

**THE ROLE OF THE LAW IN CONFRONTING  
MARITAL RAPE  
(A CASE STUDY OF GHANA)**

**Submitted in partial fulfilment of the requirements of  
a LL.M degree in Human Rights and Democratisation  
in Africa**

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30 October 2009**

## DECLARATION

I, FLEUR HEATHER NORTON declare that the work presented in this dissertation is original. It has not been presented to any other University or Institution. Where the work of other people has been used, references have been provided. It is in this regard that I declare this work as originally mine, and it is hereby presented in partial fulfilment of the requirements for the award of the LLM Degree in Human Rights and Democratisation in Africa from the University of Pretoria, South Africa.

Signature: \_\_\_\_\_

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Date: \_\_\_\_\_

## DEDICATION

I dedicate this work to my sisters throughout Africa



Picture taken by the roadside during my first visit to Accra, 8 August 2009

## **ACKNOWLEDGEMENTS**

I would like to acknowledge the love of my life, James for all his love and support and for always being my soft place to fall. To my family and friends, thank you for the support you have given me throughout my life and during the course of a difficult year. I love you all.

Thank you to the staff at the Southern Africa Litigation Centre (SALC) and the Institute for a Democratic Alternative for Zimbabwe (IDAZIM) for encouraging me to do my LLM in human rights, for supporting my application and for being so good to me during 2008.

A number of people assisted me during my stay in Ghana for which I am extremely grateful. To my supervisor Mr Benneh, thank you for your patience, guidance and encouragement. To Angela Dwamena-Aboagye and all the staff at the Ark Foundation, Dr James D Clayman and the many others who helped me gather information, thank you for being so generous with your time and for sharing your expertise and experience with me. Your passion, conviction, dedication and faith inspired me greatly. Thank you too to the staff at the Faculty of Law, Legon for making me feel at home over the past three months.

To my colleagues Abdi, Joao and Mwajuma, thank you for making my stay in Ghana so memorable. I wish you every success for the future and I hope to keep in touch. Abdi, your compassion, generosity of spirit and optimism was a great comfort to me, thank you. The class of 2009 also deserves my thanks for teaching me so much about the rest of the African continent and for lifting my spirits when I felt overwhelmed.

Lastly, my thanks go to the Centre for Human Rights for affording me this once in a life-time opportunity. Your contribution to the advancement of human rights in Africa is invaluable and I am proud to be a member of the CHR family.

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## LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
APRWA	African Protocol on the Rights of Women in Africa
CAT	Convention against Torture
CEDAW	Covenant on the Elimination of All forms of Discrimination against Women
DV Act	Domestic Violence Act 732 of 2007
DV Bill	Domestic Violence Bill
DoVVSU	Domestic Violence Victims Support Unit
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
SRVAW	Special Rapporteur on Violence Against Women
VAW	Violence against women
WAJU	Women and Juvenile Unit
WHO	World Health Organisation

# CHAPTER 1: INTRODUCTION

“No matter who the people are or what the relationship is – the fault always lies with the person who commits the acts. Rape is not sex. Rape is power, aggression, domination, and always humiliation. It has to do with all things being unequal. It is a reminder of that. Letting one know for certain you have no choice in what’s happening. It makes you feel less than human...”<sup>1</sup>

## 1.1 Background to study

The above quotation is taken from a woman who responded to research conducted on marital rape.<sup>2</sup> Her insightful comment is supported by information gathered by the SRVAW over the past fifteen years.<sup>3</sup> Stressing the “need to look at structural and ideological causes that underlie the problem beyond the injury caused” the SRVAW has argued that the state is obliged to go beyond the provision of protection against violence<sup>4</sup> to eliminate its cause - gender discrimination, as well as to address its consequences.<sup>5</sup> This approach “recasts gender-based violence as a logical outcome of unequal social, cultural and economic structures, rather than a social aberration or a ‘law-and-order’ problem; implicating state structures (of which the law is a part) in reinforcing the root causes and thereby sustaining conditions for gender-based violence.”<sup>6</sup>

Historically, the law has entrenched the notion of women as the property of men, first of their fathers and then their husbands.<sup>7</sup> This is evident from rape legislation which was originally enacted to protect a man’s property from other men, not to safeguard women’s rights.<sup>8</sup> The penalty for rape was intended to deter men from undermining the value of another man’s property and it followed that the husband, as owner of property, could not be charged with the rape of his wife.<sup>9</sup> In 1736 Sir Matthew Hale reinforced this ideology by arguing that the

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<sup>1</sup> PL Peacock ‘Marital Rape’ in VR Wiehe (Ed) *Intimate betrayal: understanding and responding to the trauma of acquaintance rape* (1995) 55.

<sup>2</sup> (n 1 above) 55.

<sup>3</sup> United Nations report ‘15 Years of The United Nations Special Rapporteur on Violence against Women, Its Causes and Consequences (1994-2009 – A critical review). Available at <http://www2.ohchr.org/english/issues/women/rapporteur/docs/15YearReviewofVAWMandate.pdf>

<sup>4</sup> Article 2 of the Declaration on the Elimination of Violence against Women states that “Violence against women shall be understood to encompass, but not be limited to, the following: (a)...marital rape...”

<sup>5</sup> (n 3 above) 33.

<sup>6</sup> (n 3 above) 33. This report also lists various examples of ‘gendered legal provisions’ among which it cites the ‘exemption of marital rape’ and observes that “the non-criminalisation of marital rape has patriarchal foundations and is one of the ways of policing women’s sexuality.”

<sup>7</sup> DEH Russell *Rape in Marriage* (1983) 358.

<sup>8</sup> RK Bergen *Wife rape: understanding the responses of survivors and service providers* (1996) 3.

<sup>9</sup> (n 8 above) 3.



marriage contract<sup>10</sup> implied irrevocable consent to sex.<sup>11</sup> This theory, which was clearly based on the unequal status of women in the eyes of the law, formed the basis for the marital rape exemption in terms of British common law which took until 1991, in *R v C and Another*<sup>12</sup> for a Court to finally hold that "...the position in law today is...that there is no marital exemption to the law of rape."<sup>13</sup> Following this, the House of Lords made a declaration "that in modern times the supposed marital exemption in rape forms no part of the law of England."<sup>14</sup>

As a former British colony, Ghana inherited the British common law system and along with it came the marital rape exemption.<sup>15</sup> Ghana went a step further though by codifying the marital rape exemption in the Criminal Code<sup>16</sup> which cemented the notion that in terms of Ghanaian custom and law, consent to marriage was the equivalent to consent to sex.<sup>17</sup> Legal reforms including the introduction of the Domestic Violence Act in 2007 and the subsequent removal of Ghana's marital rape exemption from the Criminal Code<sup>18</sup> have made it possible to hold husbands legally responsible for the rape of their wives but the role the law has to play in remedying the gender discrimination entrenched by its predecessor, remains unclear.

## 1.2 Statement of the problem

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<sup>10</sup> (n 7 above) 358-359 Russell cites S Barry who argues that Hale's perpetual consent argument regarding the contract of marriage is flawed in law and creates "a state of legalized sexual slavery." Firstly, it is argued that in order to conclude a contract there must be an objective manifestation of intent to agree and it is doubtful that any new bride would agree to give up her right to bodily integrity and privacy and to submit to any force, brutal or coercive that her new spouse may deem fit. Further to this, the appropriate remedy for breach of contract is damages, not forced performance. Thus violent enforcement violates the spirit of the law. Further still, it is highlighted that the identity of the perpetrator is irrelevant with respect to determining whether a crime has been committed – rape is rape no matter who the perpetrator may be. She concludes by stating that far from being an archaic, meaningless law any marital rape exemption "serves to protect a significant percentage of men from the charge of rape and from the perception of themselves as rapists" and wives are taught that they have no legal or socially acceptable right to refuse their husband's sexual advances. Russell concludes that in this way marital rape "affects many more women, and indirectly affects all women." The European Court of Human Rights, in the cases of *CR v UK* and *SW v UK* have affirmed that "a rapist remains a rapist subject to the criminal law, irrespective of his relationship with his victim" and have indicated that removal of the marital rape exemption is necessary to uphold human dignity and freedom, as cited in S Palmer 'Rape in marriage and the European Convention on Human Rights *CR v UK* and *SW v UK*' (1997) 5 *Feminist Legal Studies* 94. Available at <http://www.springerlink.com/content/d253785228300154/fulltext.pdf>.

<sup>11</sup> (n 8 above) 3. Sir Matthew Hale was a Chief Justice in 17<sup>th</sup> century England. "A known misogynist who burned women at the stake as witches", in the 'History of the pleas of the Crown' (1736) Hale wrote "The husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract, the wife hath given up herself in this kind unto the husband which she cannot retract."

<sup>12</sup> *R v C and Another* (1991) 1 All ER 758 (Crown Ct. Sheffield).

<sup>13</sup> N Kaymar Stafford 'Permission for Domestic Violence: Marital Rape in Ghanaian Marriages' (2008) 29 *Women's Rights Law Reporter* 64. Available at [http://papers.ssrn.com/sol3/cf\\_dev/AbsByAuth.cfm?per\\_id=839835](http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=839835).

<sup>14</sup> (n 13 above) 64.

<sup>15</sup> On 6 March 2009, Ghana celebrated the 52<sup>nd</sup> anniversary of its declaration of independence from colonial rule.

<sup>16</sup> The marital rape exemption was contained in Section 42(g) of the Criminal Code 1960 (Act 29)

<sup>17</sup> (n 13 above) 63.

<sup>18</sup> Pursuant to action taken in terms of the Laws of Ghana Amendment Act of 1998 in terms of which Section 42(g) was found to be unconstitutional and contrary to international human rights commitments.

This study proposes that the root cause of violence against women, which includes marital rape,<sup>19</sup> is gender discrimination.<sup>20</sup> Accordingly, laws which discriminate against women contribute to violence against women by sustaining its root cause and those which condone violence against women, such as marital rape exemptions, perpetuate discrimination and cause this destructive cycle to continue. Marital rape exemptions thus serve as tools through which the state entrenches gender discrimination and perpetuates violence against women.

### **1.3 Objectives of study**

The primary objective of this study is to establish the role of the law in confronting marital rape in Ghana. It will seek to determine what the status of women is in Ghana and how this intersects with the legal framework on marital rape to either exacerbate their vulnerability to this crime or ameliorate it. This study also seeks to determine how international, regional and domestic human rights laws can be used to address discrimination against women and in so doing help to solve the problem of marital rape. Finally, this study seeks to determine how the impact of the law can be maximised by highlighting some of the main challenges posed to its implementation and then proposing possible solutions to such challenges.

### **1.4 Significance of study**

Marital rape is a world-wide phenomenon and as with all acts of gender-based violence it should not be viewed as a random, isolated crime against an individual who happens to be female but rather as a crime against an individual that is intended to terrorize the larger group or class of people – women.<sup>21</sup> Research reveals, that elsewhere in the world, marital rape is the most prevalent form of rape and the consequences of it are profound which refutes the myth that it is less traumatic than stranger rape.<sup>22</sup> This also indicates that gender discrimination, which is cited by the SRVAW as the root cause of VAW, is rife and that the role of the law is not being effectively harnessed to remedy this situation. Most importantly though, despite claims that marital rape is a fabricated, foreign import, the findings of a national survey in Ghana revealed that marital rape is common despite society's failure to name or accept the existence of it.<sup>23</sup> Thus, exploring the extent to which the law can serve to restore the dignity of society by laying the foundations for equality is critically important.

