

**EXPLORING THE BOUNDARIES OF CONJUGAL RIGHTS: MARITAL RAPE AS
A CRIMINAL OFFENCE IN KENYA**

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Declaration

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

Signed:

Date:

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

Signed:.....

[Mukami Wangai]

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DEDICATION

I would like to dedicate this research to the victims of marital rape that continue to fight a war that they should not be fighting in this day and age.

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ABSTRACT

In Kenya, marital rape is not recognized as a criminal offence. This dissertation therefore argues that criminalizing the act is not only a necessary but sufficient means of tackling the issue. The marital rape exemption in Kenya is a form of discrimination to the victims of the act as they do not have the necessary legal backing to tackle the issue.

I shall therefore analyse the theories that have so far been used to uphold the marital rape exemption. This shall be followed by scrutinizing the necessity to criminalize marital rape from a human rights perspective. This research shall seek to tackle the challenges that continue to inhibit the criminalization of marital rape. I will argue that an examination of the wrongful gender stereotypes of married women is essential to create effective and holistic remedies and that wrongful gender stereotypes of married women violate their rights to equality and non-discrimination and the right to be free from violence.

LIST OF ABBREVIATIONS

CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
DEVAW	Declaration on the Elimination of Violence against Women
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
UDHR	Universal Declaration of Human Rights
UN	United Nations

LIST OF CASES

Esther Nangwanaa Nandi v Jones Chewe Bobo (2006) *eKLR*

Estelle T. Griswold and C. Lee Buxton v Connecticut (1965) The Supreme Court of the United States

People v Liberta (1984) Appeals Court of New York

People vs. Brown (1894) California Court of Appeal

R v Clarence (1889) The United Kingdom House of Lords

R v R (1992) The United Kingdom House of Lords

S v Mvamvu (2004) The Supreme Court of South Africa

S v Modise (2007) In the High Court of South Africa

Trammel v United States (1980) The Supreme Court of the United States

CHAPTER 1: INTRODUCTION

1.1 BACKGROUND

The crime of rape generally refers to non-consensual sexual intercourse that is often characterized by use of physical force, threat of injury, or other duress.¹ The common law definition of rape is unlawful intercourse by a man with a woman who is not his wife by force or threat and against her will.²

In Kenya, the Sexual Offences Act³ defines rape as an intentional and unlawful act which causes penetration to a person's genital organs without their consent or consent is obtained by use of force, threats or intimidation.⁴ Section 43(5) of the Sexual Offences Act, however, states that it is not an offence to coerce someone into a sexual act by using force or threat of harm if you are legally married to that person. This provision therefore strips victims of the protection from the state against violent and forced sex, with respect to one's husband.⁵

Despite the legal presence of section 43(5) of the Sexual Offences Act, in 2003, the first government survey was conducted by the Kenya Demographic and Health survey regarding violence against women. The survey found that 16% of married and divorced or separated women experienced sexual violence from their husbands.⁶ Between the years 2008 and 2009 the Kenya Demographic and Health Survey, conducted yet another survey and it was reported that 17% of 'ever-married' women experienced sexual violence by a husband.⁷ These statistics therefore prove that regardless of the exclusionary provision under Sexual Offences Act, marital rape is an ever present crime in our society.

The right to be free from coercion and violence is a human right that is clearly outlined in several regional and international laws that Kenya is a signatory to. These conventions include the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the International Covenant on Civil & Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Kenya has fallen

¹ Hasday J.E, Contest and Consent: A Legal History of Marital Rape 88, *California Law Review* (2000) 1382.

² Hasday J.E, Contest and Consent: A Legal History of Marital Rape 88, *California Law Review* (2000) 1384 .

³ Section 3, *Sexual Offences Act* (No.3 of 2006).

⁴ Section 3, *Sexual Offences Act* (No.3 of 2006).

⁵ West R, American Society of International Law, Symposium on the international legal obligation to criminalize marital rape: Marital Rape, Consent, and Human Rights: Comment on "Criminalizing Sexual Violence against Women in Intimate Relationships", 6.

⁶ Central Bureau of Statistics (CBS) [Kenya], Ministry of Health [Kenya] and ORC Macro, 2004, Kenya Demographic and Health Survey 2003).

⁷ Kenya National Bureau of Statistics (KNBS) and ICF Macro, Kenya Demographic and Health Survey 2008-2009.

short of its obligations to protect all people from violence as outlined in the Conventions. Its continued insistence to uphold the marital rape exemption is a classic example of its failed obligations.

There are several reasons that have been attributed to this archaic state of law. These difficulties take both a legal and social angle. In terms of the legal aspect there is no question that "ordinary" rape is a difficult crime to prove. It presents evidentiary problems for both the prosecutor and the police.⁸ However, this crime becomes more problematic for all concerned when the assailant is someone known and trusted by the victim-such as a spouse. It is quite a daunting task to prove that the crime of rape occurred in this situation as opposed to an act of passion or love between the spouses.

From a social and cultural perspective, the rigid roles assigned to the husband and wife have more or less informed our current laws, traditions and religious perspective surrounding the institution of marriage. For instance, the marriage rituals of almost every major tradition contain some ideology underscoring the view of a woman as the property of man. A case in point is the practice of payment of dowry which is more often viewed as a form of consideration for the obtainment of the wife as opposed to a token of appreciation,⁹ refers to the woman as the property of the husband.

Such deeply rooted cultural and traditional views of the man and woman in a marriage have hence created the stalemate in various countries across the globe with regards to the issue of marital rape. In this regard, countries such as Kenya still grapple with the idea and legitimacy of marital rape.

