

**DRAWING THE LINE BETWEEN MUTUAL MATRIMONIAL CONSENT AND
MARITAL RAPE IN KENYA.**

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DECLARATION

I, **GETATE SANDRA WAMBUI**, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

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Date:17/04/2020

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:

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ABSTRACT

This Paper shall focus on sexual violence and abuse of women specifically marital rape in Kenya. A report done by the Kenya Demographic Health Survey (KDHS)2014 stated that one in ten married women in Kenya, who have experienced physical and sexual violence reported suffering deep wounds and serious injuries and preferred to stay silent on their experiences of domestic violence. ¹Currently, Kenya lacks a legal framework that makes marital rape a crime. The lack of law addressing the issue of marital rape poses a sociological question. That is, the development of the society where every individual has the privilege to enjoy their rights including the right to inherent dignity. To do this study, this paper shall consist of five chapters. Chapter one shall give a background to the study. Chapter two shall focus on the theoretical framework specifically focusing on the theory of feminism. Chapter three shall touch on marital rape in Kenya, chapter four shall do a comparative analysis between Kenya and South Africa and lastly, chapter five shall give the conclusion and recommendations.

¹ Demographic and Health Survey, Spousal violence, 2014.

LIST OF LEGAL INSTRUMENTS

The Constitution of Kenya 2010

Protection against Domestic Violence Act,2015.

Sexual Offences Act,2006.

The Penal code,2012.

Criminal law Sexual offences and related matters) (2007) (South Africa)

Criminal law Sentencing Amendment Act of (2007) (South Africa)

The Penal code (India)

LIST OF CASES

Maynard vs Hill 125 U.S. 190, 211 (1888)

State vs Dodwell, 11 S.E. 525 (N.C. 1890).

S vs Mwamu (2004), Court of South Africa.

Razier vs state 86 S.W. 754 (rex. Crim. App. 1905

R v R (1921), The United Kingdom House of Lords.

R vs Mwasomola 4ALR 572, Malawi

Ogunbayo v. State (2004), The Supreme Court of Nigeria

Alausa v. Odusote (1941),7 WACA 140

State v. Vikash (2014), India.

LIST OF ABBREVIATIONS

CEDAW - Convention on Elimination of all forms of Discrimination Against women.

CREAW - Centre for Rehabilitation of Abused Women

ICCPR - International Covenant on Civil and Political Rights

UN - United Nations

UDHR - Universal Declaration of Human Rights

CHAPTER ONE

INTRODUCTION

1.2 BACKGROUND TO THE STUDY

“Let the husband render the wife the affection due to her and likewise the wife to her husband. The wife does not have authority over her body, but the husband does and likewise the husband does not have authority over his body, but the wife does.”² This simply expounds on the concept of mutuality and equity where both wives and husbands have identical instructions and are to live by the same standards without any power play.³

However, this teaching by St. Paul has influenced the western world and caused several misinterpretations. It has been misinterpreted to mean full control and dominance over the other.

These misinterpretations are also echoed in the words of Sir Matthew Hale in his book *the History of the Pleas of the Crown*. He wrote that “the husband cannot be guilty of rape committed by himself towards his wife for by their mutual matrimonial consent and contract, the wife has given herself to the husband which she cannot retract.”⁴

When a man and woman marry, they became one person in the eyes of the law and their legal identities merge. The principle of marital unity establishes each person’s status. Under coverture, the wife forfeits her legal existence therefore forfeiting her independent right in the law. The husband assumes her right in return for protection which she presumably requires in her weakened state.⁵

According to Blackstone, marriage is a civil contract with the exception that persons cannot define the terms of the contract. This system led to the husband being superior and the wife as subordinate.⁶ In *Bradwell vs Illinois*,⁷ the court held that the laws of nature and divine

² 1st Corinthians 7:3-4(Good news Bible)

³ < <http://truthandcharityforum.org/st-pauls-words-on-marriage-ephesians-521-33>> on 3/02/2019

⁴ Hale M, *History of the Pleas of the Crown*, London printing press,1800.

⁵ Ryan R, ‘*The sex right: A legal history of the Marital Rape exemption*’, Wiley,1995.993

⁶ Ellaine J, ‘*Contest and Consent: A legal history of marital Rape*’ California law review,2000.

⁷ *Bradwell vs Illinois* (1873), The Supreme court of the United States.

revelation jointly designate the husband as the head of the family. It is for the wife to love, honour and obey and it for the husband to love, cherish, and protect.⁸

The consequences of this understanding of the legal relationship between husband and wife led to the husband enjoying rights to his wife's person. Husbands were given the authority to discipline their wives at common law as long as the corporal punishment does not cause permanent injury and they were also exempted from prosecution for raping their wives.⁹

In G v G,¹⁰ it was held that the courts should not intervene in marital relationships because of its personal and private nature and its capacity of being used by a spiteful wife to get back at the husband.¹¹ In *State v Moipolai*,¹² which was a case involving a pregnant woman and her long-term boyfriend, the judge reduced the accused person's sentence from ten to five years because according to him, the rape was not as serious as if a stranger had committed it.¹³

If one intentionally and unlawfully commits an act which causes penetration with his or her genitals and where the other person does not give consent to penetration or consent obtained through force and intimidation then he commits the offence of rape¹⁴

Marital, spousal rape or intimate partner rape is any unwanted intercourse or penetration (vaginal, anal or oral) obtained by force, threat of force, or when the spouse is incapable of giving consent.¹⁵

In *R vs R*,¹⁶ the defendant was charged with the attempted rape of his wife. At the time of the offence the couple had separated although no formal legal separation existed and neither party had filed for a divorce. The House of Lords overturned the matrimonial exception to rape. His conviction for rape was upheld.¹⁷ Currently, some countries have upheld this decision by criminalizing Marital rape.

In 1997, UNICEF (United Nations Children's Fund) reported that just seventeen States criminalized marital rape. In 2003, UNIFEM (United Nations Development Fund for Women)

⁸ *Bradwell vs Illinois* (1873), The Supreme court of the United States.

⁹ Ellaine J, 'Contest and Consent: A legal history of marital Rape' California law review,2000.

¹⁰ *G v G* (1924) A.C 349.

¹¹ *G v G* (1924) A.C 349.

¹² *State v. Moipolai* (2004), Botswana.

¹³ *State v. Moipolai* (2004), Botswana.

¹⁴ Section 3, *Sexual Offences Act*,2006.

¹⁵ Yllö K and Torres G, *Marital rape*, Oxford University Press,2016.

¹⁶ *R v R* (1921), The United Kingdom House of Lords.

¹⁷ *R v R* (1921), The United Kingdom House of Lords..

reported that more than fifty states criminalized marital rape. In 2006, the UN Secretary General found Marital rape may be prosecuted in at least 104 States.¹⁸

A survey done by the women's rights organization found laws expressly allowing for spousal rape in ten countries including Ghana, India, Indonesia, Jordan, Lesotho, Nigeria, Oman, Singapore, Sri Lanka, and Tanzania. In Ghana for example, the law states that consent given by the husband and wife during marriage cannot be reversed unless divorced or legally separated. In Lesotho, marital rape is not illegal unless the offender uses abusive language, violence or threat.¹⁹ In *R v Mwasomola*²⁰, a customary law court in Malawi held that a man who killed his wife because she refused to consent to sex, was only guilty of manslaughter because his wife's refusal to have sex with her husband amounted to provocation.²¹

In Nigeria, women are expected to be passive partners to be seduced rather than active in sexual encounters. In fact, it is a taboo for a married woman to decline the advances of her spouse.²² In the case of *Ogunbayo v State*,²³ sexual relations between spouses do not come within the purview of rape. In *Alausa v Odusote*,²⁴ it should be noted however, that even where husband is shielded by virtue of the marital rape exemption, where he uses violence on the wife during intercourse, he can be guilty of assaulting or wounding his wife.

