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## Decolonising Sex: Fifty Shades of Rape

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*This article explores how ideas of patriarchy have shaped the nature and effect of rape law. It argues that rape law reinforces patriarchy, and because of the inherent inconsistencies between the male roles of aggressor and protector, it has remained ineffective. Taking Kenya as its springboard, it analyses how ideas of sexual relations within and outside marriage are transplanted through colonialism; and how they morph and merge with analogous indigenous conceptions to entrench and formalise the continued subjugation of the female body. It explores the unintended consequences of the internationalisation of English Monogamy; and rape law reform and its continuity/discontinuity with the Civilising Mission.*

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### 1. Introduction

Colonialism, in many ways, was predicated upon Antony Anghie's (2005) dynamic of difference that constructed the world in a dichotomy of the civilised and the savages (Mutua, 2001). Perhaps the starkest of these differences was in the formations around which society organised itself. The concept of marriage in English law, and in many of Britain's colonies, was at complete variance. Thus, the Civilising Mission set out, in part, to reform and discipline the marital relationships of these poor polygamous pagans.

In colonial and pre-colonial Africa, the differences between the English and various African forms of marriage seemed irreconcilable. On these alien forms of marriage, the colonial courts repeatedly pronounced themselves with disdain and judicial disgust.<sup>1</sup> Invariably, they echoed Lord Penzance in *Hyde v Hyde and Woodmansee*<sup>2</sup> in proclaiming the superiority of English monogamy over indigenous marriage systems: 'marriage ... defined as the voluntary union for life of one man and one woman, to the exclusion of all others' quickly became the marker of sophistication and civilisation on the family arena (Kang'ara, 2012).

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<sup>1</sup> See for example *Rex v Amkeyo* (1917) 7 EALR where Hamilton J in refusing to extend the protection of privileged communication to a wife of a polygamous man, called African forms of marriage 'concubinage' and wife purchase.

<sup>2</sup> (1886) L.R. 130

## 2. Pre-Colonial African Forms of Marriage

Certain elements of the African concept of marriage<sup>3</sup> were indefensibly inequitable and thoroughly discriminatory. John S. Mbiti's description exposes their philosophical underpinning:

Marriage is the meeting-point for the three layers of human life ... *the departed, the living and those to be born*. The departed ... are the roots on whom the living stand. The living are the link between death and life. Those to be born are the buds in the loins of the living, and marriage makes it possible for them to germinate and sprout (Mbiti, 1991: p. 98).

Marriage was a heavily loaded concept with various stakeholders beyond the contracting couple. The departed or the living-dead were considered a party to the ceremony as they guided everyday life, and could intervene in the affairs of the living.<sup>4</sup> Their invocation had spiritual repercussions and situated marriage in the realm of religious<sup>5</sup> regulation.

The living encapsulated the couple, as well as their extended family, clan(s) and sometimes the tribe. Beyond the contemporary understanding of community, society was a rightful party in marriage with standing, and with justiciable rights and obligations. For example, in many Kenyan communities, it was the bridegroom's family's responsibility to pay dowry to the bride's father, and thus 'marry a wife for their son.' Conversely, fathers had the right to reject their child's choice of spouse, and enforce an agreement to marry.<sup>6</sup> In some communities, brothers of the husband had the right to chastise a 'wayward' wife, while others allowed a man's age-mate to have intercourse with his wife. In a polygamous marriage, the number of stakeholders increased exponentially, as did the rules governing the particularised resulting relations.

Perhaps the most important stakeholder in a marriage were 'those to be born.' Pronatalism underpinned African marriages. Children were considered a marker of wealth, distinction, and free labour. They were inextricably linked to a person's status and guaranteed property rights. A childless woman had no honour, no status and her access to

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<sup>3</sup> I am aware that this characterisation is problematic. African marriages are as varied as the communities in various states in Africa are. However, certain similarities exist. I use this problematic term, however, to mean marriages of indigenous African communities as contrasted with the colonising English forms.

<sup>4</sup> For more on ancestralism, particularly the concept of the living dead and their influence on activities of the living, see generally Mbiti (1991).

