

**Investigating the Extent to Which Gender Neutrality Is Achieved in The
Implementation of The Sexual Offences Act**

Submitted in partial fulfilment of the requirement of the Bachelor of Laws
Degree, Strathmore University Law School.

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~~July~~ January 2021

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Acknowledgement

I would like to thank God for the strength and perseverance He has given me. The far I have gotten is by His Grace. I would also like to thank my ~~Supervisor~~supervisor for the guidance, encouragement, and patience throughout this process. If I were to go back in time, I would still pick you as my supervisor. To my family and friends, I would not have done this without you all. When I had given up on my paper, you refused to let me quit. I hope I make you all proud.

Dedication

I would like to dedicate this paper to all the men who have been victims of sexual violence and forced to remain silent ~~remain silence~~ due to fear, threats or societal misconceptions. I hope that this paper results in more research on your experiences and the government recognises the discrimination you have been facing. May this paper give you hope!

Declaration

I, MICHELLE MBITHE MWANDO, do hereby declare that this is my original work and that to my best knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any university for degree or diploma. Other works referred to have been acknowledged and duly cited.

Signed: M. Mwando

Date: 20 July 2021

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

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Abstract

Sexual violence is a serious problem in society. In Kenya, the Sexual Offences Act was introduced to make provisions about sexual offences, their definition, prevention and protection of all persons from unlawful sexual acts. Unfortunately, there is a gender imbalance in the implementation of the SOA~~sexual offence legislation in Kenya~~. While the SOA has attempted to foster gender neutrality in the drafting, this is not reflected in the society. Male victims fail to be given the due attention. Although national and international statistics reveal that more women are victims of sexual violence, the male victims need to be recognised and protected by the legal framework. The paper uses desktop research to determine the extent to which gender neutrality is achieved in the implementation of the SOA. The TFSA revealed the challenges faced during the various stages of seeking justice. These challenges addressed in this paper are mainly specific to men. A comparative study with South Africa is used to provide some recommended measures that Kenya can take in order to promote the achievement of this neutrality in implementation.

List of legal instruments

Constitution of Kenya (2010)

Sexual Offences Act (2007) Kenya

Sexual Offences Act (2003) UK

Sexual Offences Act (2007) South Africa

List of cases

- i. *CKW v Attorney General and another*
- ii. *GO v ~~Republic~~Republic*
- iii. *POO v Director of Public Prosecution*
- iv. *Nicole Levenstein and others v The Estate of the Late Sidney Lewis Frankel and others.*

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List of abbreviations

MATTSO	Ministerial Advisory Task Team on Sexual Offences
NSVRC	National Sexual Violence Resource Centre
PRC	Post Rape Care
SOA	Sexual Offences Act 2006
TFSOA	Task Force on implementing the SOA
UK	United Kingdom
US	United States
<u>USAID</u>	<u>United States Agency for International Development</u>

CHAPTER 1

INTRODUCTION

1.1 BACKGROUND

When we think about sexual assault, especially rape, the mental image is that of a male perpetrator and a female victim. However, this is not always the case. Both men and women can either be the victims or perpetrators, therefore requiring full and equal protection.¹ Kenya, like other states, has to protect its citizens equally, ensuring that every person is equal before the law and receives the equal benefit of the law.² Discrimination on the grounds of sex, among others, is prohibited in the Constitution.³ These principles inform the concept of gender neutrality. In the context of sexual offences, gender neutrality is the concept that criminal law should recognise that both men and women can be victims as well as perpetrators.⁴

In Kenya, the Sexual Offences Act (SOA) 2006 was the first legislation to comprehensively address the growing sexual violence cases. Since the late 1920s, sexual offences were insufficiently catered for in the *Penal Code*⁵ under a chapter, 'offences against morality'.⁶ By 2004, the National Crime Research Centre police ranked sexual violence as the second-highest reported crime in Kenya.⁷ This, in part, showed the need for the introduction of detailed legislation which is in sync with ~~the~~ modern realities.

Implementation of legislature is important since written laws are of no use if not properly implemented.⁸ Regarding the SOA, the provisions mainly delegate functions, rather than giving detailed measures. The SOA requires the creation of a national policy framework to guide implementation and ensure that all sexually related offences are treated acceptably and uniformly.⁹ The Minister is charged with the responsibility of preparing a national policy framework to guide the implementation of the Act, reviewing the policy framework at least once every five years, and amending the policy framework when required.¹⁰ In line with this,

¹ Roberts M, 'When a man is raped: A survival guide', 3rd ed, NSW Health Education Centre, Australia, 2013, 6.

² Article 27(1), *Constitution of Kenya* (2010).

³ Article 27(4), *Constitution of Kenya* (2010).

⁴ Rumney P, 'In defence of gender neutrality within rape', 1, *Seattle Journal for Social Justice*, 69, 2007, 481.

⁵ Chapter 63, *Laws of Kenya*.

⁶ Ndung'u N, 'Preventing and responding to violence against women and girls: From legislation to effective law enforcement: The Kenyan Experience' Regional Seminar for Asian Parliaments organised by the Inter-Parliamentary Union (IPU) and the Parliament of India, New Delhi, 15-17 September 2011, 1.

⁷ Ndung'u N, 'Preventing and responding to violence against women and girls: From legislation to effective law enforcement: The Kenyan Experience', 2.

⁸ Pandey S, *Strict laws and better implementation: need of the hour*, Banasthali University, 2020, 2.

⁹ Section 46 (a), *Sexual Offences Act* (2006).

¹⁰ Section 46, *Sexual Offences Act* (2006).

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the Task Force on implementation of the Sexual Offences Act (TFSOA) held the Sexual Offences Act Implementation Workshop in 2011. The findings from the workshop provided useful information on the achievements of the task force, and the challenges faced in implementation.¹¹ The key focus will be on the challenges highlighted by the police commissioner and the ministry of public health and sanitation during the Workshop.¹² According to the police commissioner, the main challenge is the failure of victims to report the cases. The reasons for these include fear of the perpetrator, fear of not being believed, cultural beliefs that normalise sexual violence and pressure to solve related issues outside court.¹³

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These findings support the hypotheses of this paper. Additionally, the Minister is required to work in consultation with security, prisons, social services, education and the health sectors to ensure effective implementation.¹⁴

Kenya, like other states, has a constitutional duty to protect all its citizens equally.¹⁵ In implementing the SOA, both men and women should be given equal protection before the law. Discrimination on the grounds of sex, among others, is prohibited in the Constitution.¹⁶ These principles of equality and non-discrimination inform the concept of gender neutrality. In the context of sexual offences, *gender neutrality* is the concept that criminal law should recognise that both men and women can be victims as well as perpetrators.¹⁷ Efforts to bring about gender neutrality in implementation do not seek to counter the gains made by women in the fight against sexual violence. Instead, it aims to ensure that the rights of the men are also given the due attention. The National Sexual Violence Resource Centre (NSVRC) reported that approximately 1 in 5 women experience a form of sexual violence in their lifetime compared to an estimate of 1 in 14 men.¹⁸ Women are more vulnerable; however, men also need to be protected. Sexual offences should be treated with equal degree of seriousness despite the genders of the parties.

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The SOA attempts to foster gender neutrality. It largely moves away from the gendered provisions of the *Penal Code*. A notable feature of the SOA is the broadening of the definition

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¹¹ TFSOA, 'Sexual Offences Act Implementation Workshop', Comprehensive report, 9.

¹² Kenya uses a top-down approach which in this case looks at the challenges from the point of view of those holding power rather than those going through the challenges.

¹³ TFSOA, 'Sexual Offences Act Implementation Workshop', Comprehensive report, 18.

¹⁴ Section 47 (b) (c), *Sexual Offences Act* (2006).

¹⁵ Article 27(1), *Constitution of Kenya* (2010).

¹⁶ Article 27(4), *Constitution of Kenya* (2010).

¹⁷ Rumney P. 'In defence of gender neutrality within rape', 1, *Seattle Journal for Social Justice*, 69, 2007, 481.

¹⁸ National Intimate Partner and Sexual Violence Survey, Data brief, 2015.

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of rape to include male individuals as possible victims.¹⁹ The definition in the *Penal Code* only provided for the man as the perpetrator and the woman as the victim.²⁰ Although the possibility of male rape is some people acknowledged among homosexuals the possibility of men being raped by other men, most people fail to accommodate the idea of rape by a female aggressor is often inconceivable in the general community when the woman is the aggressor.²¹ Nonetheless, an American study surprisingly noted that men make up 10% to 15% of adult rape cases, with 79.2% of the victimised men reporting being forced to penetrate²², the form of non-consensual sex that men are most likely to experience.²⁴ Moreover, the Italian National Statistics Institute noted that up to 91.6% of these cases remain unreported.²⁵ The rate is even lower in Africa with 98.12% of the cases going unreported.²⁶ In Kenya, Kenyatta National Hospital noted that among 385 rape cases treated at the hospital during a period of three years, 35 cases involved male victims, with 15 of these victims claiming assault by women.²⁷ In an interview, Dr Julius Gathongo, a senior lecturer at Kenyatta University, noted that with improved gender balance in the modern society, men have lost some of the 'exclusive power' they had over women, including acts of violence.²⁸ The protection of men by the law is, therefore, just as necessary as the protection of women and should be extended to implementation of the SOA.

Another feature illustrating the attempt to achieve gender neutrality in the SOA is the use of gender-neutral language. The pronouns 'he' or 'she' are used across the Act regarding the victims or perpetrators.²⁹ This helps prevent eliminates discrimination of either men or women gender. The UK, for example, still has discriminatory gendered provisions in their *Sexual Offences Act 2003*.³⁰ Rape, assault, and abuse of a position of trust, among other

¹⁹ Section 3, *Sexual Offences Act* (2006).

²⁰ Ndung'u N, 'Preventing and responding to violence against women and girls: From legislation to effective law enforcement: The Kenyan Experience', 2.

²¹ Roberts M, 'When a man is raped: A survival guide', 3rd ed, NSW Health Education Centre, Australia, 2013, 6.

²² Roberts M, 'When a man is raped: A survival guide', 3rd ed, NSW Health Education Centre, Australia, 2013, 6.

²³ National Intimate Partner and Sexual Violence Survey, Data brief, 2015.

²⁴ Friedsdorf C, 'The understudied female sexual predator', *The Atlantic*, 2016.

²⁵ Golding J, 'Sexual assault history and limitations in physical functioning in two general population samples. 1. Research in nursing and health, 9, 2016, 36.

²⁶ Gartner R and MacMillian R, 'The effect of the victim-offender relationship on reporting a crime of violence against women. 37, *Canadian Journal of criminology*, 3, 2015, 396.

²⁷ Gathura G, 'Cases of men raped by women in Kenya alarm doctors', *The Standard*, 2017 -< <https://www.standardmedia.co.ke/entertainment/local-news/2001243840/cases-of-men-raped-by-women-in-kenya-alarm-doctors> >- August 2020.