In Sri Lanka, unless a judge has ordered a spousal separation the perpetrator can be brought to trial only if he is separated from his wife. In Nigeria, marital rape is not seen as an offence, as it is commonly believed that the purpose of marriage was to have sexual satisfaction wherever needed.²⁵ In India, section 375 of the Indian Penal Code (IPC) considers forced sex in marriages as a crime only when the wife is below age 15. Thus, marital rape is not a criminal offence under the IPC.²⁶ This is seen in the case of the *State v Vikash*,²⁷ where the court recently acquitted a man who allegedly drugged and raped his wife.

¹⁷ https://www.researchgate.net/publication/223831051_A_review_of_marital_rape on 25th February 2019.

¹⁹ <https://www.revelist.com/world/countries-marital-rape-legal/7073> On 25th February 2019.

²⁰ *R vs Mwasomola* 4ALR 572, Malawi.

²¹ *R vs Mwasomola* 4ALR 572, Malawi

²² Ogunniran I, 'Marital Submission: Extending the Frontiers of Marital Rape to Nigeria'. (2009) 5 *Benin Journal of Public Law*, 270.

²³ *Ogunbayo v. State* (2004), The Supreme Court of Nigeria.

²⁴ *Alausa v. Odusote* (1941), 7 WACA 140.

²⁵ Chika S, *legalization of marital rape in Nigeria*, journal of social welfare and family, 2011.

²⁶ Section 375, *Penal code* (India)

²⁷ *State v. Vikash* (2014), India.

1.3 STATEMENT OF THE PROBLEM

There is lack of a legal provision addressing the issue of marital rape in Kenya. The sexual offences Act of 2006, the penal code and the Constitution of Kenya 2010 do not address the issue of marital rape. In 2015, Kenya enacted the Protection against Gender Violence Act that is meant to protect victims of domestic violence and provide relief to them. It addresses issues of physical abuse, but it does not offer any relief to sexual abuses such as marital rape which is a form of domestic violence. A report done by the Kenya Demographic Health Survey (KDHS)2014 stated that one in ten married women in Kenya who have experienced physical and sexual violence reported suffering deep wounds and serious injuries and preferred to stay silent on their experiences with domestic violence.²⁸

Therefore, the statement of the problem is that the lack of law addressing marital rape poses a sociological question. That is, the development of the society where every individual has the privilege to enjoy their rights. Social rights are rights emerging from the social contract. The social contract theory is the view that persons' moral and/or political obligations are dependent upon a contract or agreement among them to form the society in which they live.²⁹ Citizens give their rights to the government which in turn protects their fundamental rights and freedoms as the essence of the contract. The gaps in the law failing to protect certain individuals including victims of marital rape leaves a doubt on whether the contract entered by the government and its citizens is being fulfilled as some individuals are not protected and left out.

1.4 RESEARCH QUESTIONS

This dissertation aims to answer the following questions:

First, does the existing law criminalize marital rape in Kenya?

Second, what are the gaps in the legislation that exist that permit marital rape to go unaddressed?

1.5 HYPOTHESES

This study aims to study the following hypotheses:

²⁸ Demographic and Health Survey, Spousal violence, 2014.

²⁹ Celeste Friend, Social Contract theory, Academic resource, <https://www.iep.utm.edu/soc-cont/> on 25th February 2019.

That, in Kenya marital rape is not considered an offence and that there is no law expressly governing the issue.

That, the laws that protect against sexual and domestic abuse in Kenya are insufficient in protecting victims of marital rape and that present legislations permit marital rape to go unaddressed.

1.6 OBJECTIVE OF THE STUDY

The general objective of this study is to investigate to what extent does marital rape constitute as an offence in Kenya.

The specific objectives are:

- a) to investigate the laws governing marital rape in Kenya and if there are any gaps in the law,
- b) to analyse the extent of conjugal rights and matrimonial consent,
- c) to examine avenues for protecting victims of marital rape.

1.7 THEORETICAL FRAMEWORK

This paper will be guided by the following theory:

Feminism

Feminism is a movement meant to end sexism, sexual exploitation and domination.³⁰ Maggie Humm defines feminism as equal right for women and women liberation.³¹ Karren Offen presents feminism in terms of male domination as the crucial issue and the analysis of male privilege and women subordination.³² The American History movement defined feminism as the movement concerned with advancing the position of Women by making political, legal or economic rights equal as those granted to men.³³ The European history, however, took a different approach in defining feminism as the elaborations of womanliness where they celebrate sexual difference rather than similarity within a framework of male/female complementarity.³⁴ Professor Littleton takes the equality approach. She argues that women's biological and cultural differences from men are real and significant. She also adds that

³⁰ Hooks B, *Feminism is for everybody: Passionate Politics*, Lute Press London,2000.

³¹ Thompson D, *Radical Feminism*, Sage publications,2001.

³² Thompson D, *Radical Feminism*, Sage publications,2001.

³³ Offen K, *Defining feminism: A Comparative Historical feminism approach*, University of Chicago press,1998,123.

³⁴ Offen K, *Defining feminism: A Comparative Historical feminism approach*, University of Chicago press,1998,123.

women's inequality results when society devalues women because they are different from men. Therefore, “acceptance would reduce inequality not by eliminating women's differences, but by reassessing the value society accords to traditionally female occupations and lifestyles, and revaluing so as to render such value no less than that accorded to equivalent male activities.”³⁵

MacKinnon Catherine takes a different approach. Its dominance and not difference that is crucial to her argument. She argues that feminism should concentrate on identifying dominance. This enables the society to treat gender equality issues as questions about distribution of power, male supremacy and female subordination.³⁶

This theory shall expound on two concepts relevant to my study when it comes to promoting women’s social, legal and political rights. It shall look at the equality approach, where equality of both men and women that is, granting of equal rights and treatment for both genders will lead to an end of prejudices and discrimination of one gender and in this study, women. Two, the difference approach where the focus is dominance, male supremacy over women that brings social inequalities and celebrating womanliness to end such prejudices

This theory is thus relevant to my study as from the definition and ideologies given as it strives to end sexual discrimination and oppression and achieve social equality of sexes. The two concepts are relevant to my study since it’s important to establish the right and effective approach to elevate the rights of women and end sexual discrimination and abuse including marital rape which is the topic of my study.

1.8 LITERATURE REVIEW

This paper shall use relevant books and articles to support my study.

Books:

“Marital Rape: Consent, Marriage and Social Change in Global Context” by Kersti Yllö and M. Gabriela Torres. This book addresses important concepts including evolution in the notion of marital rape and it also presents research focused on marital rape from countries such as Nigeria, South Africa, Britain and the United States. It also provides for some legal and human rights approaches that will help fight against violence against women.

³⁵ Littleton C, ‘Reconstructing Social Inequality’, California law review,1987.

