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FROM THE EDITORIAL SUITE

The primary objective of the **KAMPALA INTERNATIONAL UNIVERSITY LAW JOURNAL (KIULJ*)*** is to provide a platform for a robust intellectual discourse, through the publication of incisive and insightful articles and other contributions from a variety of scholars, jurists and practitioners across jurisdictions. The desire to accomplish this objective guides the choice of the materials being presented to the reading public in every edition. The peer review and editing processes of the papers that are finally selected for publication are equally influenced largely by the pursuit of this goal.

To this end, articles from seasoned scholars and practitioners in each edition address a wide spectrum of issues from different branches of the law, such as, International Criminal Law, Law of International Institutions, Environmental Law, Human Rights Law, Medical Law, Oil and Gas Law, Constitutional Law, Corporate Governance to mention but a few. You will, no doubt, find these scholarly works a worthy contribution to knowledge in their respective fields.

On behalf of the Editorial Board, I wish to appreciate all our reviewers, internal and external, for their constructive criticisms, comments and suggestions. These go a long way to enrich the quality of the papers published in this Journal. The various contributors who painstakingly addressed the observations and suggestions of the reviewers, thus facilitating the achievement of the purpose of the review process also deserve our commendation.

We also, with a grateful heart, acknowledge the interest our teeming readers have continued to show in the succeeding editions of the journal just as we assure them of our readiness to give them the best always. We equally thank our editorial consultants for their useful advice and comments that have contributed to the continuous improvement of the quality of the journal. Legal practitioners and scholars are hereby informed that contributions to our journal are received on a rolling basis. They should feel free to send in their manuscripts and ensure they comply with the submission guidelines as spelt out in the Call for Papers obtainable from the journal's website (www.kiulj.kiu.ac.ug). All contributions should be addressed to the Editor-in-Chief and forwarded to the email addresses supplied in this edition.

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RAPE IN MATRIMONY: ADDRESSING THE CONFLICT BETWEEN STATUTORY AND CUSTOMARY LAWS WITH FOCUS ON ANGLOPHONE CAMEROON

FON FIELDING FORSUH, Ph.D.[*] & MBETIJI MBETIJI MICHEL Ph.D.[**]

Abstract

Talking of rape in matrimony had been an absurd phenomenon because marriage was perceived as bringing in irrevocable consent to sex between couples. With the passage of time and regulation on the aspect, rape in matrimony was contemplated on the basis of unconsented sexual intercourse between husband and wife. There is no law that out rightly criminalises marital rape in Cameroon. Rape can only be inferred from the reading of section 296 of the Penal Code and related international instruments ratified by Cameroon. With this it can conveniently be asserted that matrimonial rape is criminalised by statutory law in Cameroon, but it is not the case under customary law which does not recognise rape in marriage, a view which is contrary to statutory law but dominant as it is still practiced in most communities due to certain factors and prevailing social construct. This paper examines the reasons underlying the continuous dominance of customary law practices encouraging matrimonial rape in spite of statutory prohibition. With the aid of primary source of data from statutes, case law and focused group discussions, not leaving out secondary sources of information from relevant literature, this paper concludes that there is a dominance of customary law practices encouraging marital rape especially within customary communities in spite of statutory prohibition. It is therefore recommended inter alia that a specific law should be enacted to expressly criminalise marital rape backed by effective implementation. Adequate sensitisation should be carried out especially within local communities to educate women on their rights in marriage, the availability of norms and legal mechanisms to enforce them in situations of breach.

Keywords: Rape, Matrimony, Statutory, Customary Laws.

Introduction

Rape in matrimony otherwise known as marital rape is a form of domestic violence which involves an act of sexual intercourse with one's spouse without the spouse's consent. The issues of sexual and domestic violence within marriage and more specifically, violence against women have come to growing international attention from the second half of the 20thcentury. Yet still, in many countries like Cameroon,

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marital rape either remains outside the remits of criminal law, or is illegal but widely tolerated. The Penal Code[1] of Cameroon criminalises rape in section 296 but does not contemplate a situation where it can be committed within marriage. Talking of rape between husband and wife was, and is still a very controversial issue because by marriage, both parties are considered as having given their irrevocable consent to satisfying each other's sexual needs. Sexual intercourse within marriage was thus regarded as a right of spouses, but engaging in the act without the spouse's consent is now widely recognised as rape by law and society as a wrong and a crime. It is recognised as rape by many countries around the world[2]and Cameroon through many local laws accompanied by international conventions have recognised certain rights protecting women against domestic violence which is mostly perpetrated within marriage amongst which is rape. This is because many forms of domestic violence especially marital rape are mostly experienced by women.

Added to statutory laws governing the relationship between husband and wife are customary laws. Customary law consist of customs, local usages and beliefs of the community. Customs are said to vary considerably according to and reflect the social attitude of the time.[3]Most customary law rules are discriminatory against women and do not in any way accept the view that there can be rape between husband and wife. This discrimination against women in customary law is patriarchal in nature and perceived as a way of looking at the world from the vantage position of men in African and, mostly, non-western societies. Worthy of note is the fact that the application of discriminatory customary law practices in Cameroon are forbidden by statute and section 27(1) of the 1955 Southern Cameroons High Court Law is very clear on this. Moreover, Law No. 79(4) of 29 June, 1979 provides that customary laws that do not contravene statutory law may remain in force in Anglophone Cameroon. Several judicial decisions have also been taken to give force to this point of the law in guise to protect those negatively affected by such rule. In spite of all these, discriminatory customary law rules continue to prevail most especially in rural areas. This may be because of weak enforcement mechanisms, social construct, the mind set of women who are victims, poverty, etc. which have made such customary law rules to remain dominant. This paper therefore considers the availability of rape under Cameroonian law by examining the various positions under both statutory and customary law, looking at the existing conflict between both laws, bringing out the dominance of customary law. The paper further examines the reasons behind such dominance which is a

[1]Law N° 65-LF-24 of 12 November 1965 and Law No 67-LF-1 of 12 June 1967 amended by Law N° 2016/007 of 12 July 2016 relating to the Penal Code of Cameroon.