²⁸ Gathura G, 'Cases of men raped by women in Kenya alarm doctors', *The Standard*, 2017.

²⁹ *Sexual Offences Act* (2006).

³⁰ Chapter 42, *Sexual Offences Act* (2003), United Kingdom.

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offences, all regard the man as the aggressor.³¹ ~~Additionally, the~~ This same UK Act also Act introduced a provision that punished incest by female persons.³² Initially, in the Penal Code, only a provision against incest by men ale existed. Upon introduction of the offence, an equal sentence as that of incest by a male was given.³³ This fostered equality.

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~~Despite the efforts of the drafters of the SOA to promote neutrality, there seems to be an apparent lack of sufficient implementation procedures. The Minister is charged with the responsibility of preparing a national policy framework to guide the implementation of the Act, reviewing the policy framework at least once every five years and amending the policy framework when required.³⁴ The Minister works in consultation with other security, prisons, social services, education and health sectors to ensure effective implementation.³⁵ The Task Force on the implementation of the Sexual Offences Act (TFSOA) was formed to make sure the SOA is effectively implemented. Several challenges have been faced by task force hindering the fulfilment of their objectives.~~

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This paper suggests that in addition to the efforts to overcome the challenges in implementation, ~~the~~ the concept of gender neutrality should be catered for in the implementation of the SOA. Besides, ~~t~~he situation in the society should reflect the gender neutrality anticipated achieved in the SOA. Additionally, the paper ~~it~~ seeks to analyse how the SOA has been implemented in South Africa and the measures that promotes gender neutrality in the implementation. With the high levels of sexual violence in South Africa, the use of law has been instrumental in addressing the issue.³⁶ This analysis will be used to provide possible recommendations ~~to of the Act and assess the state in other jurisdictions to~~ improve the situation in Kenya.

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1.2 STATEMENT OF THE PROBLEM

The SOA consists of gender-neutral provisions, however, there seems to be an apparent lack of proper implementation procedures to guarantee this neutrality. The SOA seems to insufficiently provide for measures on its implementation to make sure its provisions apply in reality and not just in writing. This presents a number of challenges, as explained by the

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³¹ *Sexual Offences Act* (2003), United Kingdom.

³² Ndung'u N, 'Preventing and responding to violence against women and girls: From legislation to effective law enforcement: The Kenyan Experience', 2.

³³ Section 21, *Sexual Offences Act* (2006). [pp

³⁴ Section 46, *Sexual Offences Act* (2006).

³⁵ Section 47, *Sexual Offences Act* (2006).

³⁶ 'Sexual Offences Act Implementation: Policy Development and Advocacy', Sonke Gender Justice.

~~TFSOA, that potentially affect the achievement of gender neutrality.~~ The Constitution requires equality and non-discrimination in the exercise of government functions. This is largely unachievable with the ~~an~~ existing bias against men in society. ~~Public policy, including the SOA, is made for the benefit of all.~~ Even with adequate implementation procedures, if the issue of gender neutrality in the implementation is left out, men will continue to suffer from being considered the perpetual aggressor~~s. s.~~ ~~Moreover, the TFSOA highlights several challenges that hinder effective implementation.~~ These challenges need to be addressed in the legislative and institutional framework.

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1.3 STATEMENT OF OBJECTIVES

The general objective of the paper is to investigate the extent to which gender neutrality is achieved in the implementation of the SOA 2006 and ~~how the the~~ obstacles faced in the ~~implementation affect the~~ achievement of this neutrality.

The paper is guided by the following specific objectives:

- i. ~~To determine the extent to which gender neutrality is achieved in the implementation of the SOA. To assess the implementation procedures in the SOA and the any challenges that limit the adequacy of the implementation.~~
- ii. ~~To To assess the effectiveness of the implementation procedures in the SOA, determine how inadequacies in implementation affect the achievement of gender neutrality.~~
- iii. ~~To investigate the measures taken by other jurisdictions to implement their SOAs gender neutral and potentially apply them in Kenya. To investigate how the implementation of the SOA in South Africa another attempts to foster gender neutrality and potentially apply this to Kenya.~~

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~~1.41. HYPOTHESES~~

~~THIS PAPER IS BASED ON THE FOLLOWING HYPOTHESES:~~

- i. ~~THE IMPLEMENTATION PROCEDURES IN THE SOA ARE INADEQUATE AND FAIL TO PROMOTE GENDER NEUTRALITY.~~
- ii.i. ~~THE TASK FORCE ON THE IMPLEMENTATION OF THE SOA HAS FAILED TO ADDRESS THE ISSUES OF GENDER NEUTRALITY IN THE IMPLEMENTATION OF THE SOA.~~
- iii.i. ~~KENYA CAN APPLY CERTAIN MEASURES TAKEN BY OTHER JURISDICTIONS TO ACHIEVE GENDER NEUTRALITY IN THE IMPLEMENTATION OF THE SOA.~~

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1.5.1.4 RESEARCH QUESTIONS

This paper is guided by the following research questions:

- i. ~~To what extent is gender neutrality achieved in the implementation of the SOA?~~ ~~To what extent do procedural challenges affect the adequacy of the implementation of the SOA?~~
- ii. ~~Does the SOA provide adequate implementation procedures to ensure gender neutrality?~~ ~~How do inadequacies in implementation affect the achievement of gender neutrality?~~
- iii. What measures has South Africa ~~another jurisdiction~~ taken in the implementation of their SOA that promote the achievement of gender neutrality ~~to ensure gender neutrality in the implementation of their SOA~~ and how can these measures be applied in Kenya?

1.5 HYPOTHESES

This paper is based on the following hypotheses:

- i. ~~The implementation procedures in the SOA are inadequate and fail to promote gender neutrality.~~ ~~The implementation of the SOA at different stages is faced by several challenges which have affected the adequacy.~~
- ii. ~~The task force on the implementation of the SOA has failed to address the issues of gender neutrality in the implementation of the SOA.~~ ~~The inadequacies in implementation have greatly limited the achievement of gender neutrality.~~
- iii. Kenya can apply certain measures taken in South Africa ~~by other jurisdictions~~ to achieve gender neutrality in the implementation of the SOA.

1.6 JUSTIFICATION OF THE STUDY

This study is unique since it not only focuses on ~~the~~ implementation of the SOA, but also the aspect of gender neutrality in the implementation. ~~Despite the attempt to ensure gender neutrality in the drafting of the SOA, the implementation of the Act seems to give preferential treatment to women which the Act has focused on ensuring.~~ The Constitution of Kenya ~~is the supreme law of the land~~³⁷ requires non-discrimination³⁸ in the implementation of public policy.³⁹ This paper investigates the extent to which this constitutional requirement is ~~met in the implementation of the SOA since its introduction.~~

³⁷ Article 2, *Constitution of Kenya* (2010).

³⁸ Article 10 (2) (b), *Constitution of Kenya* (2010).

³⁹ Article 10 (1) (c), *Constitution of Kenya* (2010).

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Moreover, this study needs to be undertaken to provide more information on the under-researched area of sexual violence on males. Gender neutrality can only be achieved in implementation if the society acknowledges the possibility of ~~men as~~ being victims of sexual violence. The findings of this paper may influence the opinions of the ~~general public~~ and shed light on the ~~is~~ inadequacy in the implementation of the SOA. The myths on rape and sexual violence in general will be debunked. The decisions of judges may also be influenced to give men equal benefit from the law. Subsequently, male victims may be encouraged to seek justice upon occurrence of sexual violence against them.

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1.7 LITERATURE REVIEW

Njoki Ndung'u⁴⁰ in her article, 'Preventing and responding to violence against women and girls: From legislation to effective law enforcement; The Kenyan experience'⁴¹ sheds a light on the history and evolution of the Sexual Offences Act 2006. The article gives a comparison between the SOA and the previous provision in the Penal Code, noting the efforts to introduce gender-neutral legislation. This article has been used in the paper to highlight the aspects of the SOA that make it ~~gender neutral~~. Additionally, she points out Section 47 of the SOA that gives the Minister the responsibility to ensure police, health, education, justice, provincial administration, and social services are provided as required by the law. She recognises the efforts made by the Task Force on the implementation of the SOA (TFSOA)⁴², however, she emphasises that more work needs to be done to ensure the Act does not become just another piece of ineffective legislation. Finally, Ndung'u highlights the challenges facing the implementation of the SOA which include witness protection, prosecutorial processes, publicly funded medical treatment and judicial process.⁴³ This article is important for this study since it shows disparities between the drafting SOA and the reality in society: a gap which the paper intends to fill.

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The 'Sexual Offences Act Implementation Workshop summary report'⁴⁴, by TFSOA explains the existing disconnect between the requirements in the law and the response given to sexual

⁴⁰ Supreme Court Justice in Kenya and Mover of the Sexual Offences Act 2006.

⁴¹ During the Regional Seminar for Asian Parliaments organised by the Inter-Parliamentary Union (IPU) and the Parliament of India, 2011.

⁴² Tasked with the implementation of the SOA.

⁴³ Ndung'u N, 'Preventing and responding to violence against women and girls: From legislation to effective law enforcement: The Kenyan Experience' Regional Seminar for Asian Parliaments organised by the Inter-Parliamentary Union (IPU) and the Parliament of India, New Delhi, 15-17 September 2011, 6.

⁴⁴ This report presents the objectives, discussion, and findings of the Sexual Offences Act Implementation Workshop, held in Naivasha, Kenya, 25-27 May 2011. It serves as the full record of three days of discussion and

offences by the relevant institutions and individuals. The report, like Ndungu's article, highlights the numerous challenges faced in the implementation of the Act at different stages. These challenges subsequently hinder the achievement of gender neutrality in implementation. It further suggests recommendations that will address this issue.⁴⁵ The current study will aid in explaining the existing problem of inadequate implementation using real experiences and inform the recommendations made by the paper.

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In the article, 'Gendered Legislation: Critiquing the Sexual Offences Act 2003' by Bronte Cook⁴⁶ the article focuses on the efforts by the UK in making a gender-neutral Act. The SOA 2003 repealed the SOA 1956 which had several gendered provisions that portrayed men as sexual aggressors and women as sexual victims. Despite the achievements of the SOA 2003, Cook the article highlights the need to address some of its existing flaws. These include the use of gendered provisions, having separate provisions, with different responses, for same actions committed in one case by a man, and in another by a woman and finally discrepancies in sentencing, where offences with penile penetration are sanctioned more harshly than those without. This argument ~~file~~ shows the achievements of Kenya, compared to the UK, in creating a more inclusive sexual offences legislation. ~~directly applies in the case of Kenya where the SOA 2006 attempts to be more inclusive of male rape victims but still contains some~~ ~~fla~~ This is relevant to the study since Kenya is viewed to have attempted to have gender neutral provisions which fail to translate during implementation. ~~was~~

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Dr Dolan⁴⁷ in his article, 'Into the mainstream: Addressing sexual violence against men and boys in conflict' emphasises the need for more research on this issue stating that the absence of statistical data on sexual violence against men and boys is a major gap. He explains the challenges faced in gathering information on male sexual violence due to the sensitivity of the topic, especially in countries facing conflict. The article also mentions the forms in which sexual violence in men can take place.⁴⁸ This article is important in the current study since the absence of information on sexual violence against men is evidence ~~clearly illustrates~~ of the absence of gender neutrality in implementation.