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<sup>19</sup> Article 2 of the Declaration on the Elimination of Violence against Women explicitly states that "Violence against women shall be understood to encompass, but not be limited to, the following: (a) physical, sexual and psychological violence occurring within the family including...marital rape..."

<sup>20</sup> (n 3 above) 33.

<sup>21</sup> R Coomaraswamy and LM Kois 'Violence against women' in KD Askin and DM Koenig (Eds) *Women and International Human Rights Law* 1 (1999) 185. This was argued using the example of domestic violence in general. It was also highlighted that this perspective should be applied to all acts of violence, including those based on "ethnicity, national origin, religion and sexual identity."

<sup>22</sup> (n 1 above) 63.

<sup>23</sup> AC Appiah and K Cusack *Breaking the silence & challenging the myths of violence against women & children in Ghana: Report of a national study on violence* (1999) 3-6.

## 1.5 Research Questions

This study will pose the following questions:

- a. What is the status of women in Ghana?
- b. Is the status of women contributing to their risk of marital rape?
- c. How do the international, regional and domestic legal frameworks seek to confront the problem of marital rape?
- d. What are the challenges posed to the implementation of laws which seek to confront marital rape?
- e. Do these laws effectively address the root cause of marital rape, namely gender discrimination?

## 1.6 Research Methodology and sources of data

A socio-legal approach was taken with regards to gathering research for this study as not only the law itself but issues regarding its impact and implementation were taken into account. Desktop and library research was conducted to detail the Ghanaian context, the applicable international, regional and domestic legal frameworks as well as the challenges posed to the implementation of the law. Such information was supplemented by interviews conducted with women's rights activists, Justice VCRAC Crabbe<sup>24</sup>, legal practitioners, medical doctors and psychologists.

## 1.7 Literature Review

Most of the leading authors on rape within marriage explore the issue from a psychological perspective. They all do however highlight that the law has a role to play. In a book edited by VR Wiehe and AL Richards for instance PL Peacock highlights the need for multiple actors including "medical professionals, social workers, attorneys, law enforcement personnel, clergy and elected officials" to play their part in creating a solution.<sup>25</sup> Other authors such as DEH Russell explicitly state that "the solution to this problem requires that wives no longer be so regarded [as the property of men], neither by the law, nor by men and women" and that "outlawing rape in marriage is the first and easiest step in this process."<sup>26</sup> In addition, RK Bergen writes that "the criminalisation of wife rape under all circumstances is a necessary step toward eliminating this heinous crime."<sup>27</sup> These authors do not however focus on the role of the law as a tool of the state to either entrench or remedy gender-discrimination as the root cause of marital rape as this study hopes to do.

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<sup>24</sup> The Statute Law Commissioner in terms of the Laws of Ghana (Revised Edition) Act 562 of 1998

<sup>25</sup> (n 1 above) 63.

<sup>26</sup> (n 7 above) 358.

<sup>27</sup> (n 8 above) 5.

Feminist and legal critiques of the marital rape exemption including those of MJ Anderson, who exposes the unequal distribution of power by the law through institutions such as marriage,<sup>28</sup> and S Palmer<sup>29</sup> do address the structural role of the law in entrenching gender discrimination but they do not locate their discussions within the particular context of an African country such as Ghana. Those that do address the Ghanaian context include N Kaymar Stafford<sup>30</sup>, K Cusack<sup>31</sup> and Y Erturk as SRVAW.<sup>32</sup> This study seeks to supplement their work by exploring the regional human rights framework more fully as well as the role of the law in contributing to gender equality even where it is not enforced.

R Goodman<sup>33</sup> explores the law's capacity to produce or inhibit particular behaviours. Goodman argues that, in certain instances, even unenforced laws can profoundly affect the way people perceive themselves in relation to society which can influence how they choose to behave. He also indicates the potential of the law to counter-act social prejudices and in so doing, encourage people to self-police. He adds that social sanctions often act as more effective constraints than formal, legal ones do. This study seeks to briefly explore the potential of marital rape law reform in Ghana to have a similar effect on society beyond the issue of enforcement.

## 1.8 Limitations of study

The most significant challenge posed to this study was the fact that marital rape has only recently been legally acknowledged as rape through the removal of Section 42(g) of the Criminal Code. As a result, it was difficult to realistically assess the impact of legal reform if any. This was compounded by the fact that anything perceived to involve sexuality is still to a large extent shrouded in silence in Ghana. The poor level of publicity which the legal reforms have enjoyed also created difficulties as many, even in positions of law enforcement, were still of the view that the concept of marital rape did not exist in Ghana. Although this was instructive in itself regarding the challenges posed to the implementation of the law it limited the amount of information available.

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<sup>28</sup> MJ Anderson 'Lawful wife, unlawful sex - examining the effect of the criminalisation of marital rape in England and the Republic of Ireland.' Quoting John Stuart Mill in his 'The subjection of women' (1869) she indicates that through legal tools such as the marital rape exemption, "Marriage is the only actual bondage known to our law. There remain no legal slaves, except the mistress of every house" 1.

<sup>29</sup> S Palmer 'Rape in marriage and the European Convention on Human Rights CR v UK and SW v UK' (1997) 5 *Feminist Legal Studies*. Available at <http://www.springerlink.com/content/d253785228300154/fulltext.pdf>.

<sup>30</sup> (n 13 above)

<sup>31</sup> (n 23 above). This report was co-edited by Dorcas Coker Appiah who was executive director of the Gender Studies & Human Rights Documentation Centre at the time. Ms Coker Appiah currently serves as a CEDAW Committee expert which she has done since 2003. Cusack highlights on page 164 that at the personal level power is manifest through the family which acts as a microcosm of the state. The family enforces and reinforces gender roles and thus establishes a system of collusion with the state in the perpetuation of violence against women. Cusack also describes marital rape as a technique employed to control women.

<sup>32</sup> Y Erturk, Special Rapporteur on Violence against Women - mission to Ghana 'Violence against women and its causes and consequences' (7-14 July 2007). Available at <http://www.unhcr.org/refworld/type.MISSION,,GHA,47ce68652,0.html>.

<sup>33</sup> R Goodman 'Beyond the enforcement principle: sodomy laws, social norms and social panoptics' (2001) 89 *California Law Review* 643.

## 1.9 Definitions

In Ghana, the legal definition of rape is “the carnal knowledge of a woman without her consent.”<sup>34</sup> Previously, Ghanaian law codified the idea of perpetual consent in Section 42(g) by stipulating that the consent given at marriage could not be revoked until the parties were divorced or separated and went further to justify the use of force on the grounds of such consent.<sup>35</sup> With the removal of Section 42(g) from the Criminal Code, the law acknowledged that rape can occur within marriage where the husband fails to obtain consent from his wife to engage in sexual intercourse with her.

## 1.10 Overview of Chapters

Chapter one is an introductory chapter which sets out the context of the research questions; the methodology to be used in investigating the research questions; an overview of the relevant literature; limitations of the study as well as the necessary definitions. Chapter two contextualises the issue of marital rape in order to establish the status of women in Ghana and to explore whether their status contributes to their risk of being raped within marriage. Chapter three explores the international, regional and domestic legal frameworks in place to explore how they can be used to address the root cause of marital rape - gender-based discrimination. Chapter four details the challenges posed to the implementation of the law while chapter five summarises the findings of the study and provides concluding remarks and recommendations.

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<sup>34</sup> The Criminal Code of Ghana 29 of 1960

<sup>35</sup> FNA Adjetey 'Violence against women in Ghana: a pervasive yet ignored problem' in *Rights of women under national and international laws* (1995) 20. Available at <http://openlibrary.org/b/OL624733M>.

## CHAPTER 2: MARITAL RAPE IN GHANA

### 2.1 Introduction

In order to determine the role the law can play in confronting marital rape it is necessary to understand the context in which it occurs.<sup>36</sup> Details of the harm caused by marital rape to individuals, as well as to women in general, help to justify legal intervention and prompt change.<sup>37</sup> Such information can illicit the political will needed to implement and publicise laws which challenge cultural and religious ideas about men's sexual entitlement and women's duties within marriage whilst encouraging communities to question assumptions regarding same.<sup>38</sup> It is particularly important to establish whether there is a link between women's status in Ghanaian society and marital rape and whether the current law on marital rape sufficiently confronts gender discrimination where it may occur. This chapter therefore explores the status of women in Ghana and the violence they are exposed to. It also details the prevalence and impact of marital rape on women's physical and mental health, as well as on their economic and social well-being in Ghana.

### 2.2 The status of women in Ghana

As highlighted by the SRVAW, Ghanaian society is characterised by a "strong patriarchal normative framework" which is sustained by the institutions of family and marriage.<sup>39</sup> These institutions exert influence over every aspect of women's lives including their education, employment and their role in public decision making.

Within the family, children are groomed to internalize stereotyped gender roles, based on a sexual division of labour which is then used to justify the "obedience of women to male authority."<sup>40</sup> Such inequality is extended by the institution of marriage which traditionally involves certain discriminatory practices such as the payment of dowry and polygamy. It has been argued that such practices have the potential of sowing the seeds of conflict into the marriage relationship from the outset, largely because they reinforce the notion of women as the property of men.<sup>41</sup> Through the institution of marriage, certain asymmetrical rights and

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<sup>36</sup> L Riggins 'Criminalizing marital rape in Indonesia' in L Manderson and LR Bennet (Eds) *Violence against women in Asian society* (2003) Third World Law Journal 197 available at [http://www.bc.edu/schools/law/lawreviews/meta-elements/journals/bctwj/24\\_2/06\\_FMS.htm](http://www.bc.edu/schools/law/lawreviews/meta-elements/journals/bctwj/24_2/06_FMS.htm) (2003).

<sup>37</sup> The lack of a clear understanding of the prevalence and impact of marital rape results in it not being seen as a priority issue which compounds gender discrimination.

<sup>38</sup> (n 36 above). Here it is argued that unless and until the harm caused by marital rape is recognised the need to address it, let alone enforce criminal sanctions will not be appreciated. Thus the legal field cannot afford to distance itself from the fields of sociology and psychology if it is to be effective.

<sup>39</sup> (n 32 above) 9.

<sup>40</sup> (n 32 above) 9.

<sup>41</sup> (n 32 above) 9.

obligations are conferred on the husband and wife.<sup>42</sup> Among other things, husbands gain complete and exclusive sexual rights to their wives but their wives have no corresponding right or expectation to sexual exclusivity.<sup>43</sup>

The status of women is also deeply affected by the church which has become a dominant cultural institution in Ghana.<sup>44</sup> It is estimated that the majority of Ghanaians are Christian but that they also adhere to traditional cultural practices and beliefs.<sup>45</sup> Harmful attitudes towards women are reinforced by certain religious and community leaders who encourage women to remain married regardless of the consequences while failing to take a clear stance on marital rape.<sup>46</sup>

In terms of education, “differential values attached to the education of boys and girls” have led to high dropout rates among girls because many families see education “as a mere distraction from a girl’s domestic responsibilities.”<sup>47</sup> There are also reports of pregnant girls being suspended from school as a means of deterring other girls from falling pregnant.<sup>48</sup> Aside from this being a blatant violation of their right to education, it also illustrates how women and girls are punished for perceived sexual indiscretion while their male counterparts go unchallenged.