[2]Namibia(The Combating of Rape Act No. 8 of 2000), Bhutan(Penal Code of Bhutan of 2004), Canada (Sexual Assault Bill C- 1983), Australia(Criminal Law Amendment Act of 2004), Ireland(Criminal Law (Rape)(Amendment)Act of 1990), Greece(Law 3500/2006 on the Combating of Domestic Violence) Gabon (Law No. 006/2021of 6 september 2021 on the elimination of violence against women) just to cite a few.

[3] E N Ngwafor, *Family Law in Anglophone Cameroon*, Regina, Regina University Press,1993, pp. 7-12.

problem requiring appropriate solutions since they are discriminatory against women.

The Possible Rationale for the Non-Criminalisation of Marital Rape in Cameroon

Rape is generally recognised as a criminal offence in Cameroon. In criminalising rape, the penal code in section 296 provides that;

> *'Whoever by force or moral ascendency compels any person, whether above or below the age of puberty, to have sexual intercourse with him shall be punished with imprisonment for from five to ten years'.*

Rape from the reading of this provision is considered a male offence and that the victims can only be human beings of feminine gender. This is based on the wide and wrong assumption that men always want sex or that boys and men are physically strong than women whereas we have some women and girls that are strong as men and even stronger. Rape is also viewed thus, because of the physiological impossibility of female gender.[4]For the offence of rape to be consumed, there must be sexual intercourse which involves penetration of the penis into the vagina. Penetration here does not need to be complete. A degree of penetration which is slight and light without causing any injury or laceration of the hymen would be sufficient in law for the offence of rape to be complete.[5]

This provision does not in any way contemplate rape between husband and wife.[6] By considering rape as a male offence, it can therefore be concluded that women would be the only victims if marital rape was to be established by reading the spirits of the legislators from other laws governing the relationship between husband and wife. This is because there are panoply of both local and international laws that regulate husband-wife relationship. The non-criminalisation of marital rape or the reluctance to out rightly criminalise marital rape in Cameroon could be attributed to the traditional view of sexual intercourse in marriage and the interpretation of religious doctrines concerning sex in marriage.

Traditional view of sexual intercourse in marriage

Marriage is traditionally recognised as an institution which establishes a union where upon, a woman gives irrevocable consent for her husband to have sex with her at any time he demands it. Sir Matthew Hale in the Seventeenth century justified this position when he stated that; 'The husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their natural matrimonial consent, and contract, the wife hath given up herself in this kind into her husband which she

[4] Women inability to penetrate men during sexual intercourse.
[5] *R v. Russen* (1891) 2 QB and also *Jegede v. State* (2001) FWLR (Pt. 66) 72 at 73.
[6] Just like Cameroon, many countries do not recognise marital rape in their rape laws. Some examples include Ethiopia (The Criminal Code of the Federal Democratic Republic of Ethiopia, Proclamation No. 414/2004, article 620), South Sudan(Penal Code Act of 2008, article 247). Etc.

cannot retract'[7]. This therefore mean that marriage creates conjugal rights which spouses cannot revoke, consequently, there cannot be rape between husband and wife.[8]

Religious view on sexual intercourse in marriage

The adherence to several religious ideas in Cameroon is by virtue of the fact that its Constitution guarantees to its citizens, the freedom of religion and worship.[9]The Constitution proclaims the Country a secular state and that the neutrality and independence of the state in respect of all religion shall be guaranteed.[10]Religious practices in Cameroon are dominated by Christian and Islamic ideas which hold the view that rape cannot occur between husband and wife or wives, ideas which might have accounted for the reluctance or non-criminalisation of marital rape. Marriage by Christian doctrine makes husband and wife become one.[11]By marriage, a wife is not the master of her own body, but the husband is; in the same way a husband is not the master of his own body, but his wife is.[12] This implies that both parties have an obligation to satisfy each other sexually as their bodies are owned by each other. Thus, no spouse can be charge for raping the other if sex is taken without the consent of the other as marriage depicts an irrevocable consent. Spouses can deprive themselves of sex by mutual consent in certain circumstances including periods of fasting and prayers[13], not leaving out periods of health challenges.

Under Islam like in Christianity, talking about marital rape is absurd because only sexual intercourse conducted by a husband with his wife is lawful, hence, any sexual activity carried out outside marriage is unlawful.[14] In issues of sexual intercourse, a wife is called to serve her husband whenever she is demanded because it is considered a very fundamental obligation on her part. Moreover, marriage has been commonly understood as an *aqdtamlik* (contract of belonging), meaning that with marriage, the husband has right upon his wife including to have the body of his wife and use it for sexual services.[15] The wife is allowed to refuse sexual intercourse in case of sickness and the exceptional periods like fasting, menstruation, etc. The obligation of sexual satisfaction does not only rest on the wife as the husband is also called upon to satisfy his wife. In Islam, sexual satisfaction between husband and wife is more of a sacrifice to serve each other's needs. It is regarded as worship to Allah and it will bear honour. It thus, does not require force or harassment since it should be based on the principle of

