

# THE GLOBE AND MAIL

## Marital rape in Africa: The right to say no

A Canadian and international legal team pushes for new laws in three African countries where wives are often treated like property.

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"I own her. The dowry I paid for her means she's my property."

For most of our conversation, 40-year-old Linus Kariuki seemed like a soft-spoken man, a town councillor in the village of Kanjuu, 90 minutes northeast of Nairobi. But when he talked about the controversial proposal to make marital rape a crime in Kenya, he became loud and agitated.

The reform, he insisted, was not in keeping with African tradition.

"If my wife refuses to have sex with me, I will rape her. And then I'll beat her because she didn't obey me." — Linus Kariuki

Mr. Kariuki's fury was fuelled by a week-long meeting then being held in Nairobi, where human-rights lawyers from Canada, Kenya, Malawi and Ghana were in a hotel room putting the finishing touches on a plan to alter the status of African women.

Making marital rape a crime is just the start, and there is bound to be a ferocious backlash. Yet even the men in Kanjuu admitted the law would likely pass once it came to the legislature. In Kenya, that may be as early as August. (In Ghana and Malawi, it may take two more years.)

Reforming the way an entire continent treats half of its population became the aim of Fiona Sampson, director of the African and Canadian Women's Human Rights Project (ACWHRP), after she met several African women lawyers at Osgoode Hall Law School in Toronto in 2002. But it was her personal sense of urgency that made the concept take flight.

"I am the last thalidomide child to be born in Canada," she explained, referring to the anti-morning-sickness drug whose side effects in utero affected her hands and arms before it was banned in Canada in 1962. "There was a culture of impunity in the testing of drugs at that time. So I'm consumed with injustice in the face of impunity."

The African women she met wondered if they could adapt the model that was used in the early 1980s to reform Canada's laws around sexual assault. Eight years later, this winter, they gathered in Nairobi with a group of other high-profile lawyers for the launch of Three to Be Free, a program to operate in three countries (Kenya, Malawi and Ghana), using three strategies (litigation, policy reform and legal education) over three years. The group has been able to get funding from the Stephen Lewis Foundation, the Canadian Department of Justice, the International Development Research Council and the law firm Fasken Martineau. (My trip to Nairobi was also underwritten by Fasken Martineau, after I was invited to speak as a reporter on equality in developing countries at the Canadian launch

of ACWHRP in December.)

In the past three decades, unlike in many other countries, the rights of women in Africa have hardly budged when it comes to marriage, divorce and property rights. African women, the litigators said, are treated as chattels and vulnerable to ghastly violence – being beaten or mutilated and denied food and shelter for any manner of infraction.

“They have become the face of HIV/AIDS,” said Winifred Kamau, a lecturer at the University of Nairobi Law School, “as women have no right to say no to sex. Family violence hasn't been curbed even a little, and marital rape is legal.” This makes it state-sanctioned violence, Ms. Sampson said – a form of social enforcement for married women.

### **FROM CITY TO VILLAGE**

In Kanjuu, six women gathered in the home of Jedidah Wanjiku to escape the sun and discuss the new law out of public view. Everyone here had heard about it on the radio, but most men pretended it wasn't happening.

“Women need to have the right to say no,” said Ms. Wanjiku, 29, “but men here have the authority and women have no power at all.”

The women said the consequences for refusing sex were harsh and immediate. “He'll kick you out of the house, send you to the bush to spend the whole night outside with the kids. He'll burn your clothes, kill your chickens and eat them and sell your goats,” said Ms. Wanjiku. (Among the women in the room, hers was the only husband who did not follow those practices. Asked why later, he cited his religious beliefs.)

“We need a delegation to come from Nairobi,” Ms. Wanjiku said, “and tell the people here to change the way we behave. They need to say that women have feelings, that a bully in the house is not good and women are the same as men. The men in the village will listen to people who come from outside.”

So far no one had come.

Yet in Nairobi, the human-rights lawyers were sitting around a long table sharing stories and creating strategy. A lawyer from each country described its existing law. Then they dissected it – where to delete a section or add an amendment, or remove language such as, “This does not apply to married women.” They debated wording: Was the definition of consent precise enough?

When the three chosen countries made their first passes at reforming laws around sexual violence in 2006 and 2007, each had aimed to curb marital rape, but parliamentary review committees insisted on getting rid of the provision, saying men would never allow it.