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provides a background to Workshop participants' final recommendations for improved implementation of Kenya's Sexual Offences Act.

⁴⁵ TFSOA, 'Sexual Offences Act Implementation Workshop', summary report.

⁴⁶ Student at the University of Cambridge.

⁴⁷ Director, Refugee Law Project, School of Law, Makerere University, Uganda.

⁴⁸ These include anal and oral rape, genital torture, castration and forced sterilisation, gang rape, sexual slavery and being compelled or forced to rape others.

In the booklet, ‘*When a man is raped: A survival guide*’, Roberts⁴⁹ delves into the topic of male rape. She conducts interviews on male victims of sexual violence to get **information sight** on their experiences during and after the **rape incidence**.⁵⁰ She breaks down the myths on male sexual violence, the most common one being that men cannot be raped.⁵¹ Thereafter, she explains the unique challenges faced by male victims, therefore showing the need for legislation that protects them.⁵² In addition to that, she highlights the agencies that are responsible for assisting such victims and emphasises **on** the importance of these agencies in the fight against sexual violence.⁵³ This booklet is important to the paper since it provides information from interviews **as secondary data, which could not be done in the research of this paper**. The agencies mentioned in the booklet have a major role in ensuring gender neutrality is achieved in the implementation of SOA.

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Rumney in his journal, ‘*In defence of gender neutrality within rape*’, examines the **definition of gender neutrality** within the context of rape and the nature of gender-neutral legislation on sexual violence, including the reason for their enactment. He points out some reforms made in legislation to achieve gender neutrality and shows how critics of these reforms have misunderstood them. Rumney heavily relies on information **from a previous issue b** by Patricia Novotny⁵⁴ in the article, ‘*Rape victims in the (Gender) neutral zone: The Assimilation of resistance?*’. In this article, Novotny begins by looking at how the idea of a victim in sexual violence offences is justifiably changing in recent times. She largely focuses on the United States explaining how sexual violence occupies a gender-free and gender-neutral zone.⁵⁵ Notably, she discusses the case against gender neutrality in rape cases, giving six specific concerns and negative effects of achieving this neutrality. This is important for the current study since it provides information about the situation in the US, a foreign jurisdiction. It also brings out the discussion of the consequences of achieving this neutrality.

⁴⁹ Margaret Roberts M, NSW Health Education centre.

⁵⁰ Roberts M, ‘*When a man is raped: A survival guide*’, 3rd ed, NSW Health Education Centre, Australia, 2013, 4.

⁵¹ Other myths include only gay men can sexually be assaulted, women cannot rape men, erections mean consent, male rape happens only in prisons.

⁵² Roberts M, ‘*When a man is raped: A survival guide*’, 3rd ed, NSW Health Education Centre, Australia, 2013, 13.

⁵³ Roberts M, ‘*When a man is raped: A survival guide*’, 3rd ed, NSW Health Education Centre, Australia, 2013, 19.

⁵⁴ A Seattle attorney and lecturer at the University of Washington Women Studies Department and School of Law.

⁵⁵ Novotny P, ‘Rape victims in the (Gender) neutral zone: The Assimilation of resistance?’, *Seattle Journal for Social Justice*,

In the dissertation, ‘*Combating sexual offences in Kenya: An appraisal of the implementation of the Sexual Offences Act*’, Amboko⁵⁶ analyses the efficacy and success of the SOA. She examines the extent to which the SOA has effectively facilitated prosecution, execution and sentencing of sexual offenders.⁵⁷ Additionally, the dissertation covers the factors which have undermined the implementation of the Act. The current study is different from the dissertation since it focuses on the specific aspect of gender neutrality. This study is necessary since society at large seems to have a bias towards the protection of women from sexual violence. The dissertation provides an excellent foundation for the current study. It contains data from field research carried out on thirteen respondents in Kenya. This data is very useful in the current study since it provides input on the challenges faced by the various respondents especially during the reporting and investigation stages. ~~field research was not carried out.~~

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1.8 RESEARCH DESIGN AND METHODOLOGY

The study will use a socio-legal methodology. This approach is based on the argument that law does not operate in a vacuum.⁵⁸ There are multiple considerations that need to be considered when addressing a legal problem.⁵⁹ ~~focuses on the social context of the law. The advantage of this method is that it goes beyond the doctrinal methodology, that focuses only on the traditional legal sources such as case law, and provides a more enriched analysis of a legal issue.~~⁶⁰ It uses statutes, case law, books, journals, articles and reports together with analysis of foreign legislation, outcomes of social interviews, and case studies. Additionally, it derives new ideas and perspectives. On the other hand, this approach may lead to the insufficient analysis of the law therefore causing the paper to lose its legal identity. It is critical to keep in mind the objectives of the study. This method is suitable for this paper since the legal problem is rooted in issues of a social nature and aims at giving legal recommendations.

~~It addresses a legal problem rooted in issues of a social nature and aims at giving legal recommendations. This method understands the law as being a function of society. It will use statutes, case law, books, journals, articles and reports together with analysis of foreign~~

⁵⁶ From the University of Nairobi in fulfilment of Master of Law Degree.

⁵⁷ Amboko A, ‘Combating sexual offences in Kenya: An appraisal of the implementation of the Sexual Offences Act’, University of Nairobi, Nairobi, 2018.

⁵⁸ Cotterell R, ‘Why must legal ideas be interpreted sociologically?’, 25. *Journal of Law and Society*, 2, 1998, 171.

⁵⁹ Cotterell R, ‘Why must legal ideas be interpreted sociologically?’, 182.

⁶⁰ Cotterell R, ‘Why must legal ideas be interpreted sociologically?’, 296.

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~~legislation, outcomes of social interviews, experiments and case studies.~~ The information in the paper is mainly attained through research methodology is mainly desktop research.

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~~This. The choice of this design~~ is influenced by several factors. Financial resources, ability to travel and time available is limited. Primary information from interviews and questionnaires will not be used. Secondary information will mainly be used, however, the secondary data available in Kenya is inadequate for the paper. ~~The~~ inference is therefore required from foreign jurisdictions. Such information is only practically available from desktop research online since travellingsince travelling to collect data is very expensive and online surveys consume plenty of time-consuming. Foreign legislation is also used to determine the measures that have been taken by other jurisdictions to effectively ensure gender neutrality in the implementation of their SOAs. The selection of a countryies for the comparative study was based on several factors. First, the countryies provides for equality and non-discrimination in their constitutions, the countryies has~~ve~~ attempted to achieve gender neutrality in the provisions of their SOAs and finally, the countryies has~~ave~~ proper implementation procedures that are in line with the concept of gender neutrality promoted in the SOAs. As mentioned previously, the field research done by Amboko on thirteen respondents ~~in~~ will be instrumental in this paper.⁶¹

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Desktop research has some advantages. There are numerous resources available online which allow analysis and comparison ing to get the most relevant resource. The research is fast and cost-effective. Additionally, issues of sexual violence are very sensitive. Victims often shy away from talking about their experiences. It is, therefore, easier to use data gathered from specialised institutions, relevant government ministries, medical officers and non-governmental organisations in the related field. Such professionals are equipped with the necessary skills to acquire sensitive information.

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On the other hand, desktop research this research method is disadvantageous since the topic of male sexual violence is under-researched. Quantitative data, which would be useful to provide evidence of the widespread the existence of male rape, is difficult to acquire, more so in Kenya. Additionally, most literature on implementation of the SOA sheds light on the situation for female victims compared with almost total disregard to men. It is difficult to show the need for

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⁶¹ Amboko A, 'Combating sexual offences in Kenya: An appraisal of the implementation of the Sexual Offences Act', University of Nairobi, Nairobi, 2018.

gender neutrality in the implementation without illustrating that male cases exist. Field research would better illustrate the problem by acquiring first-hand information.

The paper focuses on gender neutrality in the implementation of the SOA in Kenya. The use of another jurisdiction is solely for purposes of getting practical recommendations.

1.9 ASSUMPTIONS

This paper assumes that the SOA has achieved gender neutrality in its provisions, however, the challenge is in the implementation. ~~Majority of mThe medical officers and police, who work hand in hand to help the victims of sexual violence,~~ retain the belief that females are the perpetual victims of rape cases. This is due to the concepts of masculinity, gender stereotypes, cultural beliefs and feminism. Male cases are therefore brushed off and not treated with the seriousness they require. The SOA lacks adequate implementation procedures. A majority of the people in the society are not aware that the SOA equally protects the sexual rights of males and females.

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1.10 LIMITATIONS

Several limitations are faced in the writing of this paper. The main limitation is the lack of adequate data. Most researchers ~~seem to~~ have a bias towards examining female sexual violence. Statistics and surveys of male sexual violence are almost non-existent. This makes it difficult to compare the number of male and female victims. Due to the limited information, this research paper would have more accurate information if field research was conducted. Financial constraints, time, and the limitation of movement, as part of the safety regulations during the ongoing Covid-19 pandemic, have made it ~~difficult~~ impossible to conduct field research. The paper is only limited to desktop research.

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1.11 CHAPTER BREAKDOWN

Chapter 1- This chapter has given a general introduction to the issue. It provides for the background of the problem, the achievements and gaps of the SOA concerning promoting gender neutrality. It also contains the statement of the problem, statement of the objectives, hypothesis, research questions, justification of the study and literature review.

Chapter 2- This chapter will provide a theoretical and conceptual framework.

Chapter 3- This chapter will investigate the extent to which the achievement of gender neutrality is affected by the inadequacies in implementation caused by the challenges faced

during implementation gender neutrality is achieved in the implementation of the SOA and the adequacy of the implementation provisions in the SOA.:-

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Chapter 4- This chapter will assess the steps taken by another jurisdiction to ensure the implementation reflects the concept. A comparison will attempt to discover what Kenya can borrow from this jurisdiction.

Chapter 5- This chapter will conclude the paper by summarising the findings and giving recommendations.

CHAPTER 2

THEORETICAL AND CONCEPTUAL FRAMEWORK

2.1 INTRODUCTION

This chapter explains the theories and concepts underpinning this research. It provides an understanding of why gender neutrality is essential in the implementation of the SOA. The first theory on policy implementation deals with the primary issue of this paper; implementation. It gives a detailed explanation of the theories that influence how laws in writing are translated into reality. Two other theories are explained to give an understanding of why preferential treatment ~~should not be~~ afforded to women should not be at the expense of men. The concepts explain how societal and cultural norms influence gender-neutral implementation. It expounds on notions that need to be understood to get a better understanding of the current problem. As

highlighted in the previous chapter, sexual violence is typically understood as a ~~female issue~~ problem perpetrated by men. This view prevents gender-neutral implementation with the men bearing the burden. The theories and concepts discussed below are in line with the hypotheses of the research.