³⁶ Mackinnon C, *Difference and Dominance: in her Feminism Unmodified*, Harvard University Press,1987,276.

“Contest and Consent: A legal history of marital Rape” by Jill Elaine Hadsay. This book gives the history of Marital rape by looking at the marital rape exemption in the 19th Century , the consequences of marital rape and why marital rape should be treated as an offence and the perpetrators prosecuted and lastly the legal reforms against in the late 19th century.

“Equality theory, Marital rape and the promise of the fourteenth Amendment by Robin West.” This book is relevant to my study as it talks of the three theories of equality which is key for my study. It also looks at the unconstitutionality of denying married women equal protection under the law.

“Defining feminism: A comparative Historical approach” by Karen Offen,1998. This book gives the history of feminism and also various definitions of feminism by various feminist and movements and a critique of these definitions in order to have a better understanding on what constitutes feminism

Articles:

“Reconstructing sexual Equality” by Christine Littleton. Expounds the equality approach of feminism to end discrimination. Christine Littleton argues that the differences between human beings whether real, perceived ,biologically or socially based should not be permitted to make a difference in equality of the genders

“Assessing the prevalence of Marital rape “by Christine Henneke, Nancy M Shields and George J. This article proposes a wide range of strategies to identify marital rape victims.

“A review of marital rape “by Elaine k, Casey T and Patricia k. This article reviews and focuses on theories and forms of marital rape, the scope of the problem, risk factors, resistance strategies, and marital rape's psychological and physical effects.

1.9 METHODOLOGY

The two main categories that shall be used for this study shall be both primary and secondary sources as well as case studies.

The primary sources shall include books, legal documents and articles.

The secondary sources shall include desktop research.

1.10 CHAPTER BREAKDOWN

Chapter 1 shall introduce the topic of study and give a basic background of the research question and discuss the problem statement, give a hypothesis, literature review and methodology of the research study.

Chapter 2 shall touch on the theoretical framework. It shall discuss together with the criticisms of the theory and give a conclusion.

Chapter 3 shall respond to the main research question which is whether the existing laws criminalize marital rape in Kenya

Chapter 4 shall be dealing with comparative framework between Kenya and South Africa

Chapter 5 shall give the conclusion and recommendations.

CHAPTER TWO

THEORETICAL FRAMEWORK

2.1 INTRODUCTION

2.2 Summary of chapter one

In chapter one, we looked at the background to the study at issue which is marital rape. The concept of marital rape is discussed by looking at various texts beginning with St. Paul's teaching in the bible which expounds on the concept of mutuality and equity where both wives and husbands have identical instructions and are to live by the same standards without any power play.³⁷ We then move to Sir Matthew Hale's words in his book the *History of the pleas of the crown*³⁸. The 19th century was dominated by the doctrine of coverture; the conjugal rights of the husband were not contested and were exempted from prosecution for raping their wives³⁹.

Chapter 2 shall touch on the theoretical framework and shall focus specifically on the theory of feminism. Feminism is a movement that is meant to end sexism, sexual exploitation and oppression.⁴⁰ This theory shall therefore expound on two concepts when it comes to understanding women's social, legal and political rights. It shall focus on

- a) Liberal feminism by Christine Littleton
- b) Radical feminism by Catherine Mackinnon.

2.3 Liberal feminist theory

2.3.1. Equality feminist theory

This theory looks at the equality of both men and women and that it is the granting of equal rights and treatment for both genders that will lead to an end of prejudices and discrimination. This theory shall focus on the works of Professor Littleton. Professor Christine Littleton is a feminist legal theorist who is known for her work in 'Reconstructing Social Equality'.⁴¹ She takes the equality approach in ending discrimination of one gender and in this case, women. Her model of sexual equality is 'equality as acceptance' where she argues that women's

³⁷ < <http://truthandcharityforum.org/st-pauls-words-on-marriage-ephesians-521-33>> on 3/02/2019.

³⁸ Hale M, *History of the Pleas of the Crown*, London printing press,1800.

³⁹ < <https://www.ohchr.org/EN/ProfessionalInterest/Pages/ViolenceAgainstWomen.aspx>> on 16/09/2019.

⁴⁰ Hooks B, *Feminism is for everybody: Passionate Politics*, Lute Press London,2000.

⁴¹ Littleton C, *Reconstructing Social Inequality*, California law review,1987,1279.

differences i.e. cultural and biological from men are existent and significant and that inequality results when society belittles them because they are different from men.⁴² Therefore, accepting these differences would reduce inequality by reconsidering the value society accords to traditionally “female occupations and lifestyles”, and revaluing them so that they are not less than that accorded to equivalent “male” activities.⁴³ She says that the difference between men and women should not make a difference in equality of those persons.⁴⁴

Historically, the separate sphere has disadvantages both women and black people. Blacks were set aside of society as a class while women were segregated and set aside from the male society in public.⁴⁵ In *Dothard vs Rawlinson*,⁴⁶ male prison guards were preferred to female guards because their womanhood would make them ineffective in a prison with convicted sex offenders. This showed that the separate sphere disadvantaged women because of their natural differences to men and in this case men were preferred to better prison guards to women.

The theory is relevant to this study when it comes to viewing ‘equality as acceptance’ pointed out by Christine Littleton where she argues that women's biological and cultural differences are important and that inequality results when society belittles women for being different.⁴⁷ Accepting these differences would reduce inequality by reconsidering what society views to be traditionally “female” occupations and revaluing them so that they are not less than that accorded to equivalent "male" activities.⁴⁸ Therefore, when it comes to fighting sexual discrimination such as marital rape granting special rights to elevate women in the society will be effective because it will eliminate the unequal consequence of sex differences.

2.3.2. Criticisms of the theory

The criticisms of this theory are:

One, equality will fail to be attained if we walk within traditional articulations of equality. There needs to be a concept that addresses the truths about human lives and human relations.⁴⁹ The truth is that society must consider the differences in masculinity and femininity to achieve

⁴²Littleton C, *Reconstructing Social Inequality*, California law review,1987,1279.

⁴³ Littleton C, *Reconstructing Social Inequality*, California law review,1987,1279.

⁴⁴Littleton C, *Reconstructing Social Inequality*, California law review,1987,1279.

⁴⁵ Littleton C, *Reconstructing Social Inequality*, California law review,1987.

⁴⁶ *Dothard v. Rawlinson*(1977), The Supreme Court of the United States

⁴⁷ Littleton C, ‘Reconstructing Social Inequality’, *California law review*,1987,1300.

⁴⁸ Littleton C, ‘Reconstructing Social Inequality’, *California law review*,1987,1300.