The sticking point has been customary law. As in most African countries, Kenya, Malawi and Ghana have both formal state law and customary laws, which aren't written down. Chiefs are in charge of arbitration, and they, the lawyers agreed, tend to collude with other men against the rights of women. Customary law usually trumps state law.

“Customary law is what we live with. It defines a woman's identity, how she relates to others and it is the most accessible form of dispute resolution,” said law professor Ngeyi Kamyongolo of the University of Malawi.

### **ONE NATION TO ANOTHER**

The Canadian women, however, could recall resistance, too. Jennifer Koshan, who teaches law at the University of Calgary, told the story.

In 1982, when NDP member of Parliament Margaret Mitchell raised the issue of domestic sexual assault for the first time in the House of Commons, some members laughed and called out to each other, making derisive gestures about beating their wives. In January of 1983, Bill C-127 passed, making domestic sexual assault a crime.

“Before 1983,” Prof. Koshan said, “there was impunity for men who raped their wives in Canada for the same reasons African women are struggling with now: Women are assumed to be property once married, and there is implied consent because of marriage vows.”

Seodi White, a lawyer from Malawi who joined the group when she was a visiting scholar at the University of Toronto, added that in Africa today, violence is often a part of the bargain: a man jamming a broken piece of furniture into his wife's vagina, another applying a python to her vagina because a witch doctor told him it would then spit out coins, still another cutting off her labia majora and selling it as a charm – all of it legal, because she is his property.

Prof. Kamyongolo provided the ultimate example: “A man killed his wife because she refused to have sex with him. He was arrested by the state and charged with murder. But since a woman has no right to say no, the customary law court declared her behaviour ‘provocative’ and the chiefs who heard her case in the court found her husband guilty only of manslaughter.”

Getting rid of the dowry, which systematizes husbands' ownership of wives, might be a more fundamental reform. But it's easier to change jurisprudence than to tackle ancient customs.

What's more, Ms. Sampson said the criminalization of marital rape would have a trickle-down effect. “Women will achieve increased equality under the law and will be recognized as persons rather than property. Furthermore, it will establish a culture of accountability for women's human rights.”

Still, there will remain complex consequences for a woman who reports violence: She may have to get up at 4 a.m. to get to the court in the city, paying bus fare with her meagre funds. She might not get home until 8 p.m., when the children are hungry and it's too dark to plant the fields. Meanwhile, her case gets postponed over and over.

“No wonder she gives up,” recently retired judge Effie Owuor, the grand dame of women's rights in Kenya, said the day she visited ACWHRP. “The social worker is there collecting your children because you aren't at home taking care of them and your man is next door carrying on with the neighbour's wife.”

The judge said women could not have access to justice without addressing these issues. “Sexual assault and abuse affect us physically, but also socially and emotionally. It affects families, jobs, the entire country.”

## **ONE GENERATION TO THE NEXT**

Kenyan member of Parliament Millie Odhiambo said she knew the reform would be attacked as “not African style.” But she added: “Domestic violence used to be a topic no one would talk about. Now, 10 years later, people are being prosecuted left, right and centre.”

Ms. White summed up the conundrum. “The issue is about a law that gets into the blankets, the bedroom. We're not criminalizing all men. We're criminalizing the act – and the bad men. It's doable. It's a process we need to negotiate with the general public, hear their views. ... Somewhere along the line, we'll get it right.”

Back in Kanjuu, one male farmer, 55-year-old Nyaga Mutundu, seemed to have a foot on each side:

“In our dialect, the word for marrying a woman is *kugura*, which means ‘buy.’ ... Women are agitating for change. I’m a modern man and don’t think women should be treated badly. But if a man wants sex and she says no, he will rape her. That’s how it is in our society. I think the women are using sex as a weapon for change.”

However, he added that for the sake of his married daughter, he would obey the law if it was passed.

Even Mr. Kariuki, the adamant town councillor, agreed: “My wife cannot say no to me. But my daughter must be able to say no to her husband.”

One afternoon at a public meeting in Nairobi, an audience member asked about backlash. Melanie Randall, a University of Western Ontario law professor who has written at length about the process in 1980s Canada, replied: “They’ll say the law has no place in the bedroom, that this law breaks up families and attacks men, that it doesn’t value children. Don’t let it deter you.”

“Ten years from now, people will look back at this meeting and say: ‘I was in the room that day. The end of marital rape started right here.’” — Judy Thongori, a family lawyer in Nairobi

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