[7] J C Smith & BHogan, *Criminal Law*, 5th Edition: ELBS, London, Butterworth, 1983, p. 405.
[8] *Regina v. Clarence* (1888), 22 QBD 23.
[9] Preamble of the Constitution of Cameroon enacted by Law No. 2008/001 of 14 April 2008 to amend and supplement some provisions of Law No 96/06 of 18 January 1996 to amend the Constitution of 2 June 1972.
[10] Ibid.
[11] The Good News Bible, The United Bible Society, Second Edition, 1994. Mathew 19:4-6 and Mark 10:6-8.
[12] Ibid, I Corinthians 7:4-6.
[13] Ibid.
[14] But there are exceptions to this rule when sexual intercourse between husband and wife is illegal. They include sexual intercourse conducted during fasting, menstruation, parturition and anal sex.
[15] Holy Quran 2:223

voluntariness which is presumed to be present with marriage. Therefore talking of rape in this case will be impossible.

Sexual Intercourse: A Right or an Obligation Arising From Marriage

Marriage creates certain rights and obligation between spouses amongst which is consummation which cannot be effected without sexual intercourse and is very important for the success of any marriage. Sexual intercourse in marriage is viewed differently depending on whether the union is governed by statutory or customary laws.

The position under statutory law

Marriage creates conjugal rights between spouses which include the mutual right of companionship, support, and sexual relationship.[16] The right to sexual intercourse between spouses here is therefore viewed as a privilege which is supposed to be enjoyed by each spouse with mutual consent, absent of which rape can be established. The right to enjoy sexual intercourse continues after marriage has been consummated. As long as the demands are not too regular, the other spouse is not supposed to refuse. But where the practice is too frequent as to lead to health problems, any refusal will not be taken to be unreasonable.[17]The Cameroon penal code does not make provision for any situation of rape between spouses as mentioned earlier. But an interpretation of the word '*whoever*' in the provision of section 296 can be construed to cover husbands, as rape under Cameroonian law is viewed as a male offence. Thus, in the event of unconsented sexual intercourse with the wife, a rape charge can be preferred against the husband.

Marital rape has not been addressed by locally enacted laws in Cameroon. But since sexual intercourse in marriage is recognised as a right which is supposed to be enjoyed on the basis of mutual consent, it has been recognised as such from the interpretation of many international human rights treaties and convention ratified by Cameroon and applicable by virtue of article 45 of the Constitution. International human rights law protects the rights of women against any form of domestic violence including marital rape. It therefore presupposes that the right to sexual intercourse in marriage is supposed to be based on mutual consent, out of which rape can be established. Very instrumental among international human treaties in the protection of women in this regard are the African Charter on Human and People's Rights[18],Convention on the Elimination of all Forms of Discrimination Against Women,[19]and the Protocol to the African Charter on Human and Peoples'

[16] A B Garner, *Black's Law Dictionary*, Ninth Edition, West, Thomson Reuters, 2009, p. 343.
[17]E N Ngwafor, *Family Law in Anglophone Cameroon*, Regina, Regina University Press, 1993, p, 86.
[18] Adopted on the 27th of June, 1981 and entered into Force October 21, 1986. Ratified by Cameroon the 20th of June 1989. See article 18(3) which calls for the elimination of all discrimination against women and for the protection of the rights of women and children.
[19] Adopted on the 18th of December, 1979 and entered into force on the 3rd of September 1981. Ratified by Cameroon on the 23rd of August 1994. Article 2 condemns discrimination against women in all forms.

Rights on the Rights of Women in Africa.[20]In the same light, the right to be free from torture or cruel, inhuman or degrading treatment includes the right to be free from domestic violence and rape. In this regard, any act of unconsented sexual intercourse by a spouse will constitute a violation of the Convention Against Torture.[21]

The recognition of the above mention right to sexual intercourse in marriage on the basis of mutual consent was given attention at the level of the international community and same position was adopted by the African Union with the adoption of the Maputo Protocol. In December 1993, the United Nations High Commissioner for Human Rights published a Declaration on the Elimination of Violence Against Women (DEVAW) which established marital rape as a human rights violation. Furthermore, the Fourth World Conference on Women in Beijing in 1995 and the resulting Beijing Declaration and Platform for Action reiterated that violence against women under international law includes 'physical, sexual and psychological violence occurring in the family, including battering, marital rape, and violence related to exploitation' and gender violence condoned by the state.[22] It is important to note that such declarations do not impose binding obligations on state, but the norms set forth in them have high persuasive value because they show consensus that gender violence is a fundamental human rights violation that states must take specific measures to combat. In 2003, African Union followed the same strand of reasoning by adopting the Protocol on the Rights of Women in Africa to the African Charter on Human Rights that defines violence against women as including 'all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts in private or public life.

The Position under Customary Law

Under customary law unlike statutory law, sexual intercourse in marriage is more of a right enjoyed by men with a corresponding obligation on women to satisfy their husbands when they desire sex. This is because customary law is imbued with a discriminatory structure: it is patriarchal in nature and perceived as a way of looking at the world from the vantage position of men in traditional African and, mostly, non-Western societies.[23] The status accorded to women under customary law has

[20] Adopted on the 11th of July 2003. Ratified by Cameroon on the 28th of May 2009. Article 4(2)(b)outlines several obligations with respect to violence against women. First, State parties must 'enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public'.

