constituted ‘unlawful’ in the definition of ‘unlawful sexual intercourse’ in a ‘landmark series’ of marital rape cases that culminated in the House of Lords decision in *R v R*.¹⁰⁵ By this time Scotland had already eliminated the marital rape exemption,¹⁰⁶ and even the English courts had allowed for penal remedies under conditions of marital separation. The House of Lords in *R v R* found that Parliament had not explicitly written a marital rape exemption into the Act and removed the exemption from British common law by dramatically declaring:

[M]arriage is in modern times regarded as a partnership of equals and no longer one in which the wife must be the subservient chattel of the husband. Hale’s proposition involves that by marriage a wife gives her irrevocable consent to sexual intercourse with her husband under all circumstances and irrespective of the state of her health or how she happens to be feeling at the time. In modern times any reasonable person must regard *that conception as quite unacceptable*.¹⁰⁷

In the United States, statutory codification of Hale’s dicta began in the early nineteenth century. American courts were much less critical of using Hale’s formulation of the marital rape exemption than were British courts.¹⁰⁸ Legislative reform and judicial revocation of the marital rape exemption only began slowly in the 1970s.¹⁰⁹

Many of the early law reforms in the United States merely removed the marital rape exemption for separated or divorced couples. However, some court decisions from various states in the 1980s were quick to abandon the marital rape exemption, which was deemed to have its source ‘in a bare, extra-judicial declaration made some 300 years ago’.¹¹⁰ The pivotal 1984 New York Court of Appeals decision in *People v Liberta* found the marital rape exemption to be unconstitutional and in

¹⁰³ T Fus, ‘Criminalizing Marital Rape: A Comparison of Judicial and Legislative Approaches’ (2006) 39 *Vanderbilt Journal of Transnational Law* 481, 486–87.

¹⁰⁴ Freeman (n 20) 27.

¹⁰⁵ Fus (n 103) 487–93. See *R v R* [1991] 3 WLR 767 House of Lords.

¹⁰⁶ *S v HM Advocate*, 1989 SCCR 248 (HCJ) (Scotland).

¹⁰⁷ *R v R* [1992] 1 AC 599 (HL), 616 (emphasis added).

¹⁰⁸ *Commonwealth v Fogerty*, 74 Mass 487, 491 (1847) (stating ‘it would always be competent for a defendant to show a marriage to the victim as a defense to the charge of rape’); *Frazier v State*, 86 SW 754 (Tex 1905) (‘[A] man cannot himself be guilty of actual rape upon his wife’ and a wife cannot retract her consent’).

¹⁰⁹ Freeman (n 20) 22–23.

¹¹⁰ *State v Smith*, 85 NJ 193, 200 (1981). The phrase from *State v Smith* was also quoted in *Warren v State*, 255 Ga 151, 154 (1985).

violation of the Equal Protection Amendment; on this basis the court rejected the assumption that continuous consent existed in a marital relationship.¹¹¹

Notwithstanding these cases, at least 26 US states still retain spousal immunity for sexual assault in one form or another.¹¹² In some states, marital immunity even exists for having sex with a wife who is incapacitated or unconscious. Astonishingly, this has been found to pertain even when it is the husband who has rendered his wife incapacitated without her consent and has then sexually used her body.¹¹³

In other US jurisdictions, there are separate regulations for marital rape with a lower sentence. In other states still, marriage provides cause for exemption from being charged with sexual offences of a higher degree. In several states, including Oklahoma, Arizona and Connecticut, for a sexual assault in marriage to be defined as such, it has to be accompanied by actual or threatened physical force or violence. In some states, there has to be proof of estrangement or separation, and in several states, there are higher evidentiary and reporting requirements.¹¹⁴

In each of these countries, Hale's pronouncement became accepted in the late eighteenth century as legal gospel. Despite some strong disagreements in legal and political fora, the spousal exemption persisted through most of the nineteenth century, demonstrating the strength of the marital rape exemption's anchor within a broader and deeply entrenched patriarchal ideology. Fidelity to precedent and other rule of law concepts were illusory in this regard, as illustrated by the reasoning of the Australian High Court in *PGA v The Queen*, which refused to accept Hale's dicta as reifying irrevocability of consent in common law, except perhaps during Hale's time.

The spousal rape exemption nevertheless continues to persist in some jurisdictions on the basis of a legal fiction that expresses misogynistic sociocultural norms obliterating women's right to say no to unwanted sex within marriage. Hale's pronouncement formed the basis and provided the language for the statutory law of rape throughout the British Commonwealth and protectorates from North America to Israel to Cyprus to countries across Asia, Africa and the Caribbean.

(ii) Received Common Law Countries

The colonial British government introduced codified criminal law across its colonies from the late eighteenth century onwards and included the Hale marital rape exemption in various ways. Even after independence, the colonial definitions of

¹¹¹ *People v Liberta*, 62 NY2d 651 (1984 NY).

¹¹² Anderson (n 26); Woolley (n 75) 281–84; Klarfeld (n 75) 1833–36; Held and McLaughlin (n 75) 159–60 ('35 states and the District of Columbia still provide some form of marital immunity in their legislation, typically for sexual assault that does not involve penetration, force, or great bodily harm').

¹¹³ Anderson (n 26) 1487–88.

¹¹⁴ *ibid.*, 1491–96.

rape persisted in the postcolonial context without any change, as justifications began to intermingle with local patriarchal values around women's bodies and role of women in the family. Marital rape exemptions in common law countries generally fall into two categories, dealt with in the following sections: first, where marital rape is explicitly exempted from the rape laws; and second, where rape is defined as 'unlawful' sexual intercourse and the interpretation of the term 'unlawful' renders marital rape exempted or included in the criminal offence. Both kinds of codifications were initiated during the colonial period and the strategies for reforming the penal code have generally followed distinct paths.

(a) Wives not Included as Women Legally Protected from Rape

In many received common law countries, the codification of marital rape immunity took the form of an explicit exception, stating that only perpetrators other than husbands could be charged criminally. India's Penal Code, which was drafted by Lord Macaulay in 1860, has an exception to the definition of rape in section 135, stating: 'Sexual intercourse or sexual acts by a man with his own wife, the wife not being under ten years of age, is not rape.'¹¹⁵ The Indian Penal Code was the model for the law in several countries in the British Empire, including Singapore, Sri Lanka, Malaysia, Kenya and Ghana.¹¹⁶ The ten-year age limit was later increased to fifteen years, but the explicit exemption remains to this day in India, Singapore and Sri Lanka, even when the age of consent to marriage has increased.¹¹⁷

Singapore removed the explicit blanket spousal immunity in 2007 to add exceptions to the immunity, limited to when the husband was living apart from his wife and either formal separation proceedings had been initiated or there was a protection order against him.¹¹⁸ Sri Lanka's law, which had Macaulay's explicit exemption until amendments in 1995, is currently similar to the Singapore law where marital rape immunity is removed for judicially separated spouses.¹¹⁹

¹¹⁵ Indian Penal Code (as modified up to 1 August 1860), Act No 45 of 1860, s 135, Exception 2 (1860).

¹¹⁶ KD Gaur, *Textbook on the Indian Penal Code* (Delhi, Universal Law Publishing Co, 2009) 9; JN Matson, 'The Common Law Abroad: English and Indigenous Laws in the British Commonwealth' (1993) 42 *International and Comparative Law Quarterly* 753, 758–59.

¹¹⁷ Indian Penal Code 1860 (Amended by the Criminal Law Amendment Act 2013), s 135, Exception 2; W Cheong Chan, 'Penal Code (Amendment) Act 2007: Rape within Marriage Legislation and Case Notes' (2009) 2009 *Singapore Journal of Legal Studies* 257, 257.

¹¹⁸ Chan, *ibid*, 257–60.

¹¹⁹ Sri Lanka Penal Code 1885 (as amended up to Act No 16 of 2006) Art 363(a); S Goonesekere, 'Family Law in a Multi Cultural Society with Plural Legal Traditions: The Sri Lanka Experience' (1996) *International Survey of Family Law* 461, 472; S Goonesekere, 'Overview: Reflections on Violence Against Women and Legal Systems in Some South Asian Countries' in S Goonesekere (ed), *Violence, Law, and Women's Rights in South Asia* (New Delhi, Sage, 2004) 60–61; K Pinto Jayawardane, 'Re-Visiting Our Right to Choice', *Sunday Times*, Sri Lanka, 29 August 2004, www.sundaytimes.lk/040829/columns/focus.html.

Except for a few countries, such as Trinidad and Tobago and Guyana, which have removed the marital rape exemption from their laws,¹²⁰ most countries in the Caribbean have similar explicit marital rape exemptions permitting prosecution only under conditions of separation or if the husband has a sexually transmitted disease (as is the case in Jamaica).¹²¹ The existing Caribbean Committee (CARICOM) model legislation for sexual offences continues to demand criminalisation of marital rape only under specific conditions of divorce, separation or direct order, indicating a clear commitment to retaining criminal immunity for men who sexually assault women to whom they are still married and cohabiting.¹²²

These jurisdictions are also similar to civil law jurisdictions which retain explicit marital rape exemptions in their penal codes. As will be discussed in the section on civil law and mixed countries, in such cases, the exemptions tend to have been judicially overruled on the basis of state obligations to fulfil constitutional and international human rights protections to women raped in marriages.

