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## A Postcolonial Theory of Spousal Rape: The Carribean and Beyond

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A POSTCOLONIAL THEORY OF SPOUSAL RAPE:  
THE CARIBBEAN AND BEYOND

*Stacy-Ann Elvy\**

*Many postcolonial states in the Caribbean continue to struggle to comply with their international treaty obligations to protect women from sexual violence. Reports from various United Nations programs, including UNICEF, and the annual U.S. State Department Country Reports on Antigua and Barbuda, the Bahamas, Barbados, Dominica, Jamaica, and Saint Lucia (“Commonwealth Countries”), indicate that sexual violence against women, including spousal abuse, is a significant problem in the Caribbean. Despite ratification of various international instruments intended to eliminate sexual violence against women, such as the Convention on the Elimination of All Forms of Discrimination Against Women, Commonwealth Countries have retained the common law spousal rape exemption. While much has been written on the topic of spousal rape in common law jurisdictions, this Article is unique in at least three respects. First, this Article is part of a larger project that seeks to trace the connections between colonial history and contemporary law in postcolonial states with the aim of developing a typology of the enduring effects of colonial laws and norms. Second, this Article uses postcolonial theory to provide a theoretical framework for critiquing the colonial roots of the modern-day spousal rape exemption in Commonwealth Countries. Third, this Article posits that postcolonial theory offers many insights regarding the history of colonialism and modern-day power dynamics and identities in Commonwealth Countries. The Article uses postcolonial theory to advocate for a norms-based approach to changing the structures that perpetuate in-*

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\* Associate Professor of Law, New York Law School (J.D., Harvard Law School; B.S., Cornell University). Special thanks for the useful comments received from attendees at the Legal Imperialism session at the 2014 Law & Society annual meeting and the 11th Annual LatCrit-SALT Junior Faculty Development Workshop. I also am grateful to Roberta Clarke (UN Women Regional Program Director), Gabrielle Hosein and Rhoda Reddock of the University of West Indies Trinidad & Tobago, Dorothy E. Roberts, Adrien Wing, Angela Mae Kupenda, Cindy Galway Buys, Jodie Roue, Carlton Waterhouse, Mindie Lazarus-Black, Ruti Teitel, Richard Chused, Sadiq Reza, Stephen Ellmann, Frank Munger, Gerald Korngold, Lenni Benson, Doni Gewirtzman, Rebecca Roiphe, Tamara Belinfanti, Alan Appel, Ari Waldman, Lisa Grumet, Edward Purcell, Michael Perlin, and Molly Land for their invaluable comments on this Article. I would also like to thank my research assistants Molly Mauck, Omar Kazmi, and Golriz Amid.

*equality, and goes on to suggest the need for changes to negative norms regarding the role of women in marriage, with the aim of creating national and individual identities that value compliance with modern human rights norms. The Article recommends legal, social, legislative, and judicial internalization of human rights norms. While these solutions are not new, the Article uses postcolonial theory to assess which solution may be more viable, as well as to determine the best way to implement internalization of human rights norms given the colonial heritage and politics of postcolonial Commonwealth Countries.*

#### CONTENTS

I.	INTRODUCTION	• 91
II.	POSTCOLONIAL THEORY AND THE COMMON LAW	• 98
	A. <i>Postcolonial Theory</i>	• 98
	B. <i>Implied Consent Theory</i>	• 103
	C. <i>Unities Theory</i>	• 104
	D. <i>Property Theory</i>	• 105
	E. <i>Modern Privacy and Reconciliation Theories</i>	• 105
	F. <i>Doctrine of Reception and the Imposition of British Norms and Legal Rules</i>	• 107
III.	SEXUAL OFFENCES STATUTES	• 115
	A. <i>Standard Spousal Rape Conditions</i>	• 115
	B. <i>Retention of Gendered Common Law Justifications</i>	• 118
	C. <i>Retention of Implied Consent and Unities Justifications</i>	• 119
	D. <i>Retention of Property Justification</i>	• 123
	E. <i>Evolution of Marital Privacy and Reconciliation Justifications</i>	• 125
IV.	CARIBBEAN OPPOSITION TO HUMAN RIGHTS NORMS	• 126
V.	POSTCOLONIAL LEGAL REFORM IN TRINIDAD AND TOBAGO	• 133
	A. <i>Trinidadian Sexual Offences Act</i>	• 133
	B. <i>Lessons from Trinidad and Tobago</i>	• 138
	1. <i>Failure to Change Cultural Values and Improper Implementation</i>	• 138

- 2. Failure to Incorporate International Treaties • 140
- VI. RECOMMENDATIONS • 144
  - A. *Legal, Social, and Legislative Internalization of Human Rights Norms* • 145
  - B. *Judicial Internalization of Human Rights Norms* • 147
  - C. *Judicial Internalization of CEDAW* • 153
  - D. *Judicial Internalization of IAS Convention* • 159
  - E. *Judicial Internalization Despite Savings Clause* • 162
  - F. *CARICOM's Role in Promoting Internalization of Human Rights Norms* • 165
- VII. CONCLUSION • 166

## I. INTRODUCTION

The abuse climaxed on a Friday night in February 2008. Minus the details that, to this day, make me uncomfortable [ . . . ], he returned to the home, intoxicated [and] physically assaulted me over a period of seven hours and finally raped me. I called the police. As I recounted the events of the night, what I recall most of this dialogue, was that it seemed very important to the police that I understand that I was not ‘raped’. Rape, two officers made clear for me that morning, could not take place between a man and a wife, and unless they were separated for a period of one year (it was seven months) and therefore legally separated, rape did not exist. As it were, we were still man and wife. Admittedly, while it was as hard for me to be subjective that morning, as it is still now – the police were not offended by this cruel and violent act, rather they spent their efforts that morning. . . humiliating me – in diminishing the occurrences of that night to something insignificant and of little consequence, while to me, the events of that night had possibly more reverberations onto my life than any other event of my thirty-three years. It was also the first time I had ever felt ashamed to be a woman. [ . . . ] While the police officers seemed not to take my abuse seriously, neither did the judge – and while it was offensive and humiliating when the police officers did so it was absolutely dev-

astating when the judge made light of my situation and did not offer me the protection I had literally begged for.<sup>1</sup>

The preceding quote is one victim's alleged account of her attempt to obtain legal relief in Barbados after her husband raped her, and it exemplifies the pervasive problem of spousal rape in the Caribbean.

Historically, rape within the context of marriage has not been viewed as "legitimate rape."<sup>2</sup> Current discussions on the topic of "legitimate rape" also continue to occur in countries outside of the Caribbean. When describing the effects of rape on the female body, former United States congressman Todd Akin stated, "it seems to be, first of all, from what I understand from doctors, [pregnancy from rape is] really rare. If it's a legitimate rape, the female body has ways to try to shut the whole thing down."<sup>3</sup> When addressing the issue of spousal rape, Akin argued that laws criminalizing spousal rape may be used by women "in a real messy divorce as a tool and a legal weapon to beat up on the husband."<sup>4</sup> In July 2014, Akin attempted to justify his previous statements by arguing that law enforcement officials frequently use the term "legitimate rape."<sup>5</sup> Recently, U.S. congressional candidate Dick Black has been criticized for contending that spousal rape does not inflict injury on women.<sup>6</sup> Similarly, in defending accused rapist Julian Assange, George Galloway, a prominent British politician, stated that having sex with a sleeping woman was not rape and that "not everybody needs to be asked prior to each insertion."<sup>7</sup>

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1. Juliette Maughan, *Domestic Violence in Barbados: Who Will Protect the Victim*, WORLD PULSE (May 4, 2012), <http://worldpulse.com/node/52523>.
  2. SUSAN CARINGELLA, ADDRESSING RAPE REFORM IN LAW AND PRACTICE 20 (2009).
  3. Lori Moore, *Rep. Todd Akin: The Statement and the Reaction*, N.Y. TIMES, Aug. 20, 2012, <http://www.nytimes.com/2012/08/21/us/politics/rep-todd-akin-legitimate-rape-statement-and-reaction.html>.
  4. William Saletan, *The Rape Skeptic*, SLATE (Aug. 22, 2012, 9:36 AM), [http://www.slate.com/articles/news\\_and\\_politics/frame\\_game/2012/08/todd\\_akin\\_s\\_apology\\_his\\_comments\\_on\\_spousal\\_rape\\_and\\_forcible\\_rape\\_show\\_mistrust\\_of\\_women.html](http://www.slate.com/articles/news_and_politics/frame_game/2012/08/todd_akin_s_apology_his_comments_on_spousal_rape_and_forcible_rape_show_mistrust_of_women.html).
  5. Charlotte Alter, *Todd Akin Still Doesn't Get What's Wrong With Saying 'Legitimate Rape'*, TIME (July 17, 2014), <http://time.com/3001785/todd-akin-legitimate-rape-msnbc-child-of-rape/>.
  6. Samantha Lachman, *GOP Congressional Candidate Dick Black Doesn't Have a Problem with Spousal Rape*, HUFFINGTON POST (Jan. 15, 2014, 1:22 PM), [http://www.huffingtonpost.com/2014/01/15/dick-black-rape\\_n\\_4602683.html](http://www.huffingtonpost.com/2014/01/15/dick-black-rape_n_4602683.html).
  7. Fiona Lloyd-Davies, *Why Have Men Lost Touch with Reality over Rape?*, CNN (Aug. 23, 2012, 11:05 AM), <http://www.cnn.com/2012/08/23/opinion/akin-galloway-opinion/index.html>; see also Severin Carrell, *George Galloway Sacked as Political Columnist for Rape Remarks*, THE GUARDIAN (Aug. 22, 2012, 11:16 AM), <http://www.guardian.co.uk/politics/2012/aug/22/george-galloway-sacked-holyrood-rape?newsfeed=true>.

While much has been written on the topic of spousal rape in common law jurisdictions, this Article is unique in at least three respects.<sup>8</sup> First, this Article is part of a larger project that seeks to trace the connections between colonial history and contemporary law in postcolonial states,<sup>9</sup> with the aim of developing a typology of the enduring effects of colonial laws and norms. The impact of colonial history may be distinct in certain places and cultural contexts. For instance, colonial laws and history may have long-lasting effects over time in one context, while local cultural issues that emerge post-independence may take precedence over colonial history in another context.

Second, although there may be various reasons for the retention of the spousal rape exemption,<sup>10</sup> this Article uses postcolonial theory to provide a

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8. See, e.g., DIANA E.H. RUSSELL, *RAPE IN MARRIAGE* (1990) (describing spousal rape laws in the United States); Emily J. Stack, *Is Domestic Violence a Crime?: Intimate Partner Rape as Allegory*, 24 ST. JOHN'S J. LEGAL COMMENT. 535 (2010) (discussing spousal rape and domestic violence); Morgan Lee Woolley, *Marital Rape: A Unique Blend of Domestic Violence and Non-Marital Rape Issues*, 18 HASTINGS WOMEN'S L.J. 269 (2007) (discussing domestic and international treatment of marital rape and the inadequacies of responding to marital rape solely within the rubric of domestic violence or non-marital rape); Sonya A. Adamo, Note, *The Injustice of the Marital Rape Exemption: A Survey of Common Law Countries*, 4 AM. U. J. INT'L L. & POL'Y 555 (1989) (discussing spousal rape laws in England, Scotland, New Zealand, South Africa, Australia, and Canada); Wendy Larcombe & Mary Heath, *Developing the Common Law and Rewriting the History of Rape in Marriage in Australia: PGA v. The Queen*, 34 SYDNEY L. REV. 785 (2012) (describing spousal rape case law in Australia); Jennifer Koshan, *The Legal Treatment of Marital Rape and Women's Equality: An Analysis of the Canadian Experience*, THE EQUALITY EFFECT (2010), <http://theequalityeffect.org/pdfs/maritalrapecanadexperience.pdf> (describing spousal rape in Canada).
  9. The term 'postcolonial states' refers to states that are former colonies of European powers.
  10. One potential explanation for the retention of the spousal rape exemption and sexual violence against women is the lack of sustained economic development in Commonwealth Countries, which has implications for women's roles in society. In addition to having a large or majority Afro-Caribbean population, some Caribbean countries, such as Trinidad & Tobago, are comprised of diverse groups from India, many of whom came to Trinidad as indentured servants or contract laborers during the colonial period. See Lomarsh Roopnarine, *Indian Migration During Indentured Servitude in British Guiana and Trinidad, 1850–1920*, 52 LABOR HISTORY 173 (2011). Indo-Muslim and Indo-Hindu cultural values regarding the role of women in society may also have contributed to the retention of the spousal rape exemption in Commonwealth Countries; however, Trinidad has a much larger Indian population when compared to other Commonwealth Countries and Trinidad eliminated the spousal rape exemption in 2000. Kusha R. Haraksingh, *Structure, Process and Indian Culture in Trinidad*, in AFTER THE CROSSING: IMMIGRANTS AND MINORITIES IN CARIBBEAN CREOLE SOCIETY 113, 113–14 (Howard Johnson ed., 1990). Additionally, Spanish colonial rule, which preceded British colonial rule in the Caribbean, may have imparted long lasting identities and norms on Commonwealth Countries. DENNIS M. P. MCCARTHY, AN ECONOMIC HISTORY OF ORGANIZED CRIME: A

theoretical framework for critiquing the colonial roots of the modern-day spousal rape exemption in Antigua and Barbuda, the Bahamas, Barbados, Dominica, Jamaica, and Saint Lucia (“Commonwealth Countries”). This has important implications not only for scholars, policy makers, and civil society groups in this area but also for norm construction.

Third, this Article posits that postcolonial theory offers many insights regarding the history of colonialism and modern-day power dynamics and identities in Commonwealth Countries. The Article acknowledges postcolonial agency while simultaneously using postcolonial theory to evaluate the ways in which colonialism continues to percolate through the political, legal, and social structures of postcolonial Commonwealth Countries. For instance, despite the current international debate regarding what constitutes ‘legitimate rape’ under domestic law, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (“IAS Convention”) and the Convention on the Elimination of all Forms of Discrimination Against Women (“CEDAW”) recognize the right of women to be free from all forms of violence, including spousal rape.<sup>11</sup> The laws of Commonwealth Countries generally criminalize spousal rape only where a decree nisi of divorce, a separation order, a formal separation agreement, or a protective order is in place at the time of the rape.<sup>12</sup> A husband may escape prosecution for raping his wife if none of these conditions is satisfied. By codifying the common law spousal rape exemption, Commonwealth Countries have placed their domestic laws at odds with their obligation to protect women from sexual violence and discrimination under CEDAW and the IAS Convention. Thus, there is a distinct gap between treaty ratification and treaty compliance. These countries have also unwittingly created tensions between statutory law and human rights guaranteed by their constitutions, such as the right to equal protection. Through the use of postcolonial theory, this Article contends that by codifying the spousal rape exemption, Commonwealth Countries continue to perpetuate the misogynistic rationales used during the colonial period to justify the common law spousal rape exemption. Under the common law implied consent theory, a woman was deemed to have consented to sexual intercourse with her husband upon marriage, and such consent was irrevocable. The

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NATIONAL AND TRANSNATIONAL APPROACH 170 (2011) (describing Spanish colonial rule in Jamaica from 1494–1655).

11. Convention on the Elimination of All Forms of Discrimination against Women art. 2, Dec. 18, 1979, 1249 U.N.T.S. 20378 [hereinafter CEDAW]; Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women art. 6, June 9, 1994, 33 I.L.M. 1534 [hereinafter Convention of Belém do Pará].

12. See *infra* Part III.B.

spousal rape statutes of Commonwealth Countries criminalize spousal rape only when steps have been taken to revoke a woman's implied consent, such as when a separation order has been issued prior to, and is still in place at the time of, the rape.

This Article is an incomplete exploration of rape law in Commonwealth Countries, as it does not address the numerous evidentiary and criminal procedure issues related to rape prosecution. However, the goal of this Article is to begin to understand the extent to which the history of colonialism influences not only existing structures of law, power dynamics, and identities in postcolonial states, but also the readiness of postcolonial states to comply with emerging human rights norms by using the spousal rape statutes of Commonwealth Countries and Trinidad and Tobago as a case study. This may help to identify strategies for promoting postcolonial state compliance with international law, thereby facilitating the protection of human rights recognized by international instruments and guaranteed by postcolonial state constitutions.

A postcolonial reading of the spousal rape statutes of Commonwealth Countries suggests that these laws should be revised to fully criminalize spousal rape, not only to comply with constitutional principles and international law, but also to deconstruct the colonial foundations of Caribbean law that continue to foster a cultural identity that views women as "other." One of the insights that postcolonial theory has in common with a norms-based approach to human rights enforcement is the focus on the creation of new identities. Norms based scholars contend that human rights will be more effectively protected in countries where human rights norms are firmly lodged within domestic systems.<sup>13</sup> Embedding such norms within domestic systems may facilitate the creation of national and individual identities that value state compliance with human rights law. This Article uses postcolonial theory to advocate for a norms-based approach to changing the structures

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13. See Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997) (defining social, political, legal, legislative, and judicial internalization of international norms and discussing the importance of such domestic internalization to the transnational legal process). According to Koh, social internalization occurs when a norm acquires widespread domestic legitimacy, legislative internalization occurs when legislation is changed to reflect human rights norms because of domestic lobbying efforts, and judicial internalization occurs where domestic litigation leads to the incorporation of international human rights norms by the judiciary. *Id.* at 2656–57. Political internalization occurs when political elites accept an international norm and adopt it as a matter of government policy. *Id.* at 2657. References to legal internalization in this Article refer to the incorporation of human rights norms through legislative and executive action only. In contrast, Koh uses the term legal internalization to refer to domestic incorporation via the actions of the executive, judiciary, or legislative branch. *Id.*



that perpetuate inequality, and goes on to suggest the need for changes to negative norms regarding the role of women in marriage, with the aim of creating national and individual identities that are more willing to accept modern human rights norms. In that regard, the Article recommends legal, social, legislative, and judicial internalization of human rights norms in a manner that considers the colonial heritage of Commonwealth Countries.

Although none of the norms-based solutions proposed in this Article are new, postcolonial theory can also be used to suggest which solution may be most effective, as well as to assess how to implement such a solution in a particular context. This Article posits that a judicial decision rendered by the Judicial Committee of the Privy Council (“British Privy Council”), the final court of appeals of most Commonwealth Countries,<sup>14</sup> invalidating these statutes would be unlikely to provide a viable solution. Commonwealth Countries have historically opposed judicial internalization of international human rights norms by the British Privy Council. In the 1990s, Trinidad and Tobago and Jamaica denounced a number of human rights treaties, including treaties granting jurisdiction to international human rights tribunals.<sup>15</sup> This opposition occurred as a result of a British Privy Council decision, discussed in Part IV below, based on constitutional and human rights grounds that seriously hindered the ability of Commonwealth Countries to impose the death penalty.<sup>16</sup> In contrast, similar decisions by the Caribbean Court of Justice, a regional court of final appeals established by Caribbean countries, internalizing human rights norms have been better received by Caribbean countries. Successful internalization of human rights norms is more likely to occur where such internalization is fostered locally, such as by local regional courts and Caribbean judges, rather than by the British Privy Council, a relic of colonial rule. Further, Trinidad and Tobago’s successful efforts to reform its laws to eliminate the spousal rape exemption also highlight that Commonwealth Countries may be more willing to internalize human rights norms via statutory reform when such norms are generated from the bottom up via the actions of local interest groups, such as a women’s rights movement, rather than imposed solely from the top down.

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14. The Privy Council is the British court that provides final appellate review of the judicial decisions of Caribbean countries that have not yet acceded to the jurisdiction of the Caribbean Court of Justice (“CCJ”). See David Simmons, *The Caribbean Court of Justice: A Unique Institution of Caribbean Creativity*, 29 NOVA L. REV. 169, 170 (2005).

15. See Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash against Human Rights Regimes*, 102 COLUM. L. REV. 1832, 1881 (2002).

16. *Id.* at 1834.

Despite the elimination of the spousal rape exemption in Trinidad in 2000, Trinidadian women continue to suffer from a culture of sexual violence, which may be due in part to the failure to effectively change power dynamics and negative identities. Trinidad and Tobago, like many other Commonwealth Countries, has failed to incorporate CEDAW and the IAS Convention on the domestic plane.<sup>17</sup> The failure to incorporate such treaties signals an incomplete internalization of the human rights norms contained in these treaties, as well as a lack of commitment to protecting the human rights of women, particularly when a country has chosen to incorporate treaties intended to protect the interests of other vulnerable members of society. Additionally, Trinidad and Tobago has neglected to ratify the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW Optional Protocol”), which authorizes the United Nations Committee on the Elimination of Discrimination Against Women (“CEDAW Committee”) to receive and consider complaints from individuals and groups for violation of rights under CEDAW.<sup>18</sup>

As used in this Article, the term “stranger rape” refers to rape committed by a perpetrator who is not married to the victim, while “spousal rape” refers to rape committed by a perpetrator who is legally married to the

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17. Some countries have incorporated CEDAW in the domestic plane. *CEDAW in the United States: Why a Treaty for the Rights of Women*, Women’s Env’t & Dev. Org., <http://wedo.org///.pdf>. Columbia incorporated CEDAW into domestic legislation in 1981 and Columbian women have successfully used CEDAW to lobby for domestic violence legislation. *Id.*; see also, Rep. of the Comm. on the Elimination of Discrimination Against Women, 6th Sess., ¶ 464, U.N. Doc. A//; GAOR, 42d Sess., Supp. No. 38 (May 15, 1987); *Beijing Betrayed: Women Worldwide Report that Governments Have Failed to Turn the Platform into Action*, Women’s Env’t & Dev. Org. (Mar. 2005), <http://wedo.org///.pdf>. In Rwanda, women have used CEDAW to reserve 30% of seats in parliament for women. *Id.* Some cities in the United States, such as San Francisco, have also incorporated CEDAW via legislation. Dept. on the Status of Women, City and County of San Francisco, *CEDAW in Action: Local Implementation in the City and County of San Francisco* (2010), [http://sfgov3.org/////\\_.pdf](http://sfgov3.org/////_.pdf).

18. In addition to complaints from individuals and groups, the Optional Protocol to CEDAW also allows the CEDAW Committee to initiate inquiries into situations of grave or systematic violations of women’s rights. Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, Oct. 6, 1999, 2131 U.N.T.S. 83 [hereinafter CEDAW Optional Protocol]. Today, of the 105 countries that have ratified the CEDAW Optional Protocol, the twin-island nation of Antigua and Barbuda is the only Commonwealth country that has ratified this protocol. See Ratification Status: Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, U.N. TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8-b&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8-b&chapter=4&lang=en) (last visited Sept. 17, 2014).

victim. Part II of this Article introduces postcolonial theory and provides a history of the common law justifications for the spousal rape exemption. This section contends that during the colonial period, the doctrine of reception was used to impose on Commonwealth Countries British rules and norms regarding the role of women. Part III of this Article conducts a postcolonial reading of the spousal rape statutes of Commonwealth Countries and the CARICOM model rape statute. This section posits that these statutes fail to adequately protect women who experience sexual violence at the hands of their husbands and continue to perpetuate the common law justifications for the spousal rape exemption. Part IV of this Article argues that given the Commonwealth Caribbean resistance to a top-down imposition of modern-day human rights norms in the 1990s, it is unlikely that a British Privy Council decision that invalidates the sexual offence laws of Commonwealth Countries will provide a suitable solution. Part V contends that Trinidad and Tobago's legal reform efforts can provide useful lessons for other postcolonial countries, including the need for cultural change despite legal reform and the need for domestic incorporation of international treaties. Finally, Part VI proposes solutions in light of Trinidad and Tobago's experience, as well as the Caribbean opposition to human rights norms, such as legislative, social, and judicial internalization of the human rights norms set forth in the IAS Convention and CEDAW.

## II. POSTCOLONIAL THEORY AND THE COMMON LAW

### *A. Postcolonial Theory*

To the extent that the law produces identities, vestiges of colonial laws perpetuate the existence of colonial identities in postcolonial countries. Postcolonial scholars posit that "colonialism does not really end, except in a legal sense, as the effects of colonialism are enduring for both the colonizers and the colonized."<sup>19</sup> Postcolonial scholars, such as Leela Gandhi and Gayatri Spivak, posit that postcolonial theory is particularly concerned with identifying the ways in which current orderings in postcolonial countries continue to reflect their colonial origins.<sup>20</sup> Postcolonial theory does not contend that all ills currently faced by postcolonial countries can be laid at the feet of the colonizer; rather, it recognizes postcolonial agency while contemporaneously seeking to expose the ongoing role played by colonialism in postcolonial political, legal, and cultural structures. Postcolonial theory represents an interdisciplinary approach to law and presents new ways of con-

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19. Alpana Roy, *Postcolonial Theory and Law: A Critical Introduction*, 29 *ADEL. L. REV.* 315, 318 (2008).

20. LEELA GANDHI, *POSTCOLONIAL THEORY: A CRITICAL INTRODUCTION* 7–8 (1998).

ceptualizing legal structures.<sup>21</sup> It is also concerned with critiquing the “assumptions and representations on which colonialism is based.”<sup>22</sup>

Postcolonial theory can be used, and is now being more frequently used, by legal scholars to critique legal discourse.<sup>23</sup> Postcolonial theory acknowledges that independence “does not result in a return to a pre-colonial state, but rather movement into a ‘postcolonial’ state, where the effects of colonialism have become an inextricable part of the culture and of its legal, educational, and political institutions, and where the colonial state still serves as a reference point in local discourse.”<sup>24</sup> Other postcolonial theorists posit that postcolonialism is now the central vehicle through which the West relates to its “other” and that the “law has been . . . [in] the forefront of that very relation.”<sup>25</sup> Legal scholars have used postcolonial theory to assess the role of law during the colonial period, to illustrate the ongoing impacts of colonialism, “to identify new forms of harm and domination, and [to] trace the contemporary condition of subjugation of the historically Othered.”<sup>26</sup> Postcolonial theory has been used to address current issues such as identity, globalization, racism, and reterritorialization of the non-Western world.<sup>27</sup>

Much of postcolonial theory focuses on the rethinking of power dynamics and the creation of identities. Power is viewed as central not only to oppression, but also to the production of identities and subjects.<sup>28</sup> Modern postcolonial theorists have focused on the connections between economic, social, and political structures and practices, in addition to the ways in which power and such practices shape identities in postcolonial countries.<sup>29</sup> For instance, in her work on colonialism in Kenya, Roxanne Lynn Doty contends that colonial practices that were designed to “get the natives to work” “constructed particular kinds of identities for the colonial population.”<sup>30</sup> Similarly, western constructions of democracy, good governance, and development have created new identities and new subjectivities as illus-

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21. Roy, *supra* note 19, at 316.