⁴⁹ Feder E, *Love’s Labour: Essays on women, Equality and Dependency*, Blackwell Publishers 32,2001.

equality and should not disregard it. Two, models of equality are shaped by the norms and value of the society we live in.⁵⁰ For example, a woman could get the opportunity of working outside like a man and securing the same job as a man but would still not be considered his equal or could be paid less for the same job because of what society considers as equality. Three, this theory only focuses on sexism, discrimination, sexual harassment and unequal pay but does not recognize the systematic nature of gender inequality. It therefore fails to challenge existing systems because it seeks entry into these oppressive institutions rather than eliminating them.⁵¹ It misled women by making women believe that they could succeed in a male dominated society while manage their ideal traditional roles such as motherhood.⁵² This is because they are considered to be men's equals instead of focusing on the issue which is the presence of unjust institutions and policies that enhance male supremacy

2.4 Radical feminist theory

2.4.1 The elimination of dominance

This theory is proposed by Catherine Mackinnon who is a radical feminist and a professor of the law. She is an influential legal theorist whose work is centred at sexual abuse in the context of sexuality.⁵³ Unlike Christine Littleton's work who proposes equality to end discrimination, Catharine Mackinnon takes a different approach. For her, it is dominance that is crucial to her argument. Dominance means having power, control or influence over others.⁵⁴ She reasons that feminism should pay more attention to identifying dominance. This enables the society to treat gender equality by raising questions on distribution of power, male supremacy and female subordination.⁵⁵

Sexuality is the scope in which men exercise control over women. She views equality as the question of distribution of power and mainly concentrates her theory on domination of women by men in the sexual sphere stressing that male dominance is sexual, and sexuality is a social construct of power.⁵⁶

⁵⁰ Feder E, *Love's Labour: Essays on women, Equality and Dependency*, Blackwell Publishers 32,2001.

⁵¹ <https://www.youtube.com/watch?v=cSEUtvAffn4> on 16/09/2019.

⁵² <https://www.youtube.com/watch?v=cSEUtvAffn4> on 16/09/2019.

⁵³ <https://www.britannica.com/biography/Catharine-A-MacKinnon> on 16/09/2019.

⁵⁴ <https://www.merriam-webster.com/dictionary/dominant> on 16/09/2019.

⁵⁵ Mackinnon C, *Difference and Dominance: in her Feminism Unmodified*, Harvard University Press, 1987,276.

⁵⁶ Mackinnon C, *Towards a feminist theory of the state*, Harvard University press, 1989,113.

In history, male dominance has been the most prevalent and persisting system of power.⁵⁷ Men have always had control of women even presently denying them achievement of political, legal and even economic rights.⁵⁸ When it comes to sexual assault, she perceives it as a product of the prevalent operation of patriarchy and male dominance.⁵⁹

According to Mackinnon, inequality is prevalent in the social dominance of men through which women are subjected. Sexual equality comes into being through resistance by women of such subordination and dominance by men.⁶⁰ Under her theory, curbing rape is a matter that requires a radical examination and adjustment of the structure of the state and society and not just a matter of using state power to implement the rights of women to be free from sexual violence.⁶¹

This is achieved through making laws and policies in the societies that make emphasis on the distribution of power and make an end to male supremacy and female subordination.

This theory is important to my study because it identifies that dominance is the most pervasive system of power used by men to exert control over women.⁶² In cases such as marital rape, it is because of the control and authority bestowed on a man over a woman. In Kenya, the lack of a legal framework governing spousal rape gives a leeway to men to exert control over their wives including their consent. This is an illustration of a male dominated society. As Mackinnon says, there needs to be a drastic adjustment in the systems and structures of society especially when it comes to distribution of power.⁶³

2.4.2 Criticisms of the theory

This theory ignores the role of class, race and ethnicity in sustaining and strengthening a patriarchal system. It sees women as indifferent and an alike category rather than a diverse group by race, class and ethnicity.⁶⁴ Two, it fails to adequately address structural oppression, nor does it consider an intersectional approach in understanding women's experience.⁶⁵ Structural oppression focus on the structures of patriarchy, capitalism and racism and how they work together to be the dominant forces. Intersectionality contends that while all women experience oppression, they are differently oppressed not only based on gender but also based

⁵⁷ Delgado R, Stefancic J, *Critical race theory: the cutting edge*, Temple University Press, 2000, 264.

⁵⁸ Delgado R, Stefancic J, *Critical race theory: the cutting edge*, Temple University Press, 2000, 264.

⁵⁹ Delgado R, Stefancic J, *Critical race theory: the cutting edge*, Temple University Press, 2000, 264.

⁶⁰ Gruber A, 'Rape, Feminism & the war on crime', 84, *Washington Law review*, 2009, 591.

⁶⁰ Gruber A, 'Rape, Feminism & the war on crime', 84, *Washington Law review*, 2009, 591.

⁶² Delgado R, Stefancic J, *Critical race theory: the cutting edge*, Temple University Press, 2000, 264.

⁶³ Gruber A, 'Rape, Feminism & the war on crime', 84, *Washington Law review*, 2009, 591.

⁶⁴ <https://www.youtube.com/watch?v=cSEUtvAffn4> on 16/09/2019.

⁶⁵ <https://www.youtube.com/watch?v=cSEUtvAffn4> on 16/09/2019.

on race and class.⁶⁶Three, this theory only seemed to protect a certain race of women. Mostly white women benefitted leading to the rise of other kinds of feminism such as black feminism.⁶⁷ Since the goal is to fight against patriarchy where women are oppressed, it may take all sides in all cases even if women are the oppressors.⁶⁸

2.5 Conclusion.

In conclusion, advancing the position of Women through means of attaining equal political, legal and economic rights as those granted to men and elevating womanliness by celebrating sexual differences in the society by not disregarding them for their differences together with advocating for a change in the structure and system of our societies where male domination and female subordination is put to an end will lead to equality of both genders and an end to oppression.

⁶⁶ <https://www.youtube.com/watch?v=cSEUtvAffn4> on 16/09/2019.

⁶⁷ <https://www.youtube.com/watch?v=cSEUtvAffn4> on 16/09/2019.

⁶⁸ <https://www.youtube.com/watch?v=cSEUtvAffn4> on 16/09/2019.

CHAPTER 3

MARITAL RAPE DEFINED IN KENYA

3.1 INTRODUCTION

3.2 Summary of the previous chapter

In chapter two, the theories underpinning feminism were highlighted including the equality feminism theory mainly proposed by Professor Christine Littleton and radical feminist theory where the focus is on elimination of dominance by Catharine MacKinnon. In chapter three we shall discuss the main research question which is whether the existing laws criminalize marital rape in Kenya. To do this, chapter 3 shall give the historical background and origins of marital rape and then discuss the legal position in Kenya concerning marital rape and the challenges and lastly the conclusion.

3.3 HISTORICAL BACKGROUND OF MARITAL RAPE IN THE LAW

3.3.1 Common law and Marital Rape

Women who were married had no right to own property at common law, to contract and to sue.⁶⁹ The laws governing marriage provided that it was legally impossible for a husband and wife to evade their requirements by mutual decision.⁷⁰ These laws inferred consent, as a matter of law, from the couple's initial agreement to marry.⁷¹

During the nineteenth century, rules of marriage operated within the common law principles of coverture that made wives subordinate to their husbands.⁷² William Blackstone who was an English judge in the eighteenth century wrote that “the husband and wife are one person in law and the legal existence of the woman is suspended during marriage and incorporated into that of the husband under whose protection she will perform everything”.⁷³ Recognising the legal control that husbands had over their wives, common law courts assumed that married women

⁶⁹ Backhouse C, *Marriage, Women and Property :A Legal History of Enforced Dependence*, University of North Carolina Press,1986,592.

⁷⁰ *Maynard vs Hill* 125 U.S. 190, 211 (1888).

⁷¹ Schouler J, ‘*A Treatise on the Law of Marriage, Divorce, Separation, and Domestic Relations*’ M Bender publishing,1921,22.