[21] Committee Against Torture, General Comment No. 2 to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) on the Implementation of Article 2 by States Parties, U.N. Doc. CAT/C/GC/2/CRP.1/Rev.4, paras. 18, 22 (Nov. 23, 2007). Marital rape satisfies all the elements of the act of torture as defined in article 1 of CAT. See also Article 5 of the Universal Declaration of Human Rights 1948 and article 7 of the International Covenant on Civil and Political Rights of 1966.

[22] World Conference on Women, *Rep. of the Fourth World Conference onWomen*, para. 112, 113, 117, 118, U.N. Doc. A/CONF.177/20/Rev.1 (Sept. 15, 1996).

[23] M EKiye, 'Conflict Between Customary Law and Human Rights in Cameroon: the Role of the Courts in Fostering an Equitably Gendered Society', (2015), *African Study Monographs*, 36 (2), p. 76.

created a situation where their consent to sex in marriage is irrelevant. A woman is considered as a husband's property upon the payment of her dowry also known as bride price. Bride price has been accepted as the price the husband pays for 'purchasing' his wife[24]. As such, the husband can do what he likes including having his sexual satisfaction irrespective of whether she consents to it or not.

Dowry in customary marriage plays important roles. It is the first indication of the seriousness of the suitor and the symbolic act that validates a customary marriage and its dissolution. It is only on the full payment of the dowry by the bridegroom-to-be could there be said to be a valid marriage. Such a marriage can only be terminated upon the refund of the dowry by the wife to the husband. Because of the seriousness attached to dowry, the Muea customary court held in *Musanga Mendi v. Finger Menching*[25]that a father may sue his son-in-law to be to repay the part dowry that was paid on his daughter's behalf, so as to clear any obstacle on her path, should she decide to marry someone else .Section 71 of the Civil Status Registration Ordinance[26]is very clear on this point as to the refund of anything received as dowry in the event of break off of engagement. The obligation on the refund of dowry persists during and after the life time of both spouses. Under customary law, once bride price has been paid on a woman, she and all she begets becomes her husband's property.[27] This is regardless of whether the marriage was formalised in court. Consequently, if the marriage is dissolved informally through abandonment or formally through a legal divorce, the woman remains the man's property if she does not refund the bride price. If she were to remarry, the husband to whom she owes a refund of bride price has possessory right of the woman both alive or death (her corpse) over a current husband. This obligation to refund by the wife extends till after the death of the husband because once bride price is paid on a woman, she becomes not only the property of her husband but the family property and so even if her husband dies, and she is bound to marry one of her deceased husband's brothers.[28] She can only remarry a different person upon her refund of bride price. Even though section 61(2) of the Ordinance[29] prohibits the payment of dowry as a condition sine qua non for a valid marriage, formal law courts revert to customs on the issue of dowry. A non-payment of dowry led the Buea Court of Appeal in the

[24] E N Ngwafor, *Family Law in Anglophone Cameroon*, P. 197. See the articulation of Inglish J in *Rose NdolloAchu v. Richard A. Achu*(Appeal No BCA/62/86 Unreported)

[25]Muea Customary Court: Suit No. 19/92–93 (Unreported). See also the explanation given by Lord Justice Ebong in *Kwela TheresiaAmih v.Amih Sam* (Suit No: CASWP/CC/86/95 Unreported).

[26] Law N°. 2011/011 of 6th May, 2011 to amend and complete certain provisions of Ordinance No. 81/02 of 29th June, 1981 on the Organisation of Civil Status Registration and Various Provisions relating to the Status of Physical Persons.

[27] S TabeTabe, 'Some aspects of human rights violation under Cameroonian Customary Law', (2000), *Annales de la Faculte des Sciences JuridiquesetPolitique, Universite de Dschang*, Edition Specaile: Droit de L'Homme, Tome 4, Press Universitaired'Afrique at P. 41.

[28] This practice is known as Levirate marriage. See S Tabe Tabe, 'Some aspects of human rights violation under Cameroonian Customary Law'. Ibid, p. 38.

[29] Law N°. 2011/011 of 6th May, 2011 to amend and complete certain provisions of Ordinance No. 81/02 of 29th June, 1981 on the Organisation of Civil Status Registration and Various Provisions relating to the Status of Physical Persons.

case of *Maya Ikome v. Manga Ekemason*[30] to award property collectively acquired over thirty years of marriage by a widower and his deceased wife to the wife's family on the premise that the non-payment of dowry invalidated the marriage.

Customary Law Inconsistency with Statutory Law

The foregoing analysis demonstrates that sex without consent in marriage will amount to rape under statutory law and not under customary law. This position under customary which is as a result of the status of property attached to women on the payment of dowry is contrary to statutory law. The acceptability and applicability of customary law in Anglophone Cameroon is subject to scrutiny by statutory law. The legal authority for the application of customary law in Anglophone Cameroon is derived from section 27(1) of the Southern Cameroons High Court Law 1955 which provides that;

> *'The high court shall observe and enforce the observance of every native law and custom which is not repugnant to natural justice, equity and good conscience nor incompatible with any law for the time being in force, and nothing in this law shall deprive any person of the benefit of any such native law or custom'.*

This provision establishes the criteria for the enforceability of customary law practices to the effect that it must neither be repugnant to natural justice, equity and good conscience nor incompatible with any written law. Any customary law practice considering a woman as property after the payment of dowry and can be subjected to meet the sexual desire of her husband without her consent is repugnant to natural justice, equity and good conscience. It is also incompatible with written laws because it violates human rights as consecrated in the Constitution and other human rights treaties. One of the consequences attached to the payment of dowry under customary law is that on the death of the husband, a widow may be inherited should she fail to refund the dowry paid on her behalf during the solemnisation of her marriage. Such inheritance will equally subject her to unconsented sexual intercourse as she is property which can be managed as the owner deems fit. The Kumba High Court's decision in *David Tchakokam v. Koeu Magdalene*[31] challenged this customary law position. In this case the plaintiff David Tchakokam sought among other things an order of the court to force his levirate to return to him and a declaration that she had no claims over her late husband's property which he had inherited along with her. This inheritance will also imply the right to have unconsented sexual intercourse with her not amounting to rape given that she continuous to be a property.