1.1 STATEMENT OF PROBLEM

Marital rape just like a stranger rape is an affront to the bodily integrity of the victim. The marital rape exemption in Kenya therefore provides a conducive environment for this form of violation. This exemption clearly goes against the spirit of the Constitution and other relevant international conventions. It pervades and undermines several fundamental human rights such as the right to be free from cruel and inhuman treatment, the right to life and the right free from any form of discrimination.

⁸ Kamau W, Nyaundi P, Serwanga J, 'The Legal Impunity For Marital Rape In Kenya: A Women's Equality Issue' 15.

⁹ Mahoney P, Williams LM "Sexual Assault in Marriage: Prevalence, Consequences, and Treatment of Wife Rape," *Family Research Laboratory, University of New Hampshire*.

1.2 JUSTIFICATION OF STUDY

This study is justified on the basis that although proper retributive provisions have been put in place to reprimand sexual offenders, section 43(5) of the Sexual Offences Act strips spouses from seeking redress on matters concerning marital rape.

This section is a clear contravention of Article 27 of the Constitution which states that every person is equal before the law and has the right to equal protection and equal benefit of the law. It also contravenes international conventions that Kenya is a party to such as Article 2 of the CEDAW¹⁰ and Article 3 of the ACHPR.¹¹

1.3 STATEMENT OF OBJECTIVES

The objective of this paper is to scrutinize the legal and social effect of section 43(5) of the Sexual Offences Act. As well as to find a solid legal channel for which victims of marital rape can seek redress without discrimination on any grounds including sex and marital status.

This research also proposes the need to have a separate law or provision that creates the offence of marital rape. It champions for criminal sanctions as opposed to civil redress because criminal law is often used as a means of preventing and remedying certain injustices. It deters perpetrators by placing sanctions of a great magnitude and significance to deter them from continuing with the crime as well as instil fear on those that continue to engage in the crime.

This research shall however centre around wives as victims of marital rape.

1.4 RESEARCH QUESTIONS

- What is the nature of the gap between the definition of rape in the laws of Kenya compared to international conventions and other jurisdictions?
- What are the possible consequences of legalizing marital rape? To what extent would criminalizing marital rape lower incidences of marital rape?
- How will either spouse prove that the act of rape and not a loving natural marital act? Will such legislation water down the marriage instead?
- How is Section 43(5) of the Sexual Offences Act acting as a bar to justice for victims of marital rape?

¹⁰ Article 2, *Convention on Elimination of All Forms of Discrimination Against Women* September 1981.

¹¹ Article 3, *African Charter on Human and Peoples' Rights* 1998.

1.5 LITERATURE REVIEW

History has it that marital rape was not legally and socially recognized in several countries. This is because women were considered legal minors in the eyes of the law. They first belonged to their fathers and when married, their rights were transferred from their fathers to their husbands.¹² Furthermore, marriage was understood as an institution where a husband had control over his wife's sexuality and overall freedom. This form of control was quite evident as seen in the way adultery between a wife and another man was constructed. For instance in 1707, English Lord Chief Justice John Holt described the act of a man having sexual relations with another man's wife as "the highest invasion of property."¹³

However, in 1888, British judges began to question the validity of the common law position on the marital rape exemption. It is in this regard that Lord Willis in his dictum in the case of *R v Clarence*¹⁴ noted as follows:

"...if intercourse under the circumstances now in question constitute an assault on the part of the man, it must constitute rape, unless, indeed, as between married persons rape is impossible - a proposition to which I certainly am not prepared to assent, and for which there seems to me to be no sufficient authority. I should hope, equally true that a married woman, no less than an unmarried woman, would be justified in such a refusal..."

However, it was not until the year 1991 that the British courts came to the realization that there was no longer a place for this antiquated patriarchal position in the modern day jurisprudence. In October 1991, the court while hearing the case of *R v R*,¹⁵ were challenged to determine whether a husband can be criminally liable for raping his wife. The response to this inquiry was a declaration "that in modern times the supposed marital exception in rape forms no part of the law of England."¹⁶ This therefore marked the beginning of an evolution in the marriage institution.

Furthermore, with the development of human rights in the 20th century the belief that as long as one was married he had a right to sexual intercourse was less widely tolerated. In December 1993, the United Nations High Commissioner for Human Rights published the

¹² Blackstone W. "Commentaries on the Laws of England" <<http://www.mdx.ac.uk/WWW/STUDY/xBlack.htm>>.

¹³ Pillsbury, Samuel H "Judging Evil: Rethinking the Law of Murder and Manslaughter" (2000-07-01).

¹⁴ *R v Clarence* (1889) 22 QB 133

¹⁵ *R v R* (1992) 1 A.C. 599, 614, House of Lords.

¹⁶ *R v R* (1992) 1 A.C. 599, 614, House of Lords.

Declaration on the Elimination of Violence against Women which reclassified sexual crimes "from offenses against morality, the family, good customs, honor, or chastity to offenses against liberty, self-determination, or physical integrity".¹⁷ This therefore established marital rape as a crime.

Despite this, not all members of the United Nations have criminalized marital rape.

Kenya is one of the members of the UN that has not legally recognized spousal rape. Regardless of this situation, there is evidence that it is a real phenomenon in our society as was identified in the case of *Esther Nangwanaa Nandi v Jones Chewe Bobo*¹⁸. This was a divorce case before the High Court of Kenya. The complainant in providing particulars that amounted to cruelty on the part of the respondent stated that the respondent was physically violent to her, that he would lock her out of their matrimonial home forcing her to seek alternate shelter at hostels and that he would unreasonably force her to have sex with him when under the influence of heavy drinks.