⁷² <http://people.virginia.edu/~jdk3t/ZaherWMS.pdf> on 4th September 2019.

⁷³ <https://www.thoughtco.com/blackstone-commentaries-profile-3525208> on 4th September 2019.

acted under the control of their husbands and were excused from liability for a wide range of crimes if committed in their husbands presence.⁷⁴

3.3.2 The Criminal law exemption of marital rape.

There are deep silences to the history of marital rape due to the lack of prosecution.⁷⁵ What this means is that it has become difficult to trace the origins/developments of the laws governing against marital rape due to the lack of prosecution of the perpetrators from its history. The case of *Frazier vs state*, when husbands were not the direct perpetrators of the rape but helped or forced another man to rape his wife they could be successfully prosecuted for raping their wives.⁷⁶ The courts often when deciding a case of rape, one had to prove that there was no marital relationship between the victim and the defendant for it to be successful.

The reasons explaining and justifying the exemption originated in the work of Sir Matthew Hale, a former Chief Justice of the Court of King's Bench in England. In his treatise, *The History of the Pleas of the Crown* which stated that “the husband cannot be guilty of rape committed on his lawful wife since the wife has given herself up to her husband through their mutual matrimonial consent and contract which she cannot retract.”⁷⁷

The argument proposed by Hale on the marital rape exemption echoed the coverture principles that applied to most marriages during this time. Even though both the husband and his wife agreed to marry, it imposed an obligation on the wife to submit especially where a husband demanded the right of sexual access. At common law, the husband and wife's relationship was not a reciprocal one because wives had to surrender more of their legal rights by marrying.⁷⁸

The third-party caveat in the 19th century helped further the idea of the marital rape exemption by making marital intercourse legal.⁷⁹ The third-party caveat stated that marital rape exemption did not cover any intercourse outside of marriage even if it was through the husband's command. For example, a husband could only be guilty of rape if he assisted another person in raping his wife for by marriage the wife belongs solely to her spouse and cannot be forced by the husband to prostitute with another.⁸⁰ In the case of *State vs Dodwell*,⁸¹ the third party caveat

⁷⁴ Bishop J, ‘*Commentaries on the law of married women : under the statutes of the several states, and at common law and in equity*’ Philadelphia : Kay and Brother, 1871-75, 27.

⁷⁵ Hasdey E, ‘*Contest and Consent: A Legal History of Marital rape*’, Chicago unbound, 2000, 1393.

⁷⁶ *Frazier vs state* 86 S.W. 754 (rex. Crim. App. 1905)

⁷⁷ Hale M, ‘*The history of the pleas of the crown*’, Philadelphia, Robert Small 1847) (1736)

⁷⁸ Hasdey E, ‘*Contest and Consent: A Legal History of Marital rape*’, Chicago unbound, 2000, 1400.

⁷⁹ Hasdey E, ‘*Contest and Consent: A Legal History of Marital rape*’, Chicago unbound, 2000, 1401.

⁸⁰ Hasdey E, ‘*Contest and Consent: A Legal History of Marital rape*’, Chicago unbound, 2000, 1401.

⁸¹ *State vs Dodwell*, 11 S.E. 525 (N.C. 1890).”

system was applied. The husband forced his wife to submit to sexual intercourse with another man, the court in deciding this case focused on whether the victim was a married woman and not whether she had given her consent or not. The defendant claimed that he was not guilty of rape since he was the husband to the victim. The court held that where a husband aids another in raping his wife, he is convicted of rape as if he were a stranger.⁸²

Those who defend the exemption dispute that there is both a qualitative and quantitative approach between marital and non-marital rape.⁸³ The first approach is that marital rape does not occur as many times in the community to be considered problematic and the qualitative approach is that damage to a wife is not as grave as damage caused to victim of non-marital rape.⁸⁴ When it comes to the quantitative argument, the lack of this information may be due to the fact that marital rape was not a crime in most countries until recent times therefore, women were not reporting this heinous act.⁸⁵ There was also the fear that reporting the husband would lead to the ruin of both the family and marriage or the fear that nothing will be done after reporting.⁸⁶ The qualitative approach argues that victims of marital rape suffer less than the victims of non-marital rape. This is unreasonable because evidence suggest that marital rape is more traumatic because of repeated rape by the husband and the fact that she must face her rapist daily in addition to feeling betrayed.⁸⁷

3.4 MARITAL RAPE IN KENYA

The existing laws concerned with sexual violence in Kenya are the Sexual Offences Act of 2006, the Protection against Domestic Violence Act of 2015 and the Penal code, However, none have provisions that address the issue of marital rape. The sexual offences Act under section 43 exempts persons who married from bringing a case of rape. Section 3 of the Domestic Violence Act has a broad defines what violence is and one of them includes abuse that includes sexual violence within marriage.⁸⁸ However, this Act does not specify what falls under sexual violence within marriage making it impossible to bring a case of marital rape. lastly, the penal code only provides a provision for assault under section 250. This section is insufficient when it comes to prosecuting marital rape for the reasons mentioned below.

⁸² State vs Dodwell 11 S.E. 525 (N.C. 1890).

⁸³ Freeman M, 'But If You Can't Rape Your Wife, Whom Can You Rape?': *The Marital Rape Exemption Re-examined*, 15 FAM. L. Q. Spring,1981, 42-43.

⁸⁴ Freeman M, 'But If You Can't Rape Your Wife, Whom Can You Rape?': *The Marital Rape Exemption Re-examined*, 15 FAM. L. Q.Spring,1981, 42-43.

⁸⁵ Siegel L, The Marital Rape Exemption: Evolution to Extinction, *Cleveland state law review*,1995,358.

⁸⁶ Siegel L, The Marital Rape Exemption: Evolution to Extinction, *Cleveland state law review*,1995,359.

⁸⁷ Siegel L, The Marital Rape Exemption: Evolution to Extinction, *Cleveland state law review*,1995,359.

⁸⁸ Section 3, *Protection against Domestic Violence Act*,2015."

Nevertheless, victims of marital rape still rely on this section as it's the only option that seems close to abuse they face. Besides women being subjected to marital rape and domestic violence, other offences that may occur within marital relations include emotional abuse where the wife is denied the right to express her feelings and her most important values, this may also include invasion of her privacy.⁸⁹ There is also psychological abuse which includes elements of both verbal and emotional abuse, psychological abuse includes threats or belittlement an example will be where the husband threatens the wife of continuous rape. Lastly, verbal abuse is a form of hostility and it often leads to physical abuse and acts of cruelty intended to harm and humiliate the victim.⁹⁰ Therefore, in conclusion, the position in Kenya is that there is no legal framework against marital rape in Kenya.

3.5 THE CHALLENGES FACED IN THE LACK OF LAW AGAINST MARITAL RAPE

3.5.1 Sexual offences Act

Section (3) of the Sexual offences Act provides that one commits the offence of rape if; he or she deliberately and unlawfully causes penetration with his or her genital organs; the other person did not give their consent the penetration; or the consent is obtained by compulsion or use of threats or intimidation.⁹¹ Section 42 of the Act provides that one consents by agreeing to make the choice or when one has the freedom and capacity to make that choice.⁹²Section 43 provides that an act becomes unlawful if its committed in any coercive circumstance that include use of force and threat of harm against the complainant or abuse of power or authority which causes the person affected incapable of resisting to such an act.⁹³ Based on section (3) and (43), a case of marital rape may be sustained. However, in section 43(5), it exempts persons who are married.⁹⁴

The effect of this exemption is that married spouses are denied protection from rape and in this case, women. The sexual offences Act and its provisions are termed in gender neutral terms

⁸⁹<https://www.marriage.com/advice/domestic-violence-and-abuse/4-types-of-abuse-and-how-to-recognize-them/> on 4th October 2019.