Ghana boasts an impressive employment rate but the labour market “remains strongly segregated by gender with men dominating the public sector while most women generate an income as self-employed traders.”<sup>49</sup> The result is a large wage gap which sees women earning approximately 29% less than men on average.<sup>50</sup>

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<sup>42</sup>J Fenrich and TE Higgins ‘Promise unfulfilled: law, culture and women’s inheritance in Ghana’ (2002) 25 *Fordham International Law Journal* 272-284. Available at <http://www.leitnerlaw.com/files/doc-8789.pdf>. Fenrich and Higgins highlight that eighty percent of marriages in Ghana are still celebrated under customary law. The consent of both families is an essential prerequisite to a valid customary law marriage “because marriage in Ghana is not just a union between a man and a woman as in European legal concept, but also the establishment of a permanent relationship between the families of the parties to the marriage.” Two alternatives to customary marriages exist. They include a Western-style “ordinance marriage” governed largely by English law as well as marriage under the laws of Islam. An ordinance marriage carries with it a high status for Ghanaian women who are referred to as ‘Mrs’ and who enjoy an even higher measure of respect than customary wives. As one doctor (interviewed 8 October 2009) remarked “oh how Ghanaian women treasure the title ‘Mrs’, it’s as if the husband has done them the greatest favour. It is viewed as a blessing.” A similar sentiment was expressed by a legal practitioner who provides pro bono legal services on behalf of the Ark Foundation. He said that one of the main problems in terms of the enforcement of women’s rights was the emphasis placed on marriage. He added that if women were ever to be truly equal to men, marriage would have to be viewed as a contract like any other which could be breached through acts of violence such as marital rape.

<sup>43</sup> (n 42 above) 301.

<sup>44</sup> A Dwamena-Aboagye ‘Gospel, women and the Church: An exploration of women’s perspectives about the connections between some church teachings and the Church’s response to marital abuse (in a Ghanaian congregation)’ 2006 10.

<sup>45</sup> Lecture by Professor EK Quashigah, Dean of the Faculty of Law at the University of Ghana, Legon on human rights and religious liberty in Ghana on 29 September 2009

<sup>46</sup> (n 32 above) 13.

<sup>47</sup> (n 32 above) 11.

<sup>48</sup> (n 32 above) 11.

<sup>49</sup> (n 32 above) 12.

<sup>50</sup> (n 32 above) 12.

Very few public decision makers are women in Ghana and despite Affirmative Action Policy Guidelines having been approved there appears to be little effort to implement its target of having 40% women in key decision making positions.<sup>51</sup> Although Queen mothers are afforded a relatively high degree of authority, they are not permitted to participate in local, regional and national assemblies of traditional leaders.<sup>52</sup>

### 2.3 Violence against women in Ghana

An idealised notion of the traditional Ghanaian family unit has led to the false perception that abuse represents isolated deviations from the norm instead of a problem of larger and more routine dimension, linked to the status of women in society.<sup>53</sup> The reality is that violence is the primary mechanism through which patriarchal control over women is enforced and its use enjoys widespread social acceptance in Ghana.<sup>54</sup> Such violence takes the form of physical violence which is the most common and frequently described as a method of ‘instilling discipline’; psychological violence which is used to entrench gender roles and condone double standards between men and women; socio-economic abuse which leads to feelings of helplessness and increases dependency by robbing women of choice; traditional practices such as female genital mutilation, polygamy and the payment of dowry by men before marriage which encourages notions of women as men’s property.<sup>55</sup>

Commonly, the view is that most forms of violence against women are “‘private’ matter(s) and consequently they are given no name or value.”<sup>56</sup> Sexual violence in particular is shrouded in secrecy and many women have internalised the same violence perpetuating views one might expect from perpetrators and passed them on to their daughters.<sup>57</sup> This is despite women commonly identifying sexual violence as dehumanising, harmful and destructive.<sup>58</sup> A woman denying her husband sex is largely considered to be an acceptable ground for violence including forced sex.<sup>59</sup> According to a 2003 survey, 10.1 % of men and 19% of women approved of a husband beating his wife for refusing to have sex with him.<sup>60</sup>

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<sup>51</sup> (n 32 above) 12.

<sup>52</sup> VMG Von Struensee ‘The struggle of Queen Mothers for equality in Ghana’ (2004) 1. Available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=568405](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=568405). Also, as cited in (n 23 above) 29, Queenmothers, as custodians of tradition often internalise and propagate patriarchal values. One Queenmother was recorded as saying “It is against marital laws for the woman to refuse her husband sex, so if the man is angry and wants it he can do anything to get it. Some men use guns when their wives refuse to have sex with them. If you are lucky your husband does not have a gun, but he will destroy your panties because you refuse sex and that is ok. Forcing one’s wife cannot be termed rape, it is the right of a husband to have sex with his wife.”

<sup>53</sup> (n 23 above) 31.

<sup>54</sup> (n 32 above) 31.

<sup>55</sup> (n 23 above) 17-28.

<sup>56</sup> (n 23 above) 2.

<sup>57</sup> (n 23 above) 166.

<sup>58</sup> (n 44 above) 17. In this study, 35% of the women and 50% of the men taking part acknowledged the existence of marital sexual abuse.

<sup>59</sup> A female educationalist from the Brong Ahafo region taking part in (n 23 above) stated that “if husband ask for sex women here have no say. It is her responsibility to have sex with her husband and if the wife refuses and her husband forces her it is not rape.” 73

<sup>60</sup> (n 32 above) 13.



This is based on the widespread belief that a husband is entitled to sexual intercourse from his wife on demand and that he may enforce this entitlement by force.<sup>61</sup> Society pressures women to remain silent about abuse by instilling in them the belief that violence is a justified consequence of failure to live up to gender roles or that violence is their fault which creates a cycle of self-blame. Thus, stigma plays a large role in maintaining the invisibility of violence against women in Ghana. Women are also taught that it is their responsibility to 'protect the family' which is the basis of the little status they are afforded.<sup>62</sup> There is also widespread resistance to naming forced sex within marriage 'rape' which some argue is exacerbated by the perceived lack of legal sanctions for marital rape.<sup>63</sup>

#### **2.4 The prevalence of marital rape**

The true prevalence of marital rape in Ghana, as in most countries of the world, is unknown but research conducted in Ghana suggests that it is common despite society's unwillingness to acknowledge it.<sup>64</sup> According to such research, when asked very specifically if their partners forced them to have sex, one in four (28%) of the women taking part affirmed that they were forced.<sup>65</sup> It was also recorded that of those forced to have sex with their partners, 42% were forced sometimes, 38% once in a while, 9% often and 12% very often.<sup>66</sup> Although an individual need only experience rape once to bear the full impact of it, these statistics indicate that some women are subjected to rape on a regular basis.

#### **2.5 The impact of marital rape**

Research indicates that the impacts of marital rape are profound and interconnected, leaving physical, emotional and economic scars which can be and often are long lasting.<sup>67</sup> The myth that marital rape is less traumatic than stranger rape is clearly refuted by evidence that survivors suffer even more severe consequences than survivors of stranger rape.<sup>68</sup> Such women suffer from "persistent terror"<sup>69</sup> as they are forced to endure multiple offences whilst being exposed to a generalised environment of physical, emotional, economic and verbal abuse which renders them vulnerable to experiencing flashbacks, on-going nightmares and long-term sexual dysfunction.<sup>70</sup>

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<sup>61</sup> (n 32 above) 13.

<sup>62</sup> (n 32 above) 13.

<sup>63</sup> (n 23 above) 28. This perception Cusack argues is also reflective of the totality of women's conditioning in terms of stereotyped gender roles. Through such conditioning they are taught to accept double standards and most importantly with regards to rape, accept the use of violence used against them 168.

<sup>64</sup> (n 23 above) 3-6.

<sup>65</sup> (n 23 above) 71.

<sup>66</sup> (n 23 above) 71.

<sup>67</sup> (n 1 above) 56.

<sup>68</sup> (n 8 above) 59.

<sup>69</sup> (n 28 above) 20.

<sup>70</sup> (n 8 above) 61

## 2.5.1 The impact of marital rape on women's health

According to the World Health Organisation (WHO) "health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity."<sup>71</sup> Thus the inter-relatedness of physical, psychological and social factors must be taken into account when assessing the impact of marital rape on women's health. According to a Ghanaian gynaecologist, cases of marital rape are common but women rarely identify or reveal the cause of their physical injuries or psychological symptoms of such trauma.<sup>72</sup> Often, only when a medical practitioner takes the initiative to delve deeper in order to tackle the root cause of a women's health problems, will she divulge what may be happening to her. Even then she may merely say that "when he lies on me I just pray that he finishes and gets off."<sup>73</sup>

### 2.5.1.1 Physical health

The physical consequences of rape are severe regardless of whether it occurs within marriage or not because "all sex under duress places women at risk of immediate and horrific physical injury, of pregnancy, and of sickness or death through sexually transmitted diseases."<sup>74</sup> Other effects include bladder infections, vaginal/anal stretching and bleeding<sup>75</sup>, fistulas, miscarriage, stillbirths and unwanted pregnancy.<sup>76</sup>

Dr Clayman relayed the story of a nurse who approached him for medical assistance. While giving birth to her baby she had sustained internal tearing which had required several stitches. Despite her husband being made aware of this he forced her to engage in sexual intercourse with him and during the process tore her stitches apart. As a result, faecal matter was able to enter her vagina and cause extreme pain and infection. Out of shame and a misplaced sense of responsibility she delayed seeking medical assistance until she could

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<sup>71</sup> Preamble to the Constitution of the World Health Organization. Available at <http://www.who.int/about/definition/en/print.html>

<sup>72</sup> Dr James D Clayman, Obstetrician and gynaecologist at the Amasaman General Hospital, Accra. Interview 8 October 2009.

<sup>73</sup> (n 72 above) Relaying what a patient said to him when he asked whether her sexual relationship with her husband could be interfering with her health.

<sup>74</sup> F Pickup, S Williams, C Sweetman *Ending Violence Against Women: A challenge for development and humanitarian work* (2001) 97.

<sup>75</sup> (n 72 above) Dr Clayman said that he had had two cases of women coming to him complaining of pain and incontinence following what appeared to be forced anal sex.

<sup>76</sup> (n 13 above) 68. It is worth noting too that for women impregnated as a result of rape, laws prohibiting abortion further restrict her rights to exercise control over her body and even where abortion would not be an option for religious or cultural reasons, the physical, emotional and psychological strain of unwanted pregnancy can be immense.

bare it no longer.<sup>77</sup> A similar incident was reported by the Ark Foundation in which a woman's caesarean stitches ruptured while her husband forced her to have sex with him.<sup>78</sup>

The spread of HIV/AIDS to women is closely linked to forced/coerced and sexual violence.<sup>79</sup> Dr Clayman described another case in which a woman would routinely come to see him to check whether she had contracted an infection or a sexually transmitted disease. When questioned about why she returned so often, she explained that her husband was a womaniser and because she was afraid of HIV, she would often refuse to have sex with him but that he would force her and then she would worry that he had infected her. This not only illustrates how women are robbed of their inability to effectively protect themselves against HIV/AIDS where rape within marriage is condoned but also the psychological torment it can create.