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2.2 THEORIES

2.2.1 POLICY IMPLEMENTATION THEORIES

Implementation is an important part of public policy. It occurs when the policy ideas and desired outcomes are transformed into actions to solve a societal problem.⁶² Research on policy implementation developed due to the growing concern over the effectiveness and execution of laws. This led to the development of ~~three~~ theories to study the issue: 'the top-down theory', 'the bottom-up theory' and 'the combined approach'.⁶³ These theories were introduced by Matland in 1995.⁶⁴

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a) The top-down theory

This theory places policy designers, often government or legislative officials, as the central actors and focuses on factors that can be manipulated at the central level.⁶⁵ It suggests that these central decision-makers at the top determine the policy objectives and are guided by an administrative hierarchical structure in transforming these objectives into actions.⁶⁶ In a democratic society, the elected representatives are the central actors.

The major strength of this theory is that it reduces the number of people involved in policy formation and implementation, therefore fostering accountability. On the other hand, the great emphasis placed on the central actors is a weakness since the local actors are ignored. This is problematic since the local actors often relate to the problem better and can provide the relevant input for effective policy implementation.⁶⁷

⁶² DeGroff A and Cargo M, 'Policy Implementation: Implications for Evaluation', Ottoson J and Hawe P (eds.) 2009, 48.

⁶³ Nwude U, 'A critical analysis of the top-down vs. bottom-up debate in public policy implementation studies; a case study of the implementation process in the regulation of gas flaring in the Nigerian petroleum industry', *University of Arkansas*, 2014, 2.

⁶⁴ Cerna L, 'The Nature of Policy Change and Implementation: A Review of Different Theoretical Approaches', Organisation for economic development and co-operation, 2013, 18.

⁶⁵ Cerna L, 'The Nature of Policy Change and Implementation: A Review of Different Theoretical Approaches', Organisation for economic development and co-operation, 2013, 18.

⁶⁶ Nwude U, 'A critical analysis of the top-down vs. bottom-up debate in public policy implementation studies; a case study of the implementation process in the regulation of gas flaring in the Nigerian petroleum industry', 2.

⁶⁷ Nwude U, 'A critical analysis of the top-down vs. bottom-up debate in public policy implementation studies; a case study of the implementation process in the regulation of gas flaring in the Nigerian petroleum industry', 5.

b) The bottom-up theory

This theory criticises the top-down theory by suggesting that emphasis on policy implementation should be placed on the individuals at the local level.⁶⁸ The local level consists of individuals that are directly impacted by the policy. In a democracy, the bottom-up theory suggests a deliberative approach, which involves the input of the people, rather than an administrative approach.⁶⁹ This ensures the achievement of communal interests in the implementation of policies. Using this approach provides an understanding of the problems that may hinder the achievement of the desired objectives.⁷⁰ However, this theory has been criticised for overemphasis of local autonomy⁷¹ which may hinder the achievement of the desired objectives.

c) The combination approach

This approach was developed by Suggett in 2011. Both theories discussed above, when studied individually, have strengths and weaknesses. The combination approach suggests that combining the theories will maximise the strengths of the theories and minimize the weaknesses.⁷² Successful implementation will result due to the interaction between the central and local actors.

The present research focuses on the issue of policy implementation. The SOA successfully maintained neutrality in its drafting, however, this neutrality has not been translated into practice. Kenya has mainly used the top-down approach in implementing the SOA. Individuals from the various arms of government and civil organisations have been at the centre of the process of implementation.⁷³ The views and experiences of locals have been neglected. The combination of the theories gives an alternative approach to addressing the problem presented in the study. Collaboration between all the stakeholders may lead to more effective implementation.

2.2.2 FRUSTRATION AGGRESSION THEORY

⁶⁸ Cerna L, 'The Nature of Policy Change and Implementation: A Review of Different Theoretical Approaches', Organisation for economic development and co-operation, 2013, 18

⁶⁹ Nwude U, 'A critical analysis of the top-down vs. bottom-up debate in public policy implementation studies; a case study of the implementation process in the regulation of gas flaring in the Nigerian petroleum industry', 8.

⁷⁰ Cerna L, 'The Nature of Policy Change and Implementation: A Review of Different Theoretical Approaches', Organisation for economic development and co-operation, 2013, 18.

⁷¹ Cerna L, 'The Nature of Policy Change and Implementation: A Review of Different Theoretical Approaches', Organisation for economic development and co-operation, 2013, 18.

⁷² Cerna L, 'The Nature of Policy Change and Implementation: A Review of Different Theoretical Approaches', Organisation for economic development and co-operation, 2013, 18.

⁷³ TFSOA, '*Sexual Offences Act Implementation Workshop*', summary report.

The frustration-aggression theory was first formulated in 1939 by Dollard, Doob, Mowrer, Miller and Sears.⁷⁴ It is also known as the frustration-aggression hypotheses. Its application extends to various fields including psychology, sociology, criminology and ethnology.⁷⁵ The theory posits that when people are prevented from achieving the desired goal, they become frustrated and this increases the tendency to act or react aggressively.⁷⁶ It is possible for an alternative response to be found by the individual, however, if the response fails to achieve the desired goal the aggression is intensified.⁷⁷ Individual perceptions may influence aggression.

Concerning the study, both male and female individuals may be subjected to conditions that lead to frustration. For years, women have been victims of sexual violence, oppression and subordination, often by men. This has resulted in aggression by women through various acts of sexual assault against men. ~~Another example involves the limitation of rights during imprisonment which may lead to frustration of prisoners who in turn perpetuate sexual offences against their fellow inmates.~~

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This theory emphasises the importance of gender neutrality in the implementation of the SOA since both men and women can show sexual aggressive behaviour when frustrated. Therefore, the law should ~~not give due attention to the men either of the genders preferential treatment.~~

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2.2.3 RESOURCE THEORY

This theory was formulated by Goode in 1971.⁷⁸ It looks at the relationship between wealth and violence. The theory, in relation to gender matters in spousal violence, suggests that individuals with greater socioeconomic resources tend to possess the decision-making power in a family. These individuals may use force or the threat of force within the relationship and consequently perpetrate violent actions due to the power they possess.⁷⁹ The theory presents a gendered pattern⁸⁰ whereby men have typically been the dominant providers in the family; therefore, have greater power in the family. Another perspective on the theory suggests that individuals lacking other means of power, such as income or educational status, are more likely

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⁷⁴ Dollard J, Miller N, Doob L, Mowrer O and Sears R, *Frustration and Aggression*, Yale University Press, New Haven, 1939, 7.

⁷⁵ Sturme P, *The Wiley Handbook of Violence and Aggression*, Wiley Online Library, 2017, 3.

⁷⁶ Whitaker J, Melzer A, Steffgen G and Bushman B, 'The Allure of the Forbidden: Breaking Taboos, Frustration, and Attraction to Violent Video Games', 24 *Psychological Science*, 4, 2013, 510.

⁷⁷ Spector P, 'A Model of Work Frustration-Aggression', 20 *Journal of Organizational Behaviour* 6, 1999, 918.

⁷⁸ Goode W, 'Force and violence in the family' 33 *Journal of Marriage and the Family*, 4, 1971, 624 – 635.

⁷⁹ The concept of power is further discussed in the conceptual framework.

⁸⁰ Anderson, K., (1997). 'Gender, Status, and Domestic Violence: An Integration of Feminist and Family Violence Approaches' 59 *Journal of Marriage and Family*, 3, 1997, 656.

to rely on violence to achieve greater power within a relationship.⁸¹ The limitation of this perspective is that it primarily focuses on the power differences rather than the sociodemographic factors which influence the tendency for violence.⁸²

With the empowerment of women, there has been a change in resource distribution. This began upon the entrance of women into the labour force.⁸³ Women now possess more resources due to education, improved job opportunities, an inheritance of wealth, among other factors.⁸⁴ The increased resources have resulted in increased power. Subsequently, violence perpetrated by women has become a more common occurrence.

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This theory supports the idea that men are not the sole perpetrators of sexual violence; they too can be victims. The implementation of the SOA should maintain a neutral approach to accommodate the significant change in resource possession.

2.3 CONCEPTS

2.3.1 GENDER

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Gender is a core concept for this research. Understanding the concept sheds light on the theories discussed above. The term was introduced in the 1980s by feminist scholars to replace what was commonly termed as the 'male role' and 'female role'.⁸⁵ The understanding of the concept can be distinguished into two; gender as biologically constructed, and gender as socially constructed.

Gender as biologically constructed implies that the biological differences between men and women are what results in different interests, behaviour and approaches. The perceived differences between men and women are not primarily determined by external factors, -instead, they are affected by biological factors.⁸⁶

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⁸¹ Anderson K, Gender, Status and Domestic violence: An integration of feminist and family violence approaches, 59 *Journal of Marriage and Family*, 3, 1997, 656.

⁸² Anderson K, Gender, Status and Domestic violence: An integration of feminist and family violence approaches, 59 *Journal of Marriage and Family*, 3, 1997, 657.

⁸³ The major turning point was during the World Wars were women joined the labour force to replace men that had been enlisted for the war.

⁸⁴ Anderson K, Gender, Status and Domestic violence: An integration of feminist and family violence approaches, 59 *Journal of Marriage and Family*, 3, 1997, 657.

⁸⁵ Lindsmyr S, 'A qualitative case study of gendered norms within the Swedish Armed Forces', Linnaeus University, 2016, 13.

⁸⁶ Lindsmyr S, 'A qualitative case study of gendered norms within the Swedish Armed Forces', Linnaeus University, 2016, 13.

Gender understood as a social concept implies that the perceived differences between men and women are determined by societal factors. This means that the practices attached to men and women are influenced and maintained by factors such as a person's upbringing, their religion and cultural norms.⁸⁷

This paper focuses on both constructions of gender. Biological and social factors influence the characteristics attached to men and women in society. Men, for example, are viewed to be dominant, strong, courageous, and aggressive. These characteristics support the belief that only men can be perpetrators of sexual violence; a belief that this paper argues to be wrong. The gender stereotypes socially constructed ideas of both men and women are sometimes incorrect and may lead to either of them being unfairly disadvantaged.

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2.3.2 GENDER NEUTRALITY

Gender neutrality within rape, is a concept that reflects modern understandings of the nature effects and dynamics of sexual offences.⁸⁸ It has three dimensions including: neutrality with respect to the victim, neutrality with respect to the perpetrator and neutrality in custodial and communal, war and conflict situations.⁸⁹ This paper focuses on the first two dimensions since the third is not relevant to the study.