High Court Judge, Justice Rawal, as she then was, found favour in the petitioner and therefore granted the divorce petition. The learned judge affirmed that the respondent was guilty of acts of cruelty and adultery, which she stated were of a very 'serious nature and caused danger to her life and health' and that they were acts that should not be accepted as a wear and tear of married life and of living together in thick and thin. This case therefore sheds light on some of the limitations of prosecuting marital rape in Kenya given that it is not a criminal offence.

Research has it that there are several factors and reasons that can be attributed to the marital rape exemption regardless of the shortcomings identified. Religious and traditional views on the role of men and women in a marriage deeply influence the way in which marital rape is viewed in Kenyan society today as well as worldwide. Beliefs rooted in traditional religious teachings for example in Christianity and Islam, have also served to perpetuate the problem of marital rape by putting extreme emphasis on a wife's responsibility to please and to be subordinate to her husband.

¹⁷ Frank J D, Bayliss J, Steven A B, "Worldwide Trends in the Criminal Regulation of Sex, 1945 to 2005" 75 *American Sociological Review* 867–893 [871].

¹⁸ *Esther Nangwanaa Nandi v Jones Chewe Bobo* Divorce Cause 84 of 2005 at High Court of Kenya, Nairobi.

Cultural attitudes are slow to change and in societies with rigid gender roles, the recognition and persecution of all forms of rape will therefore take time.¹⁹

Yet another reason for the lack of development in the thinking and research on wife rape may be because it is unclear where this issue “fits” and because separate fields of research on spousal violence and on sexual assault have developed with their own separate theories, methodologies and research agendas.²⁰

These differing literatures have left many issues relevant to wife rape unexamined and many questions unanswered. Is sexual assault of a spouse best understood when it is viewed as one of many forms of domestic violence and abuse, or should the discussion of wife rape be considered within the context of theories of sexual violence? Does the husband who rapes his wife have similar motivations and characteristics as the stranger-rapist?²¹

Research conducted on sexual victimization in the United States indicates that although many sexual assaults involved victims and assailants who were complete strangers, most sexual assaults occurred between assailants and victims who were acquainted or had close relationships prior to the assault.²²

According to the Bureau of Justice Statistics report of 2000, 60% of sexual assault victims knew their assailants either as partners, relatives, friends, or acquaintances.²³

Diana Russell writer of the book *Rape in Marriage*²⁴ states that although it is difficult to measure precisely how much spousal rape occurs in any society, existing research suggests that rape in marriage is a common phenomenon.

The only problem however is the fact that the cases are merely underreported. She estimated that in the United States, about 14% of women who had ever been married experienced rape or attempted rape at the hands of husbands or ex-husbands.²⁵

¹⁹Duncan B. A. *A Marital rape as a form of domestic violence and the need for law reform in Ghana, Voices of African women: Women's rights in Ghana, Uganda, and Tanzania, 147-154.*

²⁰Logan T.K, Walker R, and Col J, *Silenced Suffering: The Need for a Better Understanding of Partner Sexual Violence (Trauma, Violence, & Abuse) 2015, Vol. 16 2013.*

²¹ Mahoney P and Williams M L, *Sexual Assault in Marriage: Prevalence, Consequences, and Treatment of Wife Rape, Family Research Laboratory, University of New Hampshire* ". 8.

²² Munge B, Pomerantz A M, Falconer W J, *The Influence of Length of Marriage and Fidelity Status on Perception of Marital Rape, 5.*

²³ National Institute of Justice, October 1, 2008.

²⁴ Russel D, *Rape in Marriage* [Indiana University Press, 1990].

1.6 HYPOTHESIS

This research proceeds on the grounds that the boundaries of conjugal rights are not clearly stipulated in Kenya and for that reason there is need to clearly outline the boundary between conjugal rights and spousal rape.

1.7 ASSUMPTIONS

This paper proceeds on the assumption that, a spouse is capable of raping their spouse. This paper also assumes that victims of spousal or marital rape are unable to seek judicial redress due to the lack of sufficient and reliable legislation on the matter.

1.8 RESEARCH DESIGN & METHODOLOGY

Primary research was based on Statutes, International Conventions, Kenyan hamsard, Case law and a comparative case study of South Africa

Secondary research was derived from books, journals, internet sources, journal articles and newspaper articles

1.9 LIMITATIONS

Lack of Kenyan precedent on marital rape: This is due to the fact that marital rape is not considered a criminal offence in Kenya. This therefore limits my research to precedence of other jurisdictions.

1.10 CHAPTER BREAKDOWN

Chapter one provides an introduction to the study, the statement of the problem, the literature review, the objectives and questions, the hypothesis, the conceptual framework and the design methodology of the study.

Chapter two will explore the theories that currently support and uphold the marital rape exemption as well as criticisms of those theories.

Chapter three looks into the necessity of criminal law in addressing the issue of marital rape.

Chapter four explores the limitations of criminalizing marital rape considering the Kenyan context.

²⁵ Logan T.K, Walker R, and Col J, Silenced Suffering: The Need for a Better Understanding of Partner Sexual Violence (Trauma, Violence, & Abuse) Vol. 16 2013

Chapter 5 makes the conclusions of the study and comes up with recommendations.

CHAPTER 2: THEORETICAL FRAMEWORK

2.1 INTRODUCTION

From time immemorial, women have lived in a male dominated society and as such have been quelled and subjugated by their male counterparts.²⁶ The basis of this subjugation is attributed to various factors including the difference in the nature of design of the female and male anatomy among other things.²⁷ Due to these distinct differences, women were forced to accept men as masters, disciplinarians and protectors of the home who could assert their authority and ensure submission through discipline and chastisement. On the other hand, women were predominantly viewed and treated as chattel and if someone physically harmed

²⁶ Anderson J M, "Lawful wife, unlawful sex-examining the effect of the criminalization of marital rape in England and the Republic of Ireland," 27 (139) *Georgia Journal of International & Comparative Law*.