(b) 'Unlawful' Sexual Intercourse and Silent Exemptions

In many received common law countries, the penal code has been more ambiguous on the question of marital rape, resembling the UK Sexual Offences (Amendment) Act of 1976, which defined rape as 'unlawful' sexual intercourse without consent, where 'unlawful' was *interpreted* to exclude sexual intercourse between a husband and wife.¹²³ In Malawi, for example, the penal code on rape makes no reference to marital status. Section 132 defines rape as non-consensual 'unlawful carnal knowledge'.¹²⁴ It is, however, uniformly accepted as a matter of common legal knowledge that marital rape is not criminalised under common law or customary rules.¹²⁵

In Kenya, rape is defined in section 3 of the Sexual Offences Act as an intentional act committed 'unlawfully' and which involves penetration without consent.¹²⁶ Section 3 has no explicit exemption; section 43 provides the meaning for 'intentional and unlawful' and contains an explicit exception clause, which states that 'the section shall not apply in respect of persons who are lawfully married to each other'.¹²⁷ Kenya falls somewhere in between the two categories with an

¹²⁰ Sexual Offences Act, Act 27 of 1986, ch 11:28 (2000) (as amended by Act 20 of 1994 and Act 31 of 2000) (Trin and Tobago), rgd.legalaffairs.gov.tt/Laws2/Alphabetical_List/lawspdfs/11.28.pdf; Sexual Offences Act, Act No 7 of 2010, Official Gazette (Legal Supp) 33 (2010) (Guy), scm.oas.org/pdfs/2010/CIM02920T-2.pdf.

¹²¹ See eg Jamaica Sexual Offences Act 2009, Art 5; Bahamas Sexual Offences & Domestic Violence Act 2010, Arts 3 and 15(1). See generally SA Elvy, 'A Postcolonial Theory of Spousal Rape: The Caribbean and Beyond' (2015) 22 *Michigan Journal of Gender & Law* 89.

¹²² CARICOM Model Legislation on Sexual Offences, para 4(4) (1997).

¹²³ Sexual Offences (Amendment) Act 1976 (UK).

¹²⁴ Malawi Penal Code, ch 7:01, Laws of Malawi, 1930, s 132.

¹²⁵ White and Kanyongolo (n 51).

¹²⁶ Sexual Offences Act, Act No 3 of 2006 (Kenya), s 3.

¹²⁷ *ibid*, s 43(5).

explicit exemption only in the interpretation clause for 'unlawful', which is not as unambiguous as the Macaulay codes.¹²⁸

How has the term 'unlawful' been interpreted in other received common law jurisdictions? Since the marital rape exemption arose out of an exercise of judicial interpretation, it arguably leaves room for a different legal interpretation of what is 'unlawful', as is evidenced by the House of Lords decision in *R v R*.¹²⁹ This potential may be especially enhanced in countries with mixed legal systems, where the most progressive interpretation among the various systems can be selected as the interpretive source.

The Israeli legal system is based on a mixed common law, civil law and Jewish law system. The penal code on rape in 1977 was governed by the English common law definition where marital rape was deemed *lawful* sexual intercourse under all circumstances. The Israeli courts removed the marital exemption as early as 1979/1980.¹³⁰ In order to get around the English common law impunity for marital rape, the Supreme Court interpreted the word 'unlawful' in 'unlawful sexual intercourse' on the basis of Jewish religious law and principles, to argue that unlawful sexual intercourse includes marital rape.¹³¹

While South African law is mainly derived from Roman-Dutch civil law, it also contains influences of English common law.¹³² By 1992, in *R v R*, the marital rape exemption had been rejected in English common law, but the exemption persisted in Roman-Dutch law. When a marital rape case came before a South African court that same year, the lower court convicted the husband, using the same argument as in *R v R*, that the marital rape impunity was obsolete and that the exemption had never been properly assimilated into African or Ciskei (part of South Africa) law.¹³³ However, unlike the Israeli Supreme Court, the South African Court of Appeal followed the conservative Roman-Dutch civil law interpretation in a 1993 ruling to maintain the marital rape exception, even though the common law had already changed in England.¹³⁴

In general, once *R v R* was decided in England, it provided the much-needed impetus to change the law in other common law countries or countries with mixed common law. In 2002, the Hong Kong legislature decided to make its rape laws consistent with the British decision in *R v R* and its interpretation of 'unlawful'.¹³⁵

¹²⁸ For further discussion, see Kamau et al (n 51).

¹²⁹ *R v R* (n 105).

¹³⁰ *Cohen v The State of Israel*, Criminal Appeal 91/80, 35 (3) PD (1979/1980) 281. The exception was removed in 1979 by the lower court and upheld in 1980.

¹³¹ For a more detailed discussion of the case, see Goldstein (n 17) 166–75. See also Venkatesh, 'Pluralistic Legal Systems and Marital Rape: Cross-National Considerations' chapter 5 in this volume.

¹³² J Campanella, 'The Marital-Rape Exemption Resurrected' (1994) 111 *South African Law Journal* 31.

¹³³ *S v Ncanywa*, 1992 (2) SA 182 (Ck). See also Campanella, *ibid*, 32.

¹³⁴ *S v Ncanywa*, 1993(1) SACR 297 (CkA). See Campanella, *ibid*, 33–35 and see discussion in the next section on civil law systems.

¹³⁵ R Emerton, 'Marital Rape and Related Sexual Offences: A Review of the Proposed Amendments to Part XII of the Crimes Ordinance' (2001) 31 *Hong Kong Law Journal* 415.

To explicitly bring marital rape into its criminal law legislation on rape, Hong Kong added a phrase in its criminal law stating that ‘unlawful sexual intercourse does not exclude sexual intercourse that a man has with his wife’.¹³⁶

In countries with common law influences, there exists some leeway to introduce cases from other common law countries for interpretive guidance. In addition to the House of Lords decision in *R v R*, which has strong persuasive authority, the New York Court of Appeal case in *People v Liberta* has also been influential, for example in the Philippines.

The Philippines has a mixed civil and common law system with many areas of law relying on a civil law style of codification. Nevertheless, since the American occupation, common law statutory interpretation has ‘dominated’ the Philippine legal system, especially with respect to their Supreme Court jurisprudence.¹³⁷ In 1997, the Philippine legislature passed an ‘Anti-Rape Law’, which was silent on marital rape but had a clause that allowed for the subsequent ‘extinguishment’ of the penalty for a husband if the wife forgave him.¹³⁸ In 2014, the Supreme Court of the Philippines was faced with having to interpret whether the legislation exempted or penalised marital rape.¹³⁹ The lengthy decision covered the history of the marital rape exemption from the medieval practice of ‘bride-capture’, to Hale’s dicta, to the New York Court of Appeal decision in *People v Liberta*. The Court emphasised that the marital rape impunity is a violation of the Philippines’ international law obligations. It elaborated at length on the state’s commitments to the Convention on the Elimination of All Forms of Discrimination against Women and the UN Declaration on the Elimination of Violence Against Women, concluding ‘marriage is not a license to rape’ and that ‘there exists no legal or rational reason for the Court to apply the law and the evidentiary rules on rape any differently if the aggressor is the woman’s own legal husband’.¹⁴⁰

D. The Marital Rape Exemption in ‘Originating’ European Civil Law Countries

(i) *Originating Civil Law Countries*

The European civil law countries have had similar laws to those of common law countries providing impunity for marital rape, which is not surprising given the

¹³⁶ Hong Kong Crimes Ordinance 1972, ss 117(1B), 118(3) (as modified in 2002); Man-chung Chiu, ‘Contextualising the Rhetoric of Sexual Violence in Hong Kong’ (2004) 2 *China: An International Journal* 83, 85.

¹³⁷ Petra Mahy and Jonathan P Sale, ‘Classifying the Legal System of the Philippines: A Preliminary Analysis with Reference to Labor Law’ (2012) 32 *Philippine Journal of Labor and Industrial Relations* 1, 3, 5–11.

¹³⁸ Republic Act No 8353, 1997 (or Anti-Rape Law of 1997), Arts 335, 226-C.

¹³⁹ *People v Jumawan*, GR No 187495, 722 SCRA 108 (21 April 2014) (Phil).

¹⁴⁰ *ibid.*

common religious and social lineage of gender practices across Europe. The penal code in some civil law countries was explicit about the exclusion. For example, the German code of 1871 was explicit in mandating *extramarital* sexual intercourse as one of the necessary elements of rape.¹⁴¹ The exemption was only removed in 1997 during an overhaul of Germany's sexual violence laws.¹⁴² Even after the changes in the late 1990s, German laws on sexual assault were considered inadequate to provide sufficient protection, especially because of a requirement that the victims should have defended themselves. The German parliament recently passed legislation to modify at least some of the problematic provisions in the sexual assault laws.¹⁴³

In cases where the penal code was silent, the judiciary read impunity into the existing law if and when a marital rape case came before the courts. Since the 1970s, however, European courts have usually ruled in favour of criminalisation of sexual assault in marriage, as the following examples show.

In France, Italy and Spain, the definition of rape did not explicitly exclude marital rape. The French Cour de cassation in the early 1900s interpreted the definition of rape (*viol*) in the 1808 French penal code to explicitly exclude 'acts of violence' by a husband against his wife from constituting the crime of rape.¹⁴⁴ It was only in 1990 that the Cour de cassation removed the criminal exemption for husbands.¹⁴⁵

The Italian Corte di cassazione decided earlier, in 1976, to interpret rape in the penal code as applying to marital relationships.¹⁴⁶ In 1992, the Spanish Tribunal Supremo ruled that there was no impunity for marital rape under the constitutional principle of freedom to make one's own decisions in sexual activities.¹⁴⁷

The USSR was perhaps the first European country to remove the marital rape exemption. The tsarist criminal code in Russia had an explicit marital rape exemption, but the first criminal code of Soviet Russia in 1926 removed it.¹⁴⁸ At that time

¹⁴¹ German Criminal Code 1871, Strafgesetzbuch für das Deutsche Reich vom 15 Mai 1871, s 177(1); E Livneh, 'On Rape and the Sanctity of Matrimony' (1967) 2 *Israeli Law Review* 415, 420.