⁹⁰<https://www.marriage.com/advice/domestic-violence-and-abuse/4-types-of-abuse-and-how-to-recognize-them/> on 4th October 2019.

⁹¹ Section 3, *Sexual Offences Act*, 2006

⁹² Section 42, *Sexual Offences Act*, 2006.

⁹³ Section 43, *Sexual Offences Act*, 2006.

⁹⁴ Section 45, *Sexual Offences Act*, 2006.

implying equality treatment of victims.⁹⁵ The gender-neutral provisions are harmful to especially women because they ignore the inherent inequality between men and women.⁹⁶ Statistics show that Kenyan women suffer violence out of proportion to men.⁹⁷ The lack of law protecting married women from rape ignores the fact that they are exposed to sexual violence within their marriage and it gives the perpetrators control and dominance because nothing will be done to them. There is also the lack of equal protection of the law because it seems to protect only the perpetrators who are the husbands in this case and ignores the violence inflicted on the victim. Lastly section 38 of the Act makes it an offence for a person to make false accusations of a sexual offence of another person with a penalty equivalent to that of the offence complained of.⁹⁸ This discourages women from reporting sexual crimes within their marriage due to fear of failure to prove the allegations and end up being prosecuted themselves.

3.5.2 Protection against Domestic Violence Act

Section 3 of this Act defines violence as abuse that includes sexual violence within marriage and any other conduct that may cause harm to a person's health, safety and wellbeing among others.⁹⁹ However, this Act does not specify what falls under sexual violence within marriage therefore, it does not clearly state whether marital rape is a form of sexual abuse within marriage. The effect of this is that it makes it difficult for victims to rely on this Act for protection.

Subsection (2) provides that domestic violence in relation to any person, means violence, threat or imminent danger by one person against the other within a domestic relationship.¹⁰⁰ Marital rape occurs within a domestic relationship and therefore a form of domestic violence which our laws, policies and institutions need to address.

3.5.3 The Penal Code

Section 250 together with section 251 are the provisions that deals with assault.¹⁰¹

The assault provisions of the Penal Code are inadequate for addressing marital rape. This is because of the following reasons. First it does not deal with gender violence specifically but

⁹⁵ Kung'u C, *Criminalization of marital rape in Kenya*, University of Toronto publishers, 2011, 22.

⁹⁶ Kung'u C, *Criminalization of marital rape in Kenya*, University of Toronto publishers, 2011, 22.

⁹⁷ <https://blogs.worldbank.org/nasikiliza/mental-health-and-intimate-partner-violence-in-kenya> on 4th October 2019."

⁹⁸ Section 38, *Sexual Offences Act*, 2006.

⁹⁹ Section 3, *Protection against Domestic Violence Act*, 2015.

¹⁰⁰ Section 3(2), *Protection against Domestic Violence Act*, 2015.

¹⁰¹ Section 250, *the Penal code*, 2012.

violence in general,¹⁰² meaning that it fails to consider violence that explicitly takes place in a domestic relationship. Secondly, assault under the penal code only covers physical injury or threat of physical injury. The definition of harm is narrow because its only limited to bodily harm, disease or disorder. It doesn't consider other types of harm like emotional, economic and psychological harm¹⁰³ which is experienced by most women especially those who face domestic violence. Lastly, assault requires prove of injury which in the case of marital rape may be difficult because it mainly consists of coerced sex and may be hard to provide witnesses to prove the sexual harm because marital rape occurs in the privacy of both parties.¹⁰⁴

Victims of marital rape find it easier to sue under the assault provision as it's the only option. However, it's not the best option because of the challenges raised above.

3.6 CONCLUSION

In conclusion, looking at the relevant sections above, Kenya does not have a legal framework against marital rape. The law has failed to provide equal protection in this case women, who are denied protection from rape. The sections that would seem to be an option for suing are also insufficient in protecting victims against such violence.

¹⁰² Kamau W, Nyaundi p & Serwanga J, *The Legal Impunity of Marital Rape in Kenya: A women's Equality Issue*, 14-15.

¹⁰³ Kamau W, Nyaundi p & Serwanga J, *The Legal Impunity of Marital Rape in Kenya: A women's Equality Issue*, 14-15.

¹⁰⁴ Kamau W, Nyaundi p & Serwanga J, *The Legal Impunity of Marital Rape in Kenya: A women's Equality Issue*, 14-15.

CHAPTER 4

COMPARATIVE ANALYSIS BETWEEN KENYA AND SOUTH AFRICA

4.1 INTRODUCTION

4.2 Summary of the Previous chapter

In chapter three, the legal issue in Kenya concerning marital rape was discussed. After examining the existing laws concerned with sexual abuse in Kenya which are the Sexual Offences Act of 2006, the Protection Against Domestic Violence Act of 2015 and lastly the Penal code, we were able to deduce that none have provisions that address marital rape. The challenges faced when the law fails to provide provisions that protects victims of marital rape were also discussed and lastly the conclusion was that Kenya does not have a legal framework governing against marital rape and the lack of it shows that Kenya has failed to provide equal protection of both genders and in this case women who are denied protection from rape. In chapter four, we shall compare the laws of both south Africa and Kenya as South Africa has laws that criminalize marital rape and shall compare their laws with that of Kenya

4.3 SOUTH AFRICAN LAW ON MARITAL RAPE

South Africa is one of the leading countries to criminalize and recognize marital rape as a crime and it has done so for over 14 years.¹⁰⁵ South African legislature passed the prevention of family violence Act in 1993 which made marital rape a crime and stated that the husband may be convicted for raping his wife.¹⁰⁶

4.3.1 Historical analysis of South Africa's legislation on Marital rape

The criminalization of marital rape in South Africa is now governed by the Criminal law (Sexual offences and related matters) of 2007. This Act has made improvements on the definition of rape where penetration includes into or beyond the genitals of another, the anus or the mouth using your genital organs or any other part of the body or object including any part of body of an animal.¹⁰⁷

¹⁰⁵ Swartz N, Is a husband criminally liable for raping his wife? A comparative Analysis, *journal of academic research*,3, 2015,10.

¹⁰⁶ Swartz N, Is a husband criminally liable for raping his wife? A comparative Analysis, *journal of academic research*,3,2015,10.

¹⁰⁷ Section 1, *Criminal law Sexual offences and related matters* (2007).

Section 56 of the Act also states that the accused person shall not use the existence of a marital or other relationship between him and the complainant as a valid defence against his actions.