<sup>5</sup> Religion is a deeply divided concept in African tradition. I use this word while accepting Talal Asad's (1993) contention that in certain cultures (and certainly in Africa) religion/faith is not a separate anthropological category.

<sup>6</sup> In *Amulan Ogwang v Edward Ojok* (unreported), a father 'repossessed' his daughter from her husband for failure to complete bride price payments.

property was reduced. Further, children were seen as the rebirth of ancestors gone.<sup>7</sup> Thus marriage became an enterprise in the production and reproduction of life, with little regard for the incidental injustice it occasioned on women. This led to two main inequalities.

Firstly, marriage was co-existent with the life of the wife. Upon a husband's death, the wife was still bound to her dead husband, and independent remarriage was not a possibility. To secure the husband's lineage and continue to provide maintenance to the widow, practices like wife/widow inheritance developed. Generally, separation or divorce came at such a high material and reputational cost to a woman, that it constructively was not an option. A woman's only escape from an unkind husband was death – her death.

Secondly, in addition to endemic systemic polygamy, forms of marriage that amplified the utility of procreation evolved. High infant mortality rates that threatened the existence of the clan, the increased productivity that came with a large number of wives and children, the perceived high socio-economic status associated with having many children made polygamy extremely attractive. Further, since women's bodies were ideologically understood as incapable of owning or inheriting property, widows could only exercise such ownership through the agency of a man; an inheriting brother in law, a kinsman redeemer of sorts. Thus, various communities employed ethno-specific marriage forms, but the laundry list included levirate marriages, woman-to-woman marriage, sororate unions and forcible marriages.

Beyond these forms that treated women as inputs in the production of bio-power, other practices tangential to marriage and sexual relationships, such as wife-chastisement and compulsory female circumcision, further subjugated women. Since personal status and property systems were inextricably linked to marriage, the subjugation of women, by marriage, was complete.

The regulation of the female body and sexual conduct happened against this patriarchal background. The tools of this regulation had over time been fashioned for and by men. The African woman's body needed a savior. He arrived, in fairy tale fashion, waving the Union Jack. He offered English monogamy as salvation to the body so encumbered.

### **3. English Monogamy: A False Messiah**

The notion that English forms of marriage were superior to their African counterparts, particularly in terms of protection to wives, was false. Granted, monogamy protects a wife from the vicissitudes of 'sharing' her husband (and therefore potentially diminishing her claim to wealth, entitlement, and status) with her co-wives. Further, embracing English marriage removed a wife from the realm of custom and the vagaries of the wielders of

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<sup>7</sup> This belief was expressed in nomenclature. Many names were either identical to grandparent's names, or spoke of the reincarnation of ancestors. For example, the Meru name Muriuki; Njoki or Kariuki in Kikuyu; Mutunga, Nzioki, Nzioka and Kasyoka in Kamba all mean '(s)he who has come back to life'.

customary law power.<sup>8</sup> However, monogamy did not vest it in the wife. It consolidated societal power and years of customary tradition, sealed it with Anglicanism and bestowed it upon her husband. And that 'Monogamy Power' was ominous and had potentially devastating consequences.

Consider the Doctrine of Coverture on which English monogamy was predicated. Sir William Blackstone's language exposes portentous intentions shrouded in the language of protection:

By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection and cover she performs everything ... Under this principle of an union of person in husband and wife, depend almost all the legal right, duties and disabilities, that either of them acquire by the marriage.<sup>9</sup>

Coverture imbued a wife with certain disabilities, concerning property, reminiscent of a minor or a person with a mental disability. Specifically, a *femme covert* could not own property, enter into contracts, or obtain an education against her husband's wishes. Any property she owned before her marriage automatically vested on her husband at marriage, as did any property that she came to during her marriage. Marriage was the vehicle that disinherited women, and wherefrom there could be no disembarkation (Mill, 1869).

Coverture transgressed the thin line between property and person. No tort causes could arise between spouses. In certain instances, a wife's mental capacity was considered reduced, *ipso facto*, when she acted in her husband's presence. Specifically, if a woman committed a crime in the presence of her husband, the law automatically considered her his agent – a defence of compulsion existed. That such a defence arose, as a matter of course, is perhaps the strongest indicator of Monogamy Power's denial of a woman's agency.