¹⁴² German Criminal Code, amended on 5 July 1997, s 177(1); C McNamee, 'Rape' in Rita J Simon (ed), *A Comparative Perspective on Major Social Problems* (Lanham, MD, Lexington Books, 2001) 20–21.

¹⁴³ See Bundesverband der Frauenberatungsstellen und Frauennotrufe in Deutschland (Federation of Women's Counselling Centres and Helplines in Germany), Campaign to Reform Section 177, *Report on Protection Gaps in the Sexual Assault Laws* (July 2014) www.frauen-gegen-gewalt.de/fallanalyse-zu-schutzluecken-im-sexualstrafrecht.html?file=tl_files/downloads/kampagnen/vergewaltigung-verurteilen/bff-Fallanalyse_Sexualstrafrecht.pdf; 'Germany Rape Law: "No Means No" Law Passed', *BBC News*, 7 July 2016, www.bbc.co.uk/news/world-europe-36726095.

¹⁴⁴ Cour de cassation, 19 March 1910, Bull Crim 1910 no 153, (France); Livneh (n 141) 419–20.

¹⁴⁵ Cour de cassation, Chambre criminelle, 5 September 1990, 90-83786, Bull Crim 1990 no 313; Cour de cassation, Chambre criminelle, 11 June 1992, 91-86346, Bull Crim 1992 no 232; McNamee (n 142) 20.

¹⁴⁶ Corte di cassazione, Sentenza 12857 del 1976 (Ita); Amy Jo Everhart, 'Predicting the Effect of Italy's Long-Awaited Rape Law Reform in the Land of Machismo Note' (1998) 31 *Vanderbilt Journal of Transnational Law* 671, 679.

¹⁴⁷ Spain, Tribunal Supremo, '[Judgment of 24 April 1992]' [1992] *Actualidad Juridica Aranzadi* 1.

¹⁴⁸ Russian Soviet Federative Socialist Republic, Criminal Code of 1926 (Ugolovnyj kodeks 1926), Art 153; USSR Criminal Code, Art 117 (1960); Livneh (n 141) 420; D McBride Stetson, 'Law and Policy: Women's Human Rights in Russia' in W Rule and NC Noonan (eds), *Russian Women in Politics and Society* (Westport, CT, Greenwood Press, 1996) 160.

sexual freedom was considered to be an essential aspect of self-determination and socialism. Marriage was seen as a bourgeois institution, which should not impinge on the self-determination rights of women.¹⁴⁹ Other countries in the communist bloc which had no marital rape exemption included Czechoslovakia (1950) and Poland (1932).¹⁵⁰ Poland had removed its marital rape exemption even before it became a communist country.¹⁵¹

The Scandinavian countries are considered to be pioneers in criminalising marital rape because their penal codes have not had an explicit marital rape exemption since the 1960s. The 1962 Swedish penal code removed all references to relationship-based exemptions in its definition of rape.¹⁵² It did, however, until amendments in 1984, permit for lighter sentencing if the 'woman's relationship to the man' or any other circumstances implied a 'less grave' crime.¹⁵³ Norway's laws also had no explicit marital rape exemption and the first conviction for marital rape occurred in 1974, which was upheld by the Supreme Court.¹⁵⁴ Denmark's penal code is also considered as lacking an explicit marital rape exemption. Denmark preceded Sweden by a few years in drafting a definition of rape without reference to marital status.¹⁵⁵ However, until 2013, the Danish Penal Code included several marital exemptions, applying many of its sexual assault provisions only to 'extra-marital sexual intercourse' and reducing or remitting punishment if the parties had had sexual relations before or were in a marital relationship.¹⁵⁶ These provisions reflected the stereotypes that have prevailed since the first Danish Penal Code in 1866, where rape was mainly punishable only when committed against married women by strangers.¹⁵⁷ Rape was seen a violation of women's honour because they had been forced into extramarital intercourse. In 2013, the Danish Penal Code was amended to remove all mentions of the marital status of the victim and offender from the provisions.¹⁵⁸

¹⁴⁹ Livneh (n 141) 420; Geis (n 83) 296 n 82; McBride Stetson (n 148) 158–61.

¹⁵⁰ Czechoslovakia Criminal Code of 1950, s 238; Polish Criminal Code 1932, Art 204; Livneh (n 141) 421.

¹⁵¹ Polish Criminal Code 1932, Art 204; Livneh (n 141) 421; Freeman (n 20) 26–27; Geis (n 83) 296.

¹⁵² Geis (n 83) 297–300.

¹⁵³ Swedish Criminal Code 1962, ch 6, s 1(2); Livneh (n 141) 421; Amnesty International, 'Case Closed: Rape and Human Rights in the Nordic Countries' (Amnesty International Publications, 2008) amnesty.dk/media/1557/case-closed.pdf, 47; See also Geis (n 83) 297–98.

¹⁵⁴ Norway Supreme Court, Rt 1974 s 1121 (1974). See Freeman (n 20) 27; Norway, 'Information Provided by Norway in Follow-up to the Concluding Observations by the Committee on the Elimination of Discrimination against Women on the Eighth Periodic Report of Norway' (Committee on the Elimination of Discrimination against Women, 2014) CEDAW/C/NOR/CO/8/Add 1, 3.

¹⁵⁵ Geis (n 83) 297.

¹⁵⁶ Danish Criminal Code 2005 (as amended by Act Nos 1389 and 1400 of 21 December 2005), Arts 218, 220, 221, 227.

¹⁵⁷ Amnesty International (n 153) 16.

¹⁵⁸ Denmark, Act No 633 of 12 June 2013; Ministry of Gender Equality of Denmark, 'Report by Denmark on the Application of the Beijing Declaration and Platform for Action (1995) and the Results of the 23rd Special Session of the UN General Assembly (2000)' (Copenhagen 2014) www.unece.org/fileadmin/DAM/Gender/publication/Denmark_national_report_on_the_implementation_of_the_Beijing_Declaration_and_Platform_for_Action.pdf, 11.

(ii) Received Civil Law Countries

Just like the spread of British common law, civil law systems promulgated throughout the world as colonising countries introduced civil codes to their colonial subjects. Codification of criminal law usually resulted in explicit marital rape exemptions in the penal codes of colonised countries. When faced with such an explicitly codified exemption for marital rape, legal reform has required sustained, long-drawn legislative campaigns, sometimes over decades. The judiciary in civil law postcolonial countries with explicit marital rape exemptions has not always been the forum where marital rape has been successfully challenged. The courts have been reluctant unilaterally to overturn the marital rape exemption without the legislatures having taken the first step, as the following examples demonstrate.

South Africa was one of the first countries in Africa to criminalise rape in a spousal relationship, but through legislative reform. As discussed above, the South African appellate court had held that although English law had rejected the marital rape exemption, although the marital rape exemption in common law was based on a fiction created by Hale, and although it was possibly anachronistic and inconsistent with current standards, the exemption was nevertheless part of Roman-Dutch law, and therefore a part of South African law.¹⁵⁹ The decision led the South African legislature to enact the Prevention of Family Violence Act in 1993, even before the South African Constitution came into force. The Act removed the provision that exempted husbands from rape charges 'by reason of [a woman's] consent in marriage'.¹⁶⁰ It also incorporated an explicit marital rape criminalisation clause, which stated that 'a husband may be convicted of the rape of his wife'.¹⁶¹

Another example of successful legislative action from Africa is provided by Namibia, which like South Africa is also a mixed civil/common law jurisdiction. The Combating of Rape Act came into force in Namibia in June 2000 and was considered to be 'one of the most progressive laws on rape in the world'.¹⁶² The Act overturned many of the colonial-era patriarchal laws around rape that had been present in the common and civil law, including the marital rape exemption. Marital rape was explicitly criminalised in section 2(3) by stipulating that 'no marriage or other relationship will be a defence to a charge of rape'.¹⁶³ The Act was tabled in 1999 and the inclusion of a marital rape clause was not without controversy as male parliamentarians used familiar arguments to oppose it, including that it would lead to the break-up of marriages and

¹⁵⁹ *S v Ncanywa* (n 134). See Campanella (n 132) 33–35.

¹⁶⁰ Prevention of Family Violence Act, No 133 of 1993.

¹⁶¹ *ibid*, s 5.

¹⁶² N Bohler-Muller, 'Valuable Lessons from Namibia on the Combating of Rape' (2001) 14 *South African Journal of Criminal Justice* 71, 74.

¹⁶³ Namibian Combating of Crime Act, Act No 8 of 2000 (2000), s 2(3).

vexatious, spurious claims by wives. Lobbying by very active women's groups, NGOs, high-ranking female politicians, civil servants and other supporters of the bill ensured that the clause remained.¹⁶⁴

Once legislatures amended their countries' penal codes to include marital rape, the higher courts in at least a few countries helped in creating more progressive formulations of the code. The 1990s was a period of increased international activism among feminist groups in Latin America, where all countries have civil law systems.¹⁶⁵ Women's rights groups used a two-pronged approach combining intense participation in intergovernmental organisations and international policy arenas with grassroots mobilisation. Thus, the legislatures of several Latin American countries began to criminalise marital rape. But the judiciary played an important role in a few countries in articulating that the new marital rape criminalisation laws were essential for protecting human rights and in creating more progressive interpretation of the law.