### **2.5.1.2 Psychological health**

From a broader perspective, the sexual attack by a husband on his wife is indicative of an attack on women as a group through which such men seek to dominate, degrade and render all women powerless.<sup>80</sup> Women who are raped by their husbands frequently experience feelings of confusion and despair and research has shown marital violence to be the leading cause of female suicide.<sup>81</sup> Short-term implications of marital rape include irritation, flashbacks, loneliness and a changed relationship with one's body and men in general which can manifest into long-term damage to a woman's fertility and sexuality.<sup>82</sup> Women raped by their husbands also often experience overwhelming feelings of shame and humiliation which prevents them from seeking help, along with the fear of being further derided and humiliated by community members who misinterpret such action as being the cause of the breakdown of the marriage instead of the rape itself.<sup>83</sup>

### **2.5.2 The economic and social impact**

As with all forms of VAW, marital rape can seriously impact on women's ability to participate in social and economic activities.<sup>84</sup> It can drive women into poverty by preventing them from

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<sup>77</sup> (n 72 above). In his experience, marital rape is common but the majority of the women he examines and treats do not identify the physical and psychological trauma which has been inflicted on them as rape. "Most women will fabricate stories because they think they are protecting the integrity of their marriages and only where a medical practitioner bothers to investigate further will the details of forced sex be divulged."

<sup>78</sup> The Ark Foundation, Ghana pamphlet on 'Rape within marriage: what does it feel like'. The Ark Foundation is an NGO which advocates for the rights of women and children in Ghana and for a long while ran the only shelter for abused women in the country.

<sup>79</sup> World Health Organisation (WHO) studies have revealed that women who are subjected to domestic violence including marital rape are three times more likely to contract HIV/AIDS as referred to in (n 13 above) 68.

<sup>80</sup> (n 74 above) 98. This is so it is argued because the psychological violence inflicted by all rape instils fear which is then harnessed to control women in a community.

<sup>81</sup> These findings were pursuant to a cross-cultural study conducted, drawing on data from Africa, South America and several Melanesian islands, (n 74 above) 99.

<sup>82</sup> (n 74 above) 99.

<sup>83</sup> (n 74 above) 99.

<sup>84</sup> (n 74 above) 102.

engaging in educational and economic activities which in turn renders them vulnerable to further violence as their dependency increases.<sup>85</sup> Marital rape can also directly impact on women's ability to generate income.<sup>86</sup> Women with formal sector jobs may lose their posts due to absenteeism, resulting from the impact of the rape and fear that others may find out and ostracise them while those in the informal sector, such as traders may also find that the physical and psychological impact of the rape limits their ability to generate income.<sup>87</sup>

Failure to acknowledge and address marital rape can have serious repercussions on sexual violence within society more broadly. As Peter Volk, a researcher specialising in rape at Frieberg University's Institute for Forensic Medicine in West Germany says "as long as rape within marriage remains permissible, criminal rape must be viewed as the mere tip of an iceberg which will only disappear once the idea of the constant sexual availability of the woman has been made baseless."<sup>88</sup>

## 2.6 Conclusion

Despite constituting approximately half of Ghana's population, women's needs and concerns are not acknowledged as impacting on society as a whole.<sup>89</sup> It is clear that "women continue to occupy a subordinate position to men in virtually every domain of life"<sup>90</sup> and live amidst persistently unequal conditions in Ghana.<sup>91</sup> The dominant view that women have no value as autonomous human beings renders them vulnerable to gender-based violence in the form of marital rape.<sup>92</sup> The prevalence and consequences of marital rape in turn clearly reinforce gender discrimination by rendering all women physically, psychologically, economically and socially vulnerable and unable to effectively interact with men on an equal footing. Under these circumstances, marital rape exemption laws, which have explicitly protected the perceived male prerogative to have sex with one's wife on demand, serve to reinforce women's inferior status in society.<sup>93</sup>

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<sup>85</sup> (n 74 above) 104.

<sup>86</sup> (n 74 above) 104.

<sup>87</sup> (n 74 above) 105.

<sup>88</sup> (n 7 above) 360.

<sup>89</sup> (n 78 above)

<sup>90</sup> (n 32 above) 9.

<sup>91</sup> (n 42 above) 259. In their discussion on women's inheritance rights in Ghana, the authors describe gender inequality as a persistent, underlying challenge which justifies explorations of the efficacy of legislation in guaranteeing women's rights and challenging long standing social practices in Ghana.

<sup>92</sup> (n 23 above) 155.

<sup>93</sup> (n 32 above) 13.

## CHAPTER 3: INTERNATIONAL, REGIONAL AND DOMESTIC LAW

### 3.1 Introduction

The fundamental human rights of women have been enshrined in numerous international and regional instruments and have been elaborated upon in various United Nations Declarations and conference documents, some of which have explicitly highlighted the state's responsibility to confront VAW and respect women's sexual autonomy.<sup>94</sup> In addition, women's rights are protected in the 1992 Ghanaian Constitution which justified the introduction of the DV Act<sup>95</sup> and ultimately the removal of the marital exemption<sup>96</sup> from the Criminal Code.<sup>97</sup> Taking into account that the domestic legal framework has been influenced by international and regional instruments this chapter begins with an analysis of these instruments and then focuses on the Constitution and relevant national laws in an attempt to detail how such frameworks apply to the issue of marital rape as discussed in chapter 2.

### 3.2 Ghana's obligations under international law

#### 3.2.1 International Covenant on Civil and Political Rights (ICCPR)

On 7 September 2000 Ghana ratified the ICCPR without reservation.<sup>98</sup> Article 26 provides that:

“All persons are equal before the law and are entitled without discrimination to the equal protection of the law. In this respect the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

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<sup>94</sup> As discussed in Human Rights Watch 'Policy Paralysis' (11 February 2009) available at <http://www.hrw.org/en/node/80717/section/1>, the Declaration on the Elimination of Violence Against Women was adopted by the UN General Assembly on 23 February 1994. Although it is not binding, it does provide common international standards that states should follow. It provides that states should “pursue by all appropriate means and without delay a policy of eliminating violence against women” and to “exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons.” U.N. Document A/Res/48/104/1994. States representatives have also pledged to eliminate all practices that discriminate against women and to assist women to “establish and realize their rights, including those that relate to reproductive and sexual health” in the 1994 Cairo Programme of Action on Population and Development. In addition, it was recognised that women's human rights include their right to have control over and decide freely on matters related to their sexuality, free of coercion, discrimination and violence in the 1995 Beijing Declaration and Platform for Action.

<sup>95</sup> Domestic Violence Act 732 of 2007

<sup>96</sup> Contained in Section 42(g) of the Criminal Code of 1960

<sup>97</sup> Criminal Code of 1960.

<sup>98</sup> Available at [http://www.bayefsky.com/html/ghana\\_t1\\_ratifications.php](http://www.bayefsky.com/html/ghana_t1_ratifications.php)

This entails that all women, including those women who are victims of marital rape, have an equal right to the enforcement of the law and that a pattern of non-enforcement would amount to unequal and discriminatory treatment.<sup>99</sup>

Article 7 provides that “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”. The Human Rights Committee (HRC)<sup>100</sup>, while declining to limit specific acts covered by article 7, has stated that “the prohibition in article 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim.”<sup>101</sup> It is clear from the discussion in chapter 2 that marital rape causes both extreme physical and mental suffering. In addition, Article 9 stipulates that “everyone has the right to liberty and security of person”. Such rights are closely linked to a women’s right to sexual autonomy which is violated when she is subjected to non-consensual sex.<sup>102</sup>

The HRC has held that states not only have the duty to protect citizens from having their rights violated but also to investigate violations when they occur and to bring perpetrators to justice.<sup>103</sup> Regarding marital rape in particular, the HRC has recently stated that States parties “...should define and criminalize domestic violence, including marital rape.”<sup>104</sup>

Ghana is party to the Optional Protocol to the ICCPR which means that it may be brought before the HRC in the event that it allows for any of the rights contained in the ICCPR to be violated.

### **3.2.2 The International Covenant on Economic, Social and Cultural Rights (ICESCR)**

Ghana ratified the ICESCR on 7 September 2000. Article 12 requires that States parties “recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”. The ICESCR Committee, commenting on Article 12 have stated that “[a] major goal should be reducing women’s health risks, particularly lowering rates of maternal mortality and protecting women from domestic violence.”<sup>105</sup> As highlighted in chapter 2, marital rape interferes with women’s right to enjoy and attain the highest standard of physical and mental health.

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<sup>99</sup> Human Rights Watch *Violence against women in South Africa: State response to domestic violence and rape* (1995) 40.

<sup>100</sup> Tasked to monitor compliance with the ICCPR

<sup>101</sup> General Comment 20 as cited in (n 13 above) 67.

<sup>102</sup> (n 94 above).

<sup>103</sup> General Comment 7(16) para 1 (1982) as cited in (n 94 above).

<sup>104</sup> Concluding Observations of the Human Rights committee: United Republic of Tanzania (6 August 2009) CCPR/C/TZA/CO/4 at [10]. Available at <http://www2.ohchr.org/english/bodies/hrc/hracs96.htm>

<sup>105</sup> General Comment 14 (11 August 2000)

### 3.2.3 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

Ghana ratified the CEDAW on 2 January 1986. The adoption of CEDAW strengthened the provisions of the ICCPR by specifically providing that discrimination against women shall mean:

“any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”<sup>106</sup>

Article 2 requires that States parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay, a policy of eliminating discrimination against women and, to this end, undertake:...(b) to adopt appropriate legislative and other measures, including sanctions, where appropriate, prohibiting all discrimination against women;...(f) to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.

In 1992, the CEDAW Committee adopted a general recommendation and comments which detailed how CEDAW covered violence against women as well as how governments should approach its elimination.<sup>107</sup> It was explicitly stated that gender discrimination “includes gender-based violence” and that such violence constitutes a violation of human rights even where the perpetrators are private individuals.<sup>108</sup> The CEDAW Committee has also noted that “women’s human rights to life and physical and mental integrity cannot be superseded by other rights, including the right to property and the right to privacy.”<sup>109</sup>

Article 5 requires States “to modify social and cultural patterns” and to eliminate customary practices based on ideas of inferiority or stereotyped roles<sup>110</sup> and to “take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations.”<sup>111</sup> State Parties are also required to afford the same opportunities to men and women to decide the number and spacing of children.<sup>112</sup>

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<sup>106</sup> Article 1

<sup>107</sup> General Recommendation No19

<sup>108</sup> (n 107 above) “States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and to provide compensation.”

<sup>109</sup> In the case of Ms A.T. v Hungary as cited in (n 13 above) 65.

<sup>110</sup> Article 5

<sup>111</sup> Article 16

<sup>112</sup> Article 16(1)(e)

In 1994 the first Special Rapporteur on Violence against Women (SRVAW) was appointed by the UN Commission on Human Rights.<sup>113</sup> With regard to state responsibility, the SRVAW has noted that "...a State that does not act against crimes of violence against women is as guilty as the perpetrators. States are under a positive duty to prevent, investigate and punish crimes associated with violence against women."<sup>114</sup> The SRVAW has also noted that tradition or custom should not be used as an excuse for abdicating a state's responsibility to prevent VAW.<sup>115</sup>

In 2006 the CEDAW Committee reviewed Ghana's progress regarding the implementation of CEDAW and noted the "lack of legislation to comprehensively address domestic violence" and "urged the State party [Ghana] to repeal Section 42(g) of the Criminal Code, which exempts husbands from prosecution for marital rape" and explicitly stated that this provision violated Article 2 of CEDAW when enquiring whether the provision would be repealed once the DV Act was passed.<sup>116</sup>

Ghana signed the Optional Protocol to CEDAW which provides a mechanism for receiving individual complaints but it has yet to ratify it.