Coverture also ceded the woman's body to her husband's control. Until 1891, a husband could lawfully chastise his wife and confine her. Coleridge J. in *Re Cochrane*<sup>10</sup> held that 'the husband hath by law power and dominion over his wife and may keep her by force within the bounds of duty, and may beat her, but not in a violent or cruel manner.' He also had the right to consortium<sup>11</sup> and a wife had a corresponding duty to provide it, and this right could be enforced through incarceration.<sup>12</sup> Inherent in this right, was the right to sexual intercourse. Since a husband had unfettered access to and control over his wife, and she was

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<sup>8</sup> In *Cole v Cole* 1898 1 NLR 15 for example, early in the colonial state, a widow was able to secure her inheritance against her husband's relatives by pleading English monogamy therefore enjoying protection against patriarchal customary rules of inheritance.

<sup>9</sup> Sir William Blackstone, Commentaries on the Law of England Vol 1 (1765).

<sup>10</sup> (1840) 8 Dow PC 630. The court was finally overruled in 51 years later in *R v Jackson* [1891] 1 QB 671, CA.

<sup>11</sup> Defined as company, affection and society of one's spouse and included the right to sexual intercourse, cohabitation, the right of a wife to use her husband's name and so on.

<sup>12</sup> *supra* note 14

essentially his agent, then the idea that she could deny him sexual intercourse was preposterous. Consent to sex, for life, a core element of Monogamy Power, was presumed/acquired at marriage. She exchanged her agency for his cover – and therefore, there could be no rape in marriage.

The Hale doctrine expressed this subjugation in poetic eloquence:

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

English monogamy was a false Messiah. While proclaiming freedom and equality to the captives of African customary marriage law, it exchanged one form of subjugation for another (Nyamu-Musembi, 2000). The African monogamous husband became the fulfillment of custom and law: the wielder of Monogamy Power, and the most eloquent expression of patriarchy.

Coverture was the nail on the coffin that was a woman's agency; and its legacy and other notions of patriarchy continue to impact family and rape law in much of post-colonial Africa.

#### **4. 50 Shades of Rape: Patriarchy, Marriage and the Law**

Rape law was undergirded by patriarchy and therefore was at best severely crippled, and at worst, still born (Davis, 1981; Crenshaw, 1989). The narrative of the development of rape law is framed against a somewhat schizophrenic man, who is at once an aggressor and protector.<sup>13</sup> As protector, he seeks to shield his would be bride from being deflowered by a stranger; or his daughters from the stigma of marriage without seal of virginity; or his children from the woes of disputed paternity. Clearly, the shield here really is for his own cover: to protect his right to deflower his own bride, his reputation, and his lineage, respectively. As aggressor, he seeks to escape the clutches of rape law, so he fashions it with crippled hands.

The imperial control of rape law by patriarchy is the strongest expression of Monogamy Power. The legal definition of rape betrays this heritage. S 139 (now repealed) of the Penal Code of Kenya defined rape as the 'unlawful carnal knowledge of a woman or girl without her consent or with her consent if the consent is obtained through force, coercion or false representations or in the case of a married woman, by personating her husband.' Carnal knowledge was further defined in the language of penetrating the vagina with a penis.

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<sup>13</sup> I owe this picture of a man as the aggressor-protector to Sylvia Kang'ara who also read earlier drafts of this work.

This penetration-centred definition does not capture women's experience of sexual activity. It is clinical, and does not speak to the nuances of foreplay, repeated penetration, continued copulation, or non-penetrative sex as part of a continuous sexual transaction. This fixation with a one-way domination and aggression has its origins in marriage law. At Common Law, a marriage was void for non-consummation. So central was the idea of penetration that in *Corbett v Corbett*<sup>14</sup> the court held that the penetration of an artificially (surgically) created vagina in the case of a post-operative male-to-female transsexual person did not rise to the threshold of consummation. Further, since impotence would vitiate consummation, it is conceivable that a man suffering from erectile dysfunction could not use an artificially created aid to penetrate his wife, and thus consummate the marriage. The law seemed married (pardon the pun) to the idea that marriage was anchored around a man's penetrating, conquering role.<sup>15</sup> Even at the wedding night, he was expected to be the (gentle) aggressor.