Her Lordship, Justice Mrs. Vera Ngassa, rejected the request and ruled in favour of the widow, giving her title over all uncontested properties and pronounced their

[30] Suit N°. CASWP /CC/76/85(Unreported).
[31] Suit No. HCK/AE/K.38/97/32/92: reported and cited in Gender Law Report, (GLR) 1999, 111–126.

levirate invalid. Widow inheritance is not only repugnant to natural justice, equity and good conscience, it is also incompatible with written laws. It is contrary to the provision of section 77 of the Civil Status Registration Ordinance and amounts to the crime of forced marriage under section 356 of the Penal Code.[32]Treating a woman as a property under customary law does not only end at the level of making her an object of inheritance, but she does not have any right to inherit property. This is because she is a property and property cannot inherit property. This customary law position has been a point of litigation and has been challenged by several court decisions to the effect of granting a woman the right to inherit and owned property on the basis of gender equality and human rights.[33]

Customary law views as regards marital rape contravenes human right law which regards sex in marriage as a right which is supposed to be enjoyed on the basis of mutual consent. Human rights treaties constitute part of written laws in Cameroon by virtue of article 45 of the Constitution. This article further establishes a hierarchy of norms ranking human rights treaties over municipal and customary laws. By the provision of article 45, once ratified, a treaty provision becomes binding, ranks higher than, and prevails, over a municipal law, not least a customary law in conflict with it. By virtue of the spirit of this article, customary law is inferior and subjected to human rights scrutiny. This is evident from the provision of section 27(1) of the Southern Cameroons High Court Law and from article 1(2) of the Constitution which is to the effect that the state shall recognise and protect traditional values that conform to democratic principles, human rights and law. Traditional values here refers to the customary practices which, to be enforced, must conform to democratic principles, human rights and law. It therefore subjects traditional values to human rights scrutiny.

The Continuous Dominance of Customary Law Views

It has been underscored from the preceding analysis that customary law is imbued with rules that are discriminatory against women, considering them as properties upon the payment of dowry, which can be subjected to unconsented sexual intercourse by their husbands not amounting to rape. Such rules which have been outlawed by certain legislations and court decisions are still dominant and being observed in many customary communities. The continuous dominance of such discriminatory customary law practices can be attributed to several reasons.

The Binding Nature Of Customary Law Views Within Customary Communities

[32] Law No 65-LF-24 of 12 November 1965 and Law No 67-LF-1 of 12 June 1967 amended by Law No 2016/007 of 12 July 2016 relating to the Penal Code of Cameroon.

[33] The customary law position as to the fact a woman cannot inherit property was addressed and challenged in the following cases; *Nyanja KeyiTheresia and 4 Others v. Nkwingah FrancisNjanga and Keyim-administrators of the estate of Keyi Peter* (Suit No. HCF/AE57/97–98, Unreported) and *Chibikom Peter Fru and 4 Others v.Zamcho Florence Lum*(Supreme Court judgment No. 14L of February 14, 1993. In the South West Court of Appeal, it was registered as Suit No. CASWP/17/931: reported in Cameroon Common Law Report (CCLR), 1997, 213–223).

The general view is that customs represent a cultural package inherited from the ancestors from which no deviation is permitted. As such, customs are expected to be observed in every situation, regardless of the circumstances. This is because of certain beliefs that failure to observe will attract the anger of the ancestors who are believed to be the authors of wellbeing and existence of customary communities. The occurrence of certain events, good or bad are generally attributed to the ancestors or forefathers. Due to the superstitious dynamics underlying traditional life in most Anglophone communities of Cameroon, demands for change in customary values are generally not entertained for fear of negative reprisals from the ancestors, given that such changes may necessitate a departure from the ways of the past. This view has recently been enforced by customary courts in Cameroon. In the *Chief of Besonabang v. AgborNeba and Lucas Ndip*[34], the chief brought an action against two of his subjects for the violation of customary rules in the performance of a traditional rite. Custom demands that the rite call 'etak', which is performed during death celebrations, should be performed by two elderly males selected by the chief, each designated from one of the two villages of Besonabang. The defendants admitted to have performed the rite without the consent of the chief and in violation of this custom. The Bayang Customary Court, Mamfe, entered judgment in favour of the chief and requested the parties to conduct the traditional rite in accordance with the old tradition of their forefathers.

The payment of pride price as dowry for a woman as wife by a man is an age old tradition which has been practiced for years in many customary communities. That is why for a woman to be considered married under customary law, the husband-to-be must have paid all he is required to as dowry. When this done, she eventually becomes the husbands property and he may do with her as he wishes and she has no right to refuse sexual satisfaction, implying she cannot charge her husband for rape if he has unconsented sex with her. Unlike customary law where dowry payment is a condition sine qua non for the solemnisation of marriage, it is not the case under statutory law.[35] Court decisions[36] have rejected enforcement of customary law rules as regards dowry payment which makes a woman liable to sexual slavery and other discriminatory treatments repugnant to natural justice, equity and good conscience and incompatible with written laws including violation of human rights. This has had a limited effect on the continuance of this practice as most customary communities are attached to marriage based on the payment of dowry characterised by discrimination against women.