### **3.2.4 The Convention against Torture (CAT)**

Ghana ratified the CAT on 7 September 2000. The prohibition of torture constitutes a principle of jus cogens. It is a peremptory norm from which no derogation is permitted. In 2007 the Committee against Torture recognised rape as torture for the first time and thus afforded women one of the strongest protections available under international law in the event that they are raped.<sup>117</sup>

Article 1 requires that the prohibited act be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or a person acting in an official capacity." Despite this, it has been argued that, in light of the Committee's jurisprudence which indicates that it takes a broad view of the term 'acquiescence', a woman who is raped should be able to argue that authorities have 'acquiesced' in her torture if they have failed to provide protection

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<sup>113</sup> The SRVAW is tasked to carry out work on VAW, identify its causes and consequences and recommend ways of eliminating such violence.

<sup>114</sup> Preliminary report by the SRVAW 18 (22 November 1994) as cited in (n 99 above) 43. This approach was adopted by The South African Constitutional Court in *S v Baloyi 2000 (1) SACR 81 (CC)* in which it was held that because "domestic violence predominantly affects women, the constitutional right to gender equality is jeopardised by a legal system which fails to adequately address this violence" and in *Carmichele v Minister of Safety and Security 2001 (10) BCLR 995 (CC)* the court explicitly held that the State had a positive duty with regard to VAW and noted that in addressing such obligations, especially in light of dignity and freedom and security of the person, "few things can be more important to women than their rights."

<sup>115</sup> Preliminary report by the SRVAW 16 (22 November 1994) as cited in (n 99 above) 43.

<sup>116</sup> Concluding comments of the Committee on the Elimination of Discrimination against Women: Ghana (7-25 August 2006) 23 as discussed in (n 13 above) 70.

<sup>117</sup> K Fortin 'Rape as torture: an evaluation of the Committee against Torture's attitude to sexual violence' (2008) 4 *Utrecht Law Review* 1. Available at <http://www.utrechtlawreview.org/publish/articles/000087/article.pdf>



in specific instances or where they have “created a culture of violence through a systematic failure to investigate or prosecute complaints of domestic violence.”<sup>118</sup>

### **3.3 Ghana’s regional human rights obligations**

#### **3.3.1 The African Charter on Human and Peoples’ Rights (ACHPR)**

Ghana ratified the African Charter on 1 March 1989. Article 2 enshrines the principle of non-discrimination on the grounds of ‘sex’ and ‘other status’. States are called on to eliminate discrimination against women and to ensure the protection of their rights as stipulated in international declarations and conventions<sup>119</sup> and other human rights instruments are acknowledged as important points of reference for the application and interpretation of the Charter.<sup>120</sup> The African Platform for Action in 1994 was instrumental in highlighting the problem of VAW on the continent and helped prompt movement towards the creation of a protocol to address the rights of women in Africa.

#### **3.3.2 The African Protocol on the Rights of Women in Africa (APRWA)**

Ghana ratified the Protocol without reservation in 2007. The APRWA was articulated pursuant to a recommendation by the African Commission on Human and Peoples’ Rights<sup>121</sup> and was prompted by a concern that despite international commitments, women in Africa continued to be victims of harmful practices and discrimination which prevented them from fully enjoying their human rights.<sup>122</sup>

The preamble states that States parties are “firmly convinced that any practice that hinders or endangers the normal growth and affects the physical and psychological development of women and girls should be condemned and eliminated”. It also refers to the broader impact of women’s rights by recognising that women play an essential role in development<sup>123</sup> and a crucial role in the preservation of African values based on the principles of equality, peace, freedom, dignity, justice, solidarity and democracy.

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<sup>118</sup> (n 117 above). Fortin argues that the Committee appears to be “actively seeking out information on the female experience of torture” and that “the term ‘acquiescence’ in Article 1 may not only prove instrumental in holding the State responsible for its failure to respond to specific instances of abuse by non-state actors but it also has the potential to be a valuable tool for challenging and transforming gender imbalances in society.”

<sup>119</sup> Article 18

<sup>120</sup> Articles 60 and 61

<sup>121</sup> The African Commission on Human and Peoples’ Rights was empowered to do so by Article 66 of the African Charter. The recommendation was endorsed by the Assembly of Heads of State and Government of the OAU at its thirty first ordinary session in Addis Ababa, Ethiopia in June 1995, endorsed by resolution AHG/Res.240 (XXXI)

<sup>122</sup> Preamble to the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa. Promoting the principle of gender equality is enshrined in the Constitutive Act of the African Union and the new partnership for Africa’s Development and solemn commitments to giving greater attention to the elimination of all forms of discrimination and gender based violence against women have been encapsulated in the African Platform for Action, the Dakar Declaration of 1994 and the Beijing Platform for Action of 1995

<sup>123</sup> Which has been reaffirmed in the United Nations Plans of Action on the Environment and development 1992, on Human Rights 1993, on Population and Development 1994 and on Social Development in 1995

The APRWA obliges states to take formal legislative or regulatory measures to prevent harmful practices and discrimination against women. It also requires states to effectively implement such measures, particularly in instances where practices constitute a danger to the health and general well-being of women.<sup>124</sup>

It is highlighted that an integral part of ensuring women's right to dignity is through the legal protection against all forms of violence, including sexual violence.<sup>125</sup> The obligation to ensure the rights of women to life and integrity and security of the person also requires that states prohibit all forms of exploitation, cruel, inhuman or degrading punishment and treatment and, not only enact but enforce laws which "prohibit all forms of violence against women including unwanted or forced sex, whether the violence takes place in private or public".<sup>126</sup> States are also required to ensure women's health and reproductive rights<sup>127</sup> as well as their right to live in a positive cultural context.<sup>128</sup> States parties are further required to actively modify the social and cultural patterns of conduct which are based on the idea of the inferiority or superiority of either of the sexes or on stereotypical roles.<sup>129</sup>

The APRWA thus envisages that the law should play an active role in reformulating the destructive patterns of power which render women vulnerable to abuse and which prevent them from claiming their rightful place as equals to men, within and outside of marriage.<sup>130</sup>

### **3.4 Ghana's domestic legal framework**

#### **3.4.1 The Constitution of the Republic of Ghana 1992 (the 1992 Constitution)**

The Constitution is the supreme law of Ghana and as such it sets the standard against which everything else is to be measured.<sup>131</sup> Any laws found to be inconsistent with the Constitution are to be considered void to the extent of the inconsistency.<sup>132</sup> The Executive, Legislature and Judiciary, all other organs of government and its agencies as well as all natural and legal persons in Ghana are required to respect and uphold the fundamental rights and freedoms enshrined in chapter five.<sup>133</sup> The dignity of all persons is regarded as inviolable<sup>134</sup> and article 15(2)(a) prohibits the use of torture or other cruel, inhuman or degrading punishment while (b) protects against any other condition that is likely to detract from the dignity and worth of

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<sup>124</sup> Article 2(1)(b)

<sup>125</sup> Article 3(4)

<sup>126</sup> Article 4(2)(a)

<sup>127</sup> Article 14

<sup>128</sup> Article 17

<sup>129</sup> Article 2(2) of the Protocol

<sup>130</sup> Article 6 of the Protocol. Article 8 also enshrines the principle that women and men are equal before the law and Article 9(1)(c) states that women are equal partners with men at all levels of development

<sup>131</sup> Article 1(2) of the Constitution of the Republic of Ghana (Amendment) Act 1996

<sup>132</sup> Article 1(2)

<sup>133</sup> Article 12(1) of the 1992 Constitution

<sup>134</sup> Article 15 of the 1992 Constitution

any human being. It is explicitly stated that all persons are equal before the law<sup>135</sup> and that discrimination on the ground of gender is prohibited.<sup>136</sup> Although the right to practice and promote one's culture is protected,<sup>137</sup> this is subject to the condition that such customary practices are not dehumanising or result in injury to the physical and mental well-being of a person.<sup>138</sup>

### 3.4.2 The law on marital rape prior to legal reform

In Ghana, the legal definition of rape is "the carnal knowledge of a woman without her consent."<sup>139</sup> Section 31(j) of the Criminal Code allowed for justifiable force or harm to be used on numerous grounds including "the consent of the person against whom the force is used" and Section 42 provides that:

"the use of force against a person may be justified on the ground of his consent, but...a person may revoke any consent which he has given to the use of force against him, and his consent when so revoked shall have no effect for justifying force; save the consent given by a husband or wife at marriage, for the purposes of marriage, cannot be revoked until the parties are divorced or separated by a judgment or decree of a competent Court."<sup>140</sup>

On its face section 42(g) was neutral but coupled with the inferior status afforded women in Ghana as explored in chapter 2, it rendered women vulnerable to having their rights violated with impunity.

### 3.4.3 The introduction of the Domestic Violence Bill (DV Bill)

Civil society pressure to address domestic violence, including marital rape resulted in the drafting of a DV Bill.<sup>141</sup> Prior to being passed by Parliament in 2007, the Bill was subjected to more than three years of extensive national consultations during which proponents of the law were accused of propagating 'anti-Ghanaian' concepts.<sup>142</sup> Civil society's insistence that the marital rape exemption contained in Section 42(g) of the Criminal Code be repealed generated the most controversy.<sup>143</sup> Even the then Minister of Women's Affairs, Minsiter Asmah, described the notion of marital rape as "sowing the seeds of destroying marriages."<sup>144</sup> Such a reaction illustrated a commonly held view that women had an inferior status and that non-consensual sex within marriage was normal and not deserving of

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<sup>135</sup> Article 17(1)

<sup>136</sup> Article 17(2)

<sup>137</sup> Article 26(1)

<sup>138</sup> Article 26(2)

<sup>139</sup> The Criminal Code of Ghana 1960 (Act 29)

<sup>140</sup> Section 42(g) of the Criminal Code Act 1960 (Ghana)

<sup>141</sup> Interview with A Dwamena-Aboagye, Ark Foundation Ghana (26 August 2009).

<sup>142</sup> KM Fallon and AL Aunio 'Domesticating Transnational Activists: Cultural frames, imperialism and methods of soft repression' 37. Available at <http://www.mcgill.ca/files/cdas/Fallon.Aunio.pdf>. In response to government opposition to the DV Bill, the Domestic Violence Coalition was formed.

<sup>143</sup> T Manuh for Open Democracy News Analysis 'African women and domestic violence' (26 November 2007) available at <http://www.opendemocracy.net>

<sup>144</sup> (n 142 above) 31.

attention.<sup>145</sup> More importantly, it indicated a failure to see gender-based violence as a logical consequence of gender discrimination.<sup>146</sup>

### 3.4.4 The introduction of the Domestic Violence Act<sup>147</sup> (DV Act)

In February 2007, the Ghanaian Parliament passed the DV Act without having repealed Section 42(g) although it did retain a provision that stipulates that “the use of violence in the domestic setting is not justified on the basis of consent.”<sup>148</sup> Months later though, in June 2007 the Statute Law Commissioner repealed the marital rape exemption contained in Section 42(g) of the Criminal Code making laying a charge against one’s husband for rape a legal possibility.<sup>149</sup> A broad and gender neutral definition of domestic violence is provided in the DV Act which includes the criminalisation of sexual abuse<sup>150</sup> between spouses.<sup>151</sup> In terms of marital rape though the DV Act is rendered inoperable due to a section which stipulates that punishment under the Act applies only to offences which under the Criminal Code are misdemeanours.<sup>152</sup> If women were to report having been raped by their husbands, they should be charged with rape under the Criminal Code. If non-consensual sex within marriage is not correctly identified as rape and a charge is laid for sexual assault under the DV Act this would only perpetuate impunity for rape, entrench gender discrimination and, if done in a systematic pattern, would amount to the state attracting international legal liability for not affording women the equal protection of the law.