For example, in 1996, marital rape was criminalised in Colombia. When this law was originally enacted, it provided for a lesser punishment for rape within the context of marriage than for rape generally.¹⁶⁶ However, the Constitutional Court of Colombia declared this difference in punishment unconstitutional.¹⁶⁷ The new Penal Code not only affirmed that sexual assault could take place in intimate relationships, but, as happened in Canada, it also made rape in spousal or intimate relationships *an aggravating factor to rape*, warranting a stricter punishment.¹⁶⁸

In 1994, Mexico's Supreme Court of Justice ruled that forced sex within marriage is not rape but rather 'an undue exercise of conjugal rights'.¹⁶⁹ It also said that because the purpose of marriage is procreation, a man can force his wife to

¹⁶⁴ Becker (n 16) 188. Similar arguments were raised during parliamentary debates about criminalising marital rape in Ghana (see Morhe (n 51)), Kenya (see Kamau et al (n 51)) and Malawi (White and Kanyongolo (n 51)).

¹⁶⁵ SE Alvarez, 'Translating the Global Effects of Transnational Organizing on Local Feminist Discourses and Practices in Latin America' (2000) 1 *Meridians* 29. For a list of legal systems in Latin America, see World Legal Systems Research Group, 'Alphabetical Index of the Political Entities and Corresponding Legal Systems' (University of Ottawa-JuriGlobe) www.juriglobe.ca/eng/sys-juri/index-alpha.php.

¹⁶⁶ Colombia Ley 295 de 1996, Diario Oficial No 42.836, de 22 de Julio de 1996, Art 25; C Benninger-Budel and L O'Hanlon, 'Violence against Women in Colombia, Report Prepared for the Thirty-First Session of the Committee on Economic, Social and Cultural Rights', *Violence Against Women: 10 Reports/Year 2003* (World Organisation Against Torture (OMCT), 2004) 156.

¹⁶⁷ Colombia Constitutional Court, decision C-285 of 1997, Presiding Judge Carlos Gaviria Díaz (action for unconstitutionality of Article 25 of law 294 of 1996.) See also Center for Reproductive Rights, *Bodies on Trial: Reproductive Rights in Latin American Courts* (New York, Center for Reproductive Rights, 2003) 61.

¹⁶⁸ Colombia Ley 599 de 2000, Diario Oficial 44097 del 24 de julio de 2000, Art 211(5) (as amended by Art 30 de Ley 1257 de 2008); Benninger-Budel and O'Hanlon (n 166) 156. For the Canadian context, see Koshan (n10) and Canadian Criminal Code, RSC 1985, c C-46, s 718.2(a)(ii).

¹⁶⁹ Supreme Court of Mexico, Judgment 10/94, (1994); Human Rights Watch, 'The Second Assault: Obstructing Access to Legal Abortion after Rape in Mexico' (Human Rights Watch, 2006) www.hrw.org/sites/default/files/reports/mexico0306webwcover.pdf, 19.

have sex if the sex is for that purpose.¹⁷⁰ The case spurred Mexican women's rights groups to campaign for a legislative change removing the marital rape exemption and the Mexican government passed a new law criminalising marital rape in 1997.¹⁷¹ In November 2005, when the next marital rape case came before the Mexican Supreme Court, it explicitly overturned the 1994 decision, asserted that forced sex within marriage is rape punishable by law, and affirmed the necessity of the legislation for protecting constitutional rights.¹⁷² The Supreme Court of Mexico relied on several constitutional rights in its judgment, including the right to sexual and reproductive freedom.¹⁷³

Nepal stands as a notable exception where the judiciary unilaterally overturned a marital exception in its penal code that was more than a century old. Nepal was not a British colony and remained at least semi-autonomous through the colonial era. In the late nineteenth century, the ruling monarchy embraced the codification programme that was taking place throughout Europe and its colonies.¹⁷⁴ Nepal's legal code, *Muluki Ain*, was inspired by the Napoleonic code and is an amalgam of European civil codes, common law doctrines, and Hindu tenets and scriptures.¹⁷⁵ When rape was codified, it was defined as sexual intercourse below the age of consent (sixteen years) or where there was threat, pressure, coercion or undue influence. It was, however, defined only in the specific contexts of a (unmarried) girl, widow or another person's wife, excluding spousal rape from the definition.¹⁷⁶ The marital rape exemption was continued in the 1963 code, when the country went through a period of legal reform. In 2006, the provision was declared constitutionally invalid by Nepal's Supreme Court. In a powerful judgment, the Court asserted that legal impunity for marital rape is a 'discriminatory practice ... against the provisions of the Convention on the Elimination of All Forms of Discrimination against Women and [the letter] and spirit of Articles 11(1), (2) and (3) of the Constitution of the Kingdom of Nepal'.¹⁷⁷ The Court emphasised that women, like all human beings, have the right to equal protection of the law without discrimination, the right to live with self-respect (dignity), and rights of self-determination and independent existence, all of which were infringed by the marital rape

¹⁷⁰ A Madrazo and E Vela, 'The Mexican Supreme Court's (Sexual) Revolution Symposium: Latin American Constitutionalism: Section IV: Constitutional Review' (2010) 89 *Texas Law Review* 1863, 1872, fn 29.

¹⁷¹ Neumann (n 36) 95.

¹⁷² Judgment 9/2005-PS, First Chamber application for amendment of jurisprudence, 16 November 2005 (Supreme Court of Mexico); Madrazo (n 170) 1872.

¹⁷³ Madrazo (n 170) 1872.

¹⁷⁴ K Bikram Thapa, 'Religion and Law in Nepal' in J Martínez-Torrón, W Cole Durham and DD Thayer (eds), *Religion and the Secular State: National Reports Issued for the Occasion of the XVIIIth Congress of the International Academy of Comparative Law* (Madrid, Servicio de Publicaciones de la Facultad de Derecho de la Universidad Complutense de Madrid, 2015) 518; Nitya Ramakrishnan, *In Custody: Law, Impunity and Prisoner Abuse in South Asia* (Delhi, Sage Law, 2013) 295.

¹⁷⁵ Thapa (n 174) 518; Ramakrishnan (n 174) 295.

¹⁷⁶ *Muluki Ain* (Country Code) 1963, No 1 on the Chapter on Rape; See *Meera Dhungana v His Majesty's Government*, Writ No 55 of the year 2058 BS (2006) (Nepal).

¹⁷⁷ *Dhungana*, *ibid.*

exemption. In the same way that the Philippines Supreme Court used foreign case law such as *People v Liberta* in its decision, the Supreme Court of Nepal also referred to *R v R* and *People v Liberta* when it declared the marital rape exemption invalid.¹⁷⁸

The recent higher court decisions in Nepal, Mexico and the Philippines show how international human rights norms and domestic constitutional rights provide the most formidable basis to challenge the marital rape immunity. The Nepal Supreme Court was forthright about how laws must be changed to conform to conceptions of 'universal values and traditions', where national level laws have to reconcile with 'globalisation' of values and 'reciprocal international relations' determined by treaties and conventions.¹⁷⁹

E. Summary

In conclusion, originating countries with endogenous civil law codes were the first to remove the marital rape exemption. Originating common law countries began to criminalise marital rape only in the late 1970s, coinciding with the activism of their women's rights movements. Marital rape cases are rarely litigated and even more rarely reach the higher level of courts. Legal change has therefore more often happened in legislative institutions, not because of some intrinsic enlightened perspective of legislatures but because of the work and advocacy of feminist and other social justice grassroots organisations in pushing for this legal change.

Furthermore, in these countries before the 1970s, domestic courts supported legislatures in upholding the marital rape exemption. The trends in the United States, Israel and Italy show that after the 1970s, the courts shifted and have been responsive towards overturning the marital rape exemption so long as anti-gender discrimination laws were also recognised at that time.

Where penal codes are explicit in exempting sexual assault in marriage from the definition of rape, the judiciary has typically also been reluctant to step in where the legislature has not tread. Common law penal codes are unique in using the language of 'unlawful' to define rape, which has been somewhat easier to reinterpret as including marital rape than codes with stronger language. Common law courts in receiving countries with such ambiguous language have more leeway than other courts to rely on foreign and international human rights to resolve the ambiguity.

As constitutionalism, feminism and international human rights took root as global movements, legislatures began to respond, removing marital rape exemptions. The judiciary also played an important role in interpreting ambiguous codes and articulating the rights analysis underlying marital rape criminalisation.

¹⁷⁸ *Dhungana*, *ibid* (Nepal), *Jumawan* (n 139) (Phil).

¹⁷⁹ *Dhungana* (n 176) (Nepal).

The recent decisions by the Mexican, Nepalese, Philippines and other courts reveal expanded judicial understandings of how rights are intertwined, how marital rape expresses structural inequalities that women face in intimate relationships, and how extending rights in one area of law, such as sexual assault, reinforces and strengthens women's rights to equal benefit of the law in other areas, such as reproductive rights and anti-discrimination and procedural rights. In the next section of the chapter, we elaborate on the fundamental human rights norms and instruments making the criminalisation of marital rape imperative.