Under the Penal Code, rape was classified as a crime against morality, alongside living off the proceeds of prostitution and running brothels. It was constructed not as a violation of a woman's rights or body, but as a mere blemish on society's standards of decorum. This definition has changed somewhat, and years of feminist activism have yielded considerable results in rape law reform including the enactment of the Sexual Offences Act (SOA) of 2006. Section 3 (1) of the SOA redefines rape in gender neutral terms *viz.* '[a] person commits the offence termed rape if he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs; the other person does not consent to the penetration; or the consent is obtained by force or by means of threats or intimidation of any kind.' This definition reframes the aggressor-victim relationship in gender-neutral terms and by so doing begins the journey to subvert patriarchy's hold on sex and rape.

The new law makes a number of important interventions including creating new sexual offences such as gang rape,<sup>16</sup> expanding the definition of rape, imposing minimum mandatory sentences, creating the framework for DNA data banking and a sex offenders' registry, among others (Kamau, Nyaundi and Serwanga, 2013). Indeed, the SOA makes bold steps in expanding the justice spaces for rape victims. While acknowledging the progress that has been made, I wish to highlight inherent defects in the architecture of the law that continue the legacy of patriarchy's imperial hold on rape law.

Firstly, the Act still defines rape in the language of penetration. I have already demonstrated that penetration is a man's experience of sexual intercourse, not a woman's. A theory of sex constructed around penetration denies the agency of the actors once the

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<sup>14</sup> [1971] 2 All ER 33

<sup>15</sup> There has been some movement in this area. The Marriage Act of 2014 that consolidates all family law regimes now considers unconsummated marriages voidable at the option of the parties, not void *ab initio* as was the Common Law position.

<sup>16</sup> Such as sexual assault, sexual harassment, deliberate infection with HIV/AIDS, child trafficking for sexual exploitation and child pornography, among others.

transaction is afoot. It assumes that after penetration there can be no withdrawal of consent. After all, how can you recall a conquering army once you have been overrun?

Recall that the SOA is a child of international feminist movements and is informed by globalisation of the law and of the women's movement. Unfortunately, this law reform agenda, akin to the Civilising Mission and the conversion to monogamy a century before it, suffers from the same blind spots (Halley, 2008a). It attempts to propagate women's rights within a patriarchal superstructure. In so doing, it continues the narrative of subjugation and exclusion. Some national organic movements have had some success, at deconstructing this superstructure. In Maryland,<sup>17</sup> for example, and in much of the USA, rape is defined in language that better describes the sexual experience of women and therefore countenances situations of the withdrawal of consent post penetration. New Zealand holds a similar position.<sup>18</sup> There is need to define rape in non-penetration language without downgrading the offence to sexual or indecent assault.<sup>19</sup>

In the efforts to criminalise and effectively prosecute rape in war through the making of the Rome Statute, the feminist movement was able to reconstruct rape, in domestic spheres and at peacetime, as a continuous war against women (Kapur, 2014; Halley, 2008b). These reconstructions and other feminist ideas travelled and informed national discourses on rape law, and perhaps even became 'sufficiently institutionalised' (Otto, 2010). Perhaps the most helpful turn in international law, in departing from penetration-based definitions of rape is found in *Prosecutor v Jean-Paul Akayesu*<sup>20</sup> where the ICTR Trial Chamber wrote:

The Chamber considers that rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts. The Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment does not catalogue specific acts in its definition of torture, focusing rather on the conceptual frame work of state sanctioned violence.

In this classic twist, the Court refuses to be bound by mechanistic descriptions – such as penetration, vaginas and penises – and focuses instead on the conceptual or perhaps power dialectic within which nonconsensual sex happens. The SOA would have benefitted much from taking this approach.