22. JENNI RAMONE, *POSTCOLONIAL THEORIES* 1 (2011).

23. Roy, *supra* note 19, at 315.

24. MARGARET DAVIES, *ASKING THE LAW QUESTION: THE DISSOLUTION OF LEGAL THEORY* 278 (2d ed. 2002); *see also* Roy, *supra* note 19, at 316.

25. Roy, *supra* note 19, at 315; *see also* Peter Fitzpatrick & Eve Darian-Smith, *Introduction* to *LAWS OF THE POSTCOLONIAL* 1, 1–15 (Fitzpatrick & Darian-Smith eds., 1999).

26. Roy, *supra* note 19, at 319, 357.

27. *Id.* at 357.

28. Rita Abrahamson, *African Studies and the Post Colonial Challenge*, 102 *J. AFR. AFF.* 189, 198 (2003).

29. *Id.* at 200.

30. *Id.* at 201.

trated by a study of rural India where “underdevelopment has become a new form of identity.”<sup>31</sup>

Postcolonial perspectives, like a norms-based approach to human rights enforcement, recognize that in order to achieve sustainable changes to structures of inequality there must be a “parallel change of . . . the epistemological and psychological underpinnings and effects of such structures [including related identities and power dynamics].”<sup>32</sup> Thus, postcolonial theory can provide insights on the varied reasons for the perpetuation of structures of inequality in postcolonial countries and it can also be used to propose and identify how best to implement solutions to reform aspects of postcolonial social, legal, and political structures that facilitate inequality. For instance, health care scholars have used postcolonial theory to generate solutions to improve healthcare for pregnant women in groups historically marginalized by colonialism.<sup>33</sup>

Some scholars have argued that all-inclusive labels such as colonialism and postcolonialism fail to consider the sameness that may exist between colonized countries and countries that do not have a history of colonialism and, further, that these labels fail to account for differences between colonized nations.<sup>34</sup> For instance, pre-colonized cultures and countries that have not been colonized may have had views similar to those imposed by colonial powers regarding the role of women within marriage. Critics contend that in the context of postcolonial theory, countries such as Bangladesh and Australia become unified under the umbrella of their European colonial history despite the fact that these countries have distinct colonial experiences.<sup>35</sup>

As postcolonial theorist Leela Gandhi notes, while postcolonial theory recognizes a shared history of colonialism among countries, postcolonial theory also acknowledges the distinct ways in which colonialism has influenced the history and power structures of individual postcolonial states.<sup>36</sup> Gandhi contends that there is “fundamental incommensurability between the predominately cultural subordination of settler culture in Australia and the predominately administrative and militarist subordination of colonized culture in Africa and Asia.”<sup>37</sup>

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31. *Id.* at 203.

32. *Id.* at 209.

33. See Annette J. Browne et al., *The Relevance of Postcolonial Theoretical Perspectives to Research in Aboriginal Health*, 37 CAN. J. NURSING RES. 16 (2005); see also Dawn A. Smith et al., *‘Making a Difference’: A New Care Paradigm for Pregnant and Parenting Aboriginal People*, 98 CAN. J. PUB. HEALTH, 321, 321–24 (2007).

34. GANDHI, *supra* note 20, at 168.

35. Helen Tiffin, *Introduction* to PAST THE LAST POST: THEORIZING POST-COLONIALISM AND POST-MODERNISM vii, (Ian Adam & Helen Tiffin eds., 1991).

36. GANDHI, *supra* note 20, at 170.

37. *Id.*

Colonialism continues to have a unique enduring impact on the judicial systems of many Commonwealth Countries. The British Privy Council originated in 1833 as the highest court of civil and criminal appeal for the British Empire.<sup>38</sup> At one point in history the British Privy Council served as the final court of appeals for over a quarter of the world.<sup>39</sup> However, to date, in addition to British territories and crown dependencies, only thirteen independent countries, including Antigua and Barbuda, the Bahamas, Jamaica, Dominica, St. Lucia, Mauritius, and Trinidad and Tobago, have retained the British Privy Council as a final court of appeals.<sup>40</sup> In contrast, Nigeria, South Africa, and Ghana, all former British colonies, have established their own Supreme Courts after independence.

Spousal rape is a pervasive global problem that is not unique to postcolonial states, and Commonwealth Countries through their own agency have elected to codify the common law spousal rape exemption post-independence. Thus, one may contend that an analysis of spousal rape laws through a postcolonial lens is unnecessary. However, postcolonial theory adds significant value to this discourse, as it can suggest insights on the varied ways in which colonial history impacts modern day legislation and the retention of identities despite postcolonial agency, while simultaneously acknowledging the similarities between colonial identities and the traditional norms and identities of the colonized. For instance, spousal rape remains a significant problem in Nigeria.<sup>41</sup> However, direct colonial rule and

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38. See *The Jurisdiction of the Judicial Committee of the Privy Council*, Judicial Committee of the Privy Council, [http://www.jcpc.uk/docs/jcpc\\_jurisdiction\\_map.pdf](http://www.jcpc.uk/docs/jcpc_jurisdiction_map.pdf) (last visited Jul. 23, 2014); see also, e.g., JAM. CONST. pt. 3, § 110 (stating that the constitution expressly preserved the right to appeals to the Privy Council, generally referred to as “Her Majesty’s Council.”); compare *CCJ Blow: Cabinet Discusses Next Move Monday*, JAMAICA OBSERVER (Feb. 4, 2005), [http://web.archive.org/web/20070607000002/http://www.jamaicaobserver.com/news/html/20050203T220000-0500\\_74458\\_OBS\\_CCJ\\_BLOW.asp](http://web.archive.org/web/20070607000002/http://www.jamaicaobserver.com/news/html/20050203T220000-0500_74458_OBS_CCJ_BLOW.asp) (reporting that in 2005, Jamaica attempted to replace the British Privy Council with the CCJ but the British Privy Council held that the process used was unconstitutional), with *Dominica Moving to Cut Ties with Privy Council*, JAMAICA OBSERVER (Jul. 3, 2014), <http://www.jamaicaobserver.com/news/Dominica-moving-to-cut-ties-with-Privy-Council-17081906> (reporting that that Dominica’s legislature has approved legislation to replace the Privy Council with the Caribbean Court of Justice).
39. *The Jurisdiction of the Judicial Committee of the Privy Council*, U.K. JUDICIAL COMM. OF THE PRIVY COUNCIL, [http://www.jcpc.uk/docs/jcpc\\_jurisdiction\\_map.pdf](http://www.jcpc.uk/docs/jcpc_jurisdiction_map.pdf) (last visited July 23, 2014).
40. *Beginner’s Guide to the Judicial Committee of the Privy Council*, THE SUPREME COURT OF THE U.K. 3 (Mar. 31, 2014), <https://www.supremecourt.uk/docs/beginners-guide-to-the-jcpc.pdf>.
41. See Tolulope Monisola Oya & Johnson Olusegun Ajayi, *Values Clarifications in Marital Rape: A Nigerian Situation*, 9 EUR. SCI. J. 291 (2013) (contending that spousal rape is legal in Nigeria and noting that it is the African Yoruba value for a wife to be

the impact of the transatlantic slave trade in the Caribbean differentiate the Caribbean colonial experience from the Nigerian colonial experience, where the policy of indirect rule during the colonial period made it more likely that tribal norms and culture would remain intact.<sup>42</sup>

The prevalence of spousal rape in modern day Nigeria has been attributed to traditional African Yoruba norms regarding the role of women, which were to some extent in accord with British colonial norms on spousal rape.<sup>43</sup> And while such values regarding the role of women may have made their way over to the Caribbean via the transatlantic slave trade, a tool of colonialism, the impact of the transatlantic slave trade in the Caribbean impedes making a direct connection between such traditional pre-colonial African values and the modern day spousal rape laws in the Caribbean. What is much clearer is the imposition of colonial norms through the “doctrine of reception,” the explicit retention of common law and British statutes adopted prior to independence, and the wholesale preservation of common law spousal rape rules through the adoption of various statutes in the Caribbean. These facts illustrate the value and insights of postcolonial theory.

Additionally, one could contend that the retention of the spousal rape exemption may be due in part to pre-colonial culture in the Commonwealth Caribbean. While this argument may have some merit, the extent to which pre-colonial values in the Caribbean influences modern day Caribbean dynamics may be limited due to the genocide of the indigenous population during the sixteenth century.<sup>44</sup>

The concept of subalterneity is central in postcolonial studies.<sup>45</sup> Subaltern “refers to the various hierarchies which existed *within* the colonized world—that is, within the ‘native’ population.”<sup>46</sup> In her research on colonial

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submissive to her husband and such values may be responsible for the prevalence of spousal rape in Nigeria).

42. See Stacy-Ann Elvy, *Towards a New Democratic Africa: The African Charter on Democracy, Elections and Governance*, 27 EMORY INT’L L. REV. 41 (2013) (discussing the impact of indirect rule in Africa, which utilized existing tribal structures to facilitate British dominance); see also Christian Dippel, *Institutional Change and Elite Perspectives: The 19th Century Caribbean Colonies* (May 16, 2012), available at [http://www.anderson.ucla.edu/faculty/christian.dippel/BWL\\_cc\\_paper03.pdf](http://www.anderson.ucla.edu/faculty/christian.dippel/BWL_cc_paper03.pdf) (discussing the evolution of direct colonial rule in British Caribbean colonies).

43. Oya & Ajayi, *supra* note 41, at 303.

44. See ORLANDO PATTERSON, *SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY* (1982) for Caribbean sociologist Orlando Patterson’s contention that there were over a million native Indians in the Caribbean prior to Columbus’ arrival, but by 1550 only two hundred and fifty native Indians remained in the Caribbean, while in Jamaica the Arawak population was completely eliminated within a decade.

45. Roy, *supra* note 19, at 342.

46. *Id.* at 342–43.



women in India, postcolonial theorist Gayatri Spivak contends that patriarchy and colonialism have both been used simultaneously to oppress and control the “subaltern sexed subject, or brown woman.”<sup>47</sup> The ideology of British patriarchy, which was grounded in notions of respectability and domesticity, created a plethora of restrictive norms regarding the role of women in society. Patriarchy is a cultured construct that facilitates the production of gendered norms and creates a system of female exploitation.

At common law, women were chattel, owned first by their fathers and then by their husbands; a husband could not be held criminally responsible for raping his own chattel. This concept was incorporated into British common law through the spousal rape exemption, which prevented a husband from being prosecuted for raping his wife.<sup>48</sup> British common law facilitated the perpetuation of the superiority of the male identity over the female identity. For instance, under the common law, married women had little or no right to enter into contracts or sue, and a husband had control over his wife’s property.<sup>49</sup> British patriarchy provoked the development of four justifications for affording husbands freedom from prosecution if they engaged in forced sexual intercourse with their wives: (1) the implied consent theory, (2) the unities theory, (3) the property theory, and (4) the privacy and reconciliation theories. All of these theories implicate principles of contract law, property law, criminal law, and family law.

### *B. Implied Consent Theory*

The implied consent theory, or irrevocable consent theory, was the most commonly endorsed justification for the spousal rape exemption.<sup>50</sup> This theory was the first justification offered in support of the spousal rape exemption.<sup>51</sup> Sir William Hale, a former Chief Justice of the Court of the King’s Bench in England,<sup>52</sup> explained in his treatise that “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 her-

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47. *Id.* at 345; see also Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, in *THE POST-COLONIAL STUDIES READER* 28 (Bill Ashcroft et al. eds., 1995).

48. CARINGELLA, *supra* note 2, at 20.

49. See Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373, 1387–88 (2000); see also, Richard Chused, *Married Women’s Property Law: 1800–1850*, 71 GEO. L.J. 1359, 1361 (1983) (stating that at the beginning of the nineteenth century husbands had control of the property of their wives).

50. Anne C. Dailey, Note, *To Have and to Hold: The Marital Rape Exemption and the Fourteenth Amendment*, 99 HARV. L. REV. 1255, 1256 (April 1986).

51. *Id.* at 1255.

52. Hasday, *supra* note 49, at 1396.



self in this kind unto her husband, which she cannot retract.”<sup>53</sup> A marriage was embodied in a contract, and “the terms of this contract include[d] a wife’s irrevocable consent to have sexual intercourse with her husband, whenever he wishes.”<sup>54</sup>

Any sexual intercourse between husband and wife after the wife provided initial consent in their marriage contract was deemed consensual and thus could not constitute rape. To the extent that women were deemed to have given irrevocable consent to sexual intercourse, female submission to sexual intercourse was required. According to Anne McClintock, “controlling women’s sexuality . . . was widely perceived as a paramount means for controlling the health and wealth of the male imperial body.”<sup>55</sup> Thus, the law played a central role in restricting female sexual autonomy in an effort to facilitate British imperialism.

### C. Unities Theory

The second justification provided in support of the spousal rape exemption was the unities theory, which was derived from the feudal doctrine of coverture, the legal unity of a husband and a wife.<sup>56</sup> William Blackstone described the theory in his *Commentaries*: “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.”<sup>57</sup> Under this theory, a woman ceased to retain her identity once she was married; a husband assumed his wife’s civil identity and was given wide-ranging control over her.<sup>58</sup> Women were not recognized as separate persons from their husbands and therefore “marital rape [was] impossible because a husband [was] not capable of raping himself.”<sup>59</sup> In his commentaries, Blackstone contended that women were inferior to men.<sup>60</sup> This presumption facilitated the establishment of the third and fourth theories that justified the spousal rape exemption: the property theory and the privacy and reconciliation theories.<sup>61</sup>

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53. MATTHEW HALE, *The History of the Pleas of the Crown* 629 (Robert H. Small ed., 1847) (1736).

54. Lalenya Weintraub Siegel, *The Marital Rape Exemption: Evolution to Extinction*, 43 CLEV. ST. L. REV. 351, 354 (1995).

55. ANNE MCCLINTOCK, *IMPERIAL LEATHER: RACE, GENDER, AND SEXUALITY IN THE COLONIAL CONTEST* 47 (1995); see also GANDHI, *supra* note 20, at 98.

56. Dailey, *supra* note 50.

57. 1 WILLIAM BLACKSTONE, *COMMENTARIES*, \*442.

58. Hasday, *supra* note 49, at 1389.

59. Theresa Fus, Note, *Criminalizing Marital Rape: A Comparison of Judicial and Legislative Approaches*, 39 VAND. J. TRANSNAT’L L. 481, 483 (2006).

60. BLACKSTONE, *supra* note 57, at \*444.

61. Dailey, *supra* note 50.

#### D. Property Theory

Under the property theory, a woman became her husband's property once they were married. As a result, husbands had substantial authority over their wives.<sup>62</sup> The common law reflected this notion in that rape law in general was treated "as a property crime of man against man," rather than as a violation against women.<sup>63</sup> Prior to marriage, a woman was the property of her father; rape laws thus existed to protect both a father's interest in his daughter's virginity, as well as a husband's interest in his wife's fidelity.<sup>64</sup> Since a husband could not commit a crime against himself by taking what he already owned, "a husband was no more capable of raping his [own] wife than an owner was of stealing his own property."<sup>65</sup> Sexual intercourse between a husband and a wife could never constitute rape, because the husband would merely be "making appropriate use of his property."<sup>66</sup> Viewing women as property stems from the assumption that women are inherently weak, emotional, and infantile, and are therefore in need of direction that only a husband or father can provide. Similarly, one of the major justifications for European colonialism was the alleged infantile and primitive nature of indigenous populations.<sup>67</sup> The property theory is perhaps rooted in the concept of submissiveness of women. It is because women were also viewed as the property of their husbands or fathers that they were perceived to lack the ability to make independent decisions.

#### E. Modern Privacy and Reconciliation Theories

During the Victorian era, "privacy meant keeping people out of one's own business [and] the domestic fortress was privacy's stronghold."<sup>68</sup> Under the common law, a husband had legal and physical control over his wife, and the law protected a husband's right to exert such control without intru-

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62. Hasday, *supra* note 49, at 1389.

63. Dailey, *supra* note 50 (quoting S. BROWNMILLER, *AGAINST OUR WILL* 8 (1975)); see R. TONG, *WOMEN, SEX, AND THE LAW* 90 (1984).

64. *Id.*

65. Siegel, *supra* note 54, at 356.

66. Adamo, *supra* note 8, at 560.

67. John L. Comaroff, *Colonialism, Culture, and the Law: A Foreword*, 26 *LAW & SOC. INQUIRY* 305, 310 (2001).

68. DEBORAH COHEN, *FAMILY SECRETS: SHAME AND PRIVACY IN MODERN BRITAIN* 3–4 (2013). Cohen contends that the ideal of domestic privacy was well established in Britain by the eighteenth century. *Id.*; see also SIMON SZRETER & KATE FISHER, *SEX BEFORE THE SEXUAL REVOLUTION: INTIMATE LIFE IN ENGLAND, 1918–1963* (2010) (contending that from 1918 through 1963 privacy was at the center of marital relationships in Britain and describing the various ways in which marital privacy was understood during this period).

sion.<sup>69</sup> A husband could subject his wife to corporal punishment; authorities would intrude on the sanctity of marriage only where a husband caused permanent physical injury to his wife.<sup>70</sup> The concept of marital privacy is to some extent rooted in the doctrine of coverture. The law protected a husband's ability to exercise his legal right to control his wife within the confines of marriage. According to Blackstone, the law considered spouses to be a single person, with the wife submitting herself to her husband, and upon marriage, a husband would adequately protect his wife's interests.<sup>71</sup> Thus, the interests of the husband were viewed as identical to the interests of the wife under the unities theory. Modern-day notions of marital privacy, like the unities theory, "assume the aligned interests of husband and wife."<sup>72</sup>

The right to marital privacy and the goal of marital reconciliation have been used to justify the spousal rape exemption.<sup>73</sup> Under the privacy theory, failing to prosecute a husband for raping his wife prevented governmental intrusion, protected marital privacy, and promoted reconciliation between spouses.<sup>74</sup> Upon marriage, "the curtain is drawn: the public stays out and the spouses stay in."<sup>75</sup> If a husband were prosecuted for raping his wife, the public could review the intimate acts of a married couple, which would violate the couple's right to marital privacy.<sup>76</sup> Under the reconciliation theory, one spouse should not be able to waive the right to marital privacy without the other spouse's consent.<sup>77</sup> Spouses are incentivized to resolve their problems without outside interference, which facilitates mutual respect between the spouses.<sup>78</sup> Under the reconciliation theory, the ability of married couples to reconcile would be greatly decreased if spouses were permitted to access the criminal justice system to resolve all of their marital disputes.<sup>79</sup>

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69. BLACKSTONE, *supra* note 57, at \*442.

70. Hasday, *supra* note 49, at 1389; *see also* Reva B. Siegel, "The Rule of Love": *Wife Beating as Prerogative and Privacy*, 105 *YALE L.J.* 2117, 2118 (1996) (suggesting that nineteenth-century judges refused to intervene in wife beating cases to protect marital privacy and promote marital harmony).

71. BLACKSTONE, *supra* note 57, at \*444.

72. Hasday, *supra* note 49, at 1380.

73. *Id.*

74. *See* Michael Gary Hilf, *Marital Privacy and Spousal Rape*, 16 *NEW ENG. L. REV.* 31, 34-40 (1980).

75. *Id.* at 34.

76. *See id.* at 34-36.

77. *See id.* at 34.

78. *See id.*

79. *See id.*

*F. Doctrine of Reception and the Imposition of  
British Norms and Legal Rules*

Law is “both a producer of culture and an object of culture.”<sup>80</sup> Law “shapes individual and group identity, social practices as well as the meaning of cultural symbols, but all of these things (culture in its myriad manifestations) also shape law by changing what is socially desirable, politically feasible, [and] legally legitimate.”<sup>81</sup> Thus, law creates culture, and cultural practices can create law. The process of controlling colonial territories through colonial laws has been referred to as “lawfare” rather than “warfare.”<sup>82</sup> Law was central to the process of colonization.<sup>83</sup> John Comaroff contends that the term “colonial law” refers to “an irreducibly diverse ensemble of practices and institutions [where] cultures of legality were constitutive of colonial society [and] . . . colonies were prime sites of sociolegal experimentation.”<sup>84</sup>

Postcolonial theorists have “endeavored to show that the ideological effects of colonial laws continue to have contemporary relevance as they continue to be used as an instrument of control in [the] postcolonial world.”<sup>85</sup> However, it is often difficult to identify the exact moment at which colonial values regarding the respective roles of men and women became embedded within the various structures of postcolonial states.<sup>86</sup>

During the colonial period, the British used the colonial doctrine of reception to impose British common law, norms, justifications, and statutes on Commonwealth Countries,<sup>87</sup> including the norms regarding conjugal relations in marriage and “the science of domesticity” and respectability.<sup>88</sup> In

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80. Naomi Mezey, *Law as Culture*, 13 YALE J.L. & HUMAN. 35, 46 (2001).

81. *Id.*

82. Comaroff, *supra* note 67, at 306.

83. *See id.* at 305.

84. *Id.* at 312.

85. Roy, *supra* note 19, at 319.

86. M. Jacqui Alexander, *Not Just (Any) Body Can be a Citizen: The Politics of Law, Sexuality and Postcoloniality in Trinidad and Tobago and the Bahamas*, 48 FEMINIST REV., Autumn 1994, at 11.

87. *See* Jane Matthews Glen, *Mixed Jurisdictions in the Commonwealth Caribbean: Mixing, Unmixing, Remixing*, 12 ELEC. J. COMP. L., May 2008, at 4 (discussing the doctrine of reception as the English common law of colonization and its role as the process in which British law was adopted in the Commonwealth Caribbean); BLACKSTONE, *supra* note 57, at \*107 (discussing the imposition of English common law on settled territories: settlers were presumed to have brought with them English norms, common law, and statutes already in existence, although laws of conquered or ceded territories generally remained in place until the laws were changed by the English or colonial legislatures directly adopted English laws).

88. Alexander, *supra* note 86, at 12.

the Caribbean, the colonized were socialized to accept these colonial norms.<sup>89</sup>

After Commonwealth Countries gained independence, postcolonial masculinity emerged, in part by upholding the British principles regarding domestic respectability, conjugal relations, and the role of women.<sup>90</sup> Postcolonial masculinity aspired to imitate imperial masculinity in an effort to be viewed as legitimate and worthy of independent rule.<sup>91</sup> Commonwealth Countries have continued to perpetuate colonial ideologies regarding masculinity, respectability, and femininity.<sup>92</sup> Postcolonial Commonwealth Countries continue to rely on colonial “constructions of a servile femininity, perennially willing and able to serve.”<sup>93</sup>

During the independence period, postcolonial Caribbean leaders openly lauded their continued reliance on British traditions. Norman Manley, one of Jamaica’s leading political figures of that time, asserted that Jamaica made “no apology for the fact that [it] did not attempt to embark upon any original or novel exercise for constitution building because [it] had a system which [Jamaicans] underst[ood] . . . and which [was] consistent with the sort of ideals [held] in this country.”<sup>94</sup> Similarly, Dominica’s Premier openly acknowledged that the country intended to follow “in the noble British tradition . . . by evolution rather than revolution . . . [and] intended to base [its] progress on continuity, taking from past [British] institutions.”<sup>95</sup> The approach taken in the Caribbean, in favor of evolution rather than revolution, is somewhat distinct from the revolutionary fight for

89. *See id.* at 13 (“[S]chools like the Dundas Civic Center in the Bahamas . . . and the Trinidad and Tobago Home Industries and Women’s Self Help Organization . . . would train Black women in housewifery, cooking, sewing and knitting.”).

90. *See id.* at 13.

91. *Id.*

92. *See id.* at 14.

93. *Id.* at 19; *see also Push for Greater Gender Equality!*, THE GLEANER (Sept. 30, 2012), <http://jamaica-gleaner.com/gleaner/20120930/focus/focus6.html> (“Regardless of social position, women continue to bear the brunt of domestic responsibilities, including the nurture and care of children and the elderly” and women are overwhelming concentrated in the lowest paying sectors of the economy); Jamaica, Internat’l Labour Org. (Oct. 2009), <http://www.ilo.org/caribbean/countries-covered/jamaica/lang—en/index.htm> (women account for only 31.1% of the Jamaican labor force while men make up 68.9%). *But see* Jamaica Nat’l Pol’y for Gender Equality (2011), <http://www.jcdc.gov.jm/uploads/advisories/NPGE%20BOOKLET%20web.pdf> (indicating the Jamaican government’s dedication to promoting gender balance between men and women).

94. Tracy Robinson, *Gender, Nation and the Common Law Constitution*, 28 OXFORD J. LEGAL STUD. 735, 740 (2008).

95. *Id.*

independence taken by former colonies in Africa, such as Kenya, Angola, and Guinea-Bissau.<sup>96</sup>

Postcolonial theorist Frantz Fanon asserts that during specific phases of postcolonial development, postcolonial subjects often attempt to create a national postcolonial culture that is distinct from the culture of their colonizers.<sup>97</sup> However, in the process, postcolonial subjects may fail to realize that they continue to use instruments and principles borrowed from their colonizers.<sup>98</sup> Fanon argues that at this phase in postcolonial development, the postcolonial subject “contents himself with stamping the . . . instruments [of his colonizer] with a hall-mark which he wishes to be national, but which is strangely reminiscent of exoticism.”<sup>99</sup>

A postcolonial reading of the laws of Commonwealth Countries indicates that many of these countries continue to rely heavily on British case law and statutes when creating and operating their own legal systems. The independence constitutions of Commonwealth Countries preserved a British colonial identity by retaining the British Privy Council as the final court of appeals.<sup>100</sup> These constitutions often included a “savings clause” that upheld the validity of any law, including common law, that existed prior to independence until these laws were either repealed or revised by the legislature.<sup>101</sup> The British Privy Council has historically adopted a narrow interpretation of savings clauses, which assumed that fundamental rights and freedoms were derived from the common law rather than the constitution.<sup>102</sup> Only rights that were recognized by the common law before the

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96. MHD Noor Al-Abbood, *Native Culture and Literature under Colonialism: Fanon's Theory of Native Resistance and Development*, 2 ENG. LANGUAGE & LIT. STUD. 121, 126–30 (2012).