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Section 60 led to the abolishment of the cautionary rule that allowed a judge the freedom to apply caution to the plausibility of a rape survivor especially where the testimony was not corroborated.¹⁰⁹ The section now provides that the court may not treat the evidence of the complainant with caution pending before the court on an alleged commission of a sexual offences.¹¹⁰

The criminal law (Sentencing) Amendment Act of 2007 provides under section 3A that when giving a sentence in respect of the offence of rape shall not constitute circumstances justifying the giving of a lesser sentence which may include the complainant's previous sexual history, the lack of a physical injury on the complainant, the accused cultural or religious beliefs and lastly any relationship between the accused and the complainant before the offence was committed.¹¹¹

In the Case of *S vs Mvamu*, the accused person was convicted of multiple rape of his wife who had he married customarily. Their marriage disintegrated which led to the complainant leaving the accused to stay with her brother. However, the accused person still believed that they were married and therefore had the right to conjugal benefits while raping his wife. His actions were supported by his customary beliefs and norms which influenced his way of life. The accused person was sentenced to 10 years imprisonment.¹¹² This case South Africa's departure from harmful customs and beliefs that may undermines someone else's dignity in the administration of justice.

¹⁰⁸ Section 56, *Criminal law Sexual offences and related matter* (2007).

¹⁰⁹ Section 60, *Criminal law Sexual offences and related matters* (2007)

¹¹⁰ Section 60, *Criminal law Sexual offences and related matters*) (2007)

¹¹¹ Section 3, *Criminal law Sentencing Amendment Act of* (2007)

¹¹² *S vs Mwamu* (2004), Court of South Africa.

4.3.2 The South African Government's Response to The Offence of Rape

Not only did the state of South Africa make marital rape crime but also initiated programs that create a better response system to rape victims including victims of marital rape. Some of these positive efforts include the Wynberg sexual offences Court in Cape Town and the Hillbrow rape reporting centre in Johannesburg.¹¹³

The Wynberg court sexual offences court was created in 1992 after a protest by the women organization about the way the courts dealt with rape cases in South Africa. In this court, women assessors are used to counterbalance the possibility of male bias.¹¹⁴ The court also has specially trained regional prosecutors who deal with such cases of sexual abuse and they are always two in number which enables them to have lighter caseloads that give them more time to consult with rape complainant so to prepares for the case better.¹¹⁵ A police officer is also trained as a police rape specialist from each criminal investigation units . A prosecutor at the Wynberg court known as Lynette Myburgh noted that there has been a noteworthy improvement in the prosecution of rape cases. Since rape cases are prepared better the conviction rates are almost 20% better than other courts.¹¹⁶

The Hillbrow rape reporting centre was establishes in 1994 by the south African police service in Johannesburg. The aim of the centre was to ensure that the reporting or rape was less stressful while offering social and psychological support. ¹¹⁷The centre also provided immediate medical examination and counselling to raped women besides taking statements related to the charge The centre was staffed by trained female police officers twenty-four hours a day.¹¹⁸ Although this initiative collapsed, South African government has recognised the need to set up a duplicate initiative because it noticed that rape victims are not treated properly in regular charge offices as the police treatment is harsh and this unsympathetic behaviour made the victims' trauma worse and also shy away from reporting these offences.¹¹⁹

¹¹³ Nowrojee B, *Violence Against Women in South Africa: The State response to Domestic Violence and Rape*, Human Rights watch,1995,118

¹¹⁴ Nowrojee B, *Violence Against Women in South Africa: The State response to Domestic Violence and Rape*, Human Rights watch,1995,118.

¹¹⁵ Nowrojee B, *Violence Against Women in South Africa: The State response to Domestic Violence and Rape*, Human Rights watch,1995,119.

¹¹⁶ Nowrojee B, *Violence Against Women in South Africa: The State response to Domestic Violence and Rape*, Human Rights watch,1995,120.

¹¹⁷ Nowrojee B, *Violence Against Women in South Africa: The State response to Domestic Violence and Rape*, Human Rights watch,1995,121.

¹¹⁸ Nowrojee B, *Violence Against Women in South Africa: The State response to Domestic Violence and Rape*, Human Rights watch,1995,121.

¹¹⁹ Nowrojee B, *Violence Against Women in South Africa: The State response to Domestic Violence and Rape*, Human Rights watch,1995,122.

4.4 A COMPARISON OF BOTH SOUTH AFRICA AND KENYA

After analysing both Kenya and South Africa, Kenya lacks a legal framework that protects individuals against marital rape in this case women.

4.4.1. Legislations on marital rape in Kenya and South Africa.

Kenya's constitution states that everyone has the right to equal protection and equal benefit of the law and equality includes the full and equal enjoyment of rights and fundamental freedoms therefore governing against discrimination. However, this is not enough when it comes to protecting the fundamental rights and freedoms of victims of marital rape since the Sexual Offences Act states that marital rape is an exemption when it comes to matters concerning rape.¹²⁰ The state is meant to protect our rights. Nonetheless, it has failed to protect and respect the inherent dignity of victims of marital rape. When it comes to our national values, we have failed to provide justice and protection to these victims as we fail to provide equal treatment and equal opportunities for both men and women. In this case, the husband is accorded special treatment which is the right to have control over his wife even control of her consent which is a right inherent to her. The Prevention Against Domestic Violence Act also does not provide protection and relief to these victims of marital rape and most times they are left helpless and this can also affect the victims emotional and mental health.

South Africa on the other hand has made marital rape a crime and a husband may be convicted for raping his wife.¹²¹ The Criminal law (Sexual offences and related matters) of 2007 has also made improvements on the definition of rape to include penetration into or beyond the genitals of another using your genital organs or any other part of the body or object including any part of body of an animal.¹²² In Kenya, one commits the offence of rape if the person deliberately and unlawfully causes penetration with his or her genital organs into the genitals of another who did not give their consent, or the consent was obtained by compulsion. South Africa's definition of rape is broad as it is not only limited to penetration of one's organs into another but also beyond or any part of the body using his genital organs or object. This broad definition helps to fill in gaps that may arise when it comes to prosecuting rape. The criminal law(sentencing) amendment Act of South Africa, rules out the defence of an existing

¹²⁰ Section 43(5), *Sexual Offences Act* (2006)

¹²¹ Section 56, *Criminal law (sexual offences and related matters)* (2007)

¹²² Section 1, *Criminal law (sexual offences and related matters)* (2007)

relationship between the complainant and the accused person when bringing a case against the accused.¹²³

4.4.2. The Courts Participation in the protection of victims of marital rape

The courts approach of applying the cautionary principle has been abolished when hearing cases of sexual offences even where the testimony was not corroborated. This gives victims of sexual abuse especially victims of marital rape the confidence to approach the court that their case will be heard since marital rape can be hard to prove as it happens in the privacy of both spouses. However, in Kenya, most marital rape cases go unreported not only because of the intimidation and threats by the perpetrators,¹²⁴ but also victims of marital rape find it hard to report because such cases may be difficult to prove because it is hard to provide witnesses to prove the sexual harm as it occurs in the privacy of both parties. Furthermore, section 38 of the Sexual offences Act discourages such victims from reporting rape as the lack of proof may make it look like a false allegation.¹²⁵ The courts of Kenya should follow the example of South Africa in abolishing the cautionary principle which makes victims confident in approaching the court to report such cases.

4.4.3. Customary and societal beliefs in Kenya and South Africa

When it comes to sentencing, the Criminal Law Amendment Act of South Africa states that it shall not give a lesser punishment to the accused even if he establishes that there was an existing sexual relationship between the two or even the accused cultural and religious beliefs. This is a great move because South Africa has made the decision not to consider customary beliefs which may be offensive to one's dignity. In Kenya, customs such as payment of dowry are perceived as a way of confirming a husband right to own his wife such that the wife becomes his property.¹²⁶ Such customs contribute to domestic violence and abuse by the husband as he feels he has control over his wife.