Previously, the victim in sexual violence cases was always assumed to be the woman. This has been reflected in the legislation for years. However, the modern understanding of a victim of sexual offences includes men.⁹⁰ Awareness on the existence of male victims has led to recognition in the legislation. On the other hand, neutrality with respect to the perpetrator remains debatable. Female on male rape is less recognised than female on female rape.⁹¹ Critics of gender neutrality in sexual offences seek to retain the central importance given to female victims against male perpetrators.⁹²

This paper argues for complete neutrality, emphasising that recognition of male victimisation and female perpetration does not seek to undermine feminist efforts. Instead, it seeks to give

⁸⁷ Lindsmyr S, 'A qualitative case study of gendered norms within the Swedish Armed Forces', Linnaeus University, 2016, 13.

⁸⁸ Rumney P, 'In defence of gender neutrality within rape', 2007, 481.

⁸⁹ Narrain A, 'Violation of bodily integrity', Economic and Political Weekly, 2013, 11.

⁹⁰ Narrain A, 'Violation of bodily integrity', Economic and Political Weekly, 2013, 11.

⁹¹ Narrain A, 'Violation of bodily integrity', Economic and Political Weekly, 2013, 13.

⁹² Rumney P, 'In defence of gender neutrality within rape', 2007, 488.

the due protection to all victims, women as well as men. The understanding of this concept is necessary to achieve the objectives of the study.

2.3.3 POWER

As earlier discussed in the frustration-aggression theory, there is a relationship between power and violence. The individual with greater power often becomes the aggressor and in other instances, the individual with less power uses violence to forcefully acquire power. This section looks into the concept of power as defined in along three dimensions.⁹³

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One dimensional power exists where a certain individual (A) has power over another individual (B) to the extent that he (A) can get the person (B) to do something they otherwise would not do.⁹⁴ Second-dimensional power exists where a person or a group creates barriers to the public airing of policy conflicts. Lastly, third-dimensional power exists where a person not only gets another to do what they would not do but also influences their wants.⁹⁵

Sexual violence occurs along all dimensions of power, especially one-dimensional power. Either the man or a woman with greater power uses this power to get the other person to engage in a sexual act they would rather not do. The man is mostly thought to possess more power in a relationship and may use that power to gain sexual favours a woman may not otherwise give. Although this is the typical scenario, the opposite may also occur, making the man the victim.

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2.3.4 MASCULINITY

There exist cultural and social norms that create imbalances between men and women in society. Masculinity is a relational concept that defines the pattern of social behaviour associated with how men should behave and their position within various relationships.⁹⁶ It commonly relates manhood with rigid cultural and societal expectations, for example, dominance, toughness and risk-taking.⁹⁷

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⁹³ Lindsmyr S, 'A qualitative case study of gendered norms within the Swedish Armed Forces', Linnaeus University, 2016, 13.

⁹⁴ Lukes S, 'Power: a radical view', Palgrave Macmillan, 2005, 16.

⁹⁵ Lukes S, 'Power: a radical view', Palgrave Macmillan, 2005, 27.

⁹⁶ 'Men, Masculinities, and Changing Power: A Discussion Paper on Engaging Men in Gender Equality from Beijing 1995 to 2015', Men Engage Alliance in collaboration with UN Women, 15.

⁹⁷ 'Men, Masculinities, and Changing Power: A Discussion Paper on Engaging Men in Gender Equality from Beijing 1995 to 2015', 7.

This paper supports the idea that understanding the male gender as a unified system rather than a complex and varying system is problematic.⁹⁸ There are several factors within the concept of masculinity that affect men's privileges. The concept has however compromised men's health, their ability to ask for help on matters that have been labelled female problems and the ability to get help on similar matters.⁹⁹ Unfortunately, rape and sexual assault are still viewed as female problems. Although Kenya has attempted to maintain neutrality in the SOA, men who fall, victim to such offences, often remain silent and the few who report their cases are sometimes dismissed.¹⁰⁰ When implementing gender neutrality into sexual violence legislation policies on sexual violence, the focus is largely on women.

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2.4 CONCLUSION

As the theories suggest, the recognition and acceptance that men are also potential victims of sexual violence heavily influence the effective implementation of the SOA. The social and cultural norms influence the beliefs held by society that are preventing men from getting the assistance they may need. With the changing times, the beliefs held by society need to change to accommodate the emerging issues. It is also of great importance to collaborate at all levels to address the problem in question.

CHAPTER 3

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CHALLENGES AFFECTING THE IMPLEMENTATION OF THE SEXUAL OFFENCES ACT THAT AFFECT ACHIEVEMENT OF GENDER NEUTRALITY.

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3.1 INTRODUCTION

This chapter will analyse the different stages involved after a sexual offence has been reported, committed, to determine the extent to which gender neutrality is achieved in the

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⁹⁸ Waling A, 'Rethinking Masculinity Studies: Feminism, Masculinity, and Poststructural Accounts of Agency and Emotional Reflexivity', *The Journal of Men's Studies*, 1, 2018, 11.

⁹⁹ 'Men, Masculinities, and Changing Power: A Discussion Paper on Engaging Men in Gender Equality from Beijing 1995 to 2015,' 15.

¹⁰⁰ As in the case in Kenyatta Hospital where within a period of three years, 35 men sought emergency medical assistance claiming that they had been raped. The doctor's initial thoughts were that the men had engaged in risky consensual sexual activity without protection and wanted emergency medication to protect them from sexual infections.

implementation of the SOA. The stages include filing a report, investigating the claim, prosecution and ~~lastly the trial~~. The chapter will identify the specific provisions of the SOA that relate to implementation to assess whether these provisions provide adequate direction on how to transform the writings of the Act into action. Effective implementation involves multiple parties who are interdependent. The chapter will also discuss how the perceptions of each of these parties affect how the Act is implemented. The discussion on the perceptions draws heavily from the theories and concepts explained in the previous chapter. The contents of this chapter, especially on the challenges faced at each stage, will provide arguments that will form the basis for the next chapter.

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3.2 REPORTING OF SEXUAL OFFENCES IN KENYA

3.2.1 THE ~~PROCEDURE OF~~ REPORTING SEXUAL OFFENCES IN KENYA

Even with the large number of sexual violence cases in the world, the offence remains ~~severely~~ underreported. ~~The rate of reporting is even lower in Africa. The Italian National Statistics Institute reported that up to 91.6% of the cases remain unreported.¹⁰¹ The rate is even lower in Africa with 98.12% of the cases going unreported.¹⁰²~~ In Kenya, the Constitution through the Bill of Rights protects the rights of rape survivors including the right to report.¹⁰³ ~~Moreover, the Police Act requires police to enforce all laws including the Constitution.¹⁰⁴ The rights to access health care and justice are heavily reliant on the ability to report sexual offences.~~

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The procedure starts by identifying the closest police station to the scene of the crime. The victims and any witnesses available report the ~~incident ee~~ at the gender desk. Every police station is required to have a gender desk¹⁰⁵ which is a specific desk set aside for the reporting of sexual offences.¹⁰⁶ Due to the sensitivity of the cases, the police stationed at the gender desk should be trained on how to handle survivors.¹⁰⁷ The statement of the victim is then recorded and signed, then the victim is taken for a medical examination. The examination is done to detect the presence of infections and to determine the extent of injuries. The medical

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¹⁰¹ Golding J, 'Sexual assault history and limitations in physical functioning in two general population samples, 1, *Research in nursing and health*, 9, 2016, 36.

¹⁰² Gartner R and MacMillian R, 'The effect of the victim-offender relationship on reporting a crime of violence against women, 37, *Canadian Journal of criminology*, 3, 2015, 396.

¹⁰³ Article 48, *Constitution of Kenya* (2010).

¹⁰⁴ *Section 14, Police Act (2010)*.

¹⁰⁵ Set up in 2009 to increase reporting of rape cases.

¹⁰⁶ Ndubi M, 'Reporting rape cases at police stations in Kenya; Human rights dimensions of survivors in Nairobi County', Published, University of Nairobi, 2019, 5.

¹⁰⁷ Kara C, 'Enforcing and implementing affecting the law on Defilement in Kenya,' unpublished University of Nairobi, 2013, 8.

practitioner then fills in a P3 form which is a ~~document form~~ given to medical practitioners by police to ~~key fill~~ in the results of the medical examination.¹⁰⁸ If the police are satisfied with the report, the case is filed in court, marking the beginning of the legal process.

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Reporting the incident does not always result in prosecution of the offender. However, it is important since it ensures that the victim receives the necessary medical examinations and treatment. They also receive confidential counselling services, and it allows for the collection of evidence that will aid the prosecution, if the case ~~proceeds~~ ~~is not withdrawn~~.¹⁰⁹

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3.2.2 PERCEPTIONS AFFECTING THE REPORTING OF SEXUAL OFFENCES BY MEN.

The manner of interaction between the police and the survivors of sexual violence affects the general number of cases reported. The perceptions held by the survivors, police, medical practitioners, and the society at large affect the reporting of cases by men.¹¹⁰ First and most relevant to the study is the issue of gender stereotypes. Police tend to be more responsive to female victims than male victims.¹¹¹ Men ~~believe that they will be often~~ dismissed in disbelief if they report a case of sexual violence, especially if the man claims that the act was perpetrated by a woman.¹¹² ~~The perceptions held by male survivors~~ of the police may generally cause men to remain silent. On the other hand, the perceptions held by the police may influence their reception of cases involving male survivors. The level of belief the police have in the victim is essential to the reporting and prosecution of the case.¹¹³

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In relation to medical practitioners, the same perception held by police against male survivors is also common. This might affect their medical examinations and administering emergency treatment.¹¹⁴ The examinations are crucial for evidence collection. This perception may not only affect reporting but also the investigation and prosecution of the case.

Additionally, the gender of the police at the gender desk may influence reporting. It is hypothesized that women are more sympathetic to victims compared to men. Therefore, the

¹⁰⁸ Ndubi M, 'Reporting rape cases at police stations in Kenya; Human rights dimensions of survivors in Nairobi County', 2019, 7.

¹⁰⁹ 'Reporting Procedures for Sexual Assault, Domestic Violence, Dating Violence, Stalking, and other forms of Sexual Misconduct', Sinclair Community College, 1.

¹¹⁰ Ndubi M, 'Reporting rape cases at police stations in Kenya; Human rights dimensions of survivors in Nairobi County', 2019, 9.

¹¹¹ Ndubi M, 'Reporting rape cases at police stations in Kenya; Human rights dimensions of survivors in Nairobi County', 2019, 10.

¹¹² As explained in the previous Chapter.

¹¹³ Ndubi M, 'Reporting rape cases at police stations in Kenya; Human rights dimensions of survivors in Nairobi County', 2019, 9.