²⁷ Anderson J M, "Lawful wife, unlawful sex-examining the effect of the criminalization of marital rape in England and the Republic of Ireland," 27 (139) *Georgia Journal of International & Comparative Law*.

a man's wife, he had effectively committed "a crime against the male estate".²⁸ Such treatment has therefore aided in the formation and development of certain social and legal perceptions of marital rape.

This chapter shall therefore seek to demystify the concept and definition of marital rape as well as understand the history of the marital rape exemption through the various theories.

2.2 DEFINITION OF MARITAL RAPE

Black's Law Dictionary defines rape as a crime by which a male has sexual intercourse forcibly and without consent of the female. This can be contrasted by the common law definition of rape which termed rape as the unlawful intercourse by a man against a woman who is not his wife by force or threat and against her will.²⁹ It is therefore crystal clear from the Common Law definition that non-consensual sexual intercourse between spouses is not considered as rape. Although there is no widely accepted definition of marital rape, one can generally define it as any unwanted sexual penetration by the husband (vaginal, anal or oral) or contact with the genitals that is the result of actual or threatened physical force or when the wife is unable to give affirmative consent.³⁰ This also includes sexual exploitation involving sexual contact, such as when a husband coerces a wife to engage in sexual acts with someone else.³¹ This working definition of marital rape does not only apply to legally married couples but cohabiting couples as well as experiences that may occur during a separation period or after divorce.³² This gained judicial backing as indicated in the case of *People v Liberta*,³³ which involved a husband who raped and sodomized his wife in front of their 2-year old son while he was living apart from her under a court order. The trial court ruled that the court order had rendered him "not married," and thus the husband was found guilty of rape. The husband appealed the ruling, claiming that the court order did not declare him "not married," and therefore he should retain the exemption. In addition, he claimed this exemption was unconstitutional, as it did not offer all men the same protection from prosecution. In 1984,

²⁸ Anderson J M, "Lawful wife, unlawful sex-examining the effect of the criminalization of marital rape in England and the Republic of Ireland," 27 (139) *Georgia Journal of International & Comparative Law*.

²⁹ Mahoney P, Williams L M, "Sexual Assault in Marriage: Prevalence, Consequences, and Treatment of Wife Rape," *Family Research Laboratory, University of New Hampshire*.

³⁰ Russells E. H. D, Rape in Marriage "Indiana University Press" (1990).

³¹ Mahoney P, Williams L. M. Sexual Assault in Marriage: Prevalence, Consequences, and Treatment of Wife Rape, "Family Research Laboratory, University of New Hampshire".

³² Mahoney P and Williams L M, "Sexual Assault in Marriage: Prevalence, Consequences, and Treatment of Wife Rape".

³³ *People vs. Liberta* 62 N.Y.2d 651; 1984 N.Y.

New York's highest court not only upheld his conviction, it also struck down the exemption as an unconstitutional denial of equal protection for married women.³⁴

The marital rape exemption therefore gives legal immunity to a man that has committed the above mentioned act of forcefully assaulting his wife. While the marital rape exemption protects the interests of the husband, the wife is left to deal with harsher physical, emotional and legal consequences.³⁵

The bone of contention however arises when trying to distinguish between conjugal rights and marital rape. Conjugal rights refer to the sexual rights or privileges implied by and involved in the marriage relationship. It is the right of sexual intercourse between husband and wife.³⁶ In Kenya and several other jurisdictions, denial of conjugal rights is a ground for divorce as it is a right and as such should be upheld.³⁷ This therefore poses a huge challenge with regard to the right to reinforce your right as a spouse vis-a-vis non-consensual sex. Regardless of the blurred line between the two concepts, various scholars attribute the marital rape exemption to conjugal rights or rather what was initially termed in the medieval era as conjugal debt.³⁸

In addition to this concept, there are various historical and modern theories that seek to explain the marital rape exemption as will be discussed below.

2.3 HISTORICAL AND MODERN JUSTIFICATIONS FOR MARITAL RAPE EXEMPTION

2.3.1 THEORIES THAT SUPPORT THE MARITAL EXEMPTION

2.3.1.1 Historical theories in support of marital exemption

In order to understand the marital rape exemption as is today, there must be a full comprehension and appreciation of how the 18th century legal scholars perceived and

³⁴ Pracher M, "The Marital Rape Exemption: A Violation of a Woman's Right of Privacy," 11 (3) *Golden Gate University Law Review Women's Law Forum*, 1981.

³⁵ Burgess & Holmstrom, "Rape Trauma Syndrome, in forcible rape: The Crime, The Victim, And The Offender" as was cited by Pracher M, "The Marital Rape Exemption: A Violation of a Woman's Right of Privacy".

³⁶ Merriam-Webstar.

³⁷Section 84 of Marriage Act, (No.4 of 2014)

³⁸ This concept, derived from Biblical statements on marriage, held that "both husband and wife had a duty to perform sexually at the request of their mate." "A wife has no authority over her body, but her husband; likewise the husband has no authority over his body, but his wife. You must not refuse each other). A husband or wife could not unilaterally terminate this conjugal debt, even by joining a religious order that prohibited sexual intercourse. See 1 Corinthians 7.4

envisioned the marriage contract. The two main theories that were developed were the implied consent theory and the unity theory.