Closeness of Customary Justice to Customary Communities

[34] Suit No. MCC/41/98, (Unreported).
[35] Section 70 of the Civil Status Registration Ordinance.
[36] *David Tchakokam v. Koeu Magdalene* (Suit No. HCK/AE/K.38/97/32/92), *Nyanja KeyiTheresia and 4 Others v. Nkwingah FrancisNjanga and Keyim-administrators of the estate of Keyi Peter* (Suit No. HCF/AE57/97–98) *and Chibikom Peter Fru and 4 Others v. Zamcho Florence Lum*(Suit No. CASWP/17/931).

The administration of customary law in Cameroon is not exclusively the reserve of ordinary courts.[37]Decree No. 77/245 of July 15, 1977[38] authorises the exercise of customary justice by unofficial courts under the command of chiefs. Article 21 of this decree empowers chiefs to settle disputes using customary laws where laws and regulations do not provide otherwise. Since chiefs are not part of the judicial system, authorising them to settle disputes using native laws and customs is an implicit endorsement of unofficial traditional courts. In exercising such roles, chiefs make allusion to binding native laws and sometimes legislate by verbal proclamations to people in the village hall or through the village council. The object of such proclamations may be to create a new custom, to amend an existing one or to repeal an old one. In this way, customary law is made to move with the times through adaptation to new exigencies.[39]Unofficial traditional courts deal with vast majority of disputes in Cameroon. They are widely used in rural and poor areas where there is often limited access to official state justice. They address issues that are of deep concern to poor people, including security and local crimes, protection of land, property and livestock and resolution of family and community disputes. Most of these courts might have the tendency of applying discriminatory customary practices due to their binding nature in disregard of their rejection by law and court decisions. In spite of this, they are often preferred for a variety of reasons, including low cost, speed, accessibility, cultural relevance and responsiveness to poor peoples' concerns.

Illiteracy and Lack of Information

Cameroon has many ethnic groups with several tribes located in remote areas that are not very accessible; talk less of having courts located in such areas. Most disputes concerning indigenes are handled by customary courts applying their binding customary laws. As mentioned earlier, most of these customary laws favour male domination to the detriment of female, especially the status accorded to women on the payment of bride price. Most community dwellers tend to rely on such laws due to their level of illiteracy and lack of information on their rights and institutions to valorise them.[40] In such communities, both men and women believe that a husband is entitled to sex any time he demands it and that if his wife refuses

[37] Courts of First Instance and High Courts.

[38] This degree regulates the activities of chiefs and chiefdoms in Cameroon. Before the degree came into effect there had been two previous administrative instruments recognising chiefs in Cameroon. These were Order No. 244 of 4 February 1933 to lay down regulations governing traditional rulers and all subsequent amendments thereto and Southern Cameroons Law No. 7 of 10 December 1960 to provide for the recognition of chiefs within Southern Cameroon and matters relating thereto.

[39] CAyangwe, *The Cameroonian Judicial System*, YaoundéCeper,(1987).

[40] Discussion with some local community based groups of women like the Wibum Farmers Women association in Mesaje in the Donga Mantung division in the North West Region of Cameroon showed that they are less informed about their rights; talk less of the existence of any law proscribing negative customary law practices. A discussion with a selected group of women in Oshie located in Njikwa sub division of the North West region, especially those involved in farming revealed that they have little or no knowledge as to existence of any law proscribing negative customary practices, talk less of refusing sex from their husbands. Many women in remote areas like Issu, Akwaya, etc believe that sex is a right which tradition offers to their husbands and refusal is not permitted on their part. This is due to illiteracy and lack of information on existing regulations.

him, he has the right to use force and there will be no rape. Most women who are victims of such acts are either illiterate or poorly educated, are forced into marriage at young ages[41] and depend on their husbands for their entire life. Such situations leave women with very little sexual autonomy.

Attitude of law enforcement organs towards domestic violence

Law enforcement organs view domestic violence, especially rape related cases between husband and wife as somehow les reprehensible than rape outside of marriage. Even when marital rape is prosecuted successfully, courts often pass shorter sentences regardless of legal stipulations to that effect. This is done based on the view that sexual violation is less serious if it occurs within marriage.[42] The police always have the tendency to treat domestic violence cases with less priority and tend to focus on what provoked the abuse rather than the violent actions of the perpetrator.[43]This makes most wife abusers to get away with their crimes because when women report to police officers, their complaints are dismissed as domestic issues that ought to be addressed at home. With such responses, many women resign to their fate, and do not further report abuses.[44] In most cases, instead of sending such cases to the right quarters for prosecution, police officers act as mediators because they may feel that domestic violence is a family matter and therefore not their business.

The Perception Held by Wives Who are Victims of Unconsented Sexual Intercourse

The continuous dominance of discriminatory customary law practices which does not encourage marital rape can be attributed to how wives who are victims of rape consider what happened to them. Some take it normal due to the prevailing social norms in localities of societies where they find themselves and are attached to, some consider keeping family integrity, and some fear stigmatisation and some want to preserve personal dignity.