97. See FRANTZ FANON, *THE WRETCHED OF THE EARTH* 222–23 (Constance Farrington trans., Grove Press 1963) (1961) (discussing the revolutionary phase of colonial literature).

98. *Id.* at 223.

99. *Id.*

100. ANT. & BARB. CONST., sched. 2 ¶ 3; BAH. CONST., ch. 3, art. 31; BARB. CONST., ch. VI, §§ 76, 77; see also Helfer, *supra* note 15, at 1865.

101. See Derek O'Brien & Se-shauna Wheatle, *The Commonwealth Caribbean and the Uses and Abuses of Comparative Constitutional Law*, U.K. CONST. LAW ASS'N (Nov. 22, 2011), <http://ukconstitutionallaw.org/tag/savings-clauses/>; JAM. CONST., art. 26(8). The savings clause in the Jamaican constitution provides “nothing contained in any law in force immediately before the appointed day shall be held to be inconsistent with any of the provisions of this Chapter; and nothing done under the authority of any such law shall be held to be done in contravention of any of these provisions.” *Id.*

102. Robinson, *supra* note 94, at 744; see also DPP v. Nasralla, [1967] 2 A.C. 238–39 (P.C.) (appeal taken from Jam.) (adopting a narrow view of the savings law clause in the Jamaican constitution).

effective date of the constitution were constitutionally protected.<sup>103</sup> Thus, in some instances, savings clauses immunized laws from constitutional scrutiny, as claims by plaintiffs asserting violations of fundamental rights under state constitutions were defeated by government assertions that the common law did not guarantee such rights prior to independence.<sup>104</sup>

Commonwealth Caribbean reliance upon British statutory law, British common law, and the British Privy Council was, to some extent, necessary to maintain a functional legal system immediately after independence. In fact, many countries, including the United States and Canada, continue to rely on British common law. However, unlike most Commonwealth Countries, the United States does not rely on the British Privy Council as the final court of appeals. Similarly, Canada created its own Supreme Court in 1875 and abolished the right to appeals in criminal cases to the British Privy Council in 1888.<sup>105</sup> New Zealand abolished the right to appeals to the Brit-

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103. ROSE-MARIE B. ANTOINE, COMMONWEALTH CARIBBEAN LAW AND LEGAL SYSTEMS 101–02 (2006).

104. Robinson *supra* note 94, at 744.

105. Bryan Finlay, Q.C. & Frank E. Walwyn, WeirFoulds LLP, “Such As They Are, They Are Our Own”: A Talk on Abolishing Canadian Appeals to the Privy Council, Presentation to the Judicial Education Institute of the Eastern Caribbean Supreme Court (Feb. 8, 2008); *see also* John S. Jeremie S.C., *The Privy Council and the Caribbean*, 129 L.Q.R. 169 (2013); Dr. Nadia Bernaz, *Delivering Justice in the Caribbean: A Human Rights Assessment of the Caribbean Court of Justice*, P.L. 2012, 703 (Oct. 2012) (Eng.); Derek O’Brien, *The Caribbean Court of Justice and Its Appellate Jurisdiction: A Difficult Birth*, P.L. 2006, 344 (2006) (Eng.). Commonwealth Countries are indeed free to replace the Privy Council with the CCJ, but very few of these countries have done so. The reasons for the failure to do away with the Privy Council are varied. Many arguments have been put forward for retaining the Privy Council. For example, the political distance of the Privy Council is viewed as advantageous because it supposedly allows decisions to be decided objectively. Helfer, *supra* note 15, at 1867. The Privy Council, which is paid for by Britain, also has a long history of demonstrating its competence to decide cases on Caribbean issues. *Id.* Often, political parties cannot reach a consensus on the issue, despite the many arguments in favor of replacing the Privy Council. *See* Alicia Dunkley, *CCJ All The Way*, JAMAICA OBSERVER (May 11, 2012), [http://www.jamaicaobserver.com/news/CCJ-all-the-way\\_11438687](http://www.jamaicaobserver.com/news/CCJ-all-the-way_11438687); AJ Nicholson, *Six Reasons Why There’s No Need for Privy Council, CCJ Referendum*, JAMAICA OBSERVER (June 25, 2012), [http://www.jamaicaobserver.com/news/Six-reasons-why-there-s-no-need-for-Privy-Council—CCJ-referendum\\_11790305](http://www.jamaicaobserver.com/news/Six-reasons-why-there-s-no-need-for-Privy-Council—CCJ-referendum_11790305). In other cases, the Privy Council invalidates the actions of the legislative branch. Jamaica once attempted to replace the Privy Council with the CCJ by adoption of three statutes that passed by a simple majority in the House. *Indep. Jam. Council for Human Rights (1998) Ltd. v. Marshall-Burnett*, [2005] Appeal No. 41 of 2004, 2005 WL 62301 at \*1–2 (P.C.) (appeal taken from Jam.). The Privy Council held the statutes unconstitutional due to the Jamaican government’s failure to follow appropriate constitutional procedures for replacing the Privy Council with the CCJ. *Id.* at \*9. The Privy Council reasoned that although the right of appeal was not entrenched in the Jamaican Constitution, the structure of the



ish Privy Council in 2004.<sup>106</sup> Additionally, in contrast to the United States, most Commonwealth Countries have adopted the British Westminster system of government.<sup>107</sup> Although other former British colonial territories, such as Australia, have adopted the Westminster system, Australia abolished the right of appeal to the British Privy Council in 1986.<sup>108</sup> Commonwealth Countries are bound to follow British Privy Council decisions from their own jurisdictions; however, in many instances, the courts of Commonwealth Countries are also willing to follow British Privy Council precedent that originates from other jurisdictions.<sup>109</sup> For instance, *Pratt v. Morgan*, discussed in Part IV below, originated in Jamaica and interpreted Jamaican constitutional provisions, but many other Commonwealth Countries, including Trinidad and Tobago, have considered themselves to be bound by this decision.<sup>110</sup> Caribbean scholars have contended that Commonwealth Caribbean law is British law, as the statutes adopted by many Caribbean countries are often simply codifications of colonial British rules, particularly in the area of criminal law. These countries rarely update their laws to re-

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appeals courts in Jamaica, including the independence of their judiciary, was entrenched in the Constitution. *Id.* at \*8. Amendments to an entrenched provision require a period of at least six months between introduction of the bill in a House and its passing, and the bill must pass in each House by no less than two-thirds of all members of that House. *Id.* at \*5. Public opinion in Britain appears to favor eliminating the Privy Council for independent countries such as Commonwealth Countries. See Roy Hattersley, *Let's Abolish this Absurdity*, THE GUARDIAN (Dec. 13, 2000, 10:12 PM), <http://www.theguardian.com/uk/2000/dec/14/monarchy.comment>; see also *Privy Council's Complaint*, BBC CARIBBEAN (Sept. 24, 2009, 7:20 AM), [http://www.bbc.co.uk/caribbean/news/story/2009/09/090922\\_privyccjphillips.shtml](http://www.bbc.co.uk/caribbean/news/story/2009/09/090922_privyccjphillips.shtml) (discussing Lord Nicholas Phillip's opinion that the Privy Council was spending a disproportionate amount of time on appeals from former colonies in the Caribbean and that these countries should establish their own final appeals courts instead).

106. Supreme Court Act 2003 (N.Z.). Other former British Colonies such as India, Malaysia, Singapore, and Zimbabwe have also eliminated the right to appeal to the British Privy Council. Andrew Le Sueur, Unit Report, *What is the Future for the Judicial Committee of the Privy Council?*, UNIV. COLL. LONDON, SCH. PUB. POLICY, CONST. UNIT, at 6 (May 2001), <http://www.ucl.ac.uk/spp/publications/unit-publications/72.pdf>.
107. See Winton Anderson, *The Role of the Caribbean Court of Justice in Human Rights Adjudication: International Treaty Law Dimensions*, 21 J. TRANSNAT'L L. & POL'Y 1, 5–6 (2011–2012).
108. *Australia Act 1986* (Cth) s 11(1).
109. ANTOINE, *supra* note 103, at 141–42, 149–51. Some Caribbean scholars contend that Privy Council decisions from other jurisdictions should not be treated as binding, but rather be viewed as persuasive legal authority even where the laws and circumstances are similar. *Id.*
110. *Id.* at 149–51.



flect modern-day changes to British law.<sup>111</sup> Even the titles of the spousal rape statutes of Commonwealth Countries has colonial origins; these statutes are titled after the Sexual Offences Act adopted in Britain in 1956.<sup>112</sup>

The explicit wholesale preservation of the common law by Caribbean constitutions, the retention of the British Privy Council as the final court of appeals, and the failure to develop a distinct Commonwealth Caribbean jurisprudence tailored to the needs of the Caribbean, separate and apart from British Privy Council case law,<sup>113</sup> evidence the extent to which a British colonial identity continues to exist in Commonwealth Countries.

In the famous 1991 case of *R v. R*, the United Kingdom House of Lords abolished the spousal rape exemption.<sup>114</sup> The court reasoned that the status and role of married women in modern-day England had changed since the publication of Sir William Hale's treatise in 1736.<sup>115</sup> The House of Lords specifically rejected Hale's proposition that a married woman provided her husband with irrevocable consent to sexual intercourse.<sup>116</sup> The court held that "in modern times the supposed marital exception in rape forms no part of the law of England."<sup>117</sup> The court also acknowledged that the implied consent theory was a reflection of restrictive cultural views toward women in the eighteenth century.<sup>118</sup>

The laws of Commonwealth Countries continue to reflect the gendered justifications and binary oppositions embedded within the common law, which facilitate female subjectivity and objectivity. The attempt by the Bahamian legislature in 2009 to eliminate the spousal rape exemption provides an illustration of the maintenance of the historical gendered justifications used to perpetuate the common law spousal rape exemption. At a panel discussion on the proposed Bahamian bill, a "woman, who did not provide her identity while speaking, said that it is not possible for a man to rape his wife. She said that she makes herself available to her husband

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111. P.K. Menon, *The Law of Rape and Criminal Law Administration with Special Reference to the Commonwealth Caribbean*, 32 INT'L & COMP. L. Q. 832, 839 (1983).

112. *Id.* at 836.

113. David S. Berry & Tracy Robinson, *Introduction* to TRANSITIONS IN CARIBBEAN LAW: LAW-MAKING, CONSTITUTIONALISM AND THE CONVERGENCE OF NATIONAL AND INTERNATIONAL LAW, xiii (David S. Berry & Tracy Robinson eds., 2013) (arguing that much of the Commonwealth Caribbean courts continue to rely heavily on British cases and statutes to the detriment of the creation of a distinct Commonwealth Caribbean jurisprudence).

114. *R v. R*, [1991] UKHL 12, [1992] 1 A.C. 599 (H.L.) (appeal taken from Eng.).

115. *R v. R* [1991] UKHL at 12.

116. *R v. R* [1991] UKHL at 12.

117. *R v. R* [1991] UKHL at 12.

118. *R v. R* [1991] UKHL at 12.

whenever he desires sex, claiming that her body is ‘his body.’”<sup>119</sup> The bill, which was supported by the Archdiocese of Nassau and the Anglican Church in the Bahamas, but which was opposed by the Bahamas Christian Council,<sup>120</sup> was eventually tabled.<sup>121</sup>

The CEDAW Committee has expressed concern regarding the persistence of strong patriarchal attitudes and deep-rooted stereotypes regarding the roles, responsibilities, and identities of women and men in Jamaica.<sup>122</sup> The CEDAW Committee has recommended that Jamaica adopt a comprehensive strategy to eliminate cultural practices that discriminate against women.<sup>123</sup>

Women in Caribbean countries continue to be subject to high levels of sexual abuse.<sup>124</sup> A survey of young adults in Barbados, Jamaica, and Trinidad and Tobago found that between 52% and 73% of women reported experiences of sexual violence at the hands of a partner.<sup>125</sup> Reports from various United Nations programs, including UNICEF and the annual U.S. State Department Country Reports on Commonwealth Countries, indicate

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119. Anthony L. Hall, *Banning Marital Rape in The Bahamas*, THE IPINIONS JOURNAL, (Aug. 14, 2009), <http://www.theipinionsjournal.com/2009/08/banning-marital-rape-in-the-bahamas/>.
120. Lisa Benjamin & Cathleen LeGrand, *Sound and Fury: Newspaper Coverage of the Marital Rape Debate in New Providence*, 18 INT’L J. BAHAMIAN STUD. 16, 29–30 (2012). Archbishop Patrick Pinder supported the 2009 proposed bill to fully criminalize spousal rape and stated that “woman and man exist in a partnership where one partner completes the other, making the relationship one of complementarity and not ownership [therefore] no person can be the possession of another. Human dignity does not allow this. When an individual is forced to engage in sexual activity against his or her will then the perpetrator does violence to the dignity and value of the human person created in the image and likeness of God.” *Bahamas Church Backs Marital Rape Bill*, CATHOLIC NEWS (Trin. & Tobago), (Sept. 10, 2009, 3:27 PM), [http://www.catholicnews-tt.net/joomla/index.php?option=com\\_content&view=article&id=858:car130909-1&catid=35:caribbean-news&Itemid=93](http://www.catholicnews-tt.net/joomla/index.php?option=com_content&view=article&id=858:car130909-1&catid=35:caribbean-news&Itemid=93).
121. See Taneka Thompson, *McCartney Clarifies Position on Marital Rape Issue*, NASSAU GUARDIAN (Mar.23, 2012), [http://www.thenassauguardian.com/index.php?option=com\\_content&view=article&id=27326:mccartney-clarifies-position-on-marital-rape-issue&catid=3:news&Itemid=27](http://www.thenassauguardian.com/index.php?option=com_content&view=article&id=27326:mccartney-clarifies-position-on-marital-rape-issue&catid=3:news&Itemid=27).
122. Rep. of the Comm. on the Elimination of Discrimination Against Women, 36th Sess., Aug. 7, 2006-Aug. 25, 2006, pt. 3 at 230, U.N. Doc. A/61/38; GAOR, 61st Sess., Supp. No. 38 (Aug. 25, 2006).
123. *Id.*
124. See, e.g., Elsie Le Franc et al., *Interpersonal Violence in Three Caribbean Countries: Barbados, Jamaica, and Trinidad & Tobago*, 24 PAN. AM. J. PUB. HEALTH 409, 409 (2008) (out of the 3,401 women between the ages of 15–30 at varying levels of socioeconomic development surveyed, 70.9% reported victimization by some form of violence, with 62.8% of those reporting violence saying it was perpetrated by a relationship partner).
125. *Id.* at 414.

that sexual violence against women, including spousal abuse, is a significant problem in the Caribbean.<sup>126</sup>

A study of sexual violence in Jamaica concluded that 58.3% of surveyed women reported that they had experienced physical violence by males, and 76% of women indicated that they had been subjected to sexual coercion.<sup>127</sup> In 62.8% of all sexual violence cases against women in Barbados, Jamaica, and Trinidad and Tobago, a relationship partner was the perpetrator.<sup>128</sup> The study concluded that Jamaica had the highest rate of sexual violence when compared to Barbados and Trinidad and Tobago: 57.2% of Jamaican women have reported that they experienced sexual coercion while in a relationship.<sup>129</sup> Moreover, “the very high levels of reported [intimate partner violence] indicate very high levels of tolerance among victims, and suggest that a culture of violence and adversarial intimate relationships may be well entrenched.”<sup>130</sup> In the study, male respondents in Barbados viewed domestic quarrels as a challenge from their partner to be overcome and a “war to be won.” Not surprisingly, negotiation and compromise were not the preferred methods of conflict resolution.<sup>131</sup> This data indicates that sexual violence against women is a prevalent problem in Commonwealth Countries. The sustained prevalence of patriarchal attitudes, which promote discrimination against women and infringe on the sexual autonomy of women, continues to enable the double colonization of Caribbean women. These persistent inequalities are not due solely to the imposition of British norms during the colonial period; Commonwealth Countries have since

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126. Lorraine Blank, *Situation Analysis of Children and Women in Ten Countries in the Caribbean Region*, UNICEF EASTERN CARIBBEAN 22 (Feb. 7, 2007), [http://www.unicef.org/lac/spbarbados/Implementation/SP%20Poverty/Regional/sitan\\_2007.pdf](http://www.unicef.org/lac/spbarbados/Implementation/SP%20Poverty/Regional/sitan_2007.pdf) (indicating that high levels of sexual violence in the Caribbean negatively impact the realization of the goals of CEDAW); Joint Report, U.N. Office on Drugs and Crime & World Bank, *Latin America and Caribbean Region, Crime, Violence, and Development: Trends, Costs, and Policy Options in the Caribbean*, 12 (Mar. 2007), [http://www.unodc.org/pdf/research/Cr\\_and\\_Vio\\_Car\\_E.pdf](http://www.unodc.org/pdf/research/Cr_and_Vio_Car_E.pdf) (finding women in Caribbean countries experience a higher rate of rape than the unweighted average of 102 countries; Immigration & Refugee Bd. of Can., *Saint Lucia: Sexual Violence Against Women, Including Legislation, State Protection and Support Services Available to Victims (2009-October 2012)*, REFworld (Nov. 15 2012), <http://www.refworld.org/docid/50bf2f292.html> (reporting Saint Lucia's rate of rape at approximately 38 per 100,000 people in 2009 and 41 per 100,000 people in 2010); see, e.g., U.S. Dep't of State, Bureau of Democracy, Human Rights & Labor, *Country Reports on Human Rights Practices for 2013: Antigua and Barbuda* (Feb. 27, 2014), <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2013&dclid=220413>.

127. Le Franc et al., *supra* note 124, at 414.

128. *Id.* at 409.

129. *Id.* at 414.

130. *Id.* at 409.

131. *Id.* at 417.

adopted statutes to explicitly retain their colonial inheritance. As the following section will note, contemporary legislation continues to reflect many of the common law justifications for spousal rape.

### III. SEXUAL OFFENCES STATUTES<sup>132</sup>

#### A. *Standard Spousal Rape Conditions*

Although the famous *R v. R* case eliminated the common law spousal rape exemption in Britain in 1991,<sup>133</sup> it failed to affect Commonwealth Caribbean law because many Commonwealth Countries had already passed legislation that superseded the common law spousal rape rule.<sup>134</sup> Rather than eliminating the spousal rape exemption, Commonwealth Countries have retained a modified form of the spousal rape exemption. The spousal rape statutes of Commonwealth Countries generally provide that a husband who has sexual intercourse with his wife without her consent cannot be prosecuted for rape unless a decree nisi of divorce, a separation order, a separation agreement, or a protective order has been issued prior to, and is still in place at the time of, the rape (“Standard Spousal Rape Conditions”).<sup>135</sup>

Between 1989 and 1991, CARICOM drafted a series of model legislation, including the model legislation on sexual offences, aimed at protecting the rights of women in the Caribbean.<sup>136</sup> Like the sexual offences laws of Commonwealth Countries, CARICOM’s model legislation on sexual offences (“CARICOM Model Law”) also requires that the Standard Spousal Rape Conditions be satisfied to criminalize spousal rape.<sup>137</sup>

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132. Oftentimes, statutes of Commonwealth Countries use the British spelling of the word “offenses.” See, e.g., Sexual Offences Act (Act 9/1995) (Ant. & Barb.).

133. *R v. R*, [1991] UKHL 12.

134. GEMMA TANG NAIN & BARBARA EVELYN BAILEY, CARICOM SECRETARIAT, *GENDER EQUALITY IN THE CARIBBEAN: REALITY OR ILLUSION* 57 (2003).

135. See, e.g., Sexual Offences Act 1998, art. 3(3) (1998) (Dominica); Sexual Offences Act 2009 (Act 12/2009), art. 5 (Jam.); Sexual Offences and Domestic Violence Act, art. 3(4) (2002) (Barb.); Sexual Offences Act 1995 (Act 9/1995), art. 4 (Ant. & Barb.); Sexual Offences & Domestic Violence Act, § 15 (2010) (Bah.); Criminal Code of St. Lucia, art. 123(3) (2008). The Jamaican statute also includes an injunction for non-cohabitation or an order of ouster from the marital home. Sexual Offences Act (Act 12/2009), art. 5 (Jam.).

136. See generally Caribbean Community Secretariat, *Model Legislation on Issues Affecting Women*, CARICOM (Mar.1997), [http://www.caricom.org/jsp/secretariat/legal\\_instruments/model\\_legislation\\_women\\_issues.jsp?menu=secretariat](http://www.caricom.org/jsp/secretariat/legal_instruments/model_legislation_women_issues.jsp?menu=secretariat) (last visited Apr. 18, 2014).

137. Caribbean Community Secretariat, *CARICOM Model Legislation on Sexual Offences*, cl. 2, [http://www.caricom.org/jsp/secretariat/legal\\_instruments/model\\_legislation\\_](http://www.caricom.org/jsp/secretariat/legal_instruments/model_legislation_)

Although the Standard Spousal Rape Conditions can be found in the statutes of every Commonwealth Country, some Commonwealth Countries supplement these conditions by providing for additional circumstances that may constitute spousal rape. For instance, the Bahamian statute (“Bahamian Act”) provides that sexual assault by a husband can also occur if the husband had intercourse with his wife without her consent and the husband had notice that his wife filed a petition for judicial separation or divorce prior to the assault.<sup>138</sup> The Bahamian Act does not define the term “notice,” nor does the Bahamian Penal Code provide guidance on the issue of notice in the spousal rape context. Perhaps if a wife has served her husband with a petition for divorce or separation, or if she can provide evidence that she informed her husband that she filed for divorce or separation before the sexual assault, she may be able to obtain judicial relief.

The Bahamian Act provides a complete consolidation of the sexual offences subject to punishment.<sup>139</sup> By adopting the Bahamian Act, law commissioners in the Bahamas explicitly hoped to reassert the central role of the matrimonial home in the postcolonial state.<sup>140</sup> As with other sexual offences statutes adopted in other Commonwealth Countries, conjugal heterosexuality in the Bahamian Sexual Offences Act was “frozen within a very specific narrow set of class relations between husband and wife in marriage.”<sup>141</sup> In fact, even after the inclusion of the Standard Spousal Rape Conditions in the Bahamian Act, many people in the Bahamas feared that women who sought to exercise their rights under the new law would render men homeless and nationless.<sup>142</sup>

Rather than conditioning prosecution on the violent acts committed by a husband who has raped his wife, the Bahamian Act and the laws of other Commonwealth Countries condition prosecution on the status of the marriage prior to the rape. Spouses generally seek separation orders or protection orders or enter into separation agreements when marital discord is high. The Standard Spousal Rape Conditions presupposes the existence of

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sexual\_offences.jsp (last visited Apr. 18, 2014) [hereinafter *CARICOM Model Legislation*].

138. Sexual Offences & Domestic Violence Act, § 15(b) (2010) (Bah.). The Jamaican statute also includes the initiation of dissolution proceedings in addition to the Standard Spousal Rape Conditions. Sexual Offences Act 2009 (Act 12/2009), art. 5 (Jam.).

139. Alexander, *supra* note 86, at 8.

140. *Id.*

141. *Id.* at 10.

142. M. Jacqui Alexander, *Erotic Autonomy as a Politics of Decolonization: An Anatomy of Feminist and State Practice in the Bahamas Tourist Economy*, in *FEMINIST GENEALOGIES, COLONIAL LEGACIES, DEMOCRATIC FUTURES* 87 (M. Jacqui Alexander & Chandra Talpade Mohanty eds., 1997).

marital discord. A victim is unlikely to seek a decree nisi of divorce, separation order, or a separation agreement before being raped where there is no prior history of marital disagreements or mental or physical abuse.

In addition to the Standard Spousal Rape Conditions, the Sexual Offences Act of Jamaica (“Jamaican Act”) is notable in that it attempts to address the prevalence of sexually transmitted diseases. The Jamaican Act provides that a husband may also commit the act of spousal rape where “the husband knows himself to be suffering from a sexually transmitted infection.”<sup>143</sup> If a husband forces sexual intercourse upon his wife while knowing he is infected with a sexually transmitted disease, the intercourse will constitute spousal rape if the wife has not consented and the husband knows of or recklessly disregards her lack of consent. HIV/AIDS has become the leading cause of death among young adults in the Caribbean.<sup>144</sup> A report issued by the Jamaican Ministry of Health stated that “the greater the gender discrimination in societies and the lower the position of women, the more negatively they are affected by HIV [and] [t]herefore, more equal gender relations and the empowerment of women are vital to successfully prevent the spread of HIV infection and enable women to cope with HIV/AIDS.”<sup>145</sup> The sexual offences laws of other Commonwealth Countries, including Antigua and Barbuda, Bahamas, Barbados, and Dominica, fail to address the relationship between spousal rape and sexually transmitted diseases.

The following chart summarizes the spousal rape statutes in Commonwealth Countries:<sup>146</sup>

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143. Sexual Offences Act 2009 (Act 12/2009), art. 5(3)(e) (Jam.).

144. The Ministry of Health & The Global Fund Jamaica, *National HIV Aids Policy: Jamaica*, (May 2005), <http://www.hsph.harvard.edu/population/aids/jamaica.aids.05.pdf>.

145. *Id.* at 14.