IV. Human Rights Law Requiring Criminalisation of Marital Rape

A. Introduction

More and more countries have criminalised marital rape over the last two decades, putting those countries that have failed to do so in the minority. Until 1997, only 17 states had criminalised marital rape.¹⁸⁰ By 2006, more than 50 states had followed suit¹⁸¹ and now fewer than 50 states still entirely protect marital rape from penal prosecution. This trajectory has been lock-step with changes in the international human rights forums where women's rights, especially within the household, have slowly gained acceptance. Moreover, the public/private distinction that plagued international human rights law by focusing only on violations by state actors and privileging privacy in the family over gender justice has been slowly dismantled.¹⁸²

As *People v Liberta* was being litigated in the United States and the marital rape amendment was being debated in Canada, the first international multilateral instrument against marital rape was adopted in the European Parliament. The 1986 Resolution of Violence Against Women called for the legal recognition of marital rape.¹⁸³ In the international human rights forum, a 1982 ECOSOC resolution labelled domestic violence and rape as offences against the dignity of the person, but it did not specifically address marital rape.¹⁸⁴

¹⁸⁰ UNICEF, *The Progress of Nations 1997* (UNICEF, 1997) 48.

¹⁸¹ UN Women and UN Secretary General (n 63) 113.

¹⁸² D Sullivan, 'The Public/Private Distinction in International Human Rights Law' in JS Peters and A Wolper (eds), *Women's Rights, Human Rights: International Feminist Perspectives* (New York, Routledge, 1995).

¹⁸³ 1986 European Parliament Resolution on Violence Against Women, Doc A2-44/86, [1986] OJ C176, 73 (14 July 1986).

¹⁸⁴ UNESC Res 1982/22 1982.

The turning point came with the biggest milestone in international women's rights law, achieved by the passage of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).¹⁸⁵ This was followed by two significant human rights instrument that directly addressed violence against women: General Recommendation 19 by the CEDAW Committee¹⁸⁶ and the Vienna Declaration on the Elimination of Violence against Women (DEVAW).¹⁸⁷

Using these instruments as sources, regional and international human rights bodies, spurred on by the involvement of very active women's rights groups from across the globe, firmly institutionalised a due-diligence obligation on states to adequately prevent, combat and remedy marital rape, domestic violence and other acts of gender violence.

This was accomplished through a plethora of international and regional women's rights conferences specifically focusing on violence against women, the appointment of special committees, investigators and rapporteurs and the passage of multiple declarations. The due-diligence obligation was also influenced by cases brought before international and regional human rights adjudication bodies, the publication of reports, participation of NGOs in committee work, and affirmation of state and international responsibility to combat gender-based violence in all spheres by high-profile actors such as the UN Secretary General, combined with intense local activism by domestic women's rights groups.

The CEDAW Committee, UN Special Rapporteurs on violence against women, and several UN bodies have all recognised that criminalising sexual and physical violence against women in all its forms is essential for combating gender discrimination and for providing women with equal protection against violence under the law. At this point, the duty of states to criminalise marital rape can no longer be thought of as only an emergent norm. Instead, it is an established human rights obligation.¹⁸⁸ For these reasons, a state that fails to criminalise marital rape is also failing to live up to internationally recognised human rights obligations towards its citizens. The next sections will elaborate on the key international and regional instruments relevant to the criminalisation of marital rape.

¹⁸⁵ Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (18 December 1979) 1249 UNTS 13, 19 ILM 33 (1980), entered into force 3 September 1981.

¹⁸⁶ UN Committee on the Elimination of Discrimination Against Women, General Recommendation 19: Violence Against Women, adopted in the 11th Session of the CEDAW Committee, UN Doc A/47/38 1992.

¹⁸⁷ UN Declaration on the Elimination of Violence against Women (DEVAW), GA Res 48/104 1993.

¹⁸⁸ See Randall and Venkatesh, 'Right to No' (n 4); Randall and Venkatesh, 'Criminalizing Sexual Violence against Women in Intimate Relationships' (n 4); Randall and Venkatesh, 'Why Sexual Assault in Intimate Relationships Must Be Criminalized' (n 4).

B. Sources of International Human Rights Law Requiring an End to the Marital Rape Exemption

(i) *The 1979 Convention on the Elimination of All Forms of Discrimination Against Women*

CEDAW was adopted in 1979 by the UN General Assembly and came into force in 1981. Consisting of a preamble and 30 articles, the Convention is the primary international human rights instrument defining what constitutes discrimination against women and setting up an agenda for national action to end such discrimination. Marital status is specifically listed as a prohibited ground of ‘distinction, exclusion or restriction’.¹⁸⁹

However, this Convention contains a glaring omission: violence against women—unlike other issues such as the right to vote—was not explicitly addressed. CEDAW mentions ‘discrimination’ 22 times, ‘equal’ or ‘equality’ 34 times and ‘human rights’ five times, yet makes no mention of violence, rape, sexual assault, domestic violence and abuse, or battery.

The drafting of CEDAW took place in the 1970s, when the movement on violence against women in the family and society was still nascent and confined within states. It had yet to become an international movement. Within a few years, however, it became an issue for debate in international forums with increased reports on the widespread prevalence of violence against women and an emerging recognition of its human and economic impacts. Since it was not politically possible to create an entirely new convention addressing violence against women at that point, a ‘two-pronged approach’ was initiated by women’s rights advocates.¹⁹⁰ First, the UN Commission on the Status of Women began drafting a non-binding declaration on violence against women, and second, the CEDAW Committee simultaneously began to draft General Recommendation 19, which would provide a binding obligation on state signatories to combat gender violence.

(ii) *CEDAW’s General Recommendation 19 (1992)*

The CEDAW Committee attempted to fill the gap created by the lack of reference to violence against women in CEDAW by using an arguably retroactive ‘creative interpretation’ in drafting General Recommendation 19 (GR 19) in 1992.¹⁹¹

¹⁸⁹ CEDAW (n 185), Art 1.

¹⁹⁰ A Byrnes and E Bath, ‘Violence against Women, the Obligation of Due Diligence, and the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women—Recent Developments’ (2008) 8 *Human Rights Law Review* 517, 519.

¹⁹¹ J Fitzpatrick, ‘The Use of International Human Rights Norms to Combat Violence against Women’ in RJ Cook (ed), *Human Rights of Women: National and International Perspectives* (Philadelphia, University of Pennsylvania Press, 1994) 534.

GR 19 explicitly extended the definition of discrimination in Article 1 of CEDAW to include gender-based violence, which 'is violence that is directed against a woman because she is a woman or violence that disproportionately affects women'.¹⁹² It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.

In a strongly worded section, GR 19 declares that domestic or family violence, including rape within the family, breaches Articles 16 and 5 of CEDAW:

23. Family violence is *one of the most insidious forms* of violence against women. It is prevalent in all societies. Within family relationships women of all ages are subjected to violence of all kinds, including battering, *rape*, other forms of sexual assault, mental and other forms of violence, which are perpetuated by traditional attitudes. Lack of economic independence forces many women to stay in violent relationships. The abrogation of their family responsibilities by men can be a form of violence, and coercion. These forms of violence put women's health at risk and impair their ability to participate in family life and public life on a basis of equality.¹⁹³

GR 19 further recognised violence against women as 'a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men', thus setting the stage to claim that the right to be free from gender violence is at least a derivative right based on fundamental and widely accepted rights, even though not explicitly stated in CEDAW.¹⁹⁴

Other regional and international treaty bodies also firmly support this formulation, and following GR 19, they have demanded that their Member States fulfil their obligations to protect these fundamental rights by instituting measures and legislating laws specifically to combat violence against women. These general rights and freedoms include, *inter alia*, the right to equality in the family,¹⁹⁵ the right to liberty and security of person,¹⁹⁶ the right to equal protection under the law,¹⁹⁷

¹⁹² CEDAW Committee, General Recommendation 19 (n 186), para 6.

¹⁹³ *ibid*, para 23 (emphasis added).

¹⁹⁴ *ibid*, paras 1, 6.

¹⁹⁵ The UN Human Rights Committee has recognised that the gender-specific nature of domestic violence requires that it be classified as a violation of the human right to equality. See General Comment No 28, Art 3 (The Equality of Rights Between Men and Women), para 10, UN Doc CCPR/C/21/Rev 1/Add 10 (29 March 2000). Since intimate partner sexual assault and violence against women in general impair or nullify the enjoyment of economic, social and cultural rights, these forms of discrimination implicate the rights under the International Covenant on Economic, Social and Cultural Rights as well, see UN Comm on Econ & Soc Council, Comm On Econ, Soc & Cultural Rights, General Comment No 16, para 27, UN Doc E/C 12/2005/4 (11 August 2005).

¹⁹⁶ CEDAW Committee, Comm No 2/2003, *Ms A T v Hungary*, para 9.3, CEDAW/C/36/D/2/2003 (26 January 2005); Report of the CEDAW Committee on its Exceptional Session, transmitted by Letter Dated 15 September 2002 from the Chairperson of the CEDAW Committee to the General Assembly, paras 333–34, UN Doc No A/57/38 (2002); *S v Baloyi*, 2000 (2) SA 425 (CC), para 11 (S Afr); Inter-American Commission on Human Rights, *Access to Justice for Women Victims of Violence in Mesoamerica* (Washington, DC, Organization of American States, 2011) paras 48, 124.