The implied consent theory

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

This statement by Sir Matthew Hale is often viewed as the genesis and the fulcrum upon which the marital rape exemption turns. The premise of the implied consent is that because sexual intercourse is an integral part of the marriage, the husband need not obtain consent to all acts of marital sexual intercourse. Therefore, if a husband forces sexual intercourse on his wife, he is merely exercising his right as was presumed from the onset of the marriage. Critics of this theory firmly assert that this theory does not hold water as a marriage contract is only a contract in the narrow sense as opposed to the typical contract. This is because the parties enter into the “contract” without the benefit of traditional contract attributes. The contract theory of marriage diverges from contract law not only in formation, but also in the way it is enforced. Generally, private parties are not permitted under contract law to resort to self-help to remedy a breach of a contractual term. They instead have to seek redress from a court of law in order to regain their rights. In the same light, if a woman breaches the marital contract by withholding her consent to sexual relations, a husband should not be able to enforce the contract by rape.³⁹ Therefore, one cannot justify the marital rape exemption as it misconstrues the very nature of contract law, the marital status and the act of rape.⁴⁰

Furthermore, while looking at the element of implied consent in the marriage institution, the law does not permit a person to consent to serious bodily injuries inflicted by another regardless of whether that person is well acquainted to the victim. Therefore, a woman may consent to sexual intercourse with her husband when it is mutually desired but to impute consent on the victim not only exceeds the boundaries of law but also goes against the very essence of law.

However, there are various challenges that arise with regards to the issue of consent especially within the marriage institution. The main dilemma presented in marital rape is the

³⁹ Pracher M, “The Marital Rape Exemption: A Violation of a Woman's Right of Privacy,” 11(3) *Golden Gate University Law Review Women's Law Forum*, 1981.

⁴⁰ Pracher M, “The Marital Rape Exemption: A Violation of a Woman's Right of Privacy” 11(3) *Golden Gate University Law Review Women's Law Forum*, 1981.

difficulty in proving the wife's consent or lack thereof. Ordinarily the most arduous challenge in rape cases is proving lack of consent this problem. This problem becomes magnified in the situation of marital rape given the intimate nature of the relationship between the husband and the wife.

Unity theory

“By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least incorporate into her husband” Sir William Blackstone

This theory emanated from the above words of Sir William Blackstone. It implies that once a couple is married they become one, with the one being the man.⁴¹ In this regard, the man is incapable of raping himself as the woman's identity is immersed in his. In the same light, women historically viewed as their husband's chattels and as such were denied all forms of civil identity.⁴² However, courts have over the years rejected this view of women as chattel as was demonstrated in the case of *Trammel v United States*⁴³ where the court stated as follows, “nowhere in modern society...is a woman regarded as chattel or demeaned by denial of a separate legal identity and the dignity associated with recognition as a whole human being.”⁴⁴ This theory although established several years ago still has facets in the modern perspective of marriage, especially from various religious standpoints.

Critics also challenge the unity theory on the basis that husbands can be charged with committing other crimes against their wives. In this light it is difficult to fathom why marital rape would be an exemption to this notion.

Modern theories that support the marital exemption

Today, support for the marital rape exemption is grounded in four rationales that are as a group distinctly more modern, and thus more easily accepted, than their predecessors: marital privacy, marital reconciliation and fear of false allegations and difficult proof requirements are some of the theories that are used to justify this exemption.

⁴¹Pracher M, “The Marital Rape Exemption: A Violation of a Woman's Right of Privacy” 11 (3) *Golden Gate University Law Review Women's Law Forum* January, 1981.

⁴² Pracher M, “The Marital Rape Exemption: A Violation of a Woman's Right of Privacy” 11 (3) *Golden Gate University Law Review Women's Law Forum* January, 1981.

⁴³ *Trammel vs. United States* 445 U.S. 40 (1980)

⁴⁴ *Trammel vs. United States* 445 U.S. 40 (1980)

Marital Privacy and reconciliation theory

Marital privacy is one of the foremost modern day justifications for marital rape exemptions. Proponents of the marital privacy rationale suggest that the right to privacy within one's marriage is so fundamental that the public, and hence the legal system, should be precluded from defining or judging the activities within the marriage. This theory aims at bestowing the control of the marriage to the couple and as such upholding the sanctity of the marriage. There are however numerous counterarguments with regards to this particular theory. One such argument is that the marital rape exemption interferes with the woman's control over her body and life.⁴⁵ Therefore when the state outrightly denies a married woman from seeking redress on harm done to her physically, the state is in actual sense denying her the autonomy to decide what happens to her bodily, emotional and psychological integrity.

In addition to the issue of control, the state cannot uphold the marital rape exemption on the grounds of upholding the sanctity of the marriage and yet various jurisdictions have crossed this particular line by reinforcing the importance of conjugal rights in their statutes. In essence, the state is intentionally turning a blind eye and being selective on issues within the marriage institution.

Courts have over the years proposed numerous counterarguments to the marital privacy theory. The New York court of appeals in *People v Liberta*⁴⁶ rejected the marital privacy argument and stated clearly that the right recognized in *Estelle T. Griswold and C. Lee Buxton v Connecticut*⁴⁷ applies only to consensual acts, not to violent sexual assaults. Furthermore, the courts firmly stated that marital privacy is not an absolute right and should therefore not be treated as such. It is therefore the onus of the state to balance its interest with regards to protecting marital privacy against their interest in protecting individuals' bodily integrity.⁴⁸

A subsequent effect of keeping marital issues within the private sphere and out of the public eye is that the couple is better able to come up with solutions to their problems. This therefore fosters the spirit of reconciliation. Reconciliation theorists maintain that this resolution process, as opposed to one which allows "access to the criminal justice system for every type

⁴⁵ Jackson L, "Marital Rape: A Higher Standard Is in Order" 1 *William & Mary Journal of Women and the Law*, 1994.