146. In addition to imposing the standard spousal rape conditions, these statutes also require that the rape occur without the spouse’s consent. Sexual Offences Act 1998, art. 3(3) (1998) (Dominica); Sexual Offences Act 2009 (Act 12/2009), art. 5(1) (Jam.); Sexual Offences and Domestic Violence Act, art. 3(4) (2002) (Barb.); Sexual Offences & Domestic Violence Act, art. 15(1) (2010) (Bah.); Criminal Code of St. Lucia, art. 123(3) (2008). Some statutes also require that force or fear be used, while others require that the perpetrator have knowledge of the lack of consent or act recklessly as to whether the victim consented. Sexual Offences Act 1995 (Act 9/1995), art. 4 (Ant. & Barb.); Sexual Offences Act 1998, art. 3(3) (1998) (Dominica). The CEDAW Committee has expressed concern regarding rape statutes that require force in addition to consent. Comm. on the Elimination of Discrimination against Women, Concluding Observations of the Committee on the Elimination of Discrimination against Women: Kyrgyzstan, 20th Sess., Jan. 19, 1999–Feb. 5, 1999, ¶ 122, U.N. Doc. A/54/38/Rev.1; GAOR, 54th Sess., Supp. No. 38 (Aug. 20, 1999); see also Comm. on the Elimination of Discrimination against Women, 46th Sess., July 12, 2010–July 30, 2010, Comm’n No. 18/2008, ¶¶ 8.7–8.8(b)(1) & (ii),

SPOUSAL RAPE CRIMINALIZED IF DECREE NISI OF DIVORCE, SEPARATION AGREEMENT, PROTECTIVE ORDER, OR SEPARATION ORDER IS IN PLACE AT THE TIME OF THE RAPE (STANDARD SPOUSAL RAPE CONDITIONS (“SSRC”))	SPOUSAL RAPE ALSO CRIMINALIZED IF HUSBAND HAD NOTICE OF JUDICIAL PETITION FOR SEPARATION, DIVORCE, OR NULLIFICATION OF MARRIAGE	SPOUSAL RAPE ALSO CRIMINALIZED IF HUSBAND KNOWS HE SUFFERS FROM A SEXUALLY TRANSMITTED DISEASE OR IF PROCEEDINGS TO DISSOLVE MARRIAGE OR PROCEEDINGS FOR DECREE OF NULLITY HAVE BEEN INITIATED
Bahamas Barbados Jamaica Dominica Antigua and Barbuda St. Lucia	Bahamas	Jamaica

### B. Retention of Gendered Common Law Justifications

The common law justifications discussed in Part II of this Article arguably aided in the perpetuation of the following restrictive norms regarding the role of married women: women are objects to be controlled by their husbands; women do not have control or autonomy over their own bodies, as their bodies are first owned by their fathers and then subsumed within their husbands’ legal identity upon marriage; marital privacy is more important than a wife’s sexual autonomy; and a wife’s role is to be subservient to her husband and, thus, irrevocable consent to sexual intercourse is given at

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U.N. Doc. CEDAW/C/46/18/2008 (July 16, 2010) [hereinafter *Vertido*]. Some statutes also provide that where the parties are in fact separated or are living apart at the time of the rape or where a nullity of marriage or a peace order has been granted and is in place at the time of the rape the husband may also be prosecuted for rape. Criminal Code of St. Lucia, § 123(3)(c) (2008); Sexual Offences Act 2009, (Act 12/2009), art. 5(3) (Jam.). In contrast to Commonwealth Countries, a number of states in the U.S. have modified their rape laws to remove language that exempted spouses from prosecution for spousal rape while other states have revised their laws to explicitly note that marriage is not a defense to rape prosecution. *See, e.g.*, D.C. CODE § 22-3019 (Westlaw through Jan. 5, 2015); MICH. COMP. LAWS § 750.5201 (Westlaw through P.A. 2014, No. 556, 558–72, of the 2014 Reg. Sess.); MINN. STAT. § 609.349 (Westlaw through 2015 Reg. Sess.); N.H. REV. STAT. § 632-a:5 (Westlaw through end of 2014 Reg. Sess.); N.J. STAT. § 2c:14-5 (Westlaw through laws effective through L. 2014, c. 90 & J.R. No. 6); UTAH CODE § 76-5-402 (Westlaw through 2014 Gen. Sess.); VA. CODE § 18.2-61 (Westlaw through 2014 Reg. Sess.); WIS. STAT. § 940.225 (Westlaw through 2013 Act 20); *see also* Michelle J. Anderson, *Marital Immunity, Intimate Relationships, and Improper Influences: A New Law on Sexual Offences by Intimates*, 54 HASTINGS L.J. 1464, 1473 (2003) (discussing U.S. spousal rape statutes).



the time of marriage. The common law justifications for the spousal rape exemption demonstrate how the common law has traditionally favored a “socially embedded notion of masculinity” that facilitates the continued oppression of women.<sup>147</sup> The common law historically distinguished between subjects and objects:<sup>148</sup> British men were subjects of the law, while women and colonized individuals were objects of the law, “to be governed, controlled [and] mastered.”<sup>149</sup> Postcolonial theory seeks to identify and eliminate this dualistic opposition between subject and object.<sup>150</sup> Many of the common law justifications established during the colonial period that were used to justify the spousal rape exemption continue to underlie the modern-day spousal rape statutes of Commonwealth Countries.

### C. *Retention of Implied Consent and Unities Justifications*

Postcolonial theorists posit that physical differences, such as male and female, and the ways in which individuals are viewed determine how they will be treated under the law.<sup>151</sup> Historically, the bodies of women have been viewed as objects ripe for control. In the same way that British colonizers viewed their identities as superior to that of colonized people, British common law viewed the masculine identity as superior to the feminine identity. Women were viewed as feeble-minded individuals who lacked the moral agency and competence to control their own bodies. In a 1953 decision, a British court held that a husband could not be found guilty of rape, as a wife could only revoke her implied consent to marriage if a separation order, separation agreement, or judicial order existed prior to the rape.<sup>152</sup> Similarly in 1949, in *R v. Clarke*, the court held that a wife who had obtained a separation order prior to being raped by her husband had revoked her implied consent to sexual intercourse and so the husband could be prosecuted for rape.<sup>153</sup> The Standard Spousal Rape Conditions continue to reflect the implied consent justification for the spousal rape exemption. A

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147. DAVIES, *supra* note 24, at 258.

148. *Id.* at 272.

149. *Id.* at 273.

150. *Id.* at 271.

151. BILL ASHCROFT ET AL., *POST COLONIAL STUDIES: THE KEY CONCEPTS* 10 (2d ed. 2008).

152. *R v. Miller*, [1953] 2 Q.B. 282 (Eng.). The wife had petitioned for a divorce based on her husband’s alleged infidelities. *Id.* The court noted that, while the husband could not be prosecuted for rape because the wife’s implied consent was not revoked, he may be prosecuted for causing bodily harm because the wife’s implied consent to sexual intercourse did not extend to violence. *Id.* at 291–92. See J.L. Barton, *The Story of Marital Rape*, 108 L. Q. REV. 260 (1992), for a discussion of the history of the spousal rape exemption in British case law.

153. *R v. Clarke*, (1949) 2 All E.R. 448 (Leeds Assizes).



husband will only be prosecuted for raping his wife if steps are taken to sever the marriage via a decree nisi of divorce, a separation order, a protective order, or a separation agreement, thereby, allowing a wife to revoke her consent to sexual intercourse and retrieve her independent legal identity.

The implied consent theory continues to underlie discussions of spousal rape in the Caribbean. For instance, in response to the proposed amendment to fully criminalize spousal rape in Bahamas in 2009, the Bahamas Christian Council contended that it would

be tragically wrong [to criminalize spousal rape] because it would. . . disregard. . . the marriage covenant and contract between a man and woman, when on the day of their marriage in the sight of God and in the company of witnesses, they pledged to give themselves to each other in holy matrimony and thereby gave each other upfront implicit open-ended sexual consent.<sup>154</sup>

Similarly, one citizen claimed, “even if a woman says no to her husband it still can’t be considered rape because she is his wife. He already paid his dues at the church and she already said ‘I do,’ so from then on, even if [a man] forces sex on his wife, it isn’t rape.”<sup>155</sup> In Jamaica, Senator Lambert Brown expressed his concern about proposals to remove the Standard Spousal Rape Conditions from Jamaican law by stating

[T]he institution of marriage could lead to the filling out of a form every night for consent [and] to now subject every sexual activity to a potential future claim of rape is not something that you will get me endorsing, and I don’t care how many conventions we have signed importing from foreign things.<sup>156</sup>

The statutes of Commonwealth Countries create an irrational distinction between spousal rape and other acts of violence that occur within the context of marriage. Under these statutes, a wife is presumed to have consented to sexual intercourse with her husband unless one of the Standard Spousal Rape Conditions has been satisfied. In contrast, a wife is not presumed to have given irrevocable consent to her husband for other acts of

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154. Jasmin Bonimy, *Marital Rape Ban Tragically Wrong*, BAHAMAS CRISIS CENTRE (Sept. 7, 2009), <http://crisiscentrebahamas.wordpress.com/2009/09/07/marital-rape-ban-tragically-wrong-says-the-christian-council/>.

155. See Cara Kulwicki, *Bill in the Bahamas Attempts to Outlaw Spousal Rape*, THE CURVATURE (Aug. 22, 2009), <http://thecurvature.com/2009/08/22/bill-in-the-bahamas-attempts-to-outlaw-spousal-rape/> (citation omitted).

156. *Senator Resists Proposal on Marital Rape*, JAMAICA GLEANER (Oct. 16, 2014), <http://jamaica-gleaner.com/gleaner/20141016/lead/lead33.html>.

violence, such as beatings, that may occur during marriage.<sup>157</sup> Some Caribbean scholars have contended that Barbados' sexual offences statute reflects many of the common law exceptions to the spousal rape exemption that developed overtime in Britain via case law.<sup>158</sup> Thus, rather than being progressive on women's issues by criminalizing spousal rape where the Standard Spousal Rape Conditions have been satisfied, Caribbean countries such as Barbados have simply codified the common law spousal rape exemption.

The sexual offences statutes of some Commonwealth Countries also permit marriage to be used as a defense to statutory rape prosecution. For instance, the Sexual Offences Act of Barbados provides that when a defendant has sexual intercourse with a victim under the age of fourteen who is not the defendant's spouse, the defendant will be guilty of rape irrespective of knowledge of age or consent.<sup>159</sup> Under the common law, marriage converted rape into consensual sex.<sup>160</sup> From a postcolonial perspective, by allowing marriage to serve as a defense to statutory rape, Commonwealth Countries such as Barbados continue the common law tradition of retroactively transforming rape into consensual sex. Such statutes perpetuate the implied consent theory by implying that an underage girl's irrevocable consent to sex will be valid within the context of marriage. In contrast, the consent given by an underage girl to sex outside of marriage is invalid.

The historical justifications for the spousal rape exemption limit the sexual autonomy of Caribbean women and facilitate a husband's power to control and govern his wife. Under the unities theory, a husband could not be found guilty of raping his wife; to do so would be to find the husband guilty of raping himself.<sup>161</sup> Spousal rape was a petty conflict between spouses that the husband was entitled to win under the law.<sup>162</sup> A number of Commonwealth Countries use the term "sexual assault" rather than "rape" to categorize spousal rape. For instance, both the Sexual Offences Act of Antigua and Barbuda ("Antiguan Act") and the Bahamian Act refer to spousal rape as "sexual assault by a spouse."<sup>163</sup> In fact, both statutes specifi-

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157. Sandra L. Ryder & Sheryl A. Kuzmenka, *Legal Rape: The Marital Rape Exemption*, 24 J. MARSHALL L. REV. 393, 404 (1991).

158. Tracy S. Robinson, *Changing Conceptions of Violence: The Impact of Domestic Violence Legislation In the Caribbean*, 9 CARIBBEAN L. REV. 113, 126 (1999).

159. Sexual Offences and Domestic Violence Act, art. 4 (2002) (Barb.).

160. CATHARINE A. MACKINNON, SEX EQUALITY 804 (Robert C. Clark et al. eds., 2d ed. 2007).

161. *See supra* Part II(c).

162. *See supra* Part II(c).

163. Sexual Offences & Domestic Violence Act, art. 3(1); 15 (2010) (Bah.); Sexual Offences Act 1995 (Act 9/1995), art. 3; 4 (Ant. & Bar.). In contrast, the Jamaican statute uses the term "rape" to refer to spousal rape rather than the term sexual assault. Sexual Offences Act 2009 (Act 12/2009), art. 5 (Jam.). More specifically, the

cally provide that a spouse cannot commit the act of rape, reserving the term “rape” for attacks by perpetrators who are not married to their victims.<sup>164</sup> Similarly, rather than characterizing spousal rape as “rape,” the CARICOM Model Law defines spousal rape as an “unlawful sexual connection.”<sup>165</sup> The nomenclature of these statutes preserves the artificial distinction between spousal rape and stranger rape historically established by British common law and rationalized by the unities and implied consent theories. The express exclusion of spousal rape from the term “rape” indicates that spousal rape is not viewed as “legitimate” rape, or is simply a less serious crime than stranger rape, a concept deeply embedded in the common law tradition.

The retention of the unities theory is also reflected in statements by Caribbean citizens. For instance, in response to efforts to criminalize spousal rape, one citizen stated “it is ridiculous for them to try to make that a law, because I don’t think a man can rape his own wife. After two people get married. . . they become one – one flesh. How is it possible to rape what is yours?”<sup>166</sup>

Under the common law, spousal rape has historically been viewed as a mere “disagreement over sex;”<sup>167</sup> accordingly, perpetrators of spousal rape were exempted from prosecution, in contrast to the perpetrators of stranger rape. The laws of certain Commonwealth Countries continue to perpetuate these colonial views by providing lesser sentences for the perpetrators of spousal rape. The Antiguan Act provides that the most severe punishment a husband can receive if he is convicted of sexually assaulting his wife is fifteen years’ imprisonment,<sup>168</sup> which is in stark contrast to the severe life imprisonment punishment that a man may receive if he is found guilty of raping a woman who is not his wife.<sup>169</sup> Similarly, a person that is convicted of stranger rape under the CARICOM Model Law may face life imprison-

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act provides “A husband commits the offence of rape against his wife if he has sexual intercourse with his wife in any of the circumstances specified in subsection (3)(a) without her consent; and (b) knowing that she does not consent to sexual intercourse or recklessly not caring whether she consents or not.” *Id.*

164. The Bahamian statute provides “rape is the act of any person not under fourteen years of age having sexual intercourse with another person who is not his spouse . . .” Sexual Offences & Domestic Violence Act, art. 3 (2010) (Bah.). The Antiguan statute provides that a “male person commits the offence of rape when he has sexual intercourse with a female person who is not his wife . . .” Sexual Offences Act 1995 (Act 9/1995), art. 3(1) (Ant. & Bar.).

165. *CARICOM Model Legislation*, *supra* note 137.

166. See Cara Kulwicki, *supra* note 155, at 1.

167. DAVID FINKELHOR & KERSTI YLLÖ, LICENSE TO RAPE: SEXUAL ABUSE OF WIVES 14 (1985).

168. Sexual Offences Act 1995 (Act 9/1995), § 4(2) (Ant. & Bar.).

169. *Id.* at § 3(2).

ment, while a person convicted of spousal rape will face a maximum of fourteen years in prison.<sup>170</sup> The Sexual Offences Act of Dominica provides for a sentence of fourteen years for spousal rape and twenty-five years for stranger rape.<sup>171</sup>

The different classifications and treatment accorded to stranger rape and spousal rape under these laws create an irrational distinction between victims of spousal rape and victims of stranger rape. The lesser sentencing available for spousal rape in Commonwealth Countries illustrates the extent to which common law justifications for the spousal rape exemption continue to be ingrained in the legal system of Commonwealth Countries.

#### *D. Retention of Property Justification*

Under the common law, women were viewed as the property of their husbands. Men could not rape their wives as a man could not rape his own property. Women were to be submissive; a woman's body and her sexual autonomy belonged to her husband. During the colonial period, slave women's bodies were viewed as the property of slave owners.<sup>172</sup> Slave owners had unrestricted sexual access to these bodies; the rape of slave women was not considered a legal offence.<sup>173</sup> In the Caribbean, patriarchy, slavery, and, in particular, slave ship rape "bred violent conditions that established rape [of the female body] as a culture within a culture."<sup>174</sup> After independence, Caribbean men "[quested] for monopolistic control, ownership and possession of all properties" including the bodies of women, in order to solidify their ability to rule.<sup>175</sup> Hence, even after the colonial period, the treatment of women as property and the expectation that wives must submit to their

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170. *CARICOM Model Legislation*, *supra* note 137, at arts. 3(2), 4(3).

171. Sexual Offences Act 1998, art. 3 (Dom.). A few Commonwealth Countries, such as Jamaica and Barbados, provide for equal sentencing for both spousal rape and stranger rape. *E.g.*, Sexual Offences and Domestic Violence Act, art. 3 (2002) (Barb.) (providing for a sentence of life imprisonment for both stranger rape and spousal rape); Sexual Offences Act 2009 (Act 12/2009), art. 6(1) (Jam.) (providing that defendants convicted of spousal rape or stranger rape may receive a sentence of life imprisonment, but must be given a sentence of not less than fifteen years in prison).

172. HILARY MCD BECKLES, *CENTERING WOMAN: GENDER DISCOURSES IN CARIBBEAN SLAVE SOCIETY* 22 (1999).

173. *Id.* at 23. The lack of criminalization of the rape of black women by both masters and non-masters during the era of slavery has been well documented in non-Caribbean countries, such as the United States. *See* Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *STAN. L. REV.* 581, 599 (1990).

174. Joseph C. Lewis, "It Hurt Very Much at the Time": *Patriarchy, Rape Culture, and the Slave Body-Semiotic*, in *THE CULTURE OF GENDER AND SEXUALITY IN THE CARIBBEAN* 294, 296 (Linden Lewis ed., 2003).

175. Hilary McD Beckles, *Black Masculinity in Caribbean Slavery*, in *INTERROGATING CARIBBEAN MASCULINITIES* 228 (Rhoda Reddock ed., 2004).

husbands sexually continues to exist. Modern Caribbean views on spousal rape indicate that the property theory may be inextricably linked with the unities theory. For example, in response to debates on spousal rape one citizen stated, "I disagree with the bill [criminalizing spousal rape] because I disagree that a man can rape his wife. . . [because a]. . . wife's. . . body [becomes] his [body]. How could he rape her?"<sup>176</sup>

From a postcolonial perspective, the sexual offences statutes of Commonwealth Countries continue to perpetuate these views. Husbands may rape their property as long as a judicial order or separation agreement is not in place at the time of the rape. This reinforces the common law view that wives and their sexual autonomy become the property of men upon marriage and that a husband is free to continue to do with his property as he so pleases until steps are taken to dissolve the marriage. Only upon the initiation of the marriage dissolution process does a woman regain control over her body and sexual autonomy.<sup>177</sup>

Since women were viewed as the property of either their husbands or fathers under the common law, women were deemed to be under the protection of their fathers and then their husbands upon marriage. Married women were not considered to be in need of additional protections under the law.<sup>178</sup> The sexual offences statutes of Commonwealth Countries retain this irrational distinction between women who are worthy or in need of protection under the law and women who are not. Under these statutes, married women only become worthy of additional protections under the law when steps are taken to remove a woman from her husband's protection by dissolving the marriage. Additionally, these statutes adopt a "blame the victim" approach often seen in stranger rape cases. In the stranger rape scenario, women who wear provocative clothing are frequently blamed for be-

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176. Josh Witten, *Silence: Marital Rape - East Meets West*, SCIENCE 2.0 (Aug. 19, 20109, 12:05 PM), [http://www.science20.com/rugbyologist/silence\\_marital\\_rape\\_east\\_meets\\_west](http://www.science20.com/rugbyologist/silence_marital_rape_east_meets_west) (citing Nikia Deveaux, *Men, Women Divided Over Sex Bill*, BAH. J., Aug. 6, 2009).

177. Similar views of women's bodies as the property of their husbands and a husband's ability to exert control over their wives' bodies are found in other postcolonial British states. For example, although the interest of a potential father in a future embryo is different than the interest of a husband in asserting a right to commit rape, some states in the U.S. have attempted to require spousal notice prior to an abortion. See *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 897 (1992) (striking down spousal notice laws as unconstitutional and noting that statutes of this type reflect archaic views of a woman's role in a marriage and would not only restrict a woman's bodily integrity, but also "enable[] a husband to wield an effective veto over his wife's decision concerning an abortion[]").

178. Joan Brathwaite, *Women and the Law: A Bibliographical Survey of Legal and Quasi-Legal Materials with Special Reference to Commonwealth Caribbean Jurisdictions*, 8 CARIBBEAN L. REV. 176 (June 1998).

ing raped. In the spousal rape scenario, the wife was most likely at fault because she failed to submissively perform her wifely duties. In addition, by protecting only women who have initiated the marriage dissolution process, Caribbean governments may be inadvertently signaling that married women continue to have a duty to perform their wifely duties during marriage. By requiring a woman to first obtain a judicial order, the sexual offences statutes of Commonwealth Countries fail to adequately protect women who have not sought judicial intervention prior to a sexual assault. A married woman may not have the financial resources to obtain a court order, or her husband may have intimidated her from doing so. Wives who are the victims of spousal rape may suffer from feelings of shame or may feel responsible for their husband's actions and, as a result, may fail to report the crime.<sup>179</sup> Women might also tolerate harmful relationships because they "internalize social values that see female subordination as 'natural' . . . [and] are under social pressure to accept dominant cultural mandates."<sup>180</sup>

*E. Evolution of Marital Privacy and Reconciliation Justifications*

As discussed in Part II(E) of this Article, marital privacy was protected in certain instances under the common law, and modern-day conceptions of marital privacy and reconciliation have been used in common law jurisdictions to justify the spousal rape exemption. One of the many stereotypes regarding spousal rape is the idea that wives secretly wish to be overpowered and dominated by their husbands, a scenario that theoretically might promote marital reconciliation.<sup>181</sup> In Barbados, during the House of Assembly debates on the adoption of the domestic violence statute, debate participants frequently expressed the view that the Barbadian government should not be "going into people's bedrooms."<sup>182</sup>

Modern-day Commonwealth Caribbean family law emphasizes marital reconciliation prior to divorce.<sup>183</sup> This emphasis on reconciliation and the protection of marital privacy has, in some instances, taken precedence over the right of women to be free from violence. For instance, a trial judge in Jamaica declined a petition for divorce, despite evidence that the wife had

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179. See ROBERTA CLARKE, *VIOLENCE AGAINST WOMEN IN THE CARIBBEAN: STATE AND NON-STATE RESPONSES* (1998).

180. Maria Nieves Rico, U.N. Economic Comm'n for Latin America & the Caribbean, *Gender-Based Violence: A Human Rights Issue* (June 1997), <http://www.cepal.org/mujer/noticias/paginas/9/27409/genderbasedviolence.pdf>.

181. JULIE A. ALLISON & LAWRENCE S. WRIGHTSMAN, *RAPE: THE MISUNDERSTOOD CRIME* 90 (1993).

182. See Robinson, *supra* note 158, at 120 (citation omitted).

183. Tracy S. Robinson, *New Directions in Family Law Reform in the Caribbean*, 10 *CARIBBEAN L. REV.* 101, 104 (June 2000).

suffered physical abuse at the hands of her husband, based on the rationale that incidents of punching and kicking do not go beyond the normal wear and tear expected during a marriage.<sup>184</sup> Under the common law, husbands had the legally protected right to impose corporal punishment on their wives since public authorities would intrude on the sanctity of marriage only where a wife alleged permanent injury. The statutes of Commonwealth Countries uphold similar common law notions regarding the sanctity of marriage, as Caribbean governments continue to protect a husband's right to sexual intercourse with his wife. These statutes will not intrude on marital privacy unless certain conditions have been satisfied. It is only when spouses reach outside of the confines of their marriage to access the judicial system by obtaining, for instance, a separation order or separation agreement prior to the rape that Commonwealth Countries will attempt to infringe on marital privacy.

The implied consent, property, unities, and marital privacy theories reflect a patriarchal ideology in which a husband is entitled to engage in sexual intercourse with his wife. Husbands who raped their wives were not subject to prosecution under rape statutes, while husbands who raped women who were not their wives could be subject to lengthy prison sentences. Under the current laws of most Commonwealth Countries, perpetrators of spousal rape often continue to escape prosecution because of the imposition of the Standard Spousal Rape Conditions. The laws of Commonwealth Countries do not distinguish between a husband who murders his wife and a husband who murders a woman who is not his spouse.<sup>185</sup> Likewise, there should be no such distinction between husbands who rape their wives and husbands who rape women who are not their wives.

#### IV. CARIBBEAN OPPOSITION TO HUMAN RIGHTS NORMS

The international community recognizes violence against women, including spousal rape, as a fundamental violation of human rights.<sup>186</sup>

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184. Robinson, *supra* note 158, at 113 (citing *Llewelyn v. Llewelyn*, (1978) 27 W.I.R. 188 (CA Jam.)). The Court of Appeal ultimately reversed the trial judge's decision. *Id.*

185. In Antigua and Barbuda, the law distinguishes amongst various forms of homicide; there is murder, manslaughter, infanticide, and excusable homicide. *Offences Against the Person Act*, ch. 300, pt. 1 (1873) (Ant. and Barb.). Similarly, the Bahamian penal code distinguishes homicide; there is manslaughter, murder, abortion, and infanticide. *Penal Code*, ch. 84, Title xx (2008) (Bah.). St. Lucia distinguishes between murder, capital murder, manslaughter, gross negligent homicide, aiding in suicide, and negligent endangering of life. *St. Lucia Criminal Code*, ch. 2, §§ 85–114 (2008).

186. CLARKE, *supra* note 179.



CEDAW “is often described as an international bill of rights for women.”<sup>187</sup> All of the Commonwealth Countries have ratified CEDAW, as has Trinidad and Tobago.<sup>188</sup> CEDAW imposes a general obligation on ratifying member states “to accord women equality with men before the law,”<sup>189</sup> and requires ratifying states to eliminate discrimination and ensure equality between men and women in marriage and the family in a timely fashion and in good faith.<sup>190</sup> General Recommendation 19 requires states to exercise due diligence in combating gender-based violence under CEDAW, and asserts that “states may be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence and for providing compensation.”<sup>191</sup> The CEDAW Committee has repeatedly voiced its concern about the inadequate criminalization of spousal rape in various countries and has stated that the spousal rape exemption is discriminatory.<sup>192</sup> In its concluding observations, the CEDAW Com-

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187. Convention on the Elimination of All Forms of Discrimination against Women: Overview of the Convention, U.N. WOMEN, <http://www.un.org/womenwatch/daw/cedaw/> (last visited Apr. 20, 2014).

188. Ratification Status: Convention on the Elimination of All Forms of Discrimination against Women, U.N. TREATY COLLECTION, <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-8.en.pdf> (last visited Apr. 20, 2014) (showing Barbados ratified Oct. 16, 1980; Jamaica ratified Oct. 19, 1984; Dominica ratified Sept. 15, 1980; Trinidad & Tobago ratified Jan. 12, 1990, Antigua and Barbuda acceded Aug. 1, 1989; Bahamas acceded Oct. 1, 1993; and Saint Lucia acceded Oct. 8, 1982).

189. CEDAW, *supra* note 11, at art. 15 ¶ 1.

190. *Id.* at art. 16.

191. Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 19, 11th Sess., 1992, ¶ 9, <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm> [hereinafter Gen. Rec. No. 19]; *see also*, MARSHA A. FREEMAN, CHRISTINE CHINKIN, & BEATE RUDOLF, THE UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN: A COMMENTARY 466–67 (2012). The standard of due diligence appears to be very high as the Committee has noted that even in countries such as Austria where there is a comprehensive model designed to remedy domestic violence issues including legislation, criminal and civil law remedies, education, training, shelters, and counseling, there was still a failure on the part of the state to exercise due diligence where the authorities knew or should have known of the danger of violence. *Id.*; *see also*, Comm. on the Elimination of Discrimination against Women, 39th Sess., July 23, 2007-Aug. 10, 2007, Comm’n No. 6/2005, ¶ 12.1.5, U.N. Doc. CEDAW/C/39/D/5/2005 (Aug. 6, 2007); Comm. on the Elimination of Discrimination against Women, 39th Sess., July 23, 2007-Aug 10., 2007, Comm’n No. 6/2005, ¶ 12.1.4, U.N. Doc. CEDAW/C/39/D/6/2005 (Oct. 1, 2007).

192. *See* Declaration on the Elimination of Violence against Women, G.A. Res. 48/104, U.N. GAOR, 48th Sess., 85th Plen. Mtg., U.N. Doc. A/RES/48/104, art. 2(a) (Dec. 20, 1993); *see e.g.*, Rep. of the Comm. on the Elimination of Discrimination Against Women, 37th Sess., Jan. 15 2007-Feb. 2, 2007, 38th Sess., May 14, 2007-June 1, 2007, 39th Sess., July 23, 2007-Aug. 10, 2007, 162 ¶ 129, 250 ¶ 121, U.N.



mittee recommended that Jamaica amend its legislation to eliminate the Standard Spousal Rape Conditions.<sup>193</sup>

The IAS Convention defines violence against women “as any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere.”<sup>194</sup> The preamble affirms that “violence against women constitutes a violation of their human rights and fundamental freedoms. . . .”<sup>195</sup> All of the Commonwealth Countries in the Caribbean are member states of the Organization of American States.<sup>196</sup> The IAS Convention is binding on the countries that have ratified it.<sup>197</sup> Every Commonwealth Country has ratified the IAS Convention.<sup>198</sup> With respect to state obligations under the IAS Convention, the Inter-American Commission of Women has recommended that states strengthen their legal response to spousal rape, and the Inter-American Human Rights Commission has criticized Jamaica’s spousal rape laws, as well as the government’s inadequate response to cultural practices that facilitate discrimination and violence against women.<sup>199</sup>

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Doc. A/62/38; GAOR, 62d Sess., Supp. No. 38 (Jan. 1, 2007) (voicing concern over the inadequate criminalization of spousal rape in Syrian Arab Republic and Singapore); Rep. of the Comm. on the Elimination of Discrimination Against Women, 40th Sess., Jan. 14 2008-Feb. 1, 2008, 34 ¶ 185, U.N. Doc. A/63/38; GAOR, 63d Sess., Supp. No. 38 (Aug. 12, 2008) (voicing concern over the inadequate criminalization of spousal rape in Lebanon).

193. Comm. for the Elimination of Discrimination Against Women, Concluding Comments of the Committee on the Elimination of Discrimination against Women: Jamaica, 36th Sess., Aug. 7, 2006-Aug. 25, 2006, ¶ 21, U.N. Doc. CEDAW/C/JAM/CO/6-7/R.1 (Aug. 25, 2006).
194. Convention of Belém do Pará, *supra* note 11, at art. 1.
195. *Id.*
196. Charter of the Organization of American States, Dec. 13, 1951, 2 U.S.T. 2394, 119 U.N.T.S. 3. Some Commonwealth Countries have also accepted the American Convention on Human Rights; however, recognition of the jurisdiction of the American Court on Human Rights requires states to make a special declaration under Article 62 of the Convention. American Convention on Human Rights art. 62, Nov. 22, 1969, 1144 U.N.T.S. 123.
197. Organization of American States AG/RES.2803 (XLIII-O/13), Implementation of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women, “Convention of Belém do Pará”, 43d Sess., June 4-6 2013, U.N. Doc. OEA/Ser.P/XLIII-O.2, at 187–90 (Oct. 3, 2013); *see also* General Information on the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, DEPT. OF INT’L LAW, ORG. OF AMERICAN STATES, <http://www.oas.org/juridico/english/signs/a-61.html> (last visited Oct. 6, 2011) [hereinafter Ratification Status of Convention of Belém do Pará].
198. Ratification Status of Convention of Belém do Pará, *supra* note 197.
199. Org. of American States, Inter-American Comm’n on Human Rights, *Report on the Situation in Jamaica*, ¶¶ 221, 225, U.N. Doc. OEA/Ser.L/V/II.144 (Aug. 10, 2012); *see also* Paz Castillo & Luciana Prado, Organization of American States, Inter-American Comm’n of Women, Technical Note, *Violence Against Women in Latin America*

Despite ratifying treaties aimed at protecting women from sexual violence and the presence of constitutional provisions on human rights, Commonwealth Countries have chosen to codify the common law spousal rape exemption. Therefore, they are not in compliance with their obligations under the IAS Convention and CEDAW. The colonial justifications for the spousal rape exemption continue to be embedded in the modern-day sexual offences statutes of Commonwealth Countries, as discussed in Part III above, and so the effects of British colonialism continue to have ongoing relevance. The failure of Commonwealth Countries to effectively criminalize spousal rape indicates that Commonwealth Countries are not seriously attempting to comply with their obligations under CEDAW or protect the fundamental human rights guaranteed by the IAS Convention and their constitutions. One potential explanation for the gap between treaty ratification and state compliance in postcolonial Caribbean states is opposition to the top-down imposition of modern-day human rights norms by former colonial powers. As discussed below, the 1990s Caribbean human rights backlash supports this assertion.

The continued use of the British Privy Council post-independence evidences the extent to which colonialism continues to influence the legal systems of Commonwealth Countries. Historically, the British Privy Council has been funded by Britain, and during the emancipation period, British judges were viewed as being free from local Caribbean pressure as well as competent and impartial in administering the law.<sup>200</sup>

In the 1990s, Commonwealth Countries were outraged by the British Privy Council's decision in *Pratt v. Attorney General*, which held that the potential execution of two prisoners held on death row for more than five years violated the cruel and inhumane punishment provisions of the Jamaican Constitution.<sup>201</sup> The *Pratt* decision made it more difficult for all Commonwealth Countries to impose the death penalty, as the judicial systems of

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(Nov. 2010), <http://www.oas.org/en/mesecvi/docs/TechnicalNote-VAWinLAC-EN.pdf>. (2012); see also Organization of American States, Technical Note, *Violence Against Women in Latin America*, <http://www.oas.org/en/mesecvi/docs/TechnicalNote-VAWinLAC-EN.pdf> (last visited Oct. 19, 2014).

200. Helfer, *supra* note 15, at 1867.

201. *Pratt v. Att'y Gen. for Jam.*, [1993] UKPC 37, [1994] 2 A.C. 1 (P.C.) (appeal taken from Jam.). After *Pratt*, the Privy Council went further by judicially internalizing human rights principles under the American Convention on Human Rights (an unincorporated treaty) by holding that, where a death row inmate exercises his right to petition an international human rights body to which Jamaica is a party, due process requires Jamaica suspend action until it considers the decision of the international human rights body. *Lewis v. Att'y Gen. of Jam.*, [2000] UKPC 35, [2001] 2 A.C. 50 (P.C.) (appeal taken from Jam.); see also Berry & Robinson, *supra* note 113, at 112. The Privy Council has subsequently held the death penalty violates constitutional rights in Belize and St. Lucia. *Reyes v. R.*, [2002] UKPC 11, [2002] 2 A.C.

Commonwealth Countries were suffering from severe judicial backlog and lack of appropriate funding.<sup>202</sup> *Pratt* provides an example of the British Privy Council's attempt to promote judicial internalization of human rights norms; however, Commonwealth Countries ultimately rejected this internalization. In *Pratt*, the British Privy Council noted that since Jamaica had executed both the International Covenant on Civil and Political Rights and the Optional Protocol, the views of the United Nations Human Rights Council on the imposition of the death penalty "should be afforded weight and respect but were not of legally binding effect."<sup>203</sup> In addition to mentioning the death penalty decisions of other international tribunals, the court also stated that the European Court of Human Rights would have found the imposition of the death penalty after a five-year waiting period to violate Article 3 of the European Convention on Human Rights.<sup>204</sup> Commonwealth Countries were not only incensed by the British Privy Council's decision, which essentially required Commonwealth Countries to execute prisoners within five years of placing a prisoner on death row, but were also opposed to what they viewed as Britain's continuation of legal imperialism in the Caribbean.<sup>205</sup>

Before these decisions, Commonwealth Countries had maintained the common law rule of death by hanging, and due to high crime rates, many Caribbean citizens supported capital punishment.<sup>206</sup> The Commonwealth Countries' staunch support of the common law death penalty rule also illustrates the extent to which traditional British common law rules imposed during the colonial period are deeply embedded within the legal and social structures of Commonwealth Countries. Many of these countries believed that Britain, as a former colonial power, sought to impose modern British human rights norms on Commonwealth Countries via the *Pratt* decision, by usurping the power of Commonwealth Caribbean legislators and the self-sovereignty of Commonwealth Countries.<sup>207</sup> Ultimately, the *Pratt* case impacted the Caribbean countries in that capital defendants could commute

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235 (P.C.) (appeal taken from Belize); *R v. Hughes*, [2002] UKPC 12, [2002] 2 A.C. 259 (P.C.) (appeal taken from St. Lucia).

202. See Helfer, *supra* note 15, at 1873–74.

203. *Pratt*, [1994] A.C. at 13.

204. *Pratt*, [1994] A.C. at 20.

205. Helfer, *supra* note 15, at 1867–72, 1888.

206. Leonard Birdsong, *The Formation of the Caribbean Court of Justice: The Sunset of British Colonial Rule in the Caribbean*, 36 U. MIAMI INTER-AM. L. REV. 197, 203 (2004–2005).

207. See Helfer, *supra* note 15, at 1872.

their death penalty sentences by using domestic and supranational appellate review mechanisms.<sup>208</sup>

Immediately after the rendering of the British Privy Council decision, reports indicated that Jamaica intended to modify its constitution to explicitly preserve the common law death penalty.<sup>209</sup> Jamaica and Trinidad and Tobago both denounced the International Covenant on Civil and Political Rights First Optional Protocol, and Trinidad and Tobago also denounced the American Convention on Human Rights.<sup>210</sup> Barbados amended its constitution to preserve the death penalty, and Bahamas reinstated flogging as a punishment, which had not been in place since 1984.<sup>211</sup> The Commonwealth Caribbean opposition to human rights norms in the 1990s indicates that, to some extent, Commonwealth Countries reject a top-down imposition and internalization of human rights norms by the British Privy Council. These countries may see the imposition of these rights as attempts by the international community, and Britain in particular, to infringe on the self-sovereignty of Commonwealth Countries and to culturally recolonize these countries.

Commonwealth Countries' opposition to modern human rights norms is not limited to the death penalty or spousal rape. These countries have also been opposed to human rights regarding sexual orientation. Anti-sodomy statutes inherited from Britain during the colonial period are still in place, and homophobia is rampant. However, there are some areas in which Commonwealth Countries have begun to socially internalize human rights norms. For example, corporal punishment in schools was a common practice in British and Caribbean schools during the colonial period. Commonwealth Countries have made steady efforts to decrease corporal punishment in schools and at home. Issues regarding children may be less politically divisive, so it may be easier to adopt and implement programs regarding the rights of children in contrast to the rights of women.

The Commonwealth Countries' response to *Pratt* is, perhaps, a common response by postcolonial countries to a top-down imposition of human rights norms by former colonial powers. Postcolonial states may seek con-

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208. *Id.* at 1879; see also Ezekiel Rediker, Note, *Courts of Appeal and Colonialism in The British Caribbean: A Case For The Caribbean Court of Justice*, 35 MICH. J. INT'L L. 213 (2013) (contending that the British Privy Council imposed obstacles to the imposition of the death penalty by striking down the death penalty as a mandatory punishment for murder in Jamaica).

209. Birdsong, *supra* note 206, at 225.

210. Helfer, *supra* note 15, at 1833, 1881.

211. BARB. CONST., art. 15(3); Margaret A. Burnham, *Indigenous Constitutionalism and The Death Penalty: The Case of the Commonwealth Caribbean*, 3 INT'L J. CONST. L. 582, 587 (2005) (citing *Prince Pinder v. The Queen*, [2003] 1 A.C. 620 (P.C.)(appeal taken from Bah.)).

frontation with former colonial powers to “demonstrate independence of colonial or neo-colonial powers and a determination to be recognized as a participant in the international political arena.”<sup>212</sup> For instance, representatives of Uganda, a former British colony, believed that NATO’s involvement in the 2011 Libyan crisis was a pretense for undermining the sovereignty of African states.<sup>213</sup> Thabo Mbeki, former head of the African Union, has expressed similar views regarding what many Africans view as Britain’s and the United Nations’ attempts to culturally recolonize Africa by attacking the self-sovereignty of African countries.<sup>214</sup> The African Union has also opposed the prosecution of African heads of state by the International Criminal Court (ICC) for human rights violations, because the African Union believes that African leaders are being singled out for prosecution in a subversive attack on African self-sovereignty.<sup>215</sup> The African Union has recently threatened to withdraw from the Rome Statute establishing the ICC.<sup>216</sup> A number of Muslim majority countries have abstained from the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, because many of these countries view treaties of western origin as instruments of colonial enterprise.<sup>217</sup>

From a postcolonial perspective, colonial principles like the common law death penalty rule and spousal rape exemption may be so ingrained in the political, legal, and social structures of postcolonial states, that postcolonial states view these principles as traditional national rules or values rather than colonial rules. Postcolonial states may then resist attempts by

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212. TIYANJANA MALUWA, *INTERNATIONAL LAW IN POST-COLONIAL AFRICA* 100 (1999).

213. Ruhakana Rugunda, *African Union Statement on the NATO Invasion of Libya: It’s Time to End the Bombing and Find a Political Solution in Libya*, COUNTERPUNCH (June 22, 2011), <http://www.counterpunch.org/rugunda06222011.html>.

214. Thabo Mbeki, Chairman, Thabo Mbeki Foundation, Address at the AGM of the Law Society of the Northern Provinces: International Law and the Future of Africa (Nov. 5, 2011), <http://www.thabombekifoundation.org.za/Pages/address-by-the-patron-of-the-tmf,-thabo-mbeki,-at-the-agm-of-the-law-society-of-the-northern-provinces-sun-city,-november-5.aspx>.

215. See Assembly of the African Union, Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction, 11th Sess., June 30, 2008–July 1, 2008, Doc. Assembly/AU/14(XI), 5, Doc. Assembly/AU/Dec.199(X), (2008) (noting abuse of the principle of Universal Jurisdiction by non-African states against African leaders); Press Statement, African Union, Peace & Sec. Council, 141st Meeting, Doc. PSC/PR/BR(CXLI) (July 11, 2008) (expressing concern over the alleged abuse of ICC indictments against African Leaders).

216. See Assembly of the African Union, Decision on Africa’s Relationship with the International Criminal Court, Doc. Ext/Assembly/AU/Dec.1, (Oct. 12, 2013); see also Draft Letter from the Africa Union to Mr. Sang Hyung Song, President, ICC (Jan. 29 2014).

217. See Sadiq Reza, *Torture and Islamic Law*, 8 CHI. J. INT’L L. 21, 37 (2007).

former colonial powers to impose modern human rights norms that contradict these “traditional national rules.” Postcolonial states may ratify treaties or express support for emerging human rights norms in order to signal to the international community that they are committed to enhancing human rights, and they may intend to comply with their treaty obligations, but they only do so to the extent that their international obligations do not conflict with “traditional national values.” Alternatively, postcolonial leaders may indicate support for emerging human rights with intent to protect these norms as they incorrectly assume that the populace has abandoned “traditional national rules” in favor of accepting modern-day views regarding the human rights of women. Further, labeling such values as “traditional” may simply be a political move used to defend values and identities that Caribbean men insist on preserving in order to impede changes to colonial laws and structures that favor a masculine identity which were retained after independence, rather than a true widespread belief that such values are authentically “traditional.” Trinidad and Tobago’s attempts in 1986 and 2000 to revise its sexual offences laws to eliminate the spousal rape exemption illustrate these issues.

## V. POSTCOLONIAL LEGAL REFORM IN TRINIDAD AND TOBAGO

### A. *Trinidadian Sexual Offences Act*

Trinidad’s first Sexual Offences Act, which was adopted in 1986 (“1986 Act”), represented the country’s initial attempt to address and consolidate colonial rules that were established to regulate the sexuality of the colonized.<sup>218</sup> Many provisions of the 1986 Act were borrowed from British statutes and common law.<sup>219</sup> The initial draft of the 1986 Act criminalized spousal rape and stranger rape equally. However, the version of the 1986 Act ultimately adopted by the legislature criminalized spousal rape only where the Standard Spousal Rape Conditions were satisfied. In 2000, the 1986 Act was amended (“2000 Act”) to remove the Standard Spousal Rape Conditions and to equally criminalize spousal rape and stranger rape.<sup>220</sup> Trinidad’s initial failure in 1986 to eliminate the spousal rape exemption and its successful legal reform fourteen years later, may provide lessons for other Commonwealth Countries seeking to bring their laws into compliance with their international obligations and constitutional provisions.

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218. Alexander, *supra* note 86, at 8.

219. *Id.*

220. An Act to Amend the Sexual Offences Act, 1986 § 4(1), No. 31-2010 (2000) (Trin. & Tobago).

Trinidad has often been lauded for its legislative efforts in the area of women's rights.<sup>221</sup> Rhoda Reddock contends that the women's movement in Trinidad and Tobago has been instrumental in advocating for the adoption of legislation beneficial to the human rights of women.<sup>222</sup> The pan-Africanist movement of the early twentieth century and the attainment of universal suffrage in 1946 provided women with access to various opportunities, including education and employment.<sup>223</sup> This led to the creation of organizations such as the National Commission on the Skills of Women, Trinidad's Women for Progress, and the Center for Gender Studies and Development at the University of the West Indies.<sup>224</sup>

The experiences of the women's movement in different Caribbean countries is inextricably linked to issues related to economic development.<sup>225</sup> For example, the oil crisis of the 1970s severely affected Jamaica's economic prosperity.<sup>226</sup> In contrast, the oil-producing country of Trinidad and Tobago experienced an economic boom from 1973 to 1980.<sup>227</sup> Moreover, the unique diversity of Trinidad and Tobago is also reflected in its women's movement.<sup>228</sup> By the 1950s, Indo-Trinidad women were beginning to challenge traditional gender roles, to the chagrin of Hindu and Muslim religious authorities.<sup>229</sup> The Hindu Women's Organization has actively participated in integrating Hindu women into Trinidadian society.<sup>230</sup>

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221. MINDIE LAZARUS-BLACK, *EVERYDAY HARM: DOMESTIC VIOLENCE, COURT RITES, AND CULTURES OF RECONCILIATION* 12 (2007).

222. RHONDA E. REDDOCK, *WOMEN LABOUR & POLITICS IN TRINIDAD & TOBAGO: A HISTORY* 162 (1994).

223. See Rhoda E. Reddock, *Diversity, Difference & Caribbean Feminism: The Challenge of Anti-Racism*, 1 *CARIBBEAN REV. OF GENDER STUD.* 1, 5–8 (Apr. 2007) (discussing pan-Africanism and garveyism); REDDOCK, *supra* note 222 (discussing of universal suffrage and educational opportunities).

224. REDDOCK, *supra* note 222.

225. *Id.* at 65.

226. *Id.*

227. *Id.*

228. See Michele Alexandre, *Dance Halls, Masquerades, Body Protest and the Law: The Female Body as a Redemptive Tool Against Trinidad's Gender-Biased Laws*, 13 *DUKE J. GENDER L. & POL'Y* 177, 191 (2006). Indians accounted for 35.4% of the total population, while Africans accounted for 34.2%. GOV'T OF TRIN. & TOBAGO, MINISTRY OF PLANNING & SUSTAINABLE DEV., CENTRAL STATISTICAL OFFICE, TRIN. & TOBAGO 2011 POPULATION AND HOUSING CENSUS DEMOGRAPHIC REPORT (2012).

229. Eudine Barriteau, *Theorizing Gender Systems and the Project of Modernity in the Twentieth-Century Caribbean*, 59 *FEMINIST REV.* 186, 202 (1998).

230. Rhonda Reddock, *Women's Organizations and Movements in the Commonwealth Caribbean: The Response to Global Economic Crisis in the 1980s*, 59 *FEMINIST REV.* 57, 63 (Summer 1998).



In the 1980s, high levels of sexual violence against Trinidadian women coupled with a growing feminist movement led to calls for legal reform.<sup>231</sup> Greater access to jobs and educational opportunities increased women's independence, meaning that "women were gaining more control over their lives [while] men were losing some control over their own lives and over the lives of women."<sup>232</sup> Prior to the adoption of the 1986 Act, women's organizations and nongovernmental organizations (NGOs) actively campaigned to eliminate the spousal rape exemption, and a widely broadcast television series on women's rights brought the issue of rape in Trinidad and Tobago to the public's attention.<sup>233</sup> The women's movement created alliances with conservative women's service provider organizations to advocate for legal reform.

Although Trinidad and Tobago did not ratify CEDAW and the IAS Convention until 1990 and 1996, respectively, the Law Reform Commission of Trinidad and Tobago, which was responsible for drafting the 1986 Act, was heavily influenced by legal reforms in the United Kingdom, Australia, and Canada; these countries were viewed as being progressive on issues related to gender equality and women's sexual autonomy.<sup>234</sup> The legal reforms in these other jurisdictions reflected an international movement toward the protection of emerging human rights norms on the role of women in society.<sup>235</sup> When attempting to revise their laws in 1986, Trinidad intended to express to the international community its support and recognition of modern human rights norms. Trinidad's attempts to eliminate the spousal rape exemption in 1986 failed because of significant opposition from male members of parliament, clergymen, and male lawyers.<sup>236</sup> The legislative history indicates that many members of parliament and the legal minister at the time were opposed to what they viewed as the imposition of contemporary gender norms that would displace Trinidadian values.<sup>237</sup> From a postcolonial perspective, it appears that common law rules that reflected colonial values and justifications for women's subordinated role in marriage were so deeply rooted in Trinidadian society that they were viewed as authentic traditional Trinidadian values. As a result, efforts to change

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231. Yazmin Tambiah, *Creating Immoral Citizens: Gender, Sexuality and Lawmaking in Trinidad and Tobago, 1986*, 3 CARIBBEAN REV. OF GENDER STUD. 1, 4 (2009).

232. Tina Johnson, *The Impact of Women's Consciousness on the History of the Present*, 17 SOC. JUST. 126, 127 (Summer 1990).

233. PATRICIA ELLIS, WOMEN, GENDER AND DEVELOPMENT IN THE CARIBBEAN: REFLECTIONS AND PROJECTIONS 135 (2003); see Johnson, *supra* note 232, at 127 (discussing television series on rape).

234. Tambiah, *supra* note 231, at 4–5; see *supra* note 188 and accompanying text.

235. Tambiah, *supra* note 231, at 5.

236. ELLIS, *supra* note 233.

237. Tambiah, *supra* note 231, at 5–8.

these rules to bring them in conformity with emerging human rights norms regarding the role of women in marriage were rejected.

The initial draft of the 1986 Act, which did not contain the Standard Spousal Rape Conditions, reflected modern views on women's autonomy that were not necessarily shared by Trinidadian men at that time.<sup>238</sup> The following statement by the then Legal Ministers of Affairs supports this assertion:

[W]hat has been paramount in our minds is the consideration of our moral standards as obtained in our beloved Republic of Trinidad and Tobago. We hold firm to the view that what is good for England . . . is not necessarily good for Trinidad and Tobago . . . We feel we have to bring our laws relating to sexual offences into the twentieth and twenty-first century. On the one hand then, what works elsewhere, specifically in the advanced capitalist, white-dominated states, is not necessarily acceptable at home.<sup>239</sup>

A view of this statement through a postcolonial lens illuminates Trinidad and Tobago's attempts to distance itself from modern human rights recognized by former colonial powers that do not conform to traditional Trinidadian values. Further, the explanatory note on the proposed 1986 Act specifically stated that the act was not intended to interfere in the sexual relationship between husbands and wives.<sup>240</sup> Central to the public debate on the 1986 Act was the historic justification of marital privacy discussed in Part II(e) above. Many members of the Trinidadian parliament believed that criminalizing spousal rape would intrude on marital privacy and interfere with the sanctity of marriage.<sup>241</sup> Thus, the Standard Spousal Rape Conditions were ultimately included in the 1986 Act, and spousal rape was labeled as "sexual assault" rather than rape since a consensus could not be reached in parliament.<sup>242</sup>

Even after the 1986 campaign's failure to eliminate the spousal rape exemption, the women's movement continued to organize around issues related to women's rights. While it did not result in the elimination of the

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238. Johnson, *supra* note 232, at 130.

239. Tambiah, *supra* note 231, at 8 (citation omitted).

240. See Johnson, *supra* note 232, at 128.

241. Johnson, *supra* note 232, at 131.

242. S. 5th Parliament, 5th Sess., at 123, Dec. 7, 1999 (Trin. & Tobago) [hereinafter Sen. Debate] (statement of Sen. Mohammed); H.R. 5th Parliament, 5th Sess., at 318, 335, May 4, 2000, 318, 335 (Trin. & Tobago) [hereinafter H.R. Meeting] (statements of Hon. R. L. Maharaj & Hon. K. Persad-Bissessar).

spousal rape exemption, the 1980s women's movement led to the adoption of the Domestic Violence Act. This act allowed women who suffered sexual violence at the hands of their partners, including their husbands, to obtain protective orders. By continuing to focus their campaigns on specific issues and by partnering with women from traditional organizations, such as women's church groups, women in Trinidad conducted a successful campaign for the adoption of various laws beneficial to women.<sup>243</sup> With the passage of the 2000 Act, Trinidad and Tobago became the first Commonwealth Caribbean country to criminalize spousal rape and stranger rape equally by removing the Standard Spousal Rape Conditions. The 2000 Act explicitly provides that the provisions that apply to stranger rape also apply in relation to a husband who commits the offence of rape on his wife.<sup>244</sup> Spousal rape is no longer referred to as "sexual assault" but instead as rape under the 2000 Act. Additionally, subject to a few exceptions, the 2000 Act provides that a person who commits the offence of rape may be imprisoned for life.<sup>245</sup> Since spousal rape and stranger rape are treated similarly under the 2000 Act, the maximum sentence of life imprisonment also applies to defendants convicted of spousal rape. Although Trinidad and Tobago equally criminalizes spousal rape and stranger rape, the 2000 Act contains a defense of marriage for statutory rape similar to those found in the laws of other Caribbean countries.<sup>246</sup>

The legislative history indicates that the 2000 Act was intended to protect the sexual autonomy and sexual integrity of women, and it also reflects partial political internalization of human rights norms.<sup>247</sup> During legislative debates on the 2000 Act, the Attorney General noted that the 1986 Act, which retained the Standard Spousal Rape Conditions, was "archaic and outdated" as these conditions simply replicated the common law spousal rape exemption. The Attorney General also noted that the spousal rape exemption was completely eradicated in other common law

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243. REDDOCK, *supra* note 222, at 62.