¹⁹⁷ CEDAW Committee, General Recommendation 19 (n 186); Art 6, General Comment No 2 (n 195), paras 10, 20, 24; Y Ertürk (Special Rapporteur on Violence against Women, its causes and

the right to the highest standard attainable of physical and mental health,¹⁹⁸ and the right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment.¹⁹⁹ Other rights violated by states' failure to address marital rape include the rights to life,²⁰⁰ sexual self-determination, human dignity, humane treatment, individual privacy, effective judicial recourse, safety, physical and mental integrity, integrity of the person, and sexual and reproductive choice.²⁰¹

GR 19 imposes a list of obligations that states must fulfil in order to protect women, which include penal sanctions along with preventative and protective measures. Specific to family violence, these measures should include criminal penalties where necessary and civil remedies in cases of domestic violence, legislation to remove any defence of 'honour', and the provision of services to ensure the safety and security of victims of family violence. GR 19 also places an obligation on states to report on the measures they have taken to combat each kind of violence and the impact of the measures.²⁰²

Despite a number of reservations, CEDAW is the second most widely accepted international human rights treaty after the Convention on the Rights of the Child (CRC). There are currently 189 state parties to the Convention.²⁰³ The CEDAW Committee also has the largest membership of all the UN human rights treaty bodies with 23 members, making it the most representative of all the

consequences), *The Due Diligence Standard as a Tool for the Elimination of Violence against Women*, UN Doc E/CN.4/2006/61 (20 January 2006), para 35; R Manjoo, *Report of the Special Rapporteur on Violence against Women, its Causes and Consequences—Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, UN Doc A/HRC/23/49 (2013) paras 50, 74.

¹⁹⁸ See UN Comm on Econ & Soc Council, Comm on Econ, Soc & Cultural Rights, General Comment No 14, UN Comm on Econ & Soc Council, Comm on Econ, Soc & Cultural Rights, General Comment No 16, para 27, UN Doc E/C.12/2005/4 (11 August 2005).

¹⁹⁹ See Comm against Torture, General Comment 2 to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on the Implementation of Article 2 by States Parties, UN Doc CAT/C/GC/2/CRP.1/Rev.4 (23 November 2007), paras 21, 18–22. See also *Aydin v Turkey* (No 50), 1996–VII 75 Eur Ct HR 1866, para 86 (1997); *Opuz v Turkey*, Eur Ct HR App No 33401/02 (2009).

²⁰⁰ See UN HR Comm, Concluding Observations on Colombia, UN Doc A/52/40 (1997), para 287; UN HR Comm, Concluding Observations on Peru, UN Doc A/52/40 (1997), para 167. The UN Human Rights Committee is drafting a General Comment 36 on Art 6 of the International Covenant on Civil and Political Rights that is expected to explicitly identify domestic and sexual violence as violations of women's right to life. See International Justice Resource Centre, *Human Rights Committee Developing New Right To Life General Comment* (28 July 2015) www.ijrcenter.org/2015/07/28/human-rights-committee-developing-new-right-to-life-general-comment/.

²⁰¹ CEDAW Committee, General Recommendation 19 (n 186); Randall and Venkatesh, 'Right to No' (n 4) 177–95; Randall and Venkatesh, 'Criminalizing Sexual Violence against Women in Intimate Relationships' (n 4).

²⁰² CEDAW Committee, General Recommendation 19 (n 186), para 24.

²⁰³ MR Bustelo, 'The Committee on the Elimination of Discrimination against Women at the Crossroads' in Philip Alston and James Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (Cambridge, Cambridge University Press, 2000) 79.

committees.²⁰⁴ By ratifying CEDAW, states also accept the jurisdiction of the treaty body to monitor state compliance and to provide the substantive content for the rights and the nature of obligations through general comments and recommendations.²⁰⁵ These factors militate against the claim that the CEDAW Committee invented a non-existing obligation, which was not assumed by states when they signed the Convention. Also, Member States have dutifully accepted the obligations imposed by CEDAW (even if they are imperfectly fulfilled), as evidenced in their periodic reports, not only to the CEDAW Committee but also to the UN Human Rights Committee. In these reports, states are required to present evidence on how they have addressed violence against women, including marital rape.²⁰⁶

GR 19, along with DEVAW, discussed next, seems to have been especially successful in diffusing a normative standard of due-diligence obligations of states to combat gender violence. A recent study on the impact of GR 19 finds that state parties to CEDAW were more likely to have anti-gender violence and domestic violence laws enacted since 1996 than non-state parties.²⁰⁷ The number of pieces of legislation enacted and institutions built to combat domestic violence and violence against women increased drastically beginning in the late 1990s, and 'states rapidly conformed to General Recommendations 12 and 19, despite their rather loose basis in the treaty itself'.²⁰⁸

(iii) The 1993 UN Vienna Declaration on the Elimination of Violence against Women (DEVAW)

GR 19 must be read along with the 1993 DEVAW, which is an exceptional instrument that unambiguously spotlights gendered violence as an international human rights issue. Although it is non-binding, DEVAW clearly shows international

²⁰⁴ Bustelo, *ibid*; Office of the United Nations High Commissioner for Human Rights (OHCHR), *Human Rights Bodies*, www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx.

²⁰⁵ The United States is among the states that do not accept the opinions of treaty bodies as authoritative (see US Department of State, *Response of the United States to List of Issues to Be Taken Up in Connection With the Consideration of the Second and Third Periodic Reports of the United States of America* (27 July 2006)). However, courts in many jurisdictions, including several in the United States, have recognised that treaty bodies' 'interpretations deserve to be given *considerable weight* in determining the meaning of a relevant right and the existence of a violation' (emphasis added). See International Law Association, Committee on Human Rights Law and Practice, Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies (2004) para 148.

²⁰⁶ UN HR Comm, Concluding Observations on Colombia, UN Doc A/52/40 (1997), para 287; UN HR Comm, Concluding Observations on Peru, UN Doc A/52/40 (1997), para 167. In several concluding observations, the Human Rights Committee has specifically demanded that the member states criminalise marital rape. See eg UN HR Comm, Concluding Observations on Sri Lanka, UN Doc CCPR/CO/79/LKA, para 20 (2003).

²⁰⁷ NA Englehart, 'CEDAW and Gender Violence: An Empirical Assessment' (2014) 2014 *Michigan State Law Review* 265, 268–74, 279–80.

²⁰⁸ *ibid*, 275.

consensus and political commitment to combat violence against women in all its forms. DEVAW defines violence against women as:

Any act of gender-based violence that results in, or is likely to result in, physical, *sexual* or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or *in private life*.²⁰⁹

Article 2 further elucidates the definition of violence against women, and specifically mentions marital rape and violence within the family:

2. Violence against women shall be ... understood to encompass, but not be limited to, the following:

- (a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, *marital rape*, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;
- (b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;
- (c) Physical, sexual and psychological violence perpetrated or condoned by the State, *wherever it occurs*.²¹⁰

By prohibiting both state violence against women and private violence, DEVAW recognises the need to rethink boundaries between public and private life. The only aspect differentiating violence by private actors and violence perpetrated by the state is the location of the criminal act. Physical, sexual and psychological violence within the home is as condemnable in international law as is state-perpetrated violence. Gendered violence within private relationships was thereby proclaimed to be a matter of international concern in DEVAW.

Like GR 19, DEVAW affirms that violence against women constitutes a 'violation of the rights and fundamental freedoms of women and impairs or nullifies their enjoyment of those rights and freedoms'.²¹¹ A state's obligations to punish acts of gender violence thus also derive from the state's obligation to prevent violations of fundamental freedoms recognised in international law.

DEVAW also has a programmatic component articulating a due-diligence obligation for states to protect women from violence. All UN Member States, not just signatories to CEDAW, have a duty to 'pursue by all appropriate means and without delay a policy of eliminating violence against women'.²¹² This duty includes 'due diligence to prevent, investigate and, in accordance with national legislation,

²⁰⁹ UN Declaration on the Elimination of Violence against Women (DEVAW) (n 187), Art 1 (emphasis added).

²¹⁰ *ibid*, Art 2 (emphasis added).

²¹¹ *ibid*, preamble.

²¹² *ibid*, Art 4.

punish acts of violence against women, whether those acts are perpetuated by the State or by private persons.²¹³

(iv) *Other Major International Legal Initiatives to End Gendered Violence*

The Fourth World Conference on Women in Beijing in 1995 and the resulting Beijing Declaration and Platform for Action reiterated that violence against women is recognised under international law as including ‘physical, sexual and psychological violence occurring *in the family*, including battering ... *marital rape* ... and violence related to exploitation’ as well as gender violence condoned by the state.²¹⁴ The due-diligence standard was reiterated in the Beijing Declaration and Platform for Action, which was adopted by 189 UN Member States.²¹⁵ The Beijing Declaration further recognised that violence against women, including marital rape, ‘is a manifestation of the historically unequal power relations between men and women’ and demanded that states enact or reinforce sanctions that punish perpetrators and provide women with access to justice.²¹⁶

Numerous women’s rights advocates from across the globe participated in the Beijing Conference and other UN summits.²¹⁷ The participation of these women’s rights groups played a critical role in bringing equality-based and feminist legal conceptions of gender violence into international, regional and domestic legal institutions.²¹⁸ This role of women’s rights groups at the grassroots and transnational levels must be given particular emphasis, as without their involvement, the norms in GR 19 and DEVAW would not have the binding import and international consensus they have now.