⁴⁶ *People vs. Liberta* 62 N.Y.2d 651; 1984 N.Y.

⁴⁷ *Estelle T. Griswold and C. Lee Buxton vs. Connecticut* 381 U.S. 479 (1965)

⁴⁸ Mahoney P, Williams L M "Sexual Assault in Marriage: Prevalence, Consequences, and Treatment of Wife Rape," *Family Research Laboratory, University of New Hampshire*.

of marital dispute, fosters greater mutual respect between the parties and eases their ultimate reconciliation.”⁴⁹ The underlying notion of this theory is that once the victim of spousal rape brings forth charges against her spouse, the external factors will eventually bring discord within the marriage and as such hinder chances of reconciliation. Although the court in *People v Brown*⁵⁰ accepted this reasoning, most courts and critics reject the reconciliation and marital harmony theory on the basis that little exists to reconcile if the relationship has deteriorated to the level of forcible rape.⁵¹ Some courts and commentators have also noted that the relationship and potential for reconciliation is disrupted by the rape itself, not the rape charge.⁵²

Evidentiary Concerns and the Fear of Women Lying

Evidentiary concerns are not a novel challenge especially when it comes to the issue of rape. This issue however becomes one of greater concern when dealing with marital rape given the very nature of the institution of marriage. Due to this challenge, this theory is deemed as perhaps the most common basis for the marital rape exemption. Yet another challenge is the fear that a vindictive wife is likely to accuse her husband falsely of marital rape. Sir Matthew Hale observed that rape “is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused.”⁵³

Opponents of this "fear based" justification offer three arguments. First, other crimes exist that are equally difficult to prove yet they are not decriminalized. Our society instead relies on a criminal justice system that is sufficiently sophisticated to ensure that innocent individuals are not frivolously prosecuted or wrongly convicted.⁵⁴ Next is the jurisprudential view that convictions are not the sole reason for enacting laws. In addition to convicting

⁴⁹ Pracher M, “The Marital Rape Exemption: A Violation of a Woman's Right of Privacy” *11(3) Golden Gate University Law Review, Women's Law Forum*, 1981.

⁵⁰ Jackson L, “Marital Rape: A Higher Standard Is in Order” *1 William & Mary Journal of Women and the Law*, 1994.

⁵¹ Jackson L, Marital Rape: A Higher Standard Is in Order “*William & Mary Journal of Women and the Law*”*1*, 1994.

⁵² Jackson L, Marital Rape: A Higher Standard Is in Order “*William & Mary Journal of Women and the Law*”*1*, 1994.

⁵³ Pracher M, The Marital Rape Exemption: A Violation of a Woman's Right of Privacy “*11(3)Golden Gate University Law Review Women's Law Forum*, 1981.

⁵⁴ Pracher M, The Marital Rape Exemption: A Violation of a Woman's Right of Privacy “*11(3)Golden Gate University Law Review Women's Law Forum*, 1981.

criminals, laws serve as deterrents and educational tools, announcing to society what is morally right and morally wrong, what is socially acceptable behaviour and what is not.⁵⁵

CHAPTER 3: CONTEXTUALIZATION OF MARITAL RAPE IN KENYA

3.1 INTRODUCTION

A clear understanding of the context in which marital rape occurs is paramount in determining the role the law can play in confronting the issue. Understanding the prevalence and impact of spousal rape can illicit the political will needed to implement and challenge the current status of marital rape.

Research indicates that the effects of marital rape are both profound and long term. The consequences of marital rape are not only felt by the individual but also trickle down to the society and the economy. Sexually transmitted diseases and extreme depression are just but a few of the consequences of spousal rape that often lead to the deterioration of the wellbeing of the victim.⁵⁶ Furthermore, marital rape interferes with women's ability to participate in

⁵⁵ Pracher M, The Marital Rape Exemption: A Violation of a Woman's Right of Privacy "11(3)*Golden Gate University Law Review Women's Law Forum*, 1981.

⁵⁶Pickup F, Williams S, Sweetman C "Ending Violence Against Women: A challenge for development and humanitarian work,"2001 97.

social and economic activities.⁵⁷ Lack of motivation and absenteeism from work resulting from the effect of rape often limit the ability of the women to generate income. This therefore drives them to a point of extreme poverty as they are unable to assert themselves to their full and maximum potential.⁵⁸

Currently, intimate partner rape is not a criminal offence in Kenya. The culture of silence surrounding domestic violence has made it difficult to portray the full of extent of the impact that marital rape has both on the victim's wellbeing and the society in general.⁵⁹

Despite of these shortcomings, the first government survey was conducted in 2003 by the Kenyan Demographic and Health Survey with an aim of portraying the levels of sexual violence in Kenya and with a special focus on marital violence. The data collected indicated that 16% of married and divorced or separated women experienced sexual violence from their husbands.⁶⁰ Moreover, there were reported instances of women being slapped, punched, pushed or raped by their husbands.⁶¹ In 2008-2009, a similar survey was conducted by the Kenya Demographic and Health Survey and it was reported that 17% of married women experience sexual violence in their marriages that were perpetrated by their husbands.⁶² In a later report, 14% of women interviewed reported that they were raped by their husbands.⁶³ These statistics demonstrates the growing concern and need to criminalize marital rape as there is no recourse for the injustices done to victims of intimate partner rape.