244. Sexual Offences Act, (Act 27/1986), § 4(5) (Trin. & Tobago).

245. *Id.* at § 4(2). The Trinidadian Sexual Offences Act provides that: a person who commits the offence of rape is liable on conviction to imprisonment for life and any other punishment which may be imposed by law, except that if—(a) the complainant is under the age of twelve years; (b) the offence is committed by two or more persons acting in concert or with the assistance or in the presence, of a third person; (c) the offence is committed in particularly heinous circumstances; (d) the complainant was pregnant at the time of the offence and the accused knew that the complainant was pregnant; or (e) the accused has previously been convicted of the offence of rape, he shall be liable to imprisonment for the remainder of his natural life. *Id.*

246. *Id.* at § 6.

247. Parliamentary Debates, 18 Off. Rep. 45 (Dec. 1, 1999) (Trin. & Tobago).

jurisdictions, such as the United Kingdom and Canada.<sup>248</sup> Further, the Attorney General explicitly acknowledged the colonial roots of the spousal rape exemption by stating that the spousal rape exemption under the common law “is based on the fact that the husband has a proprietary right over the wife and that she is a sexual object.”<sup>249</sup>

### *B. Lessons from Trinidad and Tobago*

#### 1. Failure to Change Cultural Values and Improper Implementation

Despite the relative legislative success in Trinidad and Tobago, the laws that have been adopted to protect women’s rights are often ineffectively implemented. During the senate debates regarding the adoption of the 2000 Act, Senator Nafeesa Mohammed acknowledged that although removing spousal immunity was a step in the right direction, adopting new laws without more would not lead to meaningful change, as demonstrated in the case of the Domestic Violence Act, which has been inadequately implemented.<sup>250</sup> The effective implementation of “rights and protections requires attention to everyday ideologies and practices of the culture at the courthouse.”<sup>251</sup>

Rawwida Baksh and Linnette Vassell contend that colonial gender policy “defined a subordinate position for women vis-à-vis men in all aspects of political, economic and socio-cultural life, and essentialized their identities as wives and mothers under the authority of men within the private sphere.” This policy continues to negatively affect the lives of Caribbean women.<sup>252</sup> The parliamentary debates on the 2000 Act also illustrate the extent to which the ideology of patriarchy and colonial identities regarding women’s roles continue to be embedded within Trinidadian culture. On the issue of

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248. *Id.* at 46–47.

249. H.R. Meeting, *supra* note 242, at 318 (statement of Hon. R. L. Maharaj).

250. Sen. Debate, *supra* note 242, at 115–16 (statement Sen. Mohammed). Sen. Mohammed continued to note the tensions between societal goal of protecting sanctity of marriage versus protecting the rights of individual family members. *Id.* at 118. Cultural values and practices rooted in the ideology of patriarchy resulted in women often failing to file for protective orders or women abandoning their initial attempts to obtain protection orders and judges, police officers, probation officers, and court staff serving as significant barriers to women obtaining protective orders. *Id.*; *see also* Alexandre, *supra* note 228, at 192.

251. Mindie Lazarus-Black, *The (Heterosexual) Regendering of a Modern State: Criminalizing and Implementing Domestic Violence Law in Trinidad*, 28 L. & SOC. INQUIRY 979, 986 (2003).

252. Rawwida Baksh & Linnette Vassell, *Women’s Citizenship in the Democracies of the Americas: The English-Speaking Caribbean*, INTER-AMERICAN COMM’N OF WOMEN 20 (Aug. 2013), <http://www.oas.org/en/CIM/docs/CiudadaniaMujeresDemocracia-Caribbean-EN.pdf>.

removing the spousal rape exemption, Senator Cynthia Alfred stated, “the man is the one who hunts or who pursues; the woman is the one, perhaps, who lures. But, we also have women who tease. They tease the men and, sometimes, after they make their mischief and the man reacts in a certain way, the woman screams rape.”<sup>253</sup> Senator Alfred continued by arguing that if the Standard Spousal Rape Conditions were removed, vindictive wives would use the new law to punish innocent husbands.<sup>254</sup> Other members of Trinidad’s legislative branch countered this point by arguing that the issue of false crime reports is not limited solely to the context of spousal rape. They added that husbands should not be allowed to use their wives as property or to force their wives to turn over their bodies to them.<sup>255</sup> The dissonant views of members of the legislature are reflective of broader societal views on gender roles, and they indicate partial social and political internalization of the norms under CEDAW and the IAS Convention. Despite the 2000 Act and the Domestic Violence Act, Trinidad and Tobago’s failure to effectively address the gendered norms that are rooted in the ideology of patriarchy has had negative consequences for the human rights of women. These gendered norms may persist in Trinidad, not only because of the retention of colonial norms and laws that contribute to the perpetuation of these norms, but also because of the traditional cultural values of different ethnic groups in Trinidad such as the Indo-Muslim and Indo-Hindu population.

Mindie Lazarus Black argues that Trinidad’s culture of reconciliation, which is based on traditional gender roles, places family stability before the rights of individual family members.<sup>256</sup> Further, she contends that the very individuals charged with implementing statutes aimed at protecting women from sexual violence may attempt to dissuade women from using these laws.<sup>257</sup> Black also notes that in Trinidad, family violence was historically viewed as “husband and wife business,” and a husband’s ability to control his wife was unquestioned.<sup>258</sup> From a postcolonial perspective, these traditional views reflect the unities, privacy, and reconciliation theories that justify the spousal rape exemption under the common law.

Notwithstanding the adoption of progressive legislation on women’s rights, such as the 2000 Act, Trinidadian women are still subject to high levels of sexual violence. The U.N. Economic Commission for Latin America and the Caribbean reported that Trinidadian gender polices should

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253. Sen. Debate, *supra* note 242, at 145 (statement of Sen. Cynthia Alfred).

254. *Id.* at 146.

255. H.R. Meeting, *supra* note 242, at 318, 354 (statement of Hon. R.L. Maharaj).

256. LAZARUS-BLACK, *supra* note 221, at 998–99.

257. *Id.*

258. *Id.*

be revised.<sup>259</sup> Country reports on human rights practices indicate that, despite statutory provisions criminalizing spousal rape, courts often impose much shorter sentences on convicted defendants than the punishment prescribed by statute.<sup>260</sup> Partly because of the insensitivity of the police, incidents of rape and sexual violence are generally underreported.<sup>261</sup> Further, the police are often permissive in enforcing the law.<sup>262</sup>

As discussed in Part IV of this Article, CEDAW and the IAS Convention require ratifying states to adopt legislation and take concrete steps to change cultural norms that perpetuate sexual violence and discrimination against women. The 2000 Act successfully eliminated the ability of husbands to freely sexually assault wives who have not satisfied the Standard Spousal Rape Conditions. However, women continue to suffer from sexual violence both in and outside the context of marriage. Trinidad's experience indicates that while an active women's movement and NGOs are crucial to the adoption of legislation protecting women's rights, the legislation must be effectively implemented in accordance with CEDAW and the IAS Convention. Effective implementation requires, among other things, changes to social and cultural norms and identities as well as the elimination of the patriarchal ideologies that remain embedded within the political, legal, and social structures of postcolonial states.

## 2. Failure to Incorporate International Treaties

Although CEDAW and the IAS Convention do not require direct incorporation, Trinidad and Tobago provides an example of incomplete legal internalization of international norms, as these conventions have not been fully incorporated on the domestic plane. Moreover, even though Trinidad and Tobago and other Commonwealth Countries have ratified these treaties, they continue to struggle to protect women from sexual violence. Thus, it is unlikely that mere treaty ratification will sufficiently protect the human rights of Caribbean women. These facts also indicate that the enforcement mechanisms established under CEDAW and the IAS Convention may be

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259. United Nations, Economic Comm'n for Latin America and the Caribbean, Caribbean Synthesis Review and Appraisal Report in the Context of the 15th Anniversary of the Adoption of the Beijing Declaration and Platform for Action 30 (May 10, 2010), <http://www.eclac.org/mujer/noticias/paginas/0/39590/LCARL.259.pdf>.

260. U.S. Dept. of State, Bureau of Democracy, Human Rights and Labor, *Country Reports on Human Rights Practices for 2013: Trinidad and Tobago* (Feb. 27, 2014), <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2013&dclid=220475>.

261. *Id.*

262. *Id.*

inadequate.<sup>263</sup> To fill the void between treaty ratification and vertical international enforcement of human rights norms, human rights scholars suggest domestic enforcement of human rights.<sup>264</sup>

International law is enforced not only by states against other states but also through domestic courts, political institutions, individuals, and other interest groups that exert pressure on states to comply with their international obligations.<sup>265</sup> Individuals and interest groups, such as NGOs, may also enforce international law by accessing domestic courts.<sup>266</sup> Thus, the incorporation of international law on the municipal level is central to domestic enforcement of international law.

Trinidad and Tobago, like many other Commonwealth Countries, adheres to the dualist doctrine under which international law is only enforcea-

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263. The United Nations has acknowledged several challenges faced by its treaty bodies, including the CEDAW Committee, such as the need for additional meeting time and lack of human and financial resources. See G.A. Res. 68/268, ¶¶ 24–26, U.N. Doc. A/RES/68/268 (Apr. 9, 2014). Following the conclusion of a two-year inter-governmental process, the United Nations General Assembly adopted a resolution aimed at strengthening the enforcement mechanisms of the ten United Nations treaty bodies. *Id.* The resolution has been criticized for its failure to adequately increase the total amount of financial resources allocated to treaty bodies and its recommendation that treaty bodies bear in mind state views when working within their mandates. Christine Broecker, *The Reform of the United Nations' Human Rights Treaty Bodies*, 18 AM. SOC. INT'L L. (Aug. 13, 2014), <http://www.asil.org/insights/volume/18/issue/16/reform-united-nations-human-rights-treaty-bodies>. The resolution also did not adequately address the lack of mechanisms in place to allow treaty bodies to compel states to comply with their treaty obligations to submit reports and implement treaty body recommendations.

264. See, e.g., Oona Hathaway, *The New Empiricism in Human Rights: Insights and Implications*, 98 AM. SOC'Y. INT'L. L. PROC. 208 (2004); Emilie M. Hafner-Burton & Kiyoteru Tsutsui, *Human Rights in a Globalizing World: The Paradox of Empty Promises*, 110 A.J.S 1373 (2005). It should be noted that some scholars believe focusing exclusively on the concept of state compliance with international rules and norms does not take into consideration the normative effectiveness of international law. See Ruti Teitel & Robert Howse, *Beyond Compliance: Rethinking Why International Law Really Matters*, 1 GLOBAL POL'Y 127, 130 (2010) (arguing the rules and norms of international law may, among other things, “shift in whole or in part decision-making, interpretative and/or legitimating power from one set of elite actors to another” such as “from diplomats, foreign policy analysts and military planners to legal professionals such as judges, lawyers and law professors.”).

265. Oona Hathaway, Hamdan v. Rumsfeld: *Domestic Enforcement of International Law*, in INTERNATIONAL LAW STORIES 229 (John E. Noya et al. eds., 2007).

266. *Id.* Hathaway acknowledges domestic enforcement of international law is unlikely to occur in autocratic states or states with corrupt judicial systems, but where there are robust rule-of-law institutions, domestic enforcement of international law “can succeed even where there is stringent resistance by even the most powerful of political actors.” *Id.*



ble in the domestic sphere via incorporation of a treaty by statute.<sup>267</sup> Under a strict dualist approach, individuals cannot claim that a treaty is not being performed or that individual rights granted under the treaty are being violated until the treaty has been incorporated into domestic law.<sup>268</sup> Thus, domestic courts will not apply or enforce the terms of an unincorporated treaty, and to the extent that a treaty conflicts with domestic law, the terms of the treaty will not be applied.<sup>269</sup> Despite the state violations that may accrue upon treaty ratification, treaty incorporation is necessary for the principles and rights set forth in CEDAW and the IAS Convention to be actionable in the domestic courts of Commonwealth Countries.<sup>270</sup> Additionally, although a state becomes legally obligated to comply with the terms of a treaty upon ratification, many treaties let states decide how that compliance is to occur on the domestic plane.<sup>271</sup> For instance, some treaties simply obligate the state to adopt legislation to give effect to the terms of the treaty.<sup>272</sup>

With respect to human rights treaties aimed at the protection of women, such as CEDAW and the IAS Convention, Trinidad has failed to directly incorporate these treaties into domestic legislation. Instead, Trinidad has incorporated some of the principles of CEDAW and the IAS Convention in a piecemeal manner. For instance, arguably by eliminating the spousal rape exemption in the 2000 Act and passing legislation on domestic violence, Trinidad has adopted legislation to protect women from violence and discrimination in certain areas as required by these conventions. While acknowledging the passage of innovative legislation aimed at protecting the rights of women, such as the 2000 Act, the CEDAW Committee has ex-

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267. ANTOINE, *supra* note 103, at 217.

268. See Dinah L. Shelton, *Introduction to INTERNATIONAL LAW AND DOMESTIC LEGAL: INCORPORATION, TRANSFORMATION, AND PERSUASION* 4 (Dinah L. Shelton ed., 2011).

269. See Att'y Gen. v. Joseph, [2006] C.C.J. 3, ¶ 55 (A.J.), (2006) 69 WIR 104 (Barb.).

270. Shelton, *supra* note 268, at 4, 13, 308. Commonwealth Countries, like other common law countries, appear to adopt a monist approach with respect to customary international law. *Id.* On the domestic plane customary international law becomes part of domestic Caribbean law only to the extent that the customary international law is not inconsistent with Acts of Parliament or a prior judicial decision of final authority. Berry & Robinson, *supra* note 113, at 106. The constitutions of commonwealth Caribbean countries are silent on the issue of treaty making and thus common law principles, which do not require legislative consultation before treaty ratification, are controlling. Winston Anderson, *Treaty Making in Caribbean Law and Practice: The Question of Parliamentary Participation*, 8 CARIBBEAN L. REV. 75, 75-77 (June 1998).

271. *Id.* at 3.

272. International Covenant on Civil and Political Rights art. 2, ¶ 2, Mar. 23, 1976, 999 U.N.T.S. 171.

pressed concern that certain provisions of CEDAW have not yet been directly incorporated into domestic legislation.<sup>273</sup> The committee further acknowledged that sexual violence against women in Trinidad is rooted in traditional patriarchal attitudes that Trinidadian society has accepted.<sup>274</sup> The structures and norms inherited from colonialism have influenced the creation of gender systems in postcolonial Caribbean states that perpetuate inequalities for modern-day Caribbean women.<sup>275</sup> The marital privacy and property theories used to justify the spousal rape exemption exemplify many of these social norms inherited by postcolonial Caribbean states: for instance, the belief that

[A]n individual and citizen is a male household head, the separation of society into private and public sphere, the world of the dependence, the family and the world of freedom, the state and work and the gendering of that differentiation so that women are posed in opposition to civil society, to civilization.<sup>276</sup>

In contrast to its approach taken with respect to CEDAW, Trinidad has taken steps to directly incorporate the provisions of various international conventions aimed at protecting the human rights of children. For instance, the 2008 Trinidad's International Child Abduction Act specifically incorporates the Convention on the Civil Aspects of International Child Abduction by stating that the Convention "is to have the force of law in Trinidad and Tobago."<sup>277</sup> Similarly, the Convention on the Rights of the Child has been incorporated on the municipal plane through the adoption of the 2012 Children's Act.<sup>278</sup>

Trinidad's decision to directly incorporate the treaty provisions on children's rights, in light of its failure to do the same for treaty provisions regarding women's rights, perhaps signals to the Trinidadian populace that the government does not place high importance on protecting women's rights or on complying with international rules aimed at protecting women. This signal may contribute to the perpetuation of traditional patriarchal views of women within society. Police officers, lawyers, judges, and courts then, have little incentive to effectively implement domestic legislation, such

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273. Rep. of the Comm. on the Elimination of Discrimination Against Women, 26th Sess., Jan. 14 2002-Feb. 1, 2002, ¶ 139, U.N. Doc. A/57/38 (pt. 1); GAOR, 57th Sess., Supp. No. 38 (May 7, 2002).

274. *Id.* at ¶ 145.

275. Barriteau, *supra* note 229, at 187.

276. *Id.* at 194.

277. International Child Abduction Act 2008 (Act No. 8/2008), ¶ 4 (Trin. & Tobago).

278. Children Act 2012 (Act 12/2012) (Trin. & Tobago).

as the Domestic Violence Act and the 2000 Act, which were adopted to protect women from sexual violence. Trinidad and Tobago is not alone in its failure to incorporate treaty provisions related to women's rights. In fact, many Commonwealth Countries have failed to directly incorporate CEDAW and the IAS Convention by domestic legislation.<sup>279</sup>

Even where domestic legislation is changed without the domestic incorporation of treaty provisions, as was the case with Trinidad's Domestic Violence Act and the 2000 Act, new legislation may not effectively protect the rights of women when a country nonetheless fails to address cultural norms that negate the impact of such legislation. Further, women's rights are unlikely to be effectively protected when a country inadvertently signals that it accords lesser weight to the human rights of women, by failing to give direct domestic effect to international treaties aimed at protecting women, while simultaneously giving direct effect to treaties that protect the rights of others.

## VI. RECOMMENDATIONS

This section posits that legal, legislative, social, and judicial internalization of the human rights norms reflected in CEDAW and the IAS Convention may contribute to changing power dynamics that perpetuate inequality and negative identities for women. While these solutions are not new, this Article uses postcolonial theory to assess which solution may be more viable, as well as to determine the best way to implement internalization of human rights norms given the colonial heritage and politics of postcolonial Commonwealth Countries. This Article suggests that postcolonial theory can be used to, not only trace the colonial foundations of postcolonial law and provide insights regarding the modern day implications of colonialism, but also to assess what should be done with this knowledge.

While postcolonial states may not be able to escape their colonial heritage (as these states automatically became 'postcolonial' when colonialism ended), the *raison d'être* of postcolonial states is not to cease to be 'postcolonial' but to effectively exercise postcolonial agency by accepting those aspects of their colonial heritage that are beneficial to their social, political, and legal structures while rejecting those aspects that perpetuate inequalities and negative identities, such as the common law spousal rape exemption. Thus, some of the recommendations proposed below incorporate aspects of the colonial heritage of Commonwealth Countries, such as

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279. See Winston Anderson, *The Role of the Caribbean Court of Justice in Human Rights Adjudication: International Treaty Law Dimensions*, 21 J. TRANSNAT'L L. & POL'Y 1, 12-13 (2011-2012).

the use of British Privy Council case law to promote judicial internalization of human rights norms by Caribbean judges. In contrast, other solutions such as recommending that CARICOM modify its model law and encourage countries to address power dynamics and identities that negate the human rights of women, rely less on the colonial heritage of Commonwealth Countries, since CARICOM was established by Caribbean countries after independence. Moreover legal, social, legislative, and judicial internalization are undeniably intertwined.<sup>280</sup> Judicial internalization of international norms cannot occur without domestic litigation, and domestic litigation often occurs where there is some preexisting level of social internalization of human rights norms, most likely by NGOs and a local women's rights movement. Similarly, social internalization of human rights may foster legal and political internalization by pressuring the legislative branch to amend existing legislation to protect human rights.

*A. Legal, Social, and Legislative Internalization of Human Rights Norms*

Judges, civil society groups, and international bodies, where appropriate, should play a critical role in fostering internalization of human rights norms. As part of the transnational legal process, effective legal internalization of human rights norms by the legislative branch requires that the sexual offences statutes be revised to completely eradicate the common law spousal rape exemption, in addition to domestic incorporation of applicable human rights instruments, such as the IAS Convention and CEDAW.<sup>281</sup> Once treaties such as the IAS Convention, which grant individual rights to women, are incorporated on the domestic plane, Caribbean women will have the ability to claim, in domestic courts, that their rights granted under such treaties have been violated.<sup>282</sup> Commonwealth Countries should also ratify the CEDAW Optional Protocol, which would allow the CEDAW Committee to receive claims from Caribbean citizens for violations of rights under

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280. Koh, *supra* note 13, at 2657.

281. A majority of states in the U.S. have enacted legislation expressly criminalizing marital rape. *E.g.*, D.C. CODE § 22-3019 (Westlaw through Jan. 5, 2015); MICH. COMP. LAWS § 750.5201 (Westlaw through P.A. 2014, No. 556, 558–72, of the 2014 Reg. Sess.); N.H. REV. STAT. § 632-A:5 (Westlaw through end of 2014 Reg. Sess.); N.J. STAT. § 2C:14-5(b) (Westlaw through laws effective through L. 2014, c. 90 & J.R. No. 6); COLO. REV. STAT. § 18-3-409 (Westlaw through Second Reg. Sess. of the 69th Gen. Ass. (2014) and amendments adopted through Nov. 4, 2014 Gen. Elect.).

282. Convention of Belém do Pará, *supra* note 11, at ch. II.

CEDAW, request interim measures from states, conduct inquiries into grave violations of women's rights, and issue non-binding recommendations.<sup>283</sup>

Where the legislative branch fails to engage in legal internalization, local civil society groups should actively invoke the provisions of CEDAW and the IAS Convention in domestic litigation, as well as play an instrumental role in promoting internalization through domestic lobbying.

Postcolonial theory can be used to actively encourage and "engage in the formation of *positive* new political identities."<sup>284</sup> Notwithstanding the need for legislative and legal internalization, Trinidad and Tobago's experience indicates that even when statutes are revised to equally criminalize spousal rape and stranger rape, cultural attitudes and lack of effective implementation may foster environments in which the human rights of women are inadequately protected. Thus, complete rather than partial social internalization of the norms reflected in CEDAW and the IAS Convention is necessary. Social internalization is particularly important given the fact that in some instances the legislative branch may fail to timely amend statutes to reflect judicial decisions. After the New York Court of Appeals struck down the spousal rape exemption in *People v. Liberta* in 1984, it took New York legislators several years to amend the applicable statute to remove the spousal rape exemption.<sup>285</sup> Civil society groups also play an important role in facilitating this process.

CEDAW and the IAS Convention require Commonwealth Countries not only to adopt appropriate legislation to give legal effect to the conventions on the domestic plane but also to change cultural norms that diminish the human rights of women.<sup>286</sup> Commonwealth governments should endeavor to create a broader metanarrative of the role of women in society by establishing opposing norms to counteract the restrictive norms and identities established by the common law. From a postcolonial perspective, the sexual autonomy of women must be protected, and the gendered norms that are vestiges of colonial rule and that underlie rape laws must be addressed. The leaders of Commonwealth Countries as well as the Caribbean populace must 'buy in' to the elimination of gendered norms and identities

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283. CEDAW Optional Protocol, *supra* note 17. See also, CEDAW Background Information, available at [http://owjn.org/owjn\\_2009/legal-information/international-law/281-cedaw-background-information](http://owjn.org/owjn_2009/legal-information/international-law/281-cedaw-background-information) (last visited Mar. 15, 2015).

284. Roy, *supra* note 19, at 320.

285. Cassandra M. DeLaMothe, *Liberta Revisited: A Call to Repeal the Marital Exemption for All Sex Offenses in New York's Penal Law* 23 *FORDHAM URB. L. J.* 857, 858 (1996).

286. CEDAW, *supra* note 11, at art. 5; Convention of Belém do Pará, *supra* note 11, at art. 8.

that foster the subjugation of women and continue to be used as a justification for the spousal rape exemption.

Elimination of the spousal rape exemption must be done in such a manner that Commonwealth Countries do not view it as another attempt by former colonial powers to impose modern-day British views on the human rights of women. The provisions of CEDAW require Commonwealth Countries to eliminate stereotypes and social and cultural practices based on the inferiority of women.<sup>287</sup> The leaders of Commonwealth Countries and the Caribbean populace must begin to view international human rights norms as domestic norms and domestic law. Direct domestic incorporation of human rights treaties by Commonwealth Countries may facilitate this process. Common law judges in the United States, New Zealand, Canada, and Australia have successfully used various interpretative techniques to incorporate treaties into domestic law.<sup>288</sup> Further, legal internalization by the legislative branch as well as social internalization of human rights norms can foster judicial internalization. Domestic incorporation of CEDAW and the IAS Convention, along with efforts by local interests groups and changes in cultural practices and norms regarding the role of women, may require Caribbean judges to view these treaties not only as a persuasive source of constitutional interpretation, but ultimately as a binding normative framework for striking down incompatible domestic legislation.

### *B. Judicial Internalization of Human Rights Norms*

Ruti Teitel posits that international law continues to play an increasing role in domestic courts.<sup>289</sup> Even in states such as Belgium, where there has been direct incorporation of CEDAW on the domestic plane, CEDAW has rarely been invoked in domestic courts.<sup>290</sup> As a result, the CEDAW Committee has encouraged states to promote greater awareness of the provisions of CEDAW and to ensure that judges interpret CEDAW in a manner that is consistent with state obligations under CEDAW.<sup>291</sup> Despite the lack of use of CEDAW in the courts of some countries, the provisions of CEDAW have been successfully used in domestic litigation in Asia Pacific

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287. CEDAW, *supra* note 11, at art. 5(a).

288. See Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628, 657–58 (2007).

289. RUTI TEITEL, HUMANITY'S LAW 186–92 (2011).

290. See Comm. on the Elimination of Discrimination against Women, Concluding Observations of the Committee on the Elimination of Discrimination against Women: Belgium, 42d Sess., Oct. 20, 2008–Nov. 7, 2008, ¶¶ 17–18 U.N. Doc. CEDAW/C/BEL/CO/6 (2008); FREEMAN, *supra* note 191, at 81.