¹¹⁴ Gathura G, 'Cases of men raped by women in Kenya alarm doctors', The Standard, 2017.

presence of female police may encourage the reporting of sexual offences.¹¹⁵ Fear of further harm also influences the reporting of cases. A victim, whether male or female, is more likely to report a case if the perpetrator is unknown to them or if they feel secure.¹¹⁶ A case involving a person known to the victim neighbour, partner, family member, friend or acquaintance is more likely to go unreported. The victims need reassurance and protection from the perpetrators.

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3.2.3 CHALLENGES AFFECTING THE REPORTING PROCESS.

The Task Force on the implementation of the SOA noted the many challenges that affect the reporting process. These challenges subsequently affect the achievement of gender neutrality. The main challenge is the failure of victims to report the cases.¹¹⁷ Many, if not all, cases reported are those involving female victims. This only supports the idea that women are the only victims, therefore, justifying the preferential treatment.

~~The key focus will be on the challenges highlighted by the police commissioner and the ministry of public health and sanitation during the Workshop.~~¹¹⁸ ~~According to the police commissioner, the main challenge is the failure of victims to report the cases. The reasons for these include fear of the perpetrator, fear of not being believed, cultural believes that normalise sexual violence and pressure to solve related issues outside court.~~ The SOA presents a challenge in its provisions. Section 38 of the Act provides that when someone makes a false allegation of sexual violence against a person, the person is liable to get a sentence similar to what the accused would have received if found guilty.¹¹⁹ The purpose of the provision is to deter persons from lying about sexual offences. This provision has a great effect on men. This is because it is more difficult for men to prove their claims compared to women.¹²⁰ If the man fails to prove his claim, he may get a sentence as though he committed the offence. However, it has caused people to shy away from reporting their cases since in case the victim fails to prove their claims, they may get sentenced as though they committed the reported offence.

¹¹⁵ Brown M, 'Aspects of discriminatory treatment of women police in serving forces in England and Wales, 38, *British Journal and Criminology*, ' 2, 2019.

¹¹⁶ Ndubi M, 'Reporting rape cases at police stations in Kenya; Human rights dimensions of survivors in Nairobi County', 2019, 9.

¹¹⁷ TFSOA, '*Sexual Offences Act Implementation Workshop*', Comprehensive report, 18.

¹¹⁸ ~~Kenya uses a top-down approach which in this case looks at the challenges from the point of view of those holding power rather than those going through the challenges.~~

¹¹⁹ Section 38, *Sexual Offences Act (2006)*.

¹²⁰ Ndubi M, 'Reporting rape cases at police stations in Kenya; Human rights dimensions of survivors in Nairobi County', 2019, 9.

¹²¹

~~The Ministry of public health and sanitation highlighted that the number of medical practitioners able to offer the required services upon the occurrence of a sexual offence is insufficient. These services include managing physical injury, conducting clinical examinations, post exposure prophylaxis for sexually transmitted diseases and emergency contraception.¹²² As of 2014, Nairobi only had one authorised surgeon to sign all P3 forms. This leads to delays in service production. Moreover, only a few medical practitioners knew how to fill a PRC form.¹²³ Effective implementation is dependent on the collaboration between the police and medical practitioners. Without collaboration, the case is not likely to proceed. The survivors right to justice will be denied.~~

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~~The SOA presents a challenge in its provisions. Section 38 of the Act provides that when someone makes a false allegation of sexual violence against a person, the person is liable to get a sentence similar to what the accused would have received if found guilty.¹²⁴ The purpose of the provision is to deter persons from lying about sexual offences. However, it has caused people to shy away from reporting their cases since in case the victim fails to prove their claims, they may get sentenced as though they committed the reported offence.~~

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~~Lastly, some sexual violence cases are dealt with by informal justice systems.¹²⁵ The chiefs, who assume the role of the police, are influenced by cultural beliefs and practices of the various communities. In most cultures, men are held in high esteem as the providers and protectors of the families. They possess greater power in the society.¹²⁶ Therefore, men who become victims opt to remain silent instead of going through these informal justice systems.~~

~~informal justice systems in rural areas reduce the number of cases reported to the police.¹²⁷ This may be viewed as an advantage since it helps with the overload of cases reported to the police. However, the chiefs who assume the role of the police are sometimes influenced by the cultural beliefs and practices of the various communities.¹²⁸ In most cultures, men are held in~~

¹²¹ TFSOA, 'Sexual Offences Act Implementation Workshop', Comprehensive report, 18.

¹²² TFSOA, 'Sexual Offences Act Implementation Workshop', Comprehensive report, 18.

¹²³ TFSOA, 'Sexual Offences Act Implementation Workshop', Comprehensive report, 19.

¹²⁴ Section 38, *Sexual Offences Act (2006)*.

¹²⁵ TFSOA, 'Sexual Offences Act Implementation Workshop', Comprehensive report, 31.

¹²⁶ TFSOA, 'Sexual Offences Act Implementation Workshop', Comprehensive report, 36.

¹²⁷ TFSOA, 'Sexual Offences Act Implementation Workshop', Comprehensive report, 31.

¹²⁸ TFSOA, 'Sexual Offences Act Implementation Workshop', Comprehensive report, 36.

~~high esteem as the protectors of the families. Therefore, men who become victims tend to remain silent.~~

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3.3 INVESTIGATION OF SEXUAL OFFENCES IN KENYA

3.3.1 INVESTIGATION PROCEDURES IN KENYA

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Investigations are done to gather evidence to support the trial. This process entails gathering new evidence and confirming the facts given by the police and medical examiners. Witnesses and survivors are also interrogated and prepared for the trial.¹²⁹ The forensic samples taken during the medical examination are forwarded to the team of investigators for further analysis. Identification parades may also be done at this stage. The purpose is to give the survivors and witnesses a chance to identify the perpetrator.¹³⁰ The parades are often used when the perpetrator is unknown to the victim. In a study by Behrman and Davey, it was found that 73% of survivors can identify the perpetrator where he or she is present in an identification parade.¹³¹

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Legislation in Kenya does not directly lay out the investigation procedure for sexual offences. The SOA is silent on the general investigation procedures; however, it gives the Attorney General the sole power to determine whether to pursue or terminate investigations on crimes in the SOA.¹³² Additionally, the Act protects the crime scene from interference by making it an offence to mismanage the crime scene.¹³³ The Kenya Force Standing Orders provides the steps that the police and military should take in investigating crimes. These can be summarised as recording statements, opening case files, collecting evidence and analysing evidence.¹³⁴

As a constitutional requirement, the survivors have a right to information.¹³⁵ The investigation should be conducted promptly and transparently to avoid infringing on the victims' right to justice.¹³⁶ The police should give constant updates of the process to the victim.

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3.3.2 CHALLENGES AFFECTING THE INVESTIGATION PROCESS

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¹²⁹ Seelinger K, Silverberg H and Mejia R, 'The investigation and prosecution of sexual violence', Human Rights Center University of California, Sexual Violence & Accountability Project working paper, May 2011, <<https://www.usip.org/sites/default/files/missing-peace/seelinger-the-investigation.pdf>>- 14 December 2020.

¹³⁰ Ndubi M, 'Reporting rape cases at police stations in Kenya; Human rights dimensions of survivors in Nairobi County', 2019, 8.

¹³¹ Behrman w and Davey L, 'Eyewitness identification in actual criminal cases: An archival analysis', 25, *Law and Human behaviour*, 2011, 481.

¹³² Section 40, *Sexual Offences Act* (2006).

¹³³ Section 37, *Sexual Offences Act* (2006).

¹³⁴ TFSOA, '*Sexual Offences Act Implementation Workshop*', Comprehensive report, 24.

¹³⁵ Article 35, *Constitution of Kenya* (2010).

¹³⁶ Article 48, *Constitution of Kenya* (2010).

~~The first challenge affecting the investigation process is insufficient resources. Resources include both human and financial resources. Few police officers are sufficiently trained on how to receive survivors and conduct investigations.¹³⁷ In the medical field, doctors and forensic chemists that handle investigations are also few. More facilities including police gender desks, private spaces for interviews, forensic labs and safe shelters are required to facilitate the investigations. These facilities cannot be acquired with the limited resources set aside for SGBV cases.¹³⁸~~

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Withdrawals of cases is another challenge that is mainly experienced at this stage. Several victims end up withdrawing their cases due to fear of the perpetrator and the tiresome nature of the process.¹³⁹ In Kenya, there are few reported cases of sexual violence against men. However, none of these cases have made it to court. This shows that some of these cases are withdrawn during the investigations. Support should be given to these victims during the investigation to ensure the cases proceed. The perceptions held by police officers of male sexual victimisation may also affect how the investigations are conducted.

~~the tiresome nature of the process. Others withdraw due to fear of the perpetrator especially after identification has taken place.¹⁴⁰ Witnesses and survivors need to feel safe throughout the investigation. Additionally, only 38.5% of the police provide necessary information to the survivors during the investigation.¹⁴¹ In turn, several cases get withdrawn before trial or fail to get the input of the survivors which may be beneficial to the case.~~

The rights of the accused provided for in the Constitution¹⁴² creates a challenge for the police during an investigation. An accused person should only be detained for a maximum of 24 hours.¹⁴³ This gives the police limited time 24 hours to gather enough evidence and charge the individual, failure to which the accused should be released. Men are particularly affected since, with the difficulty in gathering evidence, their cases are less likely to proceed. Moreover, the inadequate investigative capacity of the police adds to this problem. The medical examinations

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¹³⁷ TFSOA, 'Sexual Offences Act Implementation Workshop', Comprehensive report, 28.

¹³⁸ TFSOA, 'Sexual Offences Act Implementation Workshop', Comprehensive report, 29.

¹³⁹ Ndubi M, 'Reporting rape cases at police stations in Kenya; Human rights dimensions of survivors in Nairobi County', 2019, 8.

¹⁴⁰ Ndubi M, 'Reporting rape cases at police stations in Kenya; Human rights dimensions of survivors in Nairobi County', 2019, 8.

¹⁴¹ Ndubi M, 'Reporting rape cases at police stations in Kenya; Human rights dimensions of survivors in Nairobi County', 2019, 35.

¹⁴² Article 49, *Constitution of Kenya* (2010).

¹⁴³ Article 49 (f), *Constitution of Kenya* (2010).