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<sup>17</sup> See *Baby v State* as discussed in Huff (2009) where the Maryland court held that after a woman's withdrawal of consent post-penetration, where a man continued penetration for five or six seconds more, this amounted to rape. Cf *Paul Ng'ang'a Kamau v. Republic* where the court stated that a woman may withdraw consent at any time *before* the sexual act.

<sup>18</sup> *Kaitamaki v R* [1984] 2 All ER 435 where the court held that sexual intercourse starts on penetration and 'continues' until it stops. If the act continues when consent is withdrawn the offense is complete. This case is still problematic, for purposes of this article, because it construes intercourse as beginning at penetration.

<sup>19</sup> The Rome Statute, for example, uses the language of 'sexual violence' and leaves this undefined. The ambiguity has been instrumental in allowing the court to give varying cultural constructions of 'sexual violence'.

<sup>20</sup> Case No. ICTR-96-4

Secondly, the Act gives a spousal rape exemption that ominously echoes the Hale Doctrine. The import of s.43(5) is to exclude the application of rape provisions from spouses.<sup>21</sup> The law continues to take this hands-off approach to domestic violence and marital rape, relegating it to the 'private sphere' where the law ostensibly cannot reach (Engle, 2005; Kapur, 2002; Charlesworth, 1996). This augments Monogamy Power. Granted, wives can rape husbands too, but by and large, the proclivity has been one of male domination and female subordination, and that is the focus of this article. Spousal rape is thus relegated to the civil sphere through constituting it as grounds for divorce.

Finally, rape law has created its others and established 'new forms of exile' (Otto, 2009). In true structuralist form, the rape victim must fit a certain mould to enjoy protection. She must be a single, young, pious, modestly dressed woman raped in broad daylight by a brutish stranger at gun point, amidst desperate screams. Single; because a married woman cannot be raped by her husband. Further, in many African communities, a person who raped a married woman paid her husband compensation. The woman got no justice. These cultural notions continue to influence how rape is understood and treated by victims, their support structures and the criminal justice system. Young; because an older woman ought to 'know better'. The persecution of rape victims along this line is common. She must be modestly dressed because a provocatively dressed woman was 'asking for it', and thus 'consent' could conveniently be inferred. In both these cases, *res ipsa loquitur* becomes a living doctrine in criminal law. She must be pious because the law does not protect women of loose virtue. Under S 3 of the Evidence Act, a rape victim's credibility can be impeached by showing that she is generally of immoral character. The tacit 'requirement' to fight off her attacker with Herculean strength, even to her dignified death, cannot be understated. If she survives, defence counsel will destroy whatever dignity she has left at trial. Once this mould of the 'protectable victim' crumbles, the law withdraws its protection.

## 5. Conclusion

The Civilising Mission attempted to, inter alia, liberate and dignify the African female body of the shackles of custom, systemic polygamy, violence and subjugation. It did so by rejecting African forms of marriage, and superimposing 'superior' English forms. Through a blend of large-scale legal transplant and incentives, the colonial state offered English monogamy as the panacea to the African woman's subjugated body. However, monogamy, though well intended, had unfortunate unintended consequences. The notion that it was protective of women's rights was based on a faulty predicate – monogamy was not a union of equals, but an imperial conquest of a man over his wife, and an assimilation of her body, agency and property onto his person. Thus, African monogamy took a menacing turn. Under these

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<sup>21</sup> See Kamau *et al*, *supra* at note 22

conditions, the male privilege inherent in custom and assumed from Common Law as infused by ideas of Coverture fused into ominous Monogamy Power that continued the chain of subjugation.

This legacy of patriarchy has shaped the contours of rape law rendering it impotent for the protection of women. The schizophrenic patriarchal lawmaker, at once the aggressor and the protector, created a law that only protected women at the convenience of men. The rape law reform project, informed by globalisation of thought and law, continues to suffer from potentially catastrophic blind spots. Particularly, it continues to construct rape in masculine terms. Until rape law is infiltrated and reconstructed, reflecting women's and survivors' experience of sexual activity, it will continue to be an ineffective tool against sexual violence.

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