4.4.4. The State's participation in the protection of victims of marital Rape in Kenya.

Lastly, the state of South Africa plays an active role when it comes to matters concerning sexual abuse. In addition to making marital rape a crime, the state formed programs that create a better response system to rape victims including victims of marital rape, like Wynberg sexual

¹²³ Section 3, *criminal law (sentencing) amendment Act (2007)*

¹²⁴ <https://www.kenyaforum.net/2012/11/17/rape-injustice-and-attitudes-to-sex-in-kenya/> on 26th November 2019.

¹²⁵ Section 38, *Sexual Offences Act (2006)*

¹²⁶ <http://theequalityeffect.org/wp-content/uploads/2013/04/Marital-Rape-Paper-Winnie-Kamau-Final-edited-July-18.pdf> on 26th November 2019.

offences Court in Cape Town as mentioned earlier. In Kenya nonetheless, the state turns a deaf ear when it comes to such cases. The state fails to consider that lack of prosecution of marital rape leads to more domestic violence and the victims end up lacking protection.

4.5 CONCLUSION

In conclusion, marital rape is not considered an offence in Kenya and that there is no law that governs against marital rape either. The laws that protect against sexual and domestic abuse in Kenya are insufficient in protecting victims of marital rape and that the existing legislations permit marital rape to go unaddressed. Kenya should follow South Africa's footsteps in criminalizing marital rape in protecting fundamental rights and freedoms of married women in the society.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.1 INTRODUCTION

In chapter 4, a comparative analysis between Kenya and South Africa was done with the following findings: South Africa has a legal framework that criminalizes marital rape and it has done so for over 14 years. South Africa which has clearly stated that marital rape is indeed a crime in the Criminal law (Sexual offences and related matters) of 2007. Besides criminalizing marital rape, the Act also made improvements on the definition of rape to leave no gaps when prosecuting for rape. Also, the South African approach of applying the cautionary principle has been abolished when hearing cases of sexual offences even where the testimony is not corroborated. This gives victims of sexual abuse especially victims of marital rape the confidence to approach the court that their case will be heard. The state of South Africa also formed programs that create a better response system to rape victims including victims of marital rape like Wynberg sexual offences Court in Cape Town. After comparing both countries, Kenya should take bold steps and borrow South Africa's approach towards marital rape.

5.2 CONCLUSION

This research was guided by two research questions. The first one was whether the existing laws criminalize marital rape in Kenya and the second one was whether there are gaps in the legislation that exist which permit marital rape to go unaddressed.

In addition to this this, the study had two main hypotheses. First, that marital rape is not considered an offence in Kenya and that there is no law expressly governing the issue and second that the laws that protect against sexual and domestic abuse in Kenya are insufficient in protecting victims of marital rape and that present legislations permit marital rape to go unaddressed.

In chapter two, we looked at the theoretical framework and focused specifically on the theory of feminism. This chapter focused on the ideas of Christine Littleton who proposed that granting of equal rights and treatment for both genders that will lead to an end of prejudices and discrimination. On the other hand, Catherine Mackinnon argues that inequality is prevalent in the social dominance of men through which women are subjected and that sexual equality comes into being through resistance by women of such subordination and dominance by men.

Chapter three directly responded to the main research question. The position in Kenya is that there is no legal framework against marital rape. On the second research question, the existing laws concerned with sexual violence which are the Sexual Offences Act of 2006, the Protection against Domestic Violence Act of 2015 and the Penal code, none have provisions that address the issue of marital rape. We also looked at the challenges faced from the findings of our research question. In summary the main challenge faced was ignoring the fact that married are exposed to sexual abuse such as rape within marriage and it gives the perpetrators control and dominance because nothing will be done to them and that victims of marital rape find it easier to sue under the assault provision as it's the only option.

In Chapter four, a comparative analysis was done between Kenya and South Africa and this responded to our hypothesis that indeed Kenya does not criminalize marital rape and that laws that protect against sexual and domestic abuse in Kenya are insufficient in protecting victims of marital rape. South Africa has a better law than Kenya in criminalizing marital rape and it has even made improvements in its definition of rape to leave no gaps when prosecuting rape.

Lastly in chapter five, recommendations were given on what can be done to push the agenda of criminalizing marital rape.

5.3 RECOMMENDATIONS

5.3.1 Amendments of the existing laws

Section 43(5) of the Sexual Offences Act should be amended as this exemption is unfair and unjust as it ignores the fact that women can get raped even in marriage. Once this section is amended marital rape will be prosecuted and therefore the victims will be protected, and relief provided to them.

Section 38 of the same Act should be amended. It says that “any person who makes false allegations against another person is guilty of an offence and shall be liable to punishment equal to that for the offence complained of.” This section is likely of discouraging not only victims of rape who might not have enough evidence but also victims of marital rape which may be hard to prove since it happens in the privacy of both spouses.

The Domestic Violence Act is supposed to offer protection and relief to those who have suffered domestic violence. It should be able to explain and specify what sexual violence within marriage is. Marital rape happens in a domestic setting and therefore a form of marital rape.

The act under section 3 provides that violence includes any form of sexual violence within marriage. However, those who have suffered domestic violence cannot rely on this section or even get some form of relief because it doesn't specify what sexual violence within marriage is and therefore inadequate.

5.3.2 Reform of police services

The police are mandated with the role of equal protection and equal enforcement of the laws. Since the police can be a big impediment when it comes to addressing and also investigating domestic violence against women, South Africa took measures to ensure improvement of police services.¹²⁷ This includes: a course or training in domestic violence and rape by the police, they should also be trained on the social and psychological effects of domestic violence. This will help improve how they handle victims of rape as opposed to the harsh treatment.¹²⁸ They should also be trained to eliminate gender bias and provide prompt protection to women by carry out court orders that prohibit abuse.

5.3.3 Active participation of the state

The state of Kenya should actively participate and respond to cases of sexual abuse. In South Africa, the states involvement in matters of rape is witnessed when it set up programs that facilitate better response system to victims of marital rape. The state of Kenya should also set up a different court that specifically deals with matters of sexual abuse. This will help convict cases of sexual abuse faster and it will also help reduce a bulk of cases involving domestic violence. This will encourage victims of sexual and domestic violence abuse to bring their cases to court. The state should also establish an independent body that supervises police treatment of women and victims of violence.

5.3.4 Creating public awareness

Awareness should be made publicly on the existence of marital rape in our society. Kenya does not have any statistics showing the prevalence of marital rape either because it refuses to recognize its existence or because those who have suffered marital rape are discouraged from reporting such cases because they are no channels to obtain relief. Public awareness also provides education to the public on the effects of marital rape which will enable people to push the agenda of criminalizing marital rape. Not only will public awareness help, but also making channels for people to report rape will be helpful and it will help victims of such abuse to have

¹²⁷ file:///C:/Users/User/AppData/Local/Temp/s.africa_1195.pdf on 30th November 2019.

¹²⁸ file:///C:/Users/User/AppData/Local/Temp/s.africa_1195.pdf On 30th November 2019.

the confidence to report it and in the long run will be protected. Once these channels are established, prompt response to a call of domestic violence should be acted upon.

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