~~and clinical tests only may take even more than 24 hours to give conclusive results.¹⁴⁴ Releasing the accused may cause fear to the victim and witnesses who may then withdraw the case.~~

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~~Another challenge is the inadequate investigative capacity. The TFSOA noted that language barriers affect the recording of statements, especially in rural areas. Some police officers are not conversant with the language of the locals. Information regarding sexual violence is too sensitive to be misinterpreted or omitted. Another capacity challenge is the weak chain of evidence.¹⁴⁵ The processes of recording, processing, analysing and storage of evidence during investigation often face corruption, negligence, and theft. This lowers the credibility of the evidence.~~

Lastly, ~~the~~ lack of knowledge affects the investigation process. Some victims are unaware that the SOA protects them from sexual violence.¹⁴⁶ Due to this, some of them remain silent while others report their cases late when it is very difficult to gather evidence thus affecting the investigation. A number of police officers also lack adequate knowledge on handling male victims.¹⁴⁷

3.4 PROSECUTION AND TRIAL OF SEXUAL OFFENCES AGAINST MEN S IN KENYA

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3.4.1 PROSECUTION AND TRIAL PROCEDURES IN KENYA

After the investigations have been concluded, the accused is prosecuted, and the trial process begins. The constitution¹⁴⁸ provides several rights applicable at this stage including the right to be brought to court within 24 hours, the right to be informed of the reason for arrest, the right to a fair hearing with representation in court and the right to cross-examine witnesses.¹⁴⁹ The SOA provides for the protection of witnesses who are decided by the court to be vulnerable.¹⁵⁰ If the accused is found guilty, the SOA provides for minimum sentences for the various sexual offences.

Several challenges faced at this stage are due to the failures of the investigation process explained above. Besides those, the perceptions of the judges also affect the trial process. This

¹⁴⁴ Ndubi M, 'Reporting rape cases at police stations in Kenya: Human rights dimensions of survivors in Nairobi County', 2019, 8.

¹⁴⁵ TFSOA, 'Sexual Offences Act Implementation Workshop', Comprehensive report, 29.

¹⁴⁶ TFSOA, 'Sexual Offences Act Implementation Workshop', Comprehensive report, 31.

¹⁴⁷ TFSOA, 'Sexual Offences Act Implementation Workshop', Comprehensive report, 31.

¹⁴⁸ Article 49, *Constitution of Kenya* (2010).

¹⁴⁹ TFSOA, 'Sexual Offences Act Implementation Workshop', Comprehensive report, 31.

¹⁵⁰ Section 31, *Sexual Offences Act* (2006).

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will be further explained through cases where the gender of the victim results in unfair decisions. Moreover, the limited number of judges and prosecutors has caused a backlog of cases.¹⁵¹ Cases stay in court for years causing a strain on the resources and time of the victims who often withdraw the cases. Finally, the reliance on evidence also presents another challenge. The courts are affected by the rampant corruption in Kenya that leads to theft or manipulation of evidence.¹⁵²

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3.4.2 CRITICISM OF THE PROSECUTION AND TRIAL PROCESS OF FEMALE PERPETRATORS IN KENYA

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The prosecution and trial process should be fair and non-discriminatory. Both male and female victims should be able to access justice through this process. Kenyan courts have shown time and time again that the female individual is at an advantage while the male individuals are viewed as perpetual offenders.¹⁵³

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In the case, *CKW v Attorney General & Another*,¹⁵⁴ two adolescents, male and female, engaged in consensual sex. Both were sixteen years old and in a relationship. The boy was charged, convicted and sentenced for having sex with a minor. The girl, on the other hand, was left scot-free. The constitutionality of Section 8 of the Act was challenged on the grounds of discrimination. The SOA provides that any person who commits an act which causes penetration with a person under eighteen years is guilty of defilement and is liable upon conviction to imprisonment.¹⁵⁵ The High court retained the decision stating that Section 8 aimed to protect adolescents and the language did not distinguish between male and female, therefore, could not be discriminatory on gender basis.¹⁵⁶ The courts¹⁵⁷ in implementing section 8 were in breach of the law since the boy and the girl did not receive equal benefit¹⁵⁸ from the law as required by the Constitution.¹⁵⁹

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In another case, *GO v Republic*,¹⁶⁰ a fifteen-year-old boy was charged with the offence of defilement. The other party involved was a seventeen-year-old girl. As in the previous case,

¹⁵¹ TFSOA, 'Sexual Offences Act Implementation Workshop', Comprehensive report, 28.

¹⁵² TFSOA, 'Sexual Offences Act Implementation Workshop', Comprehensive report, 30.

¹⁵³ Okwach H, 'The Problematic Jurisprudence on the Law of Defilement of Adolescents in Kenya' *Strathmore Law Review*, 2019, 56.

¹⁵⁴ *CKW V Attorney General & another*, 2014, eKLR.

¹⁵⁵ Section 8, *Sexual Offences Act* (2006).

¹⁵⁶ Okwach H, 'The Problematic Jurisprudence on the Law of Defilement of Adolescents in Kenya' 56.

¹⁵⁷ *CKW v Attorney General & Another*, 2014, eKLR.

¹⁵⁸ ~~Article 27, Constitution of Kenya (2010).~~

¹⁵⁹ *CKW v Attorney General & Another*, 2014, eKLR.

¹⁶⁰ *GO V Republic*, 2017, eKLR.

only the boy was charged and convicted of the offence. The accused alleged that he had been discriminated against since both were minors and committed the offence. The court agreed that both parties are minors and need equal protection by the law. It was decided that the accused would only get probation¹⁶¹ instead of the required sentence.¹⁶² The decision can be criticised since the girl, despite being older, got no punishment.

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Finally, in *POO v Director of Public Prosecution*,¹⁶³ the prosecution can be criticised for failing to observe impartiality when dealing with a case of defilement. The accused was a boy who engaged in consensual sexual intercourse with another minor and was charged with defilement. The office of the Director of Public Prosecution was sued for discrimination since no charge was filed against the girl. The court agreed with the accused and decided that instead of shifting the blame to the boy, both minors should be viewed as victims.¹⁶⁴

These cases illustrate the weaknesses of the prosecution and courts and how these weaknesses clearly show the lack of gender neutrality in the implementation of the SOA. In prosecuting cases, the Director of Public Prosecution has a bias against male individuals even when they too are victims. In courts, different rulings are given even when the facts of the cases are similar. Many of these cases end with a discriminatory decision based on gender.

3.5 CONCLUSION

By ~~Through~~ analysing the processes of reporting, investigating, prosecuting and trying of sexual violence cases, and the challenges at each level, the paper concludes that gender neutrality has not been sufficiently achieved in practice. The SOA has not adequately provided for how these processes are to be implemented in a gender-neutral way. The TFSA has noted several challenges facing the implementation at various levels. However, the findings of the taskforce fail to sufficiently address the issue of gender neutrality in implementation in Kenya. This supports the hypothesis of the current paper.

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¹⁶¹ *GO v Republic*, 2017, eKLR.

¹⁶² The minimum sentence in the SOA for a person who commits the offence of defilement with a child aged between sixteen and eighteen is fifteen years.

¹⁶³ *POO v Director of Public Prosecution*, 2017 eKLR.

¹⁶⁴ Okwach H, 'The Problematic Jurisprudence on the Law of Defilement of Adolescents in Kenya', 57.

CHAPTER 4

COMPARATIVE STUDY: IMPLEMENTATION MEASURES IN SOUTH AFRICA THAT FOSTER GENDER NEUTRALITY

4.1 INTRODUCTION

South Africa's Sexual Offences Act was updated in 2007. All sexual crimes were consolidated in one law that took a gender-neutral approach in defining sexual offences.¹⁶⁵ This is in line with the country's Constitution, that was founded on the values of human dignity, equality and the advancement of human rights and freedoms.¹⁶⁶ Despite the comprehensive and inclusive definitions, South Africa struggled to implement the Act.¹⁶⁷ This has led to the adoption of several measures to ensure effective implementation. These include setting up of sexual offences courts, removing the time limit for prosecuting sexual offences, formation of victim assistance services, and improved collaboration with civil societies. This chapter will investigate the extent to which these measures foster gender neutrality in South Africa. A comparison with Kenya will be conducted to determine whether these measures can be successfully used in Kenya to achieve gender neutrality in implementation.

4.1.1 CHOICE OF COUNTRY

South Africa is far from eradicating rape. The country has been affected by rape cases so much that it was labelled the rape capital in the world.¹⁶⁸ In an effort to reduce the high rate of sexual offences, considerable measures have been put in place. South Africa was chosen over the UK and US since it is an African country with relatable cultural norms regarding to sexual violence. Additionally, it has extensive literature on issues of sexual violence including cases involving men. Lastly, as mentioned earlier, the gendered provision in the SOA 2003¹⁶⁹ fail to recognise male rape. This limits the use of a gender-neutral approach in implementing their SOA. The

¹⁶⁵ 'Sexual Offences Act Implementation: Policy Development and Advocacy', Sonke Gender Justice.

¹⁶⁶ Department of Justice and Constitutional Development, *The Implementation of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007*, Annual Report, South Africa, 2016, 13.

¹⁶⁷ Legal Action Worldwide, *Best Practices: African Sexual Offence Act*, 2014, 9.

¹⁶⁸ Mgozeli, E., 'Exploring men's lived experiences when reporting rape to police in South Africa',

US National Library of Medicine National Institutes of Health, 2020.

¹⁶⁹ The UK Sexual Offences Act 2003.

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use of one country provides reasonably adequate information to meet the objective of this study: providing recommendations to be applied in Kenya's implementation of the Act,

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4.14.2 SEXUAL OFFENCE COURTS

The first Sexual Offences Courts were introduced in South Africa in 1993¹⁷⁰ to address the high rates of sexual violence in the country. The courts, however, faced several challenges including, lack of a specific legal framework, lack of a dedicated budget, restricted spaces to set up the courts, inadequate consultation from other stakeholders, and low visibility in remote areas.¹⁷¹ These challenges contributed ~~led~~ to the failure of the courts. The Ministerial Task Team on adjudication of Sexual Offences (MATTSO) came up with recommendations to re-establish the courts in order to address the specific needs of sexual violence victims. Nevertheless, the re-establishment was accompanied with the requirement that the gaps identified in the operations of the previous Sexual Offences Courts were filled.¹⁷² As of 2016, the following measures had been taken: 47 regional courts were upgraded to sexual offences courts; ~~a~~ a proposed budget for the courts was created although it ~~but~~ is yet to be approved, the national, regional and local sexual offences court committees were tasked to identify sites where sexual offences court structures could ~~an~~ be established and the department of Justice partnered with USAID to conduct research on how various stakeholders can collaborate to ensure effectiveness of the courts.¹⁷³

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These courts are advantageous since they have specially educated and trained personnel who are knowledgeable on various issues regarding sexual violence.¹⁷⁴ Insensitive treatment of male victims of sexual offences is therefore reduced. Sexual violence against men is recognised as a real problem and given the due attention. Additionally, the turnaround time of cases has significantly reduced, with more victims accessing justice.¹⁷⁵ This encourages victims to

¹⁷⁰ Initiated by the then Attorney General of the Western Cape at Wynberg Regional Courts.

¹⁷¹ Ministerial Task Team on the Adjudication of Sexual Offences Act (MATTSO), *Report on the re-establishment of Sexual Offences Courts*, 2013, 9.

¹⁷² Ministerial Task Team on the Adjudication of Sexual Offences Act, *Report on the re-establishment of Sexual Offences Courts*, 11.