### 3.5 Conclusion

States are required in terms of international law to show due diligence in preventing and responding to marital rape. The government of Ghana has a duty to prevent, investigate and prosecute human rights abuses committed by state actors and private citizens, especially those that involve bodily integrity such as marital rape. If Ghana were to fail to prohibit or routinely neglect to respond to evidence of rape within marriage, it would send the message that marital rape was justified or that it is not serious enough to attract criminal liability. In

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<sup>145</sup> (n 143 above)

<sup>146</sup> (n 3 above) 33.

<sup>147</sup> Domestic Violence Act 732 of 2007

<sup>148</sup> Article 4 of the Domestic Violence Act 732 of 2007. The reason given for having not repealed Section 42(g)

<sup>149</sup> The Statute Law Commissioner, Justice VCRAC Crabbe was acting pursuant to his mandate in terms of the Laws of Ghana (Revised Edition) Act 562 of 1998. In an interview with Justice Crabbe on 17 September 2009, he explained that he and his committee were tasked to revise all of Ghana’s legislation to ensure that it complied with international, regional and constitutional commitments. He highlighted that section 42(g) was premised on the notion that perpetual consent to sexual conduct was granted upon entering into a marriage and thus having sex with one’s wife without her consent would be justified in the eyes of the law. He further stated that “Section 42(g) was found to be unconstitutional and contrary to international law. Had we failed to repeal it, it would’ve meant that wives would be reduced to slaves. The problem is that people’s beliefs about marital rape do not correspond with what the law says, not yet. It will take time, a mother is not likely to prosecute the husband who rapes her today but our hope is that her daughter damn well will, if the same befalls her.”

<sup>150</sup> Section 19b)(ii) of the DV Act

<sup>151</sup> (n 32 above) 21. Section 2(1)(a) states that a ‘domestic relationship’ includes a relationship where the complainant (a) is or has been married to the respondent

<sup>152</sup> Section 23 of the DV Act. Rape is classified as a first degree felony under the Criminal Code and is punishable by a minimum term of imprisonment of five years and a maximum of twenty five years.

doing so, the state would fail to take the necessary steps required to protect women's rights as enshrined in international human rights instruments. Such failure may be argued to reflect discrimination on the basis of gender and thus also constitute a violation of its obligation to guarantee the equal protection of the law.<sup>153</sup> While regional African law reiterates these duties, it goes even further by explicitly requiring Ghana to enact and enforce laws to prohibit marital rape<sup>154</sup> which necessitates that Ghana commits itself to modifying the discriminatory social and cultural patterns of conduct which lead to marital rape in the first place.<sup>155</sup> On the domestic front, the Constitution requires that the State safeguard women against the violation of rights caused by marital rape and the removal of Section 42(g) from the Criminal Code reflects this commitment more specifically but perhaps not clearly enough given the gravity of the crime and the reluctance to acknowledge it.

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<sup>153</sup> (n 99 above) 39.

<sup>154</sup> Article 4(2)(a) APRWA

<sup>155</sup> Article 2(2) APRWA

## CHAPTER 4: CHALLENGES TO THE IMPLEMENTATION OF THE LAW

### 4.1 Introduction

Despite various international, regional and domestic legal commitments to protect women against rape within marriage a number of significant challenges to the effective implementation of such laws exist in Ghana.<sup>156</sup> Other than the social and economic factors discussed in chapter two, these include the dual governance and legal system which raises cultural considerations; deficiencies in the law itself, namely the DV Act and the Criminal Code; weaknesses in the criminal justice system which is still dominated by men and which is often sidelined in favour of customary dispute mechanisms and the lack of support and protection available to victims of violence.

### 4.2 Dual governance and legal system

Any approach to ending gender based violence is complicated by the need to simultaneously protect local cultural practices.<sup>157</sup> Implementation of such laws in Ghana is complicated further by the fact that formal state institutions<sup>158</sup> coexist with a customary system built around chiefs, council of elders and traditional authorities<sup>159</sup> who wield a considerable amount of authority, especially in rural areas where two thirds of Ghanaians live.<sup>160</sup> Despite traditional authorities being bound by Ghana's international, regional and domestic legal obligations, many local state officials are unwilling to challenge customary power because the balance of power is often tilted against the state.<sup>161</sup> It is unlikely that the customary system will actively support laws prohibiting VAW because, it has been argued that "deriving their legitimacy from a claim to tradition, traditional authorities tend to be socially conservative, putting respect for local custom before gender equality."<sup>162</sup> In terms of local custom, women are regarded as falling under the authority of their husband's and consent to marriage is viewed as the equivalent to consent to sex."<sup>163</sup> Although it is illegal for Chiefs to usurp State power and involve themselves in ordinary rape cases, there are reports that they

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<sup>156</sup> Daily Graphic Newspaper 'Challenges to the enforcement of domestic violence laws' (19 September 2009)

<sup>157</sup> SE Merry 'Women, violence and the human rights system' in M Agosin (Ed) *Women, gender and human rights: a global perspective* (2001) 90.

<sup>158</sup> Such as the administrative and legal structures were put in place during colonial rule and still function under the same basic structures, as cited in (n 32 above) 5.

<sup>159</sup> The Constitution guarantees the institution of chieftancy and traditional councils and prohibits state interference with the appointment of chiefs

<sup>160</sup> (n 32 above) 5.

<sup>161</sup> (n 32 above) 6. According to this report, in some rural districts police always seek the permission of local Chiefs before launching investigations into reported crimes.

<sup>162</sup> (n 32 above) 6.

<sup>163</sup> (n 13 above) 63.

often do and the deals they broker between families are said to contribute to a culture of impunity for violence against women.<sup>164</sup>

Customary authorities may also view the new laws as a threat to their authority which is ultimately sustained through the institution of marriage as the basis of the family structure. Some have described this as an “inevitable collision between protecting women and preserving marriages.”<sup>165</sup> In reality, ensuring that women’s rights are protected often entails ending the marriage which means that as a husband’s power over his wife is diminished, so too is the permanence of marriage and the power of customary authorities.<sup>166</sup>

Women may also be deterred from using the law because of the severe economic consequences of divorce, especially in terms of customary law.<sup>167</sup> Although the Matrimonial Causes Act<sup>168</sup> foresees a separation of property between the spouses based on “substantial contributions” made, customary law views all property acquired during a marriage as the sole property of the husband which deprives women of an equitable share in property upon divorce.<sup>169</sup> The 1992 Constitution acknowledges the discriminatory effects of both legal positions and requires Parliament to enact legislation to rectify this situation but no such law has been passed.<sup>170</sup>

The 1992 Constitution also obliges the National House of Chiefs<sup>171</sup> to “undertake an evaluation of traditional customs and usages with a view to eliminating those customs and usages that are outmoded and socially harmful”<sup>172</sup> but, largely due to the above mentioned tensions, the National House of Chiefs has “failed to launch a genuine effort to bring customary law in line with statutory law, the Constitution and Ghana’s international obligations.”<sup>173</sup>

### 4.3 Deficiencies in the law

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<sup>164</sup> (n 32 above) 6.

<sup>165</sup> (n 157 above) 90.

<sup>166</sup> (n 157 above) 90.

<sup>167</sup> Interview with A Tetteh, part-time legal practitioner for the Ark Foundation (24 September 2009)

<sup>168</sup> Matrimonial Causes Act 367 of 1971. This law requires spouses to prove that they have made “substantial contributions” in acquiring estate property in order to account for their share. The Act as it stands also allows customary law to be applied as noted in (n 32 above) 8.

<sup>169</sup> (n 32 above) 7.

<sup>170</sup> (n 32 above) 8. A Property of Spouses Bill has been drafted which requires courts to take contributions made in “cash or kind” into consideration and stipulating that spouses must receive one third of the property acquired during marriage at a minimum. The Bill as it stands also applies to all marriages including polygamous customary marriages and de facto unions.

<sup>171</sup> Which is a deliberative body which brings together paramount chiefs from all regions as discussed in (n 32 above) 8.

<sup>172</sup> Article 272(c) of the Constitution of the Republic of Ghana 1992

<sup>173</sup> (n 32 above) 8.

Failure to explicitly prohibit sexual abuse within marriage in the DV Act has contributed to a great deal of confusion among the public as well as law enforcement officials.<sup>174</sup> On 24 May 2006 the DV Bill was presented and read for the first time in Parliament after which it was referred to a Joint Committee on Gender and Children and Constitutional, Legal and Parliamentary Affairs for consideration and report.<sup>175</sup> Despite acknowledging that “domestic violence and sexual abuse in Ghana constitute a serious social evil...” and that the “[Domestic Violence] Bill seeks to provide protection for women...and to promote human dignity in accordance with the provisions of the Constitution and internationally acceptable norms and practices”, the Committee’s first proposal was to amend the DV Bill by deleting “whether married or not” in clause 1(b)(ii).<sup>176</sup>

The result is that Section 1 of the DV Act defines domestic violence to include in 1(b)(ii) “sexual abuse, namely the forceful engagement of another person in sexual contact which includes sexual conduct that abuses, humiliates or degrades the other person or otherwise violates another person’s sexual integrity...” The reason given for proposing such an amendment, which effectively repealed the marital rape exemption,<sup>177</sup> was that the phrase “whether married or not” was “superfluous”.<sup>178</sup> Contrary to this, former Attorney General and Minister of Justice J Ayikoi Otoo, in providing guidance on the wording change in a memorandum noted that “the repeal of the provision in the Criminal Code 1960 (Act 29) which prevents a wife from prosecuting her husband for rape in marriage has been excluded from the Bill in reponse to public opinion.”<sup>179</sup> Similarly, a public policy analyst stated that “marital rape is a fact; however, Ghanaians have been confronted with a situation where the Domestic Violence Bill could not be passed.”<sup>180</sup> Section 42(g) was only repealed after Parliament passed the DV Act and only because of action taken pursuant to The Laws of Ghana (Revised Edition) Act 562 of 1998.<sup>181</sup>

Thus, although it could be argued that Article 2(1)(a) defines a domestic relationship, as referred to under Article 1, as including “...a relationship where the complainant (a) is or has been married to the respondent” and that Article 4 which reads “The use of violence in the

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<sup>174</sup> Telephone conversation with DoVVSU public relations officer (13 October 2009). The officer informed me that “our law says nothing about marital rape. When a woman marries she consents to sex with her husband according to our culture and our law.” The purpose of the DV Act is “to provide protection from domestic violence particularly for women...” It is the sole piece of legislation which explicitly deals with VAW. Thus it is the first port of call for any law enforcement official faced with such a case and if it fails to provide clear guidance on how to confront rape within marriage then it is unlikely that police, of their own accord, will turn to the Criminal Code in order to charge the perpetrator.

<sup>175</sup> ‘Report of the Joint Committee on Gender and Children and Constitutional, Legal and parliamentary Affairs on the Domestic Violence Bill’ (November 2006) 1. Referral to this committee was pursuant to Article 106(4), (5) and (6) of the Constitution and Standing Orders 175 and 179 of the House.

<sup>176</sup> (n 175 above) 12.

<sup>177</sup> Contained in Section 42(g) of the Criminal Code 1960

<sup>178</sup> (n 175 above) 12.

<sup>179</sup> (n 13 above) 66.

<sup>180</sup> (n 13 above) 67.