Attachment to Prevailing Social Norms

[41] In some areas of Cameroon, very young girls are sent to marriage. This is mostly common with the Mbororos who are found scattered in many divisions of the North West Region of Cameroon. These Mbororos who are generally Muslims marry off their daughters even before puberty in order not to take responsibility for any sin she might commit. Therefore, once a girl has her first menses, she's given in for marriage. This is the same conception held by Muslims of the Grand North of Cameroon. SeeDRabiatuHamisu, 'Islamic Law and the education of the girl child in Cameroon: Bringing the rights to life', (2000), *Annales de la Faculte des Sciences JuridiquesetPolitiqueUniversite de Dschang*, Edition Speciale: Tome 4, Presses UniversitaireD'Afrique, p. 157. See also DRabiatu Ibrahim, *The Socio-Legal Perpective of Child Protection in Cameroon*, Yaounde, Presses UniversitaireD'Afrique, 2008, p. 46. For an example of the percentage of victims of forced marriage in Cameroon generally, see MICS3: Enquête par grappesaindicateur, Rapport de Synthèse, 29 Avril 2007.

[42] British courts often pass lower sentences to marital rape than to other cases of rape because it is believed that it causes less harm to the victim. See SMandal, *The Impossibility of Marital Rape*, Australian Feminist Studies, 2014, 29(81), 255-272.

[43] Discussion with some selected police officers charged with investigating domestic violence cases revealed that they always have look warm attitudes especially when it has to do with matrimonial violence. Their response is that "such issues are better resolved in the family than in the police".

[44] CTime, 'The Cameroonian Woman and the Law', in COkafo, *Grounded Law: Comparative Research on State and Non-State Justice in Multiple Societies*, United Kingdom, Wildfire Publishing House, 2012, 18: 458-473. See also VTime, 'Legal Pluralism and Harmonization of laws: The Dilemma', in C Okafo, 4: 116-123.

There are social norms that exist in certain environment making it that marital rape is not viewed as a crime in spite of the fact that it might be criminalised. Therefore, marital rape might be criminal but it is not socially recognised as a crime. It is considered unthinkable for a woman to refuse her husband's sexual demands such that in the case of forceful sex, the wife is accused of haven provoked such a situation by refusing to perform her duty. In most situations, women justify the actions by their husbands. In Mali like most African countries for instance, one survey found that 74% of women said that a husband is justified to beat his wife if she refuses to have sex with him.[45]A discussion with some local women in Bafut located[46] in the North West Region of Cameroon showed that most women who were subject of unconsented sexual intercourse could not even think of reporting to authorities because of the social construct which makes sex a man's prerogative in marriage. Findings from a discussion with some rural women in Esso-Atah in Lebialem division of the South West region of Cameroon revealed that satisfying the sexual needs of their husbands was a binding obligation on their part; therefore, refusal was not an option for them except the husband secedes to do so.

Preserving personal dignity and pride

Women who have been sexually assaulted in marriage may remain invisible because they fear the negative responses or judgment of others or because they are embarrassed or ashamed. This reaction may be fostered by the societal response to victims of sexual assault,[47] which, especially in cases where the victim knew the offender, continues to be one in which the victim is considered blameworthy for either precipitating the attack or not fighting back vigorously enough.[48] In Cameroon like many other countries, rape trials are held in public and some women wonder what will happen to them in court and the story the public will carry about them. This might cause victims of marital rape to remain silent and in some situations, would prefer the issue to be sorted out within the family than a court prosecution all in guise to preserve self-pride. To solve such type of difficulties, some sensitive judges sometimes use their discretion to order that the trial be conduct in camera. This is dependent on the discretion of the judge.[49]

Preserving Family Integrity

Some women who are victims of marital rape and other forms of domestic violence decide to remain silent for fear of not destroying the family reputation. They believe in loyalty to their husbands and keeping the family secrets. This is most especially with families who are highly respected within the social milieu in which they find

[45] RManju, et al, 'An Empirical Investigation of Attitudes towards Wife-Beating among Men and Women in Seven Sub-Saharan African Countries',(2004), *African Journal of Reproductive Health*, Vol. 8, No. 3, Dec, pp. 116-136,
[46] These are women who are basically house wives and involved in subsistent agriculture and other peti trades.
[47] KWeis,&S Borges, 'Victimology and Rape: The case of the legitimate Victim',(1973), *Issues in Criminology*, 8, 71-115.
[48]SEstrich,*Real Rape*, Cambridge, M.A, Harvard University Press, 1987.
[49] V Ngassa,*Gender Approach to Court Actions*, Yaoundé: Friedrich Ebert Stifung, 1998.

themselves.[50] Some women have come to realise that discussing such experience would cast their husbands in a negative light, thereby destroying that element of loyalty. For a wife to give a positive respond to any charge of rape perpetrated by the husband on her, this would leave her with feelings of betrayal.[51]

Stigmatisation

Many wives who are victims of forceful or unconsented sexual intercourse are reluctant to label it rape and press charges against their husbands because of stigmatisation. This is because most law enforcement officers treat offences of such nature as domestic issues which need to be handled at home and moreover, most of the officers who are men still strongly hold the traditional view that there cannot be rape between husband and wife. Most often, officers will in this situation spend time interrogating the victims in public and laying blames. Such a situation will attract some feelings of shame on the part of the victim, making her to feel bad and unimportant and also as if she provoked such a situation by refusing to perform her marital obligation and want to rip some benefit in guise to reporting and pressing charges against her husband to secure an eventual divorce.

Possible Measures in Addressing Customary Law Dominance

The preceding analysis have established that in spite the statutory repudiation of customary practices that encourage rape, customary norms still dominate because of some factors discussed above. In order to address the factors that encourage the dominance of such discriminatory customary practices, the following measures could be adopted;

Express Criminalisation of Marital Rape

This can be done by enacting a law specifically criminalising marital rape backed by effective enforcement and legally repudiating the idea of implied or continuous consent to sex in marriage.