History has it that Kenya has made attempts to criminalize marital rape but to no avail. These attempts were made during the establishment of the Sexual Offences Act which is the primary law regulating sexual offences in Kenya. The Sexual Offences Act and specifically the provision on marital rape awakened such intense and polarized debates on the subject.

⁵⁷Pickup F, Williams S, Sweetman C "Ending Violence Against Women: A challenge for development and humanitarian work," 2001 97 as cited by Norton F, "The Role of the Law in Confronting Marital Rape (A case study of Ghana)" *Faculty of Law, University of Ghana*, 2009.

⁵⁸Pickup F, Williams S, Sweetman C, "Ending Violence Against Women: A challenge for development and humanitarian work," 2001 97 as cited by Norton F, "The Role of the Law in Confronting Marital Rape (A case study of Ghana)" *Faculty of Law, University of Ghana*, 2009.

⁵⁹ Mwenesi K.B., Buluma C.B.R, Kong'ani R and Nyarunda M V, 'Gender Violence 15' 239.

⁶⁰ Central Bureau of Statistics (CBS) [Kenya], Ministry of Health [Kenya] and ORC Macro, 2004, Kenya Demographic and Health Survey 2003).

⁶¹ Central Bureau of Statistics (CBS) [Kenya], Ministry of Health [Kenya] and ORC Macro, 2004, Kenya Demographic and Health Survey 2003).

⁶² Kenya National Bureau of Statistics (KNBS) and ICF Macro, Kenya Demographic and Health Survey 2008-2009.

⁶³ Kenya National Bureau of Statistics (KNBS) and ICF Macro, Kenya Demographic and Health Survey 2008-2009.

After much deliberation, Section 43⁶⁴ which defines the elements of an unlawful act with regards to rape expressly stated that such elements do not apply to married persons.

Despite this exemption, Kenya has a positive obligation to all its citizens. The obligation to protect and safeguard the interests and rights of all its people. This obligation emanates from both the supreme law of the land, which is the Constitution⁶⁵ and other international conventions that champion for the equal protection for all. The lack of an effective remedy for victims of intimate partner rape is a complete violation of their human rights.

This chapter shall therefore argue for the importance of the criminalization of marital rape from a rights-based approach.

3.4 THE NECESSITY TO CRIMINALIZE MARITAL RAPE IN KENYA

“Perhaps one of the reasons that marital rape is ignored is that its trauma is not readily apparent. The thinking seems to be that if you’ve had sex with someone hundreds of times before, what’s one more time?”⁶⁶

This seems to be the underlying attitude towards spousal rape that has contributed to the stalemate in criminalizing marital rape. The reality of the matter is that marital rape has debilitating effects on the victim. It is a violation of self-determination and the breach of trust especially in an institution that is founded on the basis of trust.

Stranger rape is a demoralizing one-time occurrence that often leaves the victim with adverse physical, psychological and emotional effects. Marital rape however involves a frequent series of devastating occurrences that extend through several years of being in the marriage.⁶⁷

Compared with women raped by strangers, marital rape survivors report even higher rates of anger and depression as intimate partner rape entails the added offense of being violated by the very person who has pledged to honour and care for the victim. Other effects include emotional and physical effects that stem from marital rape. Physical effects include injuries to

⁶⁴ Section 43, *Sexual Offences Act* (No.3 of 2006) An act is intentional and unlawful if it is committed—

(a) in any coercive circumstance;
(b) under false pretences or by fraudulent means

(c) in respect of a person who is incapable of appreciating the nature of an act which causes the offence.

⁶⁵ Article 27 (1), *Constitution of Kenya*, 2010: Every person is equal before the law and has the right to equal protection and equal benefit of the law.

⁶⁶ Yllo, Ph.D., Kersti. *Marital Rape*. Department of Sociology, Wheaton College, Norton, Massachusetts.

⁶⁷ Battered Women’s Justice Project/Civil: Pennsylvania Coalition Against Domestic Violence ‘Marital Rape: A call to advocacy’.

the vaginal and anal areas which include but are not limited to infertility and sexually transmitted diseases whereas psychological effects include PTSD⁶⁸ and suicidal ideation.⁶⁹

When the issue is scratched a little deeper, the marital rape exemption in Kenya demonstrates a lack of commitment by the Kenyan government to protect each and every citizen regardless of their gender or marital status. The spousal rape exemption portrays an inherent discrimination towards married women as it provides a leeway for the infringement of bodily integrity of the victim.

3.4.1 MARITAL RAPE EXEMPTION AS A VIOLATION OF HUMAN RIGHTS

From a rights-based approach, the marital rape exemption is a violation of various fundamental human rights. The right to be free from violence and coercion especially in the sexual context is a human right that is properly outlined in various national, regional and international laws that Kenya is a signatory to.

Marital rape involves violations of sexual and reproductive rights that often lead to devastating consequences on the health and wellbeing of the victims.⁷⁰ By dint of Article 2 (6) of the Constitution,⁷¹ Kenya has ratified several international instruments that purpose to protect women from all forms of violence. Chief among these conventions are the UDHR, ICESCR, ICCPR, CEDAW and the DEVAW.

a. Marital rape exemption is discriminatory

The marital rape exemption in Kenya demonstrates the government's inherent discrimination towards women that are victims of marital rape. Discrimination against women is defined by the CEDAW as "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights..."⁷² The marital rape exemption is therefore a form of discrimination on the part of the government as they have chosen to make a "distinction", "exclusion" and

⁶⁸ Post-Traumatic Stress Disorder is a psychiatric disorder that develops in some people who have experienced a shocking, scary of dangerous event, < <https://www.nimh.nih.gov/health/topics/post-traumatic-stress-disorder-ptsd/index.shtml>>.