In 1994 the UN Economic and Social Council adopted Resolution 1994/45 of the UN Commission on Human Rights, and established the mandate of the Special Rapporteur on Violence against Women to recommend measures to eliminate violence against women and its causes and to remedy its consequences.²¹⁹ The Resolution emphasised that it is

the duty of Governments to refrain from engaging in violence against women and to *exercise due diligence* to prevent, investigate and, in accordance with national legislation, to *punish acts of violence against women* and to take appropriate and effective action

²¹³ *ibid*, Art 4(c) (emphasis added).

²¹⁴ World Conference on Women, Rep of the Fourth World Conference on Women, UN Doc A/CONF177/20/Rev1 1996 48, para 113(a) (emphasis added).

²¹⁵ *ibid* 51, para 124(b).

²¹⁶ *ibid*, paras 118, 124.

²¹⁷ Alvarez (n 165) 29–31.

²¹⁸ *ibid*; SE Merry, ‘Transnational Human Rights and Local Activism: Mapping the Middle’, *Dialogues on Human Rights and Legal Pluralism* (New York, Springer, 2013); SE Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (Chicago, University of Chicago Press, 2006).

²¹⁹ Commission on Human Rights, Res 1995/86, UN Doc E/CN 4/1995/176 1995, preamble.

concerning acts of violence against women, whether those acts are perpetrated by the State or by private persons, and to provide access to *just and effective remedies* and specialised assistance to victims.²²⁰

The current UN Special Rapporteur on Violence against Women, Rashida Manjoo, notes the discriminatory treatment of spousal violence in many Member States.²²¹ Even in countries where spousal violence is a criminal offence, it is often minimised by being categorised as a minor offence, prosecuted as only a misdemeanour, with reports of spousal violence not being taken seriously by the police.²²² The due-diligence standard, however, requires that states impose ‘severe’ and effective sanctions against spousal violence to prevent future conduct ‘because of the on-going nature of the relationship between victim and perpetrator’.²²³ The previous Special Rapporteur confirmed that the criminalisation of domestic and intimate partner violence is a specific requirement under the Beijing Platform and was a ‘minimum standard’.²²⁴

In 2006, the United Nations established the Task Force on Violence Against Women, and the UN Secretary-General released an ‘in-depth study on all forms of violence against women’.²²⁵ The study points out that ‘[t]he most common form of violence experienced by women globally is intimate partner violence’, which includes ‘a range of *sexually*, psychologically and physically coercive acts’.²²⁶ It reiterates the Beijing Platform’s exhortation ‘to treat all forms of violence against women and girls as “criminal offences”’, explaining why criminalisation is an important and essential response:

State inaction with regard to the proper functioning of the *criminal justice system* has particularly corrosive effects as impunity for acts of violence against women encourages further violence and reinforces women’s subordination. Such inaction by the State to *address the causes of violence against women constitutes lack of compliance with human rights obligations*.²²⁷

(v) *Regional Instruments and the Criminalisation of Marital Rape*

Regional human rights systems also make spousal rape a high priority for legislative action. The Inter-American Convention to Prevent, Punish and Eradicate Violence against Women (the Convention of Belém do Pará), which has been

²²⁰ *ibid*, para 2 (emphasis added).

²²¹ Manjoo (n 197).

²²² *ibid*, para 50.

²²³ *ibid*, para 74.

²²⁴ Y Ertürk, *Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences, Indicators on Violence against Women and State Response* (2008) UN Doc A/HRC/7/6, paras 71, 78, 81.

²²⁵ UN Women and UN Secretary General (n 63) ix.

²²⁶ *ibid*, 43 (emphasis added).

²²⁷ *ibid*, 12, 37 (emphasis added).

ratified by 32 states,²²⁸ recognises all gender-based violence as an abuse of human rights and fundamental freedoms.²²⁹ This Convention's definition of violence against women includes 'physical, sexual and psychological violence' that occurs 'within the family or domestic unit or within any other interpersonal relationship', covering IPSV.²³⁰

The Inter-American Commission on Human Rights (IACHR) has consistently demanded that states adopt 'criminal, civil and administrative laws to prevent, punish and eradicate violence against women' and demands that states make no distinctions based on the marital status of victim or perpetrator.²³¹ A recent IACHR report also points out that while 'honour' and other patriarchal cultural values used to be the core interests at stake in sexual violence crimes, it is no longer condoned in many states.²³² The report also asserts that under all circumstances rape is a crime against society and has to be prosecuted by the state as a crime even when the victim 'forgives' the perpetrator.²³³

The Council of Europe and the European Union have consistently reiterated that violence against women, including intimate partner sexual assault, is a form of discrimination that requires adequate criminal remedies.²³⁴ The European Union has expressly called for the criminalisation of marital rape for several decades, beginning with the European Parliament's Resolution on Violence Against Women of 1986.²³⁵

The 2009 European Parliament's Resolution on the Elimination of Violence against Women states that:

[M]en's violence against women represents a violation of human rights, and in particular: the right to life, the right to safety, the right to dignity, the right to physical and mental integrity, and the right to sexual and reproductive choice and health.²³⁶

The Resolution further notes that gendered violence 'is an obstacle to the participation of women in social activities, in political and public life and in

²²⁸ Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, 9 June 1994, 33 ILM 1534, preamble; see also *List of Countries that Signed, Ratified and Acceded to the Convention of Belém do Pará*, Organization of American States, www.oas.org/juridico/english/sigs/a-61.html.

²²⁹ *ibid*, preamble, Art 7.

²³⁰ *ibid*, Art 2.

²³¹ *Access to Justice for Women Victims of Sexual Violence in Mesoamerica* (n 196) ix. See also *Maria Da Penha v Brazil*, Case 12.051, Inter-Am Comm'n HR, Report No 54/01, OEA/Ser L/V/II.111, doc 20 rev 704 (2001) (emphasis added).

²³² *Access to Justice for Women Victims of Sexual Violence in Mesoamerica* (n 231) para 48.

²³³ *ibid*, 35–40.

²³⁴ Council of Europe Comm of Ministers, Recommendation Rec (2002)5 on the Protection of Women Against Violence, 794th Sess, para 34 (30 April 2002); [2010] OJ C285E, 53 preamble, Art 1 (26 November 2009) (Eur Parl Resolution on the Elimination of Violence against Women).

²³⁵ 1986 European Parliament Resolution on Violence against Women (n 183).

²³⁶ European Parliament Resolution on the Elimination of Violence against Women, Doc P7_TA(2009)0098, [2010] OJ C285E, 53 (26 November 2009), preamble, para E.

the labour market, and can lead to marginalisation and poverty for women.²³⁷ Member States must recognise sexual violence and rape against women, including within marriage and intimate informal relationships and/or where committed by male relatives, as a *crime*, and must ensure that such offences result in ‘*automatic prosecution*’.²³⁸

The Resolution repeats the language of the 1986 European Parliament’s Resolution on Violence Against Women and also urges states to reject any reference to cultural, traditional or religious practices or traditions as a mitigating factor in cases of violence against women.²³⁹ Resolutions by the European Parliament are not legally binding, but the European Parliament’s call for the criminalisation of sexual violence in the domestic sphere in several resolutions illustrates the importance given to the need to criminalise sexual violence in intimate relationships.²⁴⁰

Furthermore, a 2012 EU directive establishing mandatory minimum standards and safeguards to protect victims of crime *assumes* that IPSV is criminalised in the Member States.²⁴¹ Unlike resolutions of the European Parliament, directives are legal acts of the EU imposing obligations on Member States to achieve a specific result through the implementation of domestic legislative procedures.²⁴² The 2012 EU directive called for effective imposition of criminal sanctions in cases of IPSV, inter alia, that must be implemented by Member States within two years of its enactment, and required that within three years Member States must show the Commission data on how victims have accessed the rights in the directive. The directive furthermore explicitly recognises the particular dynamics of violence in intimate relationships and the need for states to adopt special protection measures:

Where violence is committed in a close relationship, it is committed by a person who is a current or former spouse, or partner or other family member of the victim, whether or not the offender shares or has shared the same household with the victim. Such violence could cover physical, sexual, psychological, or economic violence and could result in physical, mental or emotional harm or economic loss. Violence in close relationships is a serious and often hidden social problem, which could cause systematic psychological and physical trauma with severe consequences because the offender is a person whom the victim should be able to trust.

²³⁷ *ibid*, preamble, para F.

²³⁸ *ibid*, Art 24 (emphasis added).

²³⁹ *ibid*.

²⁴⁰ See Resolution with Recommendations to the Commission on Combating Violence Against Women, pmbl; Eur Parl Doc P7_TA-PROV (2014) 0126, preamble.

²⁴¹ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime, and replacing Framework Decision 2001/220/JHA, [2012] OJ L315, 57.

²⁴² R Folsom, ‘European Union Law Making Machine’ in RH Folsom, RB Lake and VP Nanda (eds), *European Union Law after Maastricht: A Practical Guide for Lawyers Outside the Common Market* (The Hague, Kluwer Law International, 1996) 5.

Victims of violence in close relationships may therefore be in need of special protection measures. Women are affected disproportionately by this type of violence and the situation can be worse if the woman is dependent on the offender economically, socially or as regards her right to residence.²⁴³

One of the most comprehensive instruments against gender violence, the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (the Istanbul Convention), which came into effect in August 2014, explicitly obliges its parties to *criminalise* sexual violence when committed against former or current spouses or partners (whether or not they were living in the same residence).²⁴⁴ The Council of Europe currently includes 47 countries extending all the way to the Russian Federation.²⁴⁵ The fact that the Istanbul Convention, a binding instrument, was accepted by such a wide swath of countries provides further evidence of the existence of an international consensus that marital rape must be criminalised.