291. FREEMAN, *supra* note 191, at 81.

countries to challenge discriminatory laws and cultural practices. Judges in this area have taken an active role in ensuring the protection of human rights reflected in CEDAW.<sup>292</sup>

This Article seeks not only to trace the colonial foundations of the spousal rape exemption, but also to assess the role that colonialism continues to play in the willingness of postcolonial states to adhere to international norms, as well as judicial decisions respecting these norms. As discussed in Part IV of this Article, judicial decisions by the British Privy Council that rely on international human rights norms to invalidate Caribbean procedures have not been well received by the Caribbean populace. Further, the legislative history of the 1986 Act in Trinidad and Tobago indicates that in some postcolonial states, modern-day human rights norms recognized by Britain may not be viewed as appropriate for postcolonial society.

Sociologists have frequently commented on the role of law in creating and reflecting social norms. Under Émile Durkheim's theory of solidarity, laws emanate from a shared system of values that exist in society and laws can change in response to societal needs.<sup>293</sup> The Caribbean opposition to British Privy Council decisions and "British norms" may be due in part to the fact that the British Privy Council is viewed as a relic of colonial times, and the Caribbean populace does not view the British Privy Council or Britain as having or reflecting a shared system of values with the Caribbean. Internalization of international norms, if done correctly, may be able to bridge the gap between Caribbean values and international values. The successful Trinidadian reform in 2000 indicates that a bottom-up approach to the internalization of human rights norms may eventually lead to successful statutory reform. However, statutory reform is only the first step towards achieving equality for women as negative cultural practices and stereotypes, among other things, must also be changed.

Judicial decisions that invalidate domestic laws on human rights grounds and give domestic effect to unincorporated treaties may be better received if Caribbean judges, rather than the British Privy Council, render these decisions. For instance, after the *Pratt* decision, Barbados attempted to

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292. See Vedna Jivan & Christine Foster, *What Would Gandhi Say? Reconciling Universalism, Cultural Relativism and Feminism Through Women's Use of CEDAW*, 9 SING. YEARBOOK OF INTERNAT'L L. 103, 104 (2005) (describing judicial activism in applying CEDAW in cases in India and the Philippines).

293. See ÉMILE DURKHEIM, *THE DIVISION OF LABOUR IN SOCIETY* 24–28 (W.D. Halls trans., 1984). In interpreting Durkheim's work, sociologist Roger Cotterrell posits that the value of mutual respect for the freedom and dignity of others is central to modern day conceptions of legal rights and this value of mutual respect along with moral imperatives promotes individual commitment to and respect for the rule of law in modern societies. ROGER COTTERRELL, *ÉMILE DURKHEIM: LAW IN A MORAL DOMAIN* (1999).



preserve its ability to impose the death penalty by appealing *Attorney General v. Boyce* to the Caribbean Court of Justice (“CCJ”).<sup>294</sup> This attempt ultimately failed.

The CCJ was established in 2001 and became fully operational in 2005.<sup>295</sup> All of the Commonwealth Countries executed the agreement establishing the CCJ, but to date, Barbados, Belize, and Guyana are the only countries that have replaced the British Privy Council with the CCJ.<sup>296</sup> The CCJ was intended to create a regional Caribbean Supreme Court that addressed the unique needs of the Caribbean populace and fostered a distinct Caribbean jurisprudence.<sup>297</sup> In addition, the CCJ was created as a result of the Caribbean opposition to the British Privy Council decisions that invalidated the mandatory death penalty rule on both human rights and constitutional grounds.<sup>298</sup> In *Attorney General v. Boyce*, the CCJ reasoned that “the death penalty . . . should not be carried out without scrupulous care being taken to ensure that there is procedural propriety and that in the process fundamental human rights are not violated.”<sup>299</sup> The court acknowledged that Barbados had ratified, but had not incorporated, the American Convention on Human Rights and the International Covenant on Civil and Political Rights. The court used the legitimate expectations doctrine to “to

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294. *Barbados to Challenge Pratt and Morgan Ruling at CCJ*, JAM. OBSERVER, June, 19, 2006, [http://www.jamaicaobserver.com/news/107306\\_Barbados-to-challenge-Pratt-and-Morgan-ruling-at-CCJ](http://www.jamaicaobserver.com/news/107306_Barbados-to-challenge-Pratt-and-Morgan-ruling-at-CCJ). The *Boyce* case was initially decided by the British Privy Council, which upheld the mandatory death penalty in Barbados, reasoning that the savings clause of the Barbados constitution provided that no existing law could be held to be inconsistent with a person’s right to be free from inhuman or degrading punishment. *Boyce v. The Queen*, [2004] UKPC 32 (appeal taken from Barb.). The mandatory death penalty as existing law was therefore valid according to the court. *Id.* Barbados had also adopted a constitutional amendment in 2002 to preserve the death penalty. The defendants filed an application before the Inter-American Commission on Human Rights requesting a declaration that their rights under the American Convention on Human Rights were violated. *Att’y Gen. v. Joseph*, [2006] C.C.J. 3, ¶ 7 (A.J.), (2006) 69 WIR 104 (Barb.).

295. *Frequently Asked Questions*, THE CARIBBEAN COURT OF JUSTICE, <http://www.caribbeancourtsofjustice.org/about-the-ccj/faqs> (last visited Jan. 22, 2015).

296. *Id.*

297. See Birdsong, *supra* note 206, at 199–200. The CCJ stated that the decisions of the Privy Council would serve only as persuasive authority; however, the CCJ also noted that Privy Council decisions issued while the Privy Council was still the final court of appeals for Barbados and that decided comparable statutory law in other Caribbean countries are still binding on Barbadian courts until such time as the CCJ overrules those cases. Berry & Robinson, *supra* note 113, at 28.

298. Birdsong, *supra* note 206, at 203–04 (arguing that, although the CCJ was formed after *Pratt*, discussions over creation of the CCJ occurred at least one year before *Pratt*).

299. See *Joseph*, [2006] C.C.J. at ¶ 20; see also Anderson, *supra* note 270. (general discussion of the human rights decisions of the CCJ).

finesse the rule that unincorporated treaties have no effect in domestic law.<sup>300</sup> The CCJ found that although unincorporated treaties may not be enforceable on the municipal plane, citizens have a legitimate expectation to the rights established by treaties that have been ratified by a country yet remain unincorporated.<sup>301</sup> The court ultimately dismissed Barbados' appeal of the commutation of the death penalty sentences and acknowledged that in principle, its holding upheld the decision of the British Privy Council in *Pratt*.<sup>302</sup>

In response to the CCJ's decision in *Boyce*, the government announced plans to eliminate the mandatory death penalty in Barbados.<sup>303</sup> Trinidad and Tobago also tabled its efforts to pass a constitutional amendment to preserve the death penalty.<sup>304</sup> A 2011 study of the death penalty in Trinidad and Tobago indicated that "three-quarters of those interviewed did not support the mandatory death penalty."<sup>305</sup> The CCJ justices' use of the legitimate expectations doctrine reflects judicial internalization of human rights

300. *Joseph*, [2006] C.C.J. at ¶¶ 51–78. One of the main issues on appeal was whether the government could execute the defendants before conclusion of the Inter-American human rights process. *Id.* The court held that treaty-compliant behavior by Barbados had created a legitimate expectation that Barbados would await a decision by the Inter-American human rights system before imposing the death penalty. *Id.* Ultimately, the Inter-American Commission on Human Rights made the requested declarations, and the American Court on Human Rights issued provisional measures requiring Barbados to not execute the two defendants. *Id.* at ¶ 5–6.

301. *Joseph*, [2006] C.C.J. at ¶¶ 5–6; see also ANTOINE, *supra* note 103, at 225. It should be noted that although the CCJ critiqued the Privy Council's departure from the dualist approach in prior death penalty cases, the CCJ also declined to adopt a strict dualist approach. *Joseph*, [2006] C.C.J. at ¶ 51. In Commonwealth Countries international law is not included in the definition of "law." Berry & Robinson, *supra* note 113, at 119. Thus, it is unlikely that an individual may have a legitimate expectation about a process that forms no part of the municipal legal system. *Id.* Legitimate expectations must at least arise out of processes that are recognized by municipal law. *Id.* at 120. In *Joseph*, Justice Wit critiqued the use of radical dualism in Commonwealth Countries and argued that "maintaining an old and unsound doctrine that stimulates an approach whereby treaties are ratified but almost never enacted, causes States to be perceived as having a split personality." *Joseph*, [2006] C.C.J. at ¶ 46. Justice Wit contends that in Commonwealth Caribbean countries unincorporated treaties may establish rights under domestic law. Berry & Robinson, *supra* note 113, at 119.

302. *Joseph*, [2006] C.C.J. at ¶ 138. The court also acknowledged that despite upholding the principles of *Pratt* it did not support strict implementation of the five-year deadline imposed by *Pratt*. *Id.*

303. See *Talks about the Death Penalty Plan*, BARB. TODAY, Mar. 15, 2013, <http://www.babadostoday.bb/2013/03/15/talks-about-the-death-penalty-ban/>.

304. Peter Richard, *Caribbean: Trinidad Pressured to Drop Mandatory Hanging*, INTER-PRESS SERVICE, Mar. 14, 2013, <http://www.ipsnews.net/2013/03/trinidad-pressured-to-drop-mandatory-hanging/>.

305. *Id.*

norms, as the justices attempted to promote confluence between domestic law and international law. Similarly, in *Myrie v. the State of Barbados*, the CCJ noted its obligation to “take into account principles of international human rights law when seeking to shape and develop relevant [Caribbean] law.”<sup>306</sup> In contrast to the Caribbean response to the *Pratt* decision, none of the Commonwealth Countries denounced or withdrew from any treaties as a result of the CCJ’s decision in *Boyce*. Although the death penalty continues to remain a highly contested issue in the Caribbean, the judgment of the CCJ in *Boyce* has certainly increased the pressure on Caribbean countries to eliminate the death penalty and comply with their human rights obligations on this issue. Thus, even where decisions by Caribbean judges internalize human rights norms in a manner that leads to results that are similar to decisions rendered by the British Privy Council, these decisions by Caribbean judges may be more likely to be viewed as reflecting a shared system of values with the Caribbean populace and therefore may be better received.

Other decisions by local Caribbean courts applying principles from unincorporated treaties are generally limited to instances where domestic legislation is absent or ambiguous on the applicable issue.<sup>307</sup> The 1988 Bangalore Principles of Judicial Conduct support this approach; judges from member states of the British Commonwealth Association, an intergovernmental organization consisting of fifty-three former British postcolonial

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306. *Myrie v. State of Barbados*, [2013] CCJ 3, ¶ 7 (O.J.). In *Myrie*, the plaintiff alleged Barbados violated her rights to non-discrimination on the grounds of nationality and freedom of movement under the Revised Treaty of Chaguaramas (“RTC”) and a 2007 decision of the Conference of Heads of Government of the Caribbean Community (“Conference Decision”) under the RTC when she was cavity searched at the border. *Id.* at ¶¶ 3–4, 8. The plaintiff also sought a declaration from the CCJ that Barbados had violated her rights under the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the American Convention on Human Rights. *Id.* at ¶ 9. Although the CCJ acknowledged it did not have jurisdiction to make the requested declarations because the treaties contained separate dispute mechanisms, it was required to apply applicable rules of international human rights law. *Id.* at ¶ 10. The court reasoned that domestic incorporation of decisions rendered under the RTC was not necessary to give domestic effect to decisions taken under the treaty, as requiring domestic incorporation would defeat the purpose of the CARICOM regime. *Id.* at ¶¶ 51–53. The CCJ held that it is required to adjudicate claims alleging a violation of the RTC even where there is a conflict between the treaty and domestic law, and that CARICOM member states are obligated to ensure their domestic laws comply with the treaty and decisions adopted by the organs of CARICOM under the treaty. *Id.* at ¶ 52. The court ultimately held that Barbados violated the plaintiff’s right to travel freely without harassment in CARICOM countries under the 2007 Conference Decision and RTC art. 45. *Id.* at ¶¶ 100–01.

307. See ANTOINE, *supra* note 103, at 218, 228; see also Anderson, *supra* note 279, at 11.

states and Commonwealth Countries, adopted these principles after a series of judicial colloquia.<sup>308</sup> The laws of Commonwealth Countries are unambiguous on the issue of spousal rape, as most specifically provide that a husband will receive immunity from spousal rape prosecution unless one of the Standard Spousal Rape Conditions have been satisfied. Under the 1988 Bangalore Principles, it is highly unlikely that the domestic courts of Commonwealth Countries will apply unincorporated treaty principles that directly conflict with their sexual offences statutes to protect married women who are raped by their husbands. However, the 1988 Bangalore Principles were revised in 1998. The concluding statements of the 1998 colloquia indicate that common law judges have a duty not only to apply international law in instances where domestic law is unclear, but also to interpret constitutions and domestic legislation in harmony with international treaties and customary international law to protect human rights.<sup>309</sup>

From a postcolonial perspective, Caribbean judges and lawyers must be instrumental in crafting a postcolonial identity for Caribbean states that is committed to protecting the human rights of citizens. In those Commonwealth Countries with weak civil society groups, or where the legislative branch may lack the political will or the cohesiveness to directly incorporate human rights treaties such as CEDAW and the IAS Convention, to ratify the CEDAW Optional Protocol, or to revise domestic statutes to eliminate gendered justifications inherited from colonial rule, Commonwealth Caribbean judges can play an important role by promoting harmony between domestic law and human rights set forth in unincorporated treaties. Commonwealth Caribbean judges must be willing to use unincorporated treaties as persuasive sources of constitutional interpretation, particularly in areas in which constitutional provisions can be used to support the call for respect for human rights. In *Boyce*, the CCJ explicitly noted that in assessing the meaning of rights established by domestic law, domestic courts in the Caribbean may consider and apply the jurisprudence of international bodies.<sup>310</sup>

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308. See *Developing Human Rights Jurisprudence: Domestic Application of International Human Rights Norms*, 1 COMMONWEALTH SECRETARIAT, HUMAN RIGHTS UNIT xi (1988).

309. See *The Challenge of Bangalore: Making Human Rights a Practical Reality: Domestic Application of International Human Rights Norms*, 8 COMMONWEALTH SECRETARIAT, HUMAN RIGHTS UNIT 267–70 (2001); see also Waters, *supra* note 288, at 646–48 (contending that the concluding statements from the 1998 Bangalore Colloquium indicate a shift toward monism in common law jurisdictions with judges playing a more active role in incorporating international treaties into domestic law through judicial interpretation).

310. *Joseph*, [2004] UKPC 32 at ¶ 25. The CCJ further noted that its decision is not intended to support the wholesale domestic enforcement of unincorporated treaties. *Id.* at ¶ 26.

The following sections provide various examples of how the provisions of CEDAW and the IAS Convention could be used by Caribbean judges to inform constitutional provisions such as equal protection and the right to security in order to invalidate the statutory spousal rape exemption.

### *C. Judicial Internalization of CEDAW*

The constitutions of Commonwealth Countries provide either that every individual has the right to equality under the law or that every individual has the right to be free from discrimination.<sup>311</sup> The constitutions of St. Lucia, Dominica, Trinidad and Tobago, and Antigua and Barbuda provide that the right to equal protection under the law should be freely exercised, irrespective of a person's gender.<sup>312</sup> The Commonwealth Countries' constitutional equal protection provisions and their obligations to eliminate sexual violence and discrimination against women under CEDAW and the IAS Convention should provide concrete bases for judges to invalidate the statutory spousal rape exemption. Courts in other jurisdictions have invalidated the spousal rape exemption on equal protection grounds.<sup>313</sup> Similarly, judges in other countries with a dualist tradition have used the provisions of CEDAW to interpret constitutional provisions in favor of the protection of the human rights of women.<sup>314</sup> For instance, despite a lack of direct domestic incorporation of CEDAW, the High Court of Malaysia used CEDAW's ban on pregnancy discrimination to interpret a constitutional prohibition

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311. ANT. & BARB. CONST., art. 14; BAH. CONST., art. 26; BARB. CONST., art. 23; DOMINICA CONST., art. 13(1); JAM. CONST., art. 24; ST. LUCIA CONST., art. 1; TRIN. & TOBAGO CONST., art. 4(b).

312. ST. LUCIA CONST., art. 1; DOMINICA CONST., art. 13(1); TRIN. & TOBAGO CONST., art. 4(b); ANT. & BARB. CONST., art. 14; BARB. CONST., art. 23. Although the Constitutions of Jamaica, Bahamas, and Barbados prohibit discrimination, the definition of discrimination does not include differential treatment based on gender or sex.

313. *E.g.*, *People v. Liberta*, 64 N.Y.2d 152 (1984) (holding that the N.Y. statute codifying the spousal rape exemption failed to pass rational basis scrutiny under the equal protection clauses of both the U.S. and N.Y. constitutions). A number of other U.S. state courts have held there is no rational basis for the spousal rape exemption. *E.g.*, *People v. De Stefano*, 121 Misc. 2d 113 (1984) (New York); *State v. Rider*, 449 So. 2d 903 (Fla. Dist. Ct. App. 1984); *Weishaupt v. Commonwealth*, 315 S.E.2d 847 (Va. 1984); *Commonwealth v. Chretien*, 417 N.E.2d 1203 (Mass. 1981); *State v. Smith*, 426 A.2d 38 (N.J. 1981); *State v. Smith*, 401 So. 2d 1126 (Fla. Dist. Ct. App. 1981). *Cf.* *People v. Brown*, 632 P.2d 1025 (Colo. 1981) (holding that the spousal rape exemption did meet rational basis scrutiny).

314. Jaclyn Ling-Chien Neo, *Calibrating Interpretive Incorporation: Constitutional Interpretation and Pregnancy Discrimination Under CEDAW*, 35 HUM. RTS. Q. 910, 912 (2013).

on gender discrimination to strike down employment practices that discriminate against pregnant women.<sup>315</sup>

With respect to defining the concept of equal protection and anti-discrimination in Caribbean constitutions, the British Privy Council in *Mohanlal Bhagwandeem v. Attorney General of Trinidad and Tobago* held that “a claimant who alleges inequality of treatment or its synonym discrimination must ordinarily establish that he has been or would be treated differently from some other similarly circumstanced person or persons.”<sup>316</sup>

The spousal rape exemption, as preserved by the statutes of Commonwealth Countries, establishes the following illogical distinctions that treat similarly situated individuals differently: cohabitating married couples and cohabitating nonmarried couples; married women who have filed for, but have not yet obtained, a divorce and those who have not filed; married couples who have obtained a separation agreement and those who have not; married couples who have obtained a judicial decree that prevents a husband from having intercourse with his wife and married couples who have not; a married woman who is raped by her husband and a single woman who is raped by that woman’s husband; a married man who rapes his wife and a single man who rapes the same married woman; and married women who have provided their husbands with notice of a filed petition for separation or divorce and those who have not.<sup>317</sup>

A married man who rapes his wife is no different than an unmarried man who rapes a woman as both are rapists; however, under the laws of Commonwealth Countries, spousal rapists and stranger rapists are treated differently. For a spousal rapist to be prosecuted, not only must the victim not consent to the sexual intercourse, but the Standard Spousal Rape Conditions must also be satisfied.

Sexual autonomy has been defined as “the right to freely decide when, with whom, and under what circumstance, to engage in sexual intercourse or other intimate behaviors with another person.”<sup>318</sup> The statutes of Com-

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315. See *Saikin v. Basirun*, No. 21-248-2010 (July 12, 2011) (Malay.). In *Saikin*, the plaintiff’s offer of employment was revoked after her employer learned of her pregnancy. *Id.* The court used articles 1 and 11 of CEDAW to find that revocation of the employment offer constituted gender discrimination, which was prohibited by the Malaysian Constitution. *Id.*; see also Neo, *supra* note 314, at 912–13.

316. [2003] UKPC 21, ¶ 18 (appeal taken from Trin. & Tobago).

317. Robin West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 U. FLA. L. REV. 45, 65 (1990) (making similar equal protection arguments regarding the irrational distinctions established by the spousal rape exemption contained in the laws of certain American states).

318. Chih-Chieh Lin, *Failing to Achieve the Goal: A Feminist Perspective on Why Rape Law Reform in Taiwan Has been Unsuccessful*, 18 DUKE J. GENDER L. & POL’Y 163, 178 (2010).



monwealth Countries fail to equally protect the sexual autonomy of women. Under these statutes, a husband's right to sexual autonomy, or the right to freely decide to engage in intercourse, is adequately protected; however, a married woman's right to sexual autonomy does not receive similar protection if she fails to satisfy at least one of the Standard Spousal Rape Conditions and the lack of consent conditions prior to being assaulted by her husband.<sup>319</sup> In contrast to the lack of protection given to a married women's sexual autonomy, an unmarried woman's right to sexual autonomy under these statutes is protected to the extent that the intercourse occurred without her consent.<sup>320</sup>

The CEDAW Committee has stated that any distinction, exclusion, or restriction that has the effect or purpose of impairing or nullifying the recognition, enjoyment, or exercise by women of human rights and fundamental freedoms is discrimination, even where discrimination was not intended.<sup>321</sup> The CEDAW Committee has acknowledged, and CEDAW provides, that women have the right to be free from discrimination, irrespective of their marital status.<sup>322</sup> The CEDAW Committee has also stated "gender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men."<sup>323</sup> Moreover, the United Nations Declaration on the Elimination of Violence Against Women includes spousal rape in its definition of violence against women.<sup>324</sup> Spousal rape is a form of gender-based sexual violence, as women disproportionately suffer from spousal rape.<sup>325</sup> In *Vertido v. Philippines*, the CEDAW Committee reasoned that rape violates a woman's right to "personal security and bodily integrity."<sup>326</sup> Spousal rape is a tool of domi-

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319. Sexual Offences Act (Act 9/1995), § 4 (Ant. & Barb.).

320. *Id.*

321. Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, 47th Sess., Oct. 4, 2010-Oct. 22, 2010, U.N. Doc. CEDAW/C/GC/28, ¶ 5 (Dec. 16, 2010). See CEDAW, *supra* note 11, at art. 1 for a definition of "discrimination against women."

322. Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 23, 16th Sess., 1997, ¶ 3, <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>; see also CEDAW, *supra* note 11, at arts. 1, 11, 16.

323. Gen. Rec. No. 19, *supra* note 191, at ¶ 1.

324. G.A. Res. 48/104, art. 2(a), U.N. Doc. A/RES/48/104 (Feb. 23, 1994).

325. See West, *supra* note 317, at 66–70; see also *Women in an Insecure World: Violence Against Women Facts, Figures and Analysis*, U.N. CHILDREN'S FUND 4 (Sept. 2005), [http://www.unicef.org/emerg/files/women\\_insecure\\_world.pdf](http://www.unicef.org/emerg/files/women_insecure_world.pdf) (arguing gender-based violence includes rape and domestic violence and that women disproportionately suffer from rape).

326. *Vertido*, *supra* note 146, at ¶ 8.7.



nance that subjugates women by treating women like chattel, thereby making women subject to the desires of their owners/husbands; “this perpetuates the practice of treating women as second-class citizens and discriminates against [women] on the basis of their gender.”<sup>327</sup> While Commonwealth Countries should be lauded for ratifying CEDAW, in contrast to other countries such as the United States who have not ratified CEDAW, from a postcolonial perspective the spousal rape exemption forces Caribbean women into gendered subalterneity.

It should be noted that the sexual offences laws of certain Commonwealth Countries contain gender-neutral terms, so it may be possible for a wife to be prosecuted for raping her husband.<sup>328</sup> One may argue that because such statutes permit a husband and wife to both be equally prosecuted for violating the other’s sexual autonomy, a wife’s sexual autonomy is equally protected in comparison to her husband’s sexual autonomy. A married woman’s right to sexual autonomy cannot be equally protected even under a gender-neutral law, as women are more susceptible to spousal rape.<sup>329</sup> Women are more likely to be victims of spousal rape and therefore are more likely to be required to satisfy the Standard Spousal Rape Conditions to obtain protection from the law.

International tribunals and courts have developed case law that is an important source of law in Commonwealth Caribbean jurisprudence.<sup>330</sup> The Commonwealth Caribbean jurisprudence of the British Privy Council has been significantly influenced by human rights decisions by a number of international entities, including the European Court of Human Rights and the United Nations Human Rights Committee.<sup>331</sup> The European Convention on Human Rights and the Universal Declaration of Human Rights heavily influenced the constitutions of many Commonwealth Countries, such as the Bahamas.<sup>332</sup> International courts have also concluded that vio-

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327. Nancy Kaymar Stafford, *Permission for Domestic Violence: Marital Rape in Ghanaian Marriages*, 29 WOMEN’S RTS. L. REP. 63, 73 (2008).

328. *See, e.g.*, Sexual Offences Act, ch. 99, pt. 15(1) (2014) (Bah.). The Act uses both gender neutral and gender specific terms to describe spousal rape and provides in part, “any person who has sexual intercourse with *his* spouse without the consent of the spouse.” *Id.* (emphasis added). The term “person” is gender neutral; however, the use of the term “his” may indicate only a husband can commit spousal rape, not a wife.

329. *See generally* U.S. History of Marital Rape, CRISIS CONNECTION, [http://www.crisis-connectioninc.org/pdf/US\\_History\\_of\\_Marital\\_Rape.pdf](http://www.crisis-connectioninc.org/pdf/US_History_of_Marital_Rape.pdf) [hereinafter Crisis Connection] (last visited Apr. 21, 2014).

330. ANTOINE, *supra* note 103, at 206–09.

331. *Id.* at 207; *see also* Minister of Home Affairs v. Fisher [1980] A.C. 319 (P.C.) (appeal taken from Berm.); Fisher v. Minister of Public Safety & Immigration [1998] A.C. 673 (P.C.) (appeal taken from Bah.).