A Law Specifically Criminalising Marital Rape Backed By Effective Enforcement

Law is a vital means of refining culture especially since it modifies behaviour. Therefore, a specific legislation should be enacted treating marital rape as a grievous form of domestic violence which needs prosecutorial attention. If enacting a specific legislation proves a daunting task, the penal code could be revised with a provision(s) to this effect. Such legislative moves should be backed by appropriate enforcement mechanisms for the needed social change to be effected. It has been seen from the foregoing discussions that Cameroon is signatory to many

[50] The contemporary society is characterized by competition for pride especially amongst women. A discussion carried out by the researchers mostly with educated and enlightened women (whose names the researchers would not like to reveal) living in urban areas like the Bamenda metropolitan town and Buea proved that they are aware of the vices of unconsented marital sex and abuses, but would not like to report to authorities. This is to preserve family names and pride for those who have a high social recognition where they reside.

[51] D E HRussell,*Rape in marriage.* Indianapolis, IN: Indiana University Press, 1990.

international conventions which address aspects of domestic violence against women including marital rape. The penal code equally criminalises rape in a general context, and can also be attributed to unconsented sexual intercourse in marriage. However, these laws are not effective as they are contradicted by customary law practices which are unacceptable, but very dominant in customary communities. Law enforcement agencies made up of the criminal justice system should be enlarged to cover remote customary communities and should avoid as much as possible to treat cases of force sexual intercourse as domestic matters to be treated at home. Law without effective measure will have not significance because merely condemning an act without measures of sanction or enforcement is perfunctory and only promotes impunity. Flavia supports this view when he puts is that;

> '*If oppression could be tackled by passing law, then the decades of the 1980s would be adjudged a golden period for the Indian women, when protective laws were offered on a platter. Almost every single campaign against violence of women resulted in new legislation. The successive enactments would seem to provide a positive picture of achievement…crime statistics reveals a different story… The deterrent value of the enactments were apparently nil. Some of the enactments in effect remained on paper'.*[52]

This supposes that prosecutorial attention should be able to establish marital rape in line with available and enacted legislation followed by appropriate punishment to deter future occurrences. Crime deterrence is backed by punishment which has to be certain, severe and swift.[53] The certainty that a wrong doer will be sanctioned poses more of a deterrent than even the severity of punishment.

Specific Legal Repudiation Of Implied Or Continuous Consent To Sex In Marriage

The prohibition of marital rape requires more than criminalising the act. It also requires that there be no presumption of consent in the definition of rape in marriage and that lack of consent be an essential element of the criminalisation. According to the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) Committee, definitions of marital rape which are based merely on the use of force or coercion rather than lack of consent fail to satisfy state obligations to ensure that women's right to bodily security remain protected[54].

[52]AFlavia,*Protecting Women against violence? Review of decades of legislation, 1980-89 State and Politics in India*, Edited by ParthaChatterjee, Dehli, Oxford University Press, 1997, p. 521.

[53]CBeccaria,*On Crimes and Punishment*, Translated with an Introductory by Henry Paoluci, New York: Macmillan Publishing Co, 1963. See also ABlemstein,'Prisons', in JWilson,& JPetersilia, eds. *Crime*, San Francisco Institute for Contemporary Studies, 1995.

[54] Comm. on the Elimination of Discrimination Against Women, Comm. No. 2/2003, *Ms. A. T. v. Hungary*, 9.3, CEDAW/C/36/D/2/2003 (Jan. 26, 2005).

An example on the legal repudiation of implied or continuous consent to marriage could be gotten from International Criminal Court's Rules of Procedure and Evidence[55]. Rule 70 states the following with respect to sexual violence:

(a) Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent;
(b) Consent cannot be inferred by reason of any words or conduct of a victim where the victim in incapable of giving genuine consent;
(c) Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence;
(d) Credibility, character or predisposition to sexual availability of a victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim or witness.

These rules indicate that where a victim is incapable of giving genuine consent, as in a context where the community and state condones marital rape, consent cannot simply be inferred by the relational context. Thus, the presumption of the ongoing existence of consent in a marital relationship is a violation to a woman's right to sexual autonomy and security.

Sensitising Local Communities On Their Rights And Obligations In Marriage

Many people living in local communities are so attached to their customs and traditions, and are affected by social construct to an extent that they are not aware of their rights and obligations in marriage. Sensitization would involve promotional activities aimed at creating awareness on various rights and obligations in marriage. In this guise, vigorous campaign of judicial and public education should be undertaken to raise awareness about the criminal wrongfulness of sexual violence and coercion within marriages. The social construct on availability of implied and continuous consent to sex in marriage prevailing in local communities can by decried through educational talks on equality between men and women, including the right to say no to unwanted sex which is a precondition for a genuine capacity to give consent.

Conclusion

It has been demonstrated that rape is a criminal offence under Cameroonian law. But same has not been out rightly criminalise within marriage as evidenced from that fact that the existence of rape in matrimony can only be deduced from the interpretation of other statutory laws regulating the relationship between husband and wife. Establishing rape between spouses is very controversial aspect because of the social construct which exist as to the fact that by marriage, there is a presumed and continuous consent to sex, implying that there is an irrevocable consent to sex on the part of both spouses especially women in our context. This is a position

[55] Rules of Evidence and Procedure of the International Criminal Court 2003.

strongly held by customary law which is discriminatory against women, and contrary to statutory law, but very dominant as result of people's attachment to its values and social construct, especially in customary communities. It is important to note that consent to sex, be it in marriage or not should not be presumed, but should be freely given as violation of such would amount to violence and breach of a fundamental human right.

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