¹⁷³ Department of Justice and Constitutional Development, *The Implementation of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, Annual Report*, 30.

¹⁷⁴ Ministerial Task Team on the Adjudication of Sexual Offences Act, *Report on the re-establishment of Sexual Offences Courts*, 13.

¹⁷⁵ Ministerial Task Team on the Adjudication of Sexual Offences Act, *Report on the re-establishment of Sexual Offences Courts*, 24.

institute claims against their offenders. Lastly, the courts are required to promote equality and fairness in their functions.¹⁷⁶ This implies treating all victims, male and female, equally.

In Kenya, there are no specialised courts that deal with sexual offences. Cases are heard at the magistrate courts and appeals are further forwarded to the High Court.¹⁷⁷ The courts have been criticised for the high level of acquittals, prolonged trials, poor investigations and lenient sentences. Moreover, there are arguments that the legal system in general ~~take take~~ a biased approach in determining cases.¹⁷⁸ The woman is viewed as the perpetual victim while male rape cases barely make it past the reporting stage. The closest thing to sexual offence courts in Kenya, are the gender desks that are specialised for sexual offences victims. Kenya can benefit from the system by having specialised courts that deal with gender equality in among other issues.

4.24.3 VICTIM ASSISTANCE SERVICES

These are assistance services given to victims of sexual violence throughout the legal process. The special assistance includes sharing important information ~~with~~ the victim, offering counselling services, ensuring the victim is protected from harm or threats of harm, offering legal advice and emotional support.¹⁷⁹ These services were introduced in South Africa by the Sexual Offences and Community Affairs Unit in 2002.¹⁸⁰ The individuals working under this initiative are trained on the various issues regarding sexual violence. This initiative offers the much-needed support to male victims who face discrimination in the legal process.

In Kenya, the gender desks offer support to victims during the reporting stage and sometimes up to the investigation stage. This support needs to be extended throughout the trial process. Male victims, in particular, are often ridiculed and discriminated. This makes it difficult for them to initiate proceedings against the offenders. Having victim assistance services would give support to all victims, including men.

¹⁷⁶ Ministerial Task Team on the Adjudication of Sexual Offences Act, *Report on the re- establishment of Sexual Offences Courts*, 18.

¹⁷⁷ Shadle B, 'Sexual Offences in Kenyan Courts', *Kenya Law Journal*, 2010 - <<http://kenyalaw.org/kl/index.php?id=1920>>- on 12 January 2021.

¹⁷⁸ Shadle B, 'Sexual Offences in Kenyan Courts', *Kenya Law Journal*, 2010 - <<http://kenyalaw.org/kl/index.php?id=1920>>- on 12 January 2021.

¹⁷⁹ Ministerial Task Team on the Adjudication of Sexual Offences Act, *Report on the re- establishment of Sexual Offences Courts*, 20.

¹⁸⁰ Ministerial Task Team on the Adjudication of Sexual Offences Act, *Report on the re- establishment of Sexual Offences Courts*, 21.

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4.4 REMOVAL OF TIME LIMIT FOR PROSECUTION OF SEXUAL OFFENCES

In 2017, the Constitutional Courts, in the case *Nicole Levenstein and Others v The Estate of the Late Sidney Lewis Frankel and Others*, issued a unanimous judgement removing the time limit in which a criminal proceeding for sexual violence can be instituted. Previously, the time limit was set at 20 years.¹⁸¹ This was helpful for evidence collection since it becomes more difficult to collect evidence with time. Nonetheless, the judgement ruled Section 18 of the Criminal Procedure Act unconstitutional on the grounds that it was against the right to institute criminal proceedings for sexual offences.¹⁸²

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This judgement has been instrumental in the fight against sexual violence. It encourages victims of rape to report their cases despite the lapse of time by removing procedural barriers.¹⁸³ Reporting sexual violence is a difficult experience for the victims. Male cases remain largely unreported due to various misconceptions and perceptions. Despite the difficulties entailed, female victims are more likely to report their cases and receive support to institute criminal proceedings. This judgement gives room for male victims to deal with the trauma, heal and come to terms with the fact that being victims of sexual violence does not make them less manly. Therefore, this measure promotes gender neutrality in implementation of the Act. Men are given as much time as they need to decide on whether to prosecute the perpetrator.

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In Kenya, no distinction is drawn on sexual offences in relation to time of instituting a claim. Neither the SOA nor the Limitations of Actions Act prescribe periods for such time limits.¹⁸⁴ The lack of a provision dealing with the time limit for instituting claims is problematic. It leaves room for cases being struck off due to procedural barriers. Kenya States should take appropriate measures to ensure time limits do not affect their quest for justice against serious crimes such as sexual violence.

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4.34.5 CONCLUSION

South Africa has unique implementation measures that can be said to foster gender neutrality. It also contains a ministerial taskforce to monitor implementation. Most of the measures

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¹⁸¹ International Federation for Human Rights, *'No more time limit to prosecute rape cases in South Africa'*, 2018, 1.

¹⁸² Muwanga S, 'The Impact of Litigation on Combating Sexual Violence and its Consequences in Africa', International Federation for Human Rights, 2019, 15.

¹⁸³ Muwanga S, 'The Impact of Litigation on Combating Sexual Violence and its Consequences in Africa', 16.

¹⁸⁴ Wanjiku F, *'A prescription period distinguishing between rape or compelled rape, and other sexual offences is irrational and arbitrary thus unconstitutional as the harm caused by sexual offences is gravely similar'*, Kenya Law, 2018.

identified in this chapter do not apply directly to ~~male victims~~men, howevertherefore, these measures ~~can be have been~~ applied ~~in to men in~~the Kenyan context ~~to achieve gender neutrality in the implementation of the SOA. T.~~This comparison would inform some of the recommendations discussed in the next chapter.

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CHAPTER 5

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FINDINGS, RECOMMENDATIONS AND CONCLUSION

This chapter gives a summary of the findings of the study based on the research conducted above. The recommendations of the paper shall be drawn from the comparative study with South Africa ~~and furtherthe writer's~~ observations. Lastly, conclusions shall be made to close the discussion.

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5.1 FINDINGS OF THE STUDY

The SOA 2006 fosters gender neutrality, however, this neutrality has not been achieved in the implementation. Gender neutrality in implementation of the SOA is vital. Women are increasingly perpetrating sexual offences against men. The power, once possessed by men, is slowly shifting due to women empowerment. The aggressive behaviour by the women is also influenced by the years of frustration under ~~some the men~~,¹⁸⁵ Men, therefore need to receive the due protection.

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Generally, several challenges affect implementation including underreporting, lack of adequately trained police officers, fear of harm by the perpetrators, fear of disbelief by the police and medical officers, and lack of financial resources, among others.¹⁸⁶ These challenges show that the inadequacy of the implementation affect men more than women. ~~The Ce~~courts also play a major role ~~in promotingthe~~ discrimination against male individuals,¹⁸⁷ especially when a female minor is involved.

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Both Kenya and South Africa have taken measures to ensure gender neutrality is achieved in the drafting of the SOAs. Nonetheless, South Africa has taken various beneficial measures to ensure effective implementation of the SOA that are not available in Kenya. These measures

¹⁸⁵ Frustration aggression theory.

¹⁸⁶ Highlighted during the workshop by the Task Force on the Implementation of the Sexual Offences Act.

¹⁸⁷ *Go v Republic, POO v Director of Public Prosecution, CKW v Attorney General and another.*

can be adopted in Kenya to promote gender neutrality in implementation. They include setting up sexual offence courts, providing victim support services, and removing the time limit for prosecuting sexual offences.

These findings confirm the hypothesis of the paper that inadequacies in the implementation procedures affect the achievement of gender neutrality.

5.2 RECOMMENDATIONS

As seen in South Africa, Sexual Offences Courts give specialised attention to sexual violence cases. Kenyan courts have been noted to pose a great challenge in achieving gender neutrality. This may be due to the fact that the judicial officers do not possess specialised training on the various issues regarding sexual violence. This paper recommends that Kenya **introduces** ~~should adopt~~ these courts to deal with the sexual violence cases. The Sexual Offences Courts would hear cases without a bias **in favour of** ~~for~~ women since they recognise that men too can be victims. The neutrality in the judgements would also encourage men to report and prosecute their cases since they stand a chance at accessing justice.

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Secondly, **in addition to the gender desks**, Kenya should provide victim assistance services **to guide and protect victims throughout the various stages**. ~~in addition to the gender desks. These beneficial services are provided for in South Africa. The purpose is to guide and protect the victims throughout the various stages.~~ ~~The~~ gender desks play an important role during the reporting stage but ~~these are~~ ~~this are~~ not adequate. This measure will give the necessary support to the male victims living in silence in Kenya. A sense of safety will be created.

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The third measure that Kenya can adopt from South Africa is explicitly stating in the SOA that **there is no time limitation for the prosecution of sexual offences**. A distinction should be made on sexual offences in relation to time of instituting claims. This will encourage men in Kenya to institute proceedings against their aggressors despite long lapse of time. This is important since male cases often remain unreported. This measure will provide Kenyan men time to come to terms with the experience and seek justice.

Commented [JW168]: Previous comment on time limit refers. What's their logic? What are the risks of not having a time limit considering that the current one is quite long – 20 years? Include in previous chapter, not here. Here only make an allusion.

Another important recommendation is spreading awareness through education at public gatherings, learning institutions and seminars. This will debunk the myths about male sexual victimisation. Subsequently, it will encourage men to report and prosecute their cases since the society is informed that men too can be victims. The education should also extend to police

and medical officers who have a major influence on whether cases proceed or not. They should be educated on the existence of rape and sexual assault of men, how to handle male victims, and the effects of ~~the~~ mishandling men who decide to report their cases.

Kenya mainly uses the top-down approach¹⁸⁸ to come up with solutions for existing problems in the country. Using the combined approach¹⁸⁹ to deal with cases, would promote the achievement of gender neutrality in implementation of the SOA. The locals would give more input on challenges faced by male victims of sexual violence, showing the gravity intensity of the issue.~~of issue.~~ The government would be able to make more effective reforms to cater to the male victims as required.

The Kenyan government should set up more resources to conduct further research on male sexual victimisation. This is a neglected area among Kenyan researchers. With the necessary information, the government can come up with more ~~and better~~ measures to ensure that the implementation of the SOA is non- discriminatory.

5.3 CONCLUSION

Sexual violence is an issue that affects all people, men and women. Consequently, preferential treatment should not be afforded to either men or women~~of the genders~~. In Kenya, gender neutrality is yet to be achieved in the implementation of the SOA 2006. The recommendations provided in the paper would create more opportunities for more men to seek justice, as they should. Finally, Kenya should work to ensure that the provisions of the SOA are reflected in the society.

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¹⁸⁸ This approach places emphasis on the central actors, that is the government and legislative actors.

¹⁸⁹ This approach involves collaboration of the high level and low-level members in the society.

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