In 2003, the African Union adopted the Protocol on the Rights of Women in Africa, which defines violence against women as including ‘all acts perpetrated against women which cause or could cause them physical, *sexual*, psychological, and economic harm, including the threat to take such acts ... in *private* or public life’.²⁴⁶ Sub-regional instruments such as the Southern African Development Community (SADC)’s Declaration on Gender and Development on Prevention and Eradication of Violence against Women and Children specifically mentions marital rape as an expression of violence against women and a ‘serious violation of fundamental human rights’.²⁴⁷

The multilateral Arab Charter on Human Rights explicitly prohibits all forms of violence or abuse against women.²⁴⁸ However, marital rape is not explicitly mentioned and none of the 14 ratifying Arab states have criminalised marital rape.²⁴⁹

²⁴³ Directive 2012/29/EU of the European Parliament at para 18 (n 241) (emphasis added).

²⁴⁴ Council of Europe, Convention on Preventing and Combating Violence against Women and Domestic Violence, Art 36, para 36, 11 May 2011, CETS No 210.

²⁴⁵ *Our Member States*, Council of Europe, www.coe.int/en/web/about-us/our-member-states.

²⁴⁶ African Commission on Human and Peoples’ Rights, Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, Art 1(i) (11 July 2003) (emphasis added). As of December 2015, only 3 out of 54 African countries have not signed the Protocol and 38 states, including Kenya, Ghana and Malawi have ratified it. See African Commission on Human and Peoples’ Rights, Ratification Table, www.achpr.org/instruments/women-protocol/ratification/.

²⁴⁷ Heads of States or Government of Southern African Development Community, *Prevention and Eradication of Violence against Women and Children (Addendum to the 1997 Southern African Development Community Declaration on Gender and Development)* (1998) Arts 4, 5(1).

²⁴⁸ League of Arab States, *Arab Charter on Human Rights*, 22 May 2004, entered into force 15 March 2008. Commission of Human Rights–League of Arab States, *Member States*, www.lasportal.org/ar/humanrights/Committee/Pages/MemberCountries.aspx.

²⁴⁹ World Bank Group (n 37).

Asia lacks an effective regional human rights system. However, at least 11 Asian countries, including Nepal, Thailand and Indonesia, explicitly criminalise marital rape.²⁵⁰

C. Summary of Human Rights Law Requiring the Criminalisation of Marital Rape

As this overview of international human rights law has shown, marital rape exceptions to the criminalisation of sexual assault impinge on international human rights instruments and binding principles, as courts and states across the world have affirmed.²⁵¹ Many state constitutions now include similar rights protections that add another layer of obligation on states to ensure women's equality and protect them from violence in all its forms. The due-diligence obligation further expresses the legal requirement that states take action to prevent and remedy sexual violence, including sexual violence in intimate relationships. Criminalising sexual violence against women in intimate relationships is clearly necessary for the protection of women's full and equal human rights.

Most of the world's countries now criminalise sexual assault by spouses, even if imperfectly in terms of implementation, and those countries that do not are outliers. However, only a minority of countries explicitly state in their penal code or statutes that marital rape is not to be distinguished from other forms of rape. The risks of implicit criminalisation are evident in the experiences of the Scandinavian countries and the erstwhile communist bloc. For example, the legislation in all the Scandinavian countries did not explicitly immunise marital rape from prosecution, but until recently, their ambiguous provisions allowed for differences in charges and sentencing, as described in the preceding section on the laws in Denmark and Sweden. These countries have had very low rates of prosecution and even lower rates of conviction even though surveys show that stranger rapes are less common than IPSV.²⁵² In Poland and Russia, the first two countries to remove the marital rape exemption, marital rape continues to be a serious social problem that is under-reported and unacknowledged by the courts and police.²⁵³ Explicit criminalisation removes ambiguity in the law, sends a strong message of

²⁵⁰ *ibid.* See also *Dhungana* (n 176) (Nepal), *Jumawan* (n 139) (Phil).

²⁵¹ *Dhungana*, *ibid* (Nepal); *Jumawan*, *ibid* (Phil).

²⁵² K Bennhold, 'In Norway, Gender Equality Does Not Extend to the Bedroom', *New York Times*, 24 October 2011, www.nytimes.com/2011/10/25/world/europe/in-norway-gender-equality-does-not-extend-to-the-bedroom.html; Amnesty International (n 153).

²⁵³ K Aberg et al, 'Domestic Violence in Poland' (Minnesota Advocates for Human Rights, Warsaw Women's Rights Center and New York International Women's Human Rights Clinic, 2002) www.theadvocatesforhumanrights.org/uploads/poland_domestic_violence_2002_10-18-2002_2.PDF, 34–35; C Benninger-Budel and LO'Hanlon, 'Violence against Women in Russia, Report Prepared for the Thirty-First Session of the Committee on Economic, Social and Cultural Rights', *Violence Against Women: 10 Reports/Year 2003* (World Organisation Against Torture (OMCT), 2004).

condemnation, and creates the conditions for social change. This approach is espoused by human rights groups, the Council of Europe and the United Nations. The UN model legislation for violence against women, for example, states:

The legislation should specifically criminalise sexual assault within a relationship (ie, 'marital rape'), either by:

- providing that sexual assault provisions apply 'irrespective of the nature of the relationship' between the perpetrator and complainant;
- or stating that 'no marriage or other relationship shall constitute a defence to a charge of sexual assault under the legislation'.²⁵⁴

International human rights law and the due-diligence standard clearly require that states no longer exempt married women from legal protections against rape by their spouse, and that marital rape, like rape generally, must be subject to criminal sanctions.

V. Conclusion: Why Criminalising Sexual Violence in Intimate Relationships is Essential for the Protection of Women's Equal Rights

Intimate partner sexual violence is a form of gendered violence which breaches women's fundamental human rights. Criminalisation of IPSV is one use of state power necessary to the protection of women's human rights, including, most importantly, rights to equality, autonomy and bodily integrity.

Engaging criminal law to bolster the protection of human rights and to empower local and international struggles to end gendered violence is not a new strategy. On the contrary, it has been and remains a crucial plank of the struggle to seek state accountability and end impunity for a range of rights violations. Engaging the power of criminal law is only one important, but by no means exclusive, component of feminist strategies to remedy and end gendered violence in women's lives. Furthermore, an insistence on the criminalisation of marital rape can, and necessarily does, coexist with robust critiques of the practices and effects of the criminal justice system and the many deficiencies in criminal law responses.

Many of the criticisms of those feminists who believe that the criminal justice system should play a role in remedying gendered violence miss the fact that feminist work in the area of criminalisation has largely been cognisant of the perils of engaging this very system. Indeed, alongside calls for criminalisation of gendered violence, feminist scholars and activists have worked vigorously for criminal law

²⁵⁴ United Nations Division for the Advancement of Women, *Handbook for Legislation on Violence against Women* (New York, United Nations, 2010) 26.

reform to improve criminal law responses and this remains a fundamental component of criminalisation strategies.²⁵⁵

Law and human rights movements such as feminism exist in dynamic interplay. The World Bank Report of 2016 identifies the link between law reform and the social movements seeking equality and human rights. The Report observes that: ‘[O]ver the past 25 years, the number of economies introducing laws addressing domestic violence has risen precipitously from close to zero, to 118. This increase has been driven by international and regional human rights conventions and campaigns.’²⁵⁶ This finding speaks to the importance of engaging the language and protections offered by human rights law, domestically and internationally. There has been a sea change in reconfiguring social relationships of gender, at both the structural and the micro levels, in the direction of more full and equal protection of women’s human rights.

Criminalisation of marital rape articulates, at the social level and in the public sphere, the message that sexual violence in the domestic and private sphere is not to be tolerated. Criminalising spousal sexual assault repudiates the view that a woman becomes a man’s property upon marriage, and fundamentally challenges traditional and patriarchal social norms that confer upon men unlimited rights of sexual access to the women who are their spouses. Eradicating legal immunity for men who sexually violate their wives or other intimates is predicated on principles of equality and signals a significant move towards establishing new social norms of gender equality, consent, autonomy and sexual personhood for women. This is one crucial element of the broader structural social change sought by those concerned with human rights and equality for women.

The United Nations, the World Health Organization and the World Bank describe gender-based violence, including that in marriage, as a global pandemic. While a majority of the world’s countries recognise, in theory at least, that gendered violence in the form of marital rape requires criminal legal remedies, too many countries fail to protect married women, and fail to observe their due-diligence obligations by persisting in inadequately criminalising, or not criminalising at all, this form of violence against women. These are legal gaps that must be closed as a crucial step towards protecting all women from gendered violence.

²⁵⁵ See eg United Nations Office on Drugs and Crime, *Strengthening Crime Prevention and Criminal Justice Responses to Violence against Women*, (New York, United Nations, 2014); ES Buzawa, CG Buzawa and ED Stark, *Responding to Domestic Violence: The Integration of Criminal Justice and Human Services* (Thousand Oaks, CA, Sage, 2015); KA Lonsway, and J Archambault, ‘The “Justice Gap” for Sexual Assault Cases Future Directions for Research and Reform’ (2012) 18 *Violence Against Women* 145; L Kelly, *Promising Practices Addressing Sexual Violence—Expert Report* (New York, UN Division for the Advancement of Women, 2005) www.un.org/womenwatch/daw/egm/vaw-gp-2005/docs/experts/kelly_sexualviolence.pdf.

²⁵⁶ World Bank Group (n 62) 22.