<sup>181</sup> (n 149 above).



domestic setting is not justified on the basis of consent” covers violence occurring within marriage, the absence of the phrase “whether married or not” from the final DV Act reinforces the preconceived notion that sexual abuse, including rape, within marriage is not possible.<sup>182</sup> Such advice is also contrary to that of the Human Rights Committee which has explicitly stated that States parties “...should define and criminalize domestic violence, including marital rape.”<sup>183</sup>

Even more importantly, despite having repealed Section 42(g) of the Criminal Code<sup>184</sup> the rape clause was not amended to refer to rape within marriage. In addition, the rape clause “is narrowly premised on vaginal penetration and force” which means that rape in the absence of force, through coercion for example, cannot and will not be prosecuted.<sup>185</sup> This illustrates the persistently gendered nature of the law, the discriminatory effect of which fails to adequately address gender discrimination and thus marital rape.

#### **4.4 The criminal justice system**

The Domestic Violence Victims Support Unit (DoVVSU) was established in 2005 to replace the Women and Juvenile Unit (WAJU) as a specialised police unit which is tasked to investigate all crimes involving domestic and gender based violence.<sup>186</sup> A severe lack of resources is hampering the effectiveness of DoVVSU which is comprised of only 320 officers who often lack sufficient training, are unable to adequately cover rural areas and who very rarely have access to basic investigative equipment or motor vehicles.<sup>187</sup> In addition, the perception that it is inappropriate to bring ‘private’ domestic disputes before ‘public’ law enforcement and the court system still prevails.<sup>188</sup> Highly discriminatory treatment is meted out to women who seek recourse through the criminal justice system and “more often than not rape victims are treated as suspects, right from the police station to the court room.”<sup>189</sup> One Ghanaian judge is recorded to have stated that “it is un-Ghanaian for a man to be sentenced into imprisonment because he slapped or pushed his wife”.<sup>190</sup> Women who do

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<sup>182</sup> (n 174 above).

<sup>183</sup> Concluding Observations of the Human Rights committee: United Republic of Tanzania (6 August 2009) CCPR/C/TZA/CO/4 at 10. Available at <http://www2.ohchr.org/english/bodies/hrc/hrcs96.htm>. Although Ghanaian authorities have criminalised marital rape, given the cultural context, it is insufficient to do so in such a subtle or technical way. It does not send a clear enough message that rape within marriage is a crime for which the state must ultimately assume responsibility.

<sup>184</sup> Criminal Code of Ghana Act 29 of 1960

<sup>185</sup> (n 23 above) 3.

<sup>186</sup> (n 32 above) 22.

<sup>187</sup> (n 32 above) 22. The SRVAW reported that there were even cases of women having to hire taxis for police officers to come and arrest alleged perpetrators.

<sup>188</sup> H Boas ‘Lessons from Ghana: The challenges of a legal response to domestic violence in Africa’ ABA Commission on Domestic Violence, Law student writing competition (2006) 5. Available at <http://www.abanet.org/domviol/priorwinners/Boas2.pdf>

<sup>189</sup> (n 35 above) 17.

<sup>190</sup> (n 188 above) 5.

report incidents of violence are re-traumatized by being disbelieved<sup>191</sup> and frequently told that they are to blame by police officers, lawyers and judges.<sup>192</sup> Corruption is also said to be widespread with some officials accepting bribes from those accused of violence and others charging 'unofficial fees' to produce reports.<sup>193</sup> Seemingly interminable delays, referred to as the 'come-and-go syndrome' which are exacerbated by a lack of co-ordination between the judicial service, police, prosecutors and Attorney General's office are also said to be responsible for women's reluctance to pursue legal action against abusive husbands.<sup>194</sup>

#### 4.5 Support and protection available to victims

Numerous factors combine to limit women's access to justice over and above those discussed above. These include poverty and a lack of education about legal rights and the procedures to follow to report a case.<sup>195</sup> Those who do seek assistance are faced with the added problem of there being so few facilities available to provide the necessary support.<sup>196</sup> Although Section 7 of the DV Act requires the police to "offer the protection that the circumstances...require" there exist so few facilities that this provision means very little to women in reality.<sup>197</sup>

A lack of medical facilities where medical assistance as well as evidence can be collected also acts as a barrier to justice for women, especially in the rural areas.<sup>198</sup> Despite Section 8(4) of the DV Act providing for free medical treatment in case of emergency or a life threatening situation, even where women are able to gain access to medical attention they frequently find that the health care services they require are unaffordable, with some doctors charging the equivalent of between US\$15-30 to issue a medical certificate confirming abuse.<sup>199</sup> Failure to obtain a medical certificate will severely jeopardise a woman's chances of securing a successful prosecution which inevitably leads to charges being dropped.<sup>200</sup>

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<sup>191</sup> During an Ark Foundation police training session 'Domestic violence and responding skills' (3 September 2009) an officer responded when asked about whether people reported marital rape that "there were allegations but not cases". According to (n 23 above) 172 "By trivializing violence State agencies, like the family, collude in perpetrating violence".

<sup>192</sup> Hilary Gbedemah, Legal Practitioner, Video documentary by the Coalition on the National domestic violence legislation in Ghana "Taking Action; Protecting Lives" (2007).

<sup>193</sup> (n 188 above) 6. Also, according to staff at the Ark Foundation officers prefer not to be placed with the DOVVSU because they complain that it is "dry" meaning that they can't get as much money out of victims of domestic violence.

<sup>194</sup> Ms Ursula Owusu, Vice President FIDA, Video documentary by the Coalition on the National domestic violence legislation in Ghana "Taking Action; Protecting Lives" (2007). According to Ms Owusu the average rape case can take between 3-5 years to be concluded so women who often face extreme economic and social challenges or who merely lack the emotional energy needed to sustain such a long and uncertain battle, often give up.

<sup>195</sup> (n 156 above). A lack of awareness about legal developments and procedures is also common among educated Ghanaians.

<sup>196</sup> (n 188 above) 6.

<sup>197</sup> (n 32 above) 22. As of 2007, only one shelter run by the Ark Foundation, Ghana, a non-profit organisation which relies exclusively on donor funds, existed to service a population of over twenty one million people.

<sup>198</sup> (n 156 above).

<sup>199</sup> (n 32 above) 23. Those not covered by Ghana National Health Insurance, which is the vast majority of the country as well as non-citizens, have to pay upfront. A small number of doctors such as Dr James D Clayman do

Yet another constraint on women's ability to exercise their rights is the shortage of counselling services available to provide women with the emotional support they require to follow through with their cases.<sup>201</sup> As discussed in chapter 2 women who are raped by their husbands are particularly vulnerable and frequently feel powerless and isolated because they know that even those closest to them are unlikely to support legal action against their husband. Thus they require additional support to sustain the emotional energy required to see a case through to its completion.

The DV Act does provide for the establishment of a Victims of Domestic Violence Support Fund but this is not yet operational.<sup>202</sup> The fund is intended to contribute towards basic material support for victims; training for families of victims; any matter connected with the rescue, rehabilitation and reintegration of victims; the construction of reception shelters for victims as well as the training and capacity building of persons connected with the provision of shelter, rehabilitation and reintegration.<sup>203</sup> The DV Act also stipulates that sources of money for the fund include voluntary contributions from individuals, organisations and the private sector, monies approved by Parliament and any other source that is approved by the Minister responsible for finance.<sup>204</sup>

#### 4.6 Conclusion

It has been argued that "in articulation of its laws, a society makes its most powerful statement of what will and will not be tolerated. In its enforcement of those laws, society demonstrates its level of commitment to the values it professes, and begins the process of transforming words into reality."<sup>205</sup> Thus, the wide gap between existing laws and their implementation is a reflection of where the State positions itself in relation to violence against women and women's status more broadly.<sup>206</sup> It also points to state collusion in sustaining a culture of violence against women by reinforcing men's primary mechanism of control over women – violence.<sup>207</sup> The lack of reported cases of marital rape, despite its high level of occurrence, speaks of social perceptions of this form of violence.<sup>208</sup> It is also not surprising given the degree to which such violence has been normalised and that sexual violence in general is highly under-reported and the most hidden.<sup>209</sup> The lack of commitment to provide

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provide medical care to women who are victims of abuse free of charge but most have not yet been sensitized or harbour deep personal prejudices.

<sup>200</sup> United States Department of State, 2008 Country Reports on Human Rights Practices – Ghana (25 February 2009) available at: <http://www.unhcr.org/refworld/docid/49a8f18a2.html> [accessed 8 September 2009]

<sup>201</sup> (n 32 above) 23. According to the SRVAW, this is due to the Ministry of Manpower, Youth and Employment's failure to hire a sufficient number of social workers to deal with domestic violence cases.

<sup>202</sup> In terms of Section 29 of the DV Act

<sup>203</sup> Section 31 of the DV Act

<sup>204</sup> Section 31 of the DV Act

<sup>205</sup> C Thomas 'Domestic Violence' (1999) 1 *Women and International Human Rights Law* 220.

<sup>206</sup> (n 23 above) 171.

<sup>207</sup> (n 23 above) 171.

<sup>208</sup> As discussed more fully in chapter 2.

<sup>209</sup> (n 23 above) 172.

the financial support necessary to implement the law reflects a lack of appreciation for the negative impact which violence against women is having on development by undermining political, social and economic activity.<sup>210</sup>

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<sup>210</sup> The Council of Europe's Committee of Ministers in their recommendations to member states on the protection of women against violence (2002) highlighted that "violence against women runs counter to the establishment of equality and peace and constitutes a major obstacle to citizens' security and democracy in Europe" and recommended that research, data collection and networking at national and international level should be developed, particularly regarding the "health, social and economic costs of violence against women."

## CHAPTER 5: SUMMARY OF FINDINGS, CONCLUDING REMARKS AND RECOMMENDATIONS

### 5.1 Summary of findings

This study set out to explore the role of the law in confronting marital rape by focusing on the situation in Ghana. It was guided by the SRVAW's assertion that the root cause of VAW is gender discrimination and that the marital rape exemption contained in Section 42(g) of the Ghanaian Criminal Code was a legal mechanism through which the state institutionalised gender inequality.<sup>211</sup> In contextualising women's experience of marital rape in Ghana it was found that gender discrimination is rife which leaves women vulnerable to gender-based violence in the form of marital rape. According to the international human rights law it was found that Ghana is required to take all necessary steps to protect their female citizens and that failure to do so will reflect discrimination on the basis of gender. Regional human rights instruments such as the APRWA go further to explicitly prohibit forced sex within marriage and to oblige states to modify social and cultural patterns of conduct which promote the stereotyped roles of men and women.<sup>212</sup> The Ghanaian Constitution itself prohibits discrimination on the grounds of gender<sup>213</sup> and protects the dignity of women.<sup>214</sup> The State's approach to marital rape was then explored and it was found that steps had been taken to address VAW through the removal of the marital rape exemption from the Criminal Code and the introduction of a Domestic Violence Act. Finally, the challenges posed to the implementation of Ghana's new laws were detailed. This led to the conclusion that, within the context of numerous other challenges, the laws currently in place to confront marital rape do not effectively tackle the issue of gender discrimination and are therefore inadequate in terms of confronting marital rape.

### 5.2 Conclusion

This study reaffirmed that VAW in the form of marital rape is merely a symptom of a wider social issue and "to fragment the issue is to preserve and protect spaces of abuse and violation."<sup>215</sup> Laws relating to marital rape have reinforced a variety of social, economic and political myths regarding the role of women in society.<sup>216</sup> They have contributed to the process of normalizing this form of violence by failing to hold perpetrators accountable and in so doing have contributed to marital rape having remained invisible.<sup>217</sup> This has led to a

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<sup>211</sup> (n 36 above) 197.