332. ANTOINE, *supra* note 103, at 208.

lence against women is a form of gender-based discrimination, which violates the obligation of a state to provide equal protection to its citizens.<sup>333</sup> In *Opuz v. Turkey*, the European Court on Human Rights held that Turkey had violated the equal protection and antidiscrimination clause contained in Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,<sup>334</sup> by failing to protect a married woman and her mother from the repeated violent assaults inflicted by the husband of the married woman.<sup>335</sup> The court concluded that violence against women was tolerated by Turkish authorities<sup>336</sup> and found that “[a] [s]tate’s failure to protect women against domestic violence breaches their right to equal protection of the law and . . . this failure does not need to be intentional.”<sup>337</sup>

In *Bishop of Roman Catholic Diocese of Port Louis v. Suttjhudeo Tengur*, the British Privy Council reasoned that once an individual alleging violation of antidiscrimination principles or the right to equal protection provides evidence that he or she has been or would be treated differently from some other similarly circumstanced person or persons, the alleged discriminator must then justify the discrimination as “having a legitimate aim and as having a reasonable relationship of proportionality between the means employed and the aim sought to be realized.”<sup>338</sup>

As Part II of this Article discusses, one justification for the spousal rape exemption is the protection of marital privacy and the promotion of reconciliation between spouses, which has evolved from the unities theory. Spousal rape more frequently occurs in relationships that involve other types of violence, and, as a result, some researchers have concluded that spousal rape is an “extension of domestic violence.”<sup>339</sup> As the New York Court of Appeals noted in *People v. Liberta*, a state arguably has no legitimate interest in protecting marital privacy or promoting marital reconciliation where a marriage involves domestic violence and where the marriage has decayed to a point where the sexual relations of the spouses are no longer consensual

333. *Opuz v. Turkey*, App. No. 33401/02, Eur. Ct. H.R. (2009), <http://www.refworld.org/docid/4a2f84392.html>.

334. Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No. 11 and No. 14, June 1, 2010, CETS No. 194. Article 14 provides “the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” *Id.*

335. *Opuz*, App. No. 33401/02 at ¶¶ 7-69, 202.

336. *Opuz*, App. No. 33401/02 at ¶ 197.

337. *Opuz*, App. No. 33401/02 at ¶ 191.

338. *Bishop of Roman Catholic Diocese of Port Louis v. Tengur*, [2004] UKPC 9, ¶ 19 (P.C.) (appeal taken from Mauritius).

339. Crisis Connection, *supra* note 329, at 4; *see also* IDA M. JOHNSON & ROBERT T. SIGLER, FORCED SEXUAL INTERCOURSE IN INTIMATE RELATIONSHIPS 22 (1997).

and sexual abuse has occurred.<sup>340</sup> CEDAW explicitly provides that states must “modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women” and “repeal all national penal provisions which constitute discrimination against women.”<sup>341</sup> The statutes of Commonwealth Countries retain many of the gendered common law justifications, as discussed in Part III of this Article. By codifying the common law spousal rape exemption, Commonwealth Countries have failed to meet their obligations under CEDAW to eliminate gender-based violence. In addition, these statutes violate the equal protection provisions of Caribbean constitutions, as husbands are free to rape their wives as long as none of the Standard Spousal Rape Conditions are satisfied.

Requiring a woman to comply with the Standard Spousal Rape Conditions prior to being raped by her husband is contrary to the goal of marital reconciliation. Satisfaction of at least one of the Standard Spousal Rape Conditions requires the couple to take steps to dissolve their marriage before a sexual assault; this requirement does not promote marital reconciliation. What if a woman has no interest in filing for divorce or separation but believes her husband should face consequences for raping her? The sexual offences statutes of Commonwealth Countries fail to address this issue.

Moreover, even if one concedes that marital privacy is a legitimate aim, the imposition of the Standard Spousal Rape Conditions is not reasonably proportionate, as these laws contribute to the continued subordination of women. These laws fail “to ensure that all citizens are subject equally to one and only one sovereign, namely the sovereignty of the rule of law,”<sup>342</sup> and they fail to protect women raped by their husbands who cannot satisfy one of the Standard Spousal Rape Conditions before the rape. Put differently, by requiring satisfaction of the Standard Spousal Rape Conditions, the spousal rape exemptions contained in the laws of Commonwealth Countries legitimize “a regime of private force and organized violence that creates and encourages the male subordination of women and the insulation of [a] separate and sovereign political regime through which that subordination is effectuated.”<sup>343</sup> Furthermore, a law that provides no protection to similarly situated individuals, specifically married women who are raped and have satisfied at least one of the Standard Spousal Rape Conditions and married women who are raped but have failed to satisfy any of the Standard Spousal Rape Conditions, cannot be rational, legitimate, or reasonably proportionate.

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340. *People v. Liberta*, 474 N.E.2d 567, 574 (1984).

341. CEDAW, *supra* note 11, at art. 2.

342. West, *supra* note 317, at 71.

343. *Id.*

Additionally, although some Commonwealth Countries such as Barbados have adopted domestic violence statutes that may provide aid via the issuance of protective orders to married women being abused by their husbands,<sup>344</sup> the law should do more than simply provide “some remedy” to married women.<sup>345</sup> The law should provide appropriate and adequate remedies to women raped by their husbands.<sup>346</sup>

#### *D. Judicial Internalization of IAS Convention*

Judges could also use many of the provisions of the IAS Convention to interpret other human rights provisions contained in the constitutions of Commonwealth Countries, thereby justifying striking down the statutory spousal rape exemption. Article 4 of the IAS Convention provides that women have the right to life, liberty, and security of person.<sup>347</sup> Similarly, the constitutions of Commonwealth Countries contain a number of provisions regarding the right to personal security that lend support to the call for the elimination of the spousal rape exemption. For instance, the Constitution of Antigua and Barbuda (“Antiguan Constitution”) proscribes the violation of certain fundamental rights and freedoms, including, but not limited to, the right of life, liberty, and security of the person.<sup>348</sup> The constitutions of Dominica,<sup>349</sup> St. Lucia,<sup>350</sup> Jamaica,<sup>351</sup> Barbados,<sup>352</sup> Bahamas,<sup>353</sup> and Trinidad and Tobago<sup>354</sup> also provide for the right to security of the person and protection under the law. In addressing the right to protection under the law in *Ong Ah Chuan v. Public Prosecutor*, the British Privy Council reasoned that “[c]onstitution[s] . . . that purport to assure to all individual citizens the continued enjoyment of fundamental liberties or rights, . . . [such as the] ‘protection of the law’ . . . refer to a system of law which incorporates . . . fundamental rules of natural justice.”<sup>355</sup>

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344. See Domestic Violence Act 1993, ch. 130A (Barb.). <http://unwomen.org//%20Violence%20Protection%20Orders%20Act%201993.pdf><http://unwomen.org//%20Violence%20Protection%20Orders%20Act%201993.pdf>.

345. Hilf, *supra* note 74, at 42. (citation omitted).

346. *Id.*

347. Convention of Belém do Pará, *supra* note 11, at art. 4.

348. ANT. & BARB. CONST., arts 3–15.

349. DOMINICA CONST., art. 1.

350. ST. LUCIA CONST., art. 1(a).

351. JAM. CONST., art. 13(a).

352. BARB. CONST., art 11(a).

353. BAH. CONST., art. 15(a).

354. TRIN & TOBAGO CONST., art. 4(a).

355. *Ong Ah Chuan v. Pub. Prosecutor*, [1980] UKPC 32, [1981] A.C. 648 (P.C.) (appeal taken from Sing.). The Privy Council has also held that the right to protection of the law also includes a right to due process of the law. *Lewis v. Att’y Gen. of Jam.*,

The IAS Convention provides “that violence against women is an offense against human dignity and a manifestation of the historically unequal power relations between women and men.” Scholars have defined human dignity as “a kind of intrinsic worth that belongs equally to all human beings as such, constituted by certain intrinsically valuable aspects of being human,”<sup>356</sup> and have further stated that “human dignity involves expressing an attitude—the attitude of respect—toward the humanity in each man’s person.”<sup>357</sup> Jack Donnelly argues that human rights and the concept of human dignity are inextricably intertwined.<sup>358</sup> Donnelly posits that “human rights reflect—or at least analytically can be understood to reflect—a particular specification of certain minimum preconditions for a life of dignity in the contemporary world. But our detailed understanding of human dignity is shaped by our ideas and practices of human rights.”<sup>359</sup> Spousal rape, like stranger rape, violates the human dignity of a woman, as a woman’s intrinsic worth as a human being has been attacked; in this situation, no respect is accorded to the “humanity within a woman’s person.” Rape is a violation of human dignity in that rape impacts the physical, mental, and emotional well-being of a woman.<sup>360</sup> Through rape, a woman becomes a mere tool of her rapist’s sexual desires.<sup>361</sup> By failing to protect a married woman that has been raped by her husband, the laws of Commonwealth Countries signal to perpetrators that a married woman’s right to human dignity is to be accorded less value and protection than an unmarried woman’s right to human dignity.

Caribbean judges must be willing to use unincorporated treaties to elucidate the meaning of constitutional provisions, which can be used to strike down domestic statutes that infringe on human rights.<sup>362</sup> A woman’s

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[2000] UKPC 35, [2001], 2 A.C. 50 (P.C.) (appeal taken from Jam.) (analyzing the right to protection of the law under the Jamaican Constitution).

356. Alan Dewart, *Human Dignity as the Basis of Rights*, in *THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES* 12 (M. J. Meyer & W. A. Parent eds., 1992).

357. Jack Donnelly, *Human Dignity and Human Rights*, Swiss Initiative to Commemorate the 60th Anniversary of the UDHR Protecting Dignity: An Agenda for Human Rights Research Project on Human Dignity 82 (2009).

358. *Id.* at 83.

359. *Id.*

360. Martha Nussbaum, *Human Dignity and Bioethics*, *ESSAYS COMMISSIONED BY THE PRESIDENT’S COUNCIL ON BIOETHICS* (Mar. 2008), available at [http://bioethics.georgetown.edu/pcbe/reports/human\\_dignity/chapter14.html](http://bioethics.georgetown.edu/pcbe/reports/human_dignity/chapter14.html).

361. *Id.*

362. For instance, in *Reyes v. The Queen*, the Privy Council used the ICCPR’s prohibition on inhuman punishment to interpret Belize’s constitutional ban on inhuman treatment and invalidated Belize’s mandatory death penalty statute. *Reyes v. The Queen*, [2002] UKPC 11, 27-28, 41, 43, [2002] 2 A.C. at 247, 255-56. *The Criminal*

security and human dignity are not guaranteed when the law fails to adequately protect her from spousal rape. By criminalizing spousal rape only when one of the Spousal Rape Conditions has been satisfied, Commonwealth Countries fail to protect women who cannot satisfy these conditions. These countries are arguably condoning sexual violence against women in the context of marriage.

Article 3 of the IAS Convention states that “Every woman has the right to be free from violence in both the public and private spheres.”<sup>363</sup> The perpetuation of the spousal rape exemption via the imposition of the Standard Spousal Rape Conditions and the lesser sentencing accorded to the crime of spousal rape compared to stranger rape reinforces inequality between men and women within the private sphere of the home. It also perpetuates sexual violence against women in the private sphere by failing to adequately protect married women from husbands who sexually abuse them.

In *Pratt*, the British Privy Council interpreted the right to be free from inhumane treatment under Article 17 of the Jamaican Constitution, holding that it “prefer[red] an interpretation of the Constitution of Jamaica that accepts civilized standards of behavior which will outlaw acts of inhumanity.”<sup>364</sup> David Mitchell posits “rape is universally included as a component of every other *jus cogens* norm, and has long been [seen as] a violation of

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Code of Belize provides, “Every person who commits murder shall suffer death.” Belize Crim. Code, ch. 101, 106(1) (2000); See also Waters, *supra* note 288, at 681, for a detailed discussion of the Reyes case. Waters contends that in Reyes, the “Privy Council . . . took a turn toward a more monistic conception, creating a sort of presumption that the people of Belize intended that their chosen ‘rules’ would comply with international human rights law.” *Id.* at 681. When a domestic statute, adopted prior to ratification of an international treaty that guarantees human rights or obligates states to protect human rights, conflicts with the international treaty, Caribbean judges should be willing to implement the last-in-time rule, meaning that the later in time prevails in case of conflict. Shelton, *supra* note 268, at 5. If the legislative branch adopted the conflicting domestic law after treaty ratification, Caribbean judges should be willing to presume the legislative branch did not intend to legislate against the state’s international treaty obligations. *Id.* at 625.

363. Convention of Belem do Pará, *supra* note 11, at art. 3.

364. *Pratt*, [1994] A.C. The right to be free from inhuman treatment can be found in the constitutions of many Commonwealth Countries. See, e.g., ST. LUCIA CONST., art. 5; JAM. CONST., art. 17(1); BARB. CONST., 15(1); DOMINICA CONST., art. 5; BAH. CONST., art. 17(1); ANT. & BARB. CONST., art. 7. The Trinidad and Tobago Constitution does not contain a general reference to the right to be free from torture and inhuman punishment. SIR FRED PHILLIPS, FREEDOM IN THE CARIBBEAN: A STUDY IN CONSTITUTIONAL CHANGE 124 (1977).

customary international law.”<sup>365</sup> Moreover, arguments against establishing rape as a principle of *jus cogens* “force one to make an inhuman, almost barbaric [point] regarding why rape should not be expressly prohibited in all situations.”<sup>366</sup> The Inter-American Court on Human Rights has also recognized rape as a form of torture.<sup>367</sup> In *Meja v. Peru*, the Inter-American Court on Human Rights held that the rape of a civilian woman by a Peruvian soldier violated the American Convention on Human Rights and constituted torture.<sup>368</sup> The court found that “rape is considered to be a method of psychological torture.”<sup>369</sup> From the human rights perspective, it is necessary to protect citizens from state-condoned actions and policies that may deprive them of their human rights and negatively affect the global community.<sup>370</sup> In 2009, the Inter-American Human Rights Court held that, by failing to effectively prevent or prosecute the rape and murder of three women in Juarez, Mexico, the Mexican government had violated their rights to life, personal integrity, and personal liberty as set forth in the American Convention on Human Rights.<sup>371</sup> The Inter-American Human Rights Court ordered Mexico to prevent future violations through public reporting, education, and training.<sup>372</sup>

Rape is a brutal act that should be punished no matter the context. International law requires Commonwealth Countries to protect married women from rape at the hands of their husbands, even where a woman is unable to satisfy the Standard Spousal Rape Conditions. When given the opportunity to do so, Caribbean judges should be willing to declare that the statutory spousal rape exemption violates not only international law, but also constitutional provisions.

### *E. Judicial Internalization Despite Savings Clause*

The savings clause contained in the constitutions of many Commonwealth Countries may require Caribbean judges to consider preserving the

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365. Davis S. Mitchell, *The Prohibition of Rape in International Humanitarian Law as Norm of Jus Cogens: Clarifying the Doctrine*, 15 DUKE J. COMP. & INT'L L. 219, 226 (2005).

366. *Id.*; see also James R. McHenry III, *The Prosecution of Rape Under International Law: Justice That Is Long Overdue*, 35 VAND. J. TRANSNAT'L L. 1269, 1309 (2002).

367. See Mitchell, *supra* note 365, at 245.

368. *Meja v. Peru*, Case 10.970, Inter-Am. Comm'n H.R., Report No. 5/96, OEA/Ser.L/V/II.91 doc. 7, at 157 (1996).

369. *Meja*, Inter-Am. Comm'n H.R., Report No. 5/96, OEA/Ser.L/V/II.91 doc. 7, at 157.

370. LUNG-CHU CHEN, AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW 204–05 (1989).

371. *González v. Mexico*, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶ 602(5) (Nov. 16 2009).

372. *González*, Inter-Am. Ct. H.R. (ser. C) No. 205, at ¶ 602(19–22).



spousal rape exemption in some form. Savings clauses in Caribbean constitutions have, in some instances, prevented local courts from protecting fundamental human rights.<sup>373</sup> As discussed in Part I of this Article, the British Privy Council has historically interpreted the savings clause of Commonwealth Countries to mean that the rights guaranteed by the constitutions of these countries are subject to the common law principles that existed prior to emancipation. Historically, at common law, a man could not be convicted of raping his wife based on the many justifications that have been discussed in detail in Part II of this Article. Therefore, one could argue that the fundamental rights contained in the constitutions of Commonwealth Countries, such as the right to protection from inhuman treatment, are subject to the common law spousal rape exemption. However, the British Privy Council has adopted a more liberal approach to interpreting savings clauses in its recent decisions. Although the death penalty was legal under the common law prior to Jamaica gaining independence, in the 2004 case of *Lambert v. the Queen (Attorney General for Jamaica Intervening)*, the British Privy Council held that the imposition of the death penalty violated the Jamaican Constitution.<sup>374</sup>

In *Lambert*, the British Privy Council held that the common law that existed prior to Jamaica gaining independence recognizes the fundamental rights set forth in the Jamaican constitution.<sup>375</sup> The British Privy Council reasoned that an analysis of Jamaica's constitution must "proceed upon the presumption that the fundamental rights that it covers are already secured to the people of Jamaica by existing law."<sup>376</sup> The court also indicated that its prior case law addressing savings clauses should not be interpreted to mean that "human rights in Jamaica were to be frozen indefinitely at the point they had reached [on emancipation] in August 1962."<sup>377</sup> The British Privy Council went so far as to state that to the extent its prior decisions on saving laws clauses prohibited "judicial modification or adaptation of any existing

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373. *Forsythe v. Att'y Gen. of Jam.*, (1997) 34 J.L.R. 512. In *Forsythe*, the Jamaican Court of Appeals held a Rastafarian could not challenge laws criminalizing the use of marijuana on religious grounds as these laws were in place prior to the development of the Rastafarian religion. *Id.*; see also Burnham, *supra* note 211 (arguing that the Caribbean Court of Justice should address the role of saving clauses in Caribbean constitutions).

374. *Watson v. The Queen* [2004] UKPC 34, [2005] 1 A.C. 472 (appeal taken from Jam.); see also Stephen Vasciannie, *The Decision of the Judicial Committee of the Privy Council in the Lambert Watson Case from Jamaica on the Mandatory Death Penalty and the Question of Fragmentation*, 41 INT'L L. & POL'Y. 837 (2009).

375. *Watson*, [2004] UKPC 34, at ¶¶ 59–61.

376. *Watson*, [2004] UKPC 34, at ¶ 41 (citation omitted).

377. *Watson*, [2004] UKPC 34, at ¶ 54.

law to bring it into conformity with the human rights guarantees,” such decisions should no longer be followed.<sup>378</sup>

Similarly, although the common law recognized the spousal rape exemption prior to many Commonwealth Countries’ gaining independence from Britain, under the more liberal interpretation of savings clauses adopted by the British Privy Council, the common law that existed prior to independence arguably acknowledges the existence of fundamental rights, including the right of women to be free from sexual violence in the home. The existence of savings clauses in the constitutions of Commonwealth Countries does not prevent Commonwealth Countries from modifying their laws to completely eliminate the spousal rape exemption and bring them into conformity with international law.

Even after a country has domestically incorporated its treaty obligations, judges should have a continuing obligation to ensure that human rights are protected. Judicial internalization is not without its limits. Judicial activism may in some instances result in decisions that infringe on human rights.<sup>379</sup> This Article does not advocate for blanket judicial activism, but instead calls for local judges to use international instruments to protect human rights. By relying on domestic constitutional provisions to incorporate treaties, the extent to which such incorporation is effective will depend on the language of the constitutional provisions.<sup>380</sup> However, judicial internalization may also promote social and legislative internalization of the norms established by CEDAW and the IAS Convention. Judicial decisions using provisions of CEDAW and the IAS Convention in a manner that promotes the human rights of women and highlights the importance of state compliance with these conventions may lead the legislative branch to directly incorporate these treaties into domestic legislation. Statements by judges incorporating the provisions of CEDAW and the IAS Convention may also encourage women and civil society groups to continue to use domestic litigation as a tool to protect the human rights of women. Finally, it may signal to the populace the importance of combatting gendered norms that discriminate against women.<sup>381</sup>

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378. *Watson*, [2004] UKPC 34, at ¶ 61.

379. *See generally* *S.A.S. v. France*, App. No. 43855/11, Eur. Ct. H.R. (2014), [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-145466#{"itemid":\["001-145466"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-145466#{). In *S.A.S.*, the European Court of Human Rights upheld a French law that banned face covering veils on the rationale that the goal of social cohesion and living together justifies the restriction which has a disparate impact on Muslim women.

380. Neo, *supra* note 314, at 913.

381. Jivan, *supra* note 292, at 120.

*F. CARICOM's Role in Promoting Internalization of  
Human Rights Norms*

All of the Commonwealth Countries are parties to the Inter-American human rights system ("IAS"). As such the IAS has a crucial role to play with respect to internalization of human rights norms; however, the IAS's ability to facilitate internalization may be limited in Commonwealth Countries. Commonwealth Countries are under-represented in key structures of the IAS system, and they do not have a sense of proprietorship in the IAS system, which is often viewed as a Latin American endeavor. For instance, decisions by the Inter-American Court of Human Rights are generally first published in Spanish, as all of the judges on the Inter-American Court of Human Rights are from Latin America, and it is only recently that a representative from a Commonwealth Caribbean country has been appointed to serve on the Inter-American Commission on Human Rights.<sup>382</sup> On the other hand, Commonwealth Countries established CARICOM, and these countries continue to actively participate in the CARICOM system.

CARICOM, as the regional organization that is responsible for improving the living conditions of both Caribbean men and women, should revise the CARICOM Model Law discussed in Part III of this Article to eliminate the Standard Spousal Rape Conditions, to provide for equal sentencing for spousal rape and stranger rape, and to define spousal rape as rape rather than "an unlawful sexual connection." To the extent that the law impacts culture, the adoption of laws that refer to spousal rape as "rape," rather than "sexual assault" or "unlawful sexual connection," can indicate the seriousness with which the law views and treats incidences of spousal rape. The sexual offences acts of Commonwealth Countries replicate the spousal rape provisions of the CARICOM Model Law; thus, modification of the CARICOM Model Law may prompt Commonwealth Countries to begin modifying their own statutes. CARICOM should encourage Commonwealth Countries to further adopt effective educational programs aimed at children to change cultural attitudes at a young age. CARICOM could provide economic incentives to Commonwealth Countries that take concrete steps to combat embedded common law gendered norms that foster the subjugation of women.

Spousal rape is a global problem that is not just limited to the Caribbean. Feminist scholars have proposed various solutions for changing cul-

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382. See generally I/A Court Composition, INTER-AMERICAN COURT ON HUMAN RIGHTS, <http://www.corteidh.or.cr/index.php/en/about-us/composicion> (last visited Oct. 1, 2014); Inter-American Comm'n on Human Rights Composition, ORG. OF AMERICAN STATES, <http://www.oas.org/en/iachr/mandate/composition.asp> (last visited Oct. 1, 2014).

tural attitudes that harm women. For instance, in the area of female genital mutilation, which is a significant problem in various countries, feminist scholars have proposed a three-pronged methodology for challenging the negative cultural practices behind genital mutilation.<sup>383</sup> This methodology has been described as a “culturally sensitive approach to culturally challenging practices.”<sup>384</sup> In promoting social internalization of international norms under CEDAW and the IAS Convention, entities such as CARICOM, the IAS, and the CEDAW Committee should consider the complexity of the social environments in the Caribbean so as to better understand not only what led to the creation of these negative norms, but also what continues to sustain them. This Article is meant as an initial effort to unveil the role played by colonialism and law in creating and perpetuating these norms, as well as the continued responsibility of postcolonial countries to exercise their agency to change these norms. Further, internalization must be done in a manner that facilitates state compliance, rather than in a manner that embarrasses states into non-compliance.

## VII. CONCLUSION

The reasons for the lack of state compliance with international obligations are varied. This Article seeks to identify the ways in which the history of colonialism influences identities, power dynamics, and legal reform in postcolonial states, as well as address the willingness and the ability of postcolonial states to protect the human rights of women. The Commonwealth Countries’ continued overreliance on legal principles and statutes established during the colonial period, coupled with their failure to update laws to ensure compliance with international obligations, have had far-reaching implications for the human rights of women in these countries, as well as implications on their ability to comply with human rights norms established by international law and by their respective constitutions. The spousal rape exemption is a relic of the British common law. Gendered justifications regarding women’s role in society led to the creation of the common law spousal rape exemption, which was imposed on Commonwealth Countries via the doctrine of reception during the colonial period.

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383. Isabelle Gunning, *Arrogant Perception, World Travelling, and Multicultural Feminism: The Case of Female Genital Surgeries*, 23 COLUM. HUM. RTS. L. REV. 189, 194 (1992). Gunning proposes the following methodology: (1) understand one’s own historical context including recognizing shared negative cultural practices that are present in one’s own country and in the country whose cultural practices one seeks to change; (2) understand how as an outsider one impacts on the ‘other’s’ worlds and is perceived by the ‘other’; and (3) recognize the complexities of the life circumstances of the ‘other’ woman. *Id.*

384. *Id.* at 244.

The spousal rape exemption as codified by Commonwealth Countries facilitates the maintenance of colonial hierarchies and identities that relegate women to the bottom rung of societal order. The retention of gendered common law norms strips women of their sexual autonomy and facilitates the subjugation of women as “objects” under the law. Further, by codifying the spousal rape exemption, Commonwealth Countries have not only created dissonance between domestic laws and their international obligations, but they have also created conflicts between human rights guaranteed by their constitutions and by domestic statutes.

Colonialism continues to have a unique impact on Commonwealth Countries. This suggests a need for tailored efforts to protect human rights and facilitate postcolonial Caribbean state compliance with international treaties. Unlike most former British colonial territories, Commonwealth Countries continue to rely on the British Privy Council as their final court of appeals. On one hand, Commonwealth Countries understand that the British Privy Council has been preserved as their Supreme Court and, as a result, decisions rendered by the British Privy Council are binding. On the other hand, as the 1990s Caribbean opposition to human rights indicates, postcolonial Caribbean states appear particularly sensitive to the top-down imposition of modern human rights norms, which have been accepted by their former colonizer. This colonial history indicates that legal change may have a greater likelihood of success when generated by an internal source (that is by local women’s movement and Caribbean judges) rather than an external source with a long colonial history, such as the British Privy Council. Given the opposition to British Privy Council decisions, local Caribbean justices must play an instrumental role in creating harmony between domestic laws and international human rights.

Trinidad and Tobago’s failure to directly incorporate CEDAW and the IAS Convention on the municipal plane signals that the country may place less emphasis on the rights of women. To the extent that the law is viewed as inspirational, domestic incorporation of CEDAW and the IAS Convention may signal governmental commitment to societal changes that protect women from sexual violence. Trinidad and Tobago’s experience also indicates that for transformative legal change to be realistically effective, the gendered norms and identities that negatively affect the human rights of women must also be changed. A combination of legal and social change is needed not only to enable Caribbean women to overcome their subaltern status, but also to increase the ability of Commonwealth Countries to protect the human rights of Caribbean women and thereby comply with international obligations under CEDAW and the IAS Convention. ❀

