

The Conundrum of Marital Rape in Malawi: The Past, the Present and the Future

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Abstract : While the definition of rape has evolved over the years and now differs from one jurisdiction to another, at the heart of the offence remains the absence of consent on the part of the victim. In simple terms, rape consists in non-consensual sexual intercourse. Therefore, the core issue is whether the accused acted with the consent of the victim. Once it is established that the act was consensual, a conviction of rape cannot be secured. Traditionally, rape within marriage was impossible because it was understood that a woman gave irrevocable consent to sex with her husband throughout the duration of the marriage. This position has since changed in most jurisdictions. Indeed, Malawian law now recognises the offence of marital rape. This is a victory for women's rights and gender equality. Curiously, however, the definition of marital rape endorsed differs from the standard understanding of rape as non-consensual sex. Instead, the law has introduced the concept of unreasonableness of the refusal to engage in sex as a defence to an accused. This is an alarming position that undermines the protection sought to be derived from the criminalisation of rape within marriage. Moreover, in the Malawian context where rape remains an offence only men can commit against women, the current legal framework for marital rape perpetuates the societal misnomer that a married woman gives a once-off consent to sexual intercourse by virtue of marriage. This takes us back to the old common law position which many countries have moved away from. The present definition of marital rape under Malawian law also sits at odd with the nature of rape that is applicable to all other instances of non-consensual sexual intercourse. Consequently, the law fails to protect married women from unwanted sexual relations at the hands of their husbands. This paper critically examines the criminalisation of marital rape in Malawi. It commences with a historical account of the conceptualisation of rape and then looks at judgments that rejected the validity of marital rape. The discussion then moves to the debates that preceded the criminalisation of marital rape in Malawi and how the Law Commission reasoned to finally make a recommendation in its favour. Against this background, the paper analyses the legal framework for marital rape and what this means for the elements of the offence and defences that may be raised by an accused. In the final analysis, this contribution recommends that there is need to amend the definition of marital rape. Better still, the law should simply state that the fact of marriage is not a defence to a charge of rape, or, in other words, that there is no marital rape exemption. This would automatically mean that husbands are subjected to the same criminal law principles as their unmarried counterparts when it comes to non-consensual sexual intercourse with their wives.

Keywords : criminal law, gender, Malawi, marital rape, rape, sexual intercourse

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