<sup>212</sup> Article 2(2) APRWA

<sup>213</sup> Section 17(2) 1992 Constitution

<sup>214</sup> Section 15 1992 Constitution

<sup>215</sup> (n 23 above) 4.

<sup>216</sup> (n 23 above) 3-4.

<sup>217</sup> (n 23 above) 4.

situation whereby many women are unable to name forced sex within marriage 'rape' and exercise their newly acquired right to legal recourse.<sup>218</sup> Thus, "the importance of deconstructing the public and private spheres of operation and of naming and documenting all forms of violence against women as a social issue cannot be overemphasized."<sup>219</sup> The legal acknowledgment of marital rape brings into focus that which always existed but which was actively obscured and rendered invisible through, among other things, the law itself.<sup>220</sup> The inevitable resistance to legal reform regarding marital rape can be attributed to the fact that like revised intestate succession laws<sup>221</sup> they pose a significant threat to the status quo which sees men dominating positions of power and control within the family and over communities. Despite this, legal reform can inform more gender sensitive policies and programmes and thus represents a "necessary if insufficient step"<sup>222</sup> towards the eradication of marital rape in Ghana. Ultimately, by ending the "marriage between an intimate relationship and the improper inference of ongoing consent to sexual intercourse"<sup>223</sup> the law takes an important step towards fulfilling its role in confronting marital rape as such a divorce is fundamentally necessary in laying the legal foundation for equality.

### **5.3 Recommendations**

In order to maximize the role the law can play in addressing gender discrimination through its acknowledgment of marital rape, the following recommendations are proposed in order to address the challenges posed to implementation raised in chapter 4 and to harness the influence of the law even where it is not enforced.

#### **5.3.1 Overcoming the challenges to implementation**

##### **5.3.1.1 Overcoming cultural challenges**

It must be made clear to traditional authorities that in terms of the Ghanaian Constitution, the APRWA and CEDAW custom or tradition may not be used as justification for the continuation of practices which violate the fundamental human rights and freedoms of women. It should be highlighted though that the elimination of abuses should not be viewed as a threat to the preservation of culture. The National House of Chiefs must be prompted to comply with their obligations in terms of Article 272(c) of the Constitution to identify for elimination or modification, all cultural practices which serve to entrench gender discrimination. They should also be urged to take this opportunity to confront the issue of marital rape among

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<sup>218</sup> (n 23 above) 4.

<sup>219</sup> (n 23 above) 4.

<sup>220</sup> As cited in (n 23 above) 9. As B DuBois put it "that which has no name, that for which we have no words or concepts is rendered mute and invisible.

<sup>221</sup> (n 42 above) 294.

<sup>222</sup> (n 94 above).

<sup>223</sup> M Anderson 'Marital immunity, intimate relationships, and improper inferences: a new law on sexual offences by intimates' (2003) 54 *Hastings Law Journal* 40  
<http://law.bepress.com/cgi/viewcontent.cgi?article=1009&context=villanovawps>.

themselves but from the perspective of it being yet another symptom of gender discrimination. Parliament should pass the Property of Spouses Bill without further delay. By addressing gender discrimination in this way the law will improve women's ability to exercise their rights in the event that they are raped by their husbands. `

#### **5.3.1.2 Improving the law on marital rape**

The pursuit of gender equality requires a decisive break from the ideology propagated by the marital rape exemption. In order to ensure that such a break is made "the wholesale downgrading of spousal offences" such as marital rape through the application of lesser penalties must not be tolerated.<sup>224</sup> Unless there is explicit mention of rape within marriage in the Criminal Code or penalties are provided for officers who fail to charge husbands under the Criminal Code, there is real risk that rape within marriage will be recorded as sexual assault under the DV Act. Even where prosecutors are successful in obtaining convictions, the penalties imposed will be a far cry from the ones applicable under the Criminal Code for rape and will thus reinforce the same gender discrimination propagated by the marital rape exemption. It is also proposed that the definition of rape be expanded to include anal as well as vaginal penetration as well as penetration with any body part or object and that common law rules that empower courts to devalue the testimony of certain victims are addressed.<sup>225</sup>

#### **5.3.1.3 Improving the criminal justice system**

Efforts should be made to formalise the way VAW cases are dealt with in order to help overcome the negative culture that frames personal biases.<sup>226</sup> Although the law provides a formal framework, each procedure at every level from reporting the rape to the court's ruling would need to be formalised in order to prevent the dominant ideological forces from derailing the process. As such, laws, protocols, policies and procedures should be used as management tools to cement gender equality. The establishment of a legal framework which holds people accountable offers a means of divorcing cultural beliefs from work practices.<sup>227</sup>

The Government should ensure that adequate funds are made available to DoVVSU in order for it to effectively investigate and prosecute all cases of VAW and that police officers and judges receive training on the reasons for and implications of legal reform. In addition, it should be ensured that there is effective collaboration between police officers, medical practitioners and prosecutors in order to minimise delays in concluding cases.

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<sup>224</sup> (n 223 above) 13. This is because at the core of such action is the same belief as the one upon which the marital rape exemption was based, that "marriage extends to men some kind of ongoing consent for sexual acts" and this sees marriage as creating a "rebuttable presumption of consent" or as a mitigating factor. This obscures the central role which consent should play in the determination of any rape case.

<sup>225</sup> (n 94 above).

<sup>226</sup> (n 23 above) 176.

<sup>227</sup> (n 23 above) 176.

#### **5.3.1.4 Improving support and protection available to victims**

In terms of its international and regional obligations to prevent human rights abuses, government is required to embark on extensive public awareness campaigns to inform people of the legal reform, the reasons for it and the procedures to follow when filing a complaint with the police.<sup>228</sup> The public should be made aware that the main objective of the law is not the destruction of families or the imprisonment of husbands but rather to achieve gender equality. This is especially urgent given the misleading and unconstitutional message sent to the public by government during the awareness campaigns about the DV Bill.

During such awareness campaigns, public declarations should be made that according to the law, non-consensual sexual relations within marriage amounts to rape, that marital rape is a serious form of violence against women which is the result of an imbalance of power between men and women and which is having a negative impact on society as a whole. Men should thus be encouraged to support the legislation in the interests of building a stronger nation. The fundamental human rights and freedoms violated by marital rape should be detailed and it should be made clear that this was the basis for legal reforms. Government should also publically acknowledge that “violence against women runs counter to the establishment of equality and peace and constitutes a major obstacle to citizens’ security and democracy in Ghana.”<sup>229</sup> Pursuant to this they should make the necessary funds available to enhance protection facilities available to women in need and ensure that their medical costs are covered by the Victims of Domestic Violence Support Fund envisaged in terms of the DV Act.<sup>230</sup>

The Ministry of Manpower, Youth and Employment should also ensure that a sufficient number of social workers are deployed to deal with domestic violence and that they are aware of the position of the law on marital rape.

#### **5.3.2 Acknowledging the role the law can play even where it is not enforced**

In light of the challenges discussed in chapter 4 it may be tempting yet short-sighted to dismiss laws acknowledging marital rape as having no potential to impact on society at all.<sup>231</sup> Some have argued that the law’s ability to interact with other social institutions such as religion and medicine can be profound and contribute towards attaining the ultimate objective of the law - tackling gender discrimination as a means of confronting marital rape.

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<sup>228</sup> GO Okereke ‘Violence against women in Africa’ (2006) 2 *African Journal of Criminology and Justice studies* 21. Available at <http://www.umes.edu/cms300uploadedFiles/AJCJS/Vol2Issue1Okereke.pdf>.

<sup>229</sup> Recommendations of the Council of Europe Committee of Ministers to member States on the protection of women against violence (2002)

<sup>230</sup> Section 29

<sup>231</sup> (n 33 above) 644.



It is predictable that women will not readily seek to enforce their rights through the law given that rape within marriage has been normalised through a process of social conditioning which was reinforced by the law. Some have argued however that undue influence is placed on enforcement which creates the impression that laws which are not used, have no effect.<sup>232</sup> It is also charged that the three major realms of religion, law and medicine “have historically worked to reinforce one another, producing structural sexual inequality” and for this reason, it is worth considering “the process by which law aids or abets the other two.”<sup>233</sup>

### **5.3.2.1 The influence of the law on religion**

As mentioned in chapter two, the church has become a dominant cultural institution in Ghana.<sup>234</sup> Religious teachings which portray women as inferior to men and which hold that a wife’s duty is to submit to her husband were legitimated by the marital rape exemption because the state’s acceptance of such behaviour was perceived as representing the sentiments of the general community. This explains why the abandonment of such laws is commonly portrayed as constituting “an erosion of their moral universe” and “a threat to the community.”<sup>235</sup> While religious teachings have great influence, it should be borne in mind that they are subject to interpretations that “reflect the socio-cultural norms of the time” and that “law plays a constitutive role in shaping those underlying socio-cultural standards.” In this way the law has the potential to not only prompt discussions on marital rape but also to influence the messages preached by religious leaders to the extent that they are made aware of the illegality of marital rape and the legal justifications for such legal reform.

### **5.3.2.2 The influence of the law on medicine**

Law also has the capacity to influence the medical field and in doing so can indirectly achieve its objective of addressing gender discrimination. Medical practitioners, who enjoy a great deal of status in Ghana, are likely to be the first port of call for women who have been raped by their husbands, whether they acknowledge it as rape or not. Medical staff are thus in a unique position to create awareness regarding the legal protection provided while addressing the physical and psychological symptoms of gender based discrimination. Medical doctors who are sensitized regarding the objectives of the law can gain a sense of empowerment from laws acknowledging VAW including marital rape.<sup>236</sup> This can prompt

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<sup>232</sup> (n 33 above) 644.

<sup>233</sup> (n 33 above) 722.

<sup>234</sup> (n 44 above) 10.

<sup>235</sup> (n 33 above) 723. Goodman raises this argument but in relation to the Church’s response to the abandonment of sodomy laws.

<sup>236</sup> (n 72 above). Dr Clayman said that asking a patient pointed questions to rule out the possibility of rape having occurred would’ve felt inappropriate before legal reforms had been implemented mainly because there was nothing that could’ve been done. Now that the law is in place “it allows me to be bold and ask more questions because if she is being abused I can refer her to the Ark, WISE and DOVVSU, I can do something and at the same time as her gynaecologist, help to eliminate what is causing her health problems.” Dr Clayman is a member of the Gender Violence Survivors Support Network (GVSSN) which is a network of medical, legal and psychological professionals who provide support to victims of gender based violence.

them to delve deeper into a patient's medical history and family life in order to eliminate violence as a cause of a patient's health problems. Others may begin to feel compelled to offer women new windows of opportunity to exercise the fundamental human rights they have always been entitled to but denied due to deep seated gender prejudices.<sup>237</sup> There are promising indications that the law is already prompting medical professionals to join forces to combat gender based violence by putting pressure on state institutions to implement their international obligations.<sup>238</sup>

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<sup>237</sup> Informal discussion with a doctor on duty at the Legon University Hospital emergency wing 26 September 2009. He informed me that since the DV Act had been introduced doctors were less likely to ask women seeking sterilisation procedures to get their husband's permission first. This he attributed to a new appreciation for the dangers some women faced and for their right to make decisions regarding their own bodies. He was quick to add however that the vast majority of medical practitioners though were still highly conservative and that many are not aware of legal developments and still feel that violence in the home is a private family matter.

<sup>238</sup> The Society of Ghanaian Women Medical and Dental Practitioners (SGWMDP) has urged government to ensure the full implementation of all the provisions and recommendations of CEDAW and "pledged its full support to the realisation of the aims and principles of CEDAW" as cited in (n 94 above).

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