⁶⁹ Kennedy R "Wife Rape: Understanding the Response of Survivors and Service Providers." CA. (1996). Pg. 99 as cited by Battered Women's Justice Project/Civil: Pennsylvania Coalition Against Domestic Violence 'Marital Rape: A call to advocacy'.

⁷⁰ Crichton J, Musembi N C, Ngugi A, Painful Trade-offs: Intimate-partner Violence and Sexual Reproductive Health Rights in Kenya.

⁷¹ Article 2(6), *Constitution of Kenya*, 2010: Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.

⁷² Article 1, *Convention on the Elimination of All Forms of Discrimination Against Women*.

“restriction” with regards to victims of spousal rape. The express alienation of marital rape victims as stated within Section 43(5) of the Sexual Offences Act ⁷³ is an outright form of discrimination as they are not afforded equal protection by the law as every other victim of sexual assault. The legislators purposefully excluded victims of marital rape from seeking redress but established legal provisions for all other victims of sexual violence.

This therefore goes against the spirit of the Constitution which seeks to be all inclusive and aims at ensuring equal protection for all. In light of this, Article 27(3) of the Constitution provides that the State shall not discriminate directly or indirectly against any person on any ground including race, sex, pregnancy, marital status.⁷⁴ Article 29(c) provides that every person has the right to freedom and security of the person which includes the right not to be subjected to any form of violence from either public or private sources.⁷⁵ The provisions of the Kenyan Constitution place a positive obligation on the Kenyan government to protect married women from violence of any kind whether at home or in public, whether by private individuals or by state officials.

In addition to the Constitution of Kenya, the UDHR states under Article 1 that all human beings are born free and equal in dignity and rights. Article 1 coupled with Article 2⁷⁶ of the UDHR aim at protecting the rights of all persons including but not limited to women of all walks of life. It therefore rebukes any form of violence that is directed against any woman which can be construed as a threat to her personhood or dignity.

The ICCPR and the ICESCR also prohibit violence against women with equal vigour. Article 2 of the ICCPR contains a non-discrimination provision that seeks to protect the right of all persons.⁷⁷ Furthermore, Article 26 of the same Convention states that “all persons are equal before the law and are entitled without discrimination to the equal protection of the law.”⁷⁸ In

⁷³ Section 43 (5), Sexual Offences Act (No. 4 of 2006): This section shall not apply in respect of persons who are lawfully married to each other.

⁷⁴ Article 27(3), *Constitution of Kenya*, 2010.

⁷⁵ Article 29 (c), *Constitution of Kenya*, 2010.

⁷⁶ Article 2, *Universal Declaration of Human Right*: Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

⁷⁷ Article 2(1), *International Covenant on Civil and Political Rights*, 23 March 1976: Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

⁷⁸ Article 26, *International Covenant on Civil and Political Rights*, 23 March 1976: All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against

this regard, the government of Kenya has a mandate under this Convention to prohibit and effectively eradicate any form of discrimination on any ground including sex and marital status.

The CEDAW is one of the main conventions that addresses discrimination against women. Although the text does not explicitly address violence against women, the CEDAW Committee General Recommendations has affirmed the provisions of the CEDAW aim at tackling violence against women. General Recommendation 19 defines gender-based violence to include physical, mental or sexual harm of suffering, threats of acts, coercion or other deprivations of liberty.⁷⁹ The CEDAW Committee further obligates its signatories to take all necessary measures to curb this insidious form of violence. States therefore have the onus to act in due diligence by putting in place various legislative measures such as penal sanctions, civil remedies and others forms of compensation.⁸⁰ Furthermore, the government has a duty to implement preventative measures such as increasing public awareness on the matter through education programmes. The government should also incorporate support services for victims of marital rape. Article 5(a) of CEDAW obligates states to take the necessary measure that will curb both social and cultural practices that are prejudicial to women.⁸¹ General Recommendation 25 asserts that State parties have three main objectives which are to eliminate direct and indirect discrimination, to address prevailing gender relations and the persistence of gender-based stereotypes that affect women.⁸² In this light, if a country has identified laws, regulations and practices that are detrimental to the prosperity and equality of genders, it is then their obligation to abolish such laws and practices.⁸³

While these international human rights instruments are profoundly relevant to Kenyan women, it has been observed that they are frequently ignored and rarely followed through

discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

⁷⁹ Committee on the Elimination of Discrimination against Women, General Recommendations No.19: Violence against Women, UN Doc. A/47/38 (1992).

⁸⁰ Committee on the Elimination of Discrimination against Women, General Recommendations No.19: Violence against Women, UN Doc. A/47/38 (1992).

⁸¹ Committee on the Elimination of Discrimination against Women, General Recommendations No.19: Violence against Women, UN Doc. A/47/38 (1992).

⁸² Committee on the Elimination of Discrimination against Women, General Recommendations No.19: Violence against Women, UN Doc. A/47/38 (1992).

⁸³ Kung'u W C, "Criminalization of marital rape in Kenya," Published LLM, University of Toronto, 2011.

hence being inconsequential to the lives of several Kenyan women that face intimate partner rape.⁸⁴

The existence of the marital rape exemption under the Sexual Offences Act therefore acts in a discriminatory manner and this is to the detriment of victims of marital rape.

b. Marital rape exemption as a violation of fundamental human rights

The marital rape exemption impinges on a myriad of key and fundamental human rights such as the right to life, liberty and security of person.⁸⁵ It further violates the rights critical to the autonomy of an individual such as the right to health, the right to sexual self-determination, humane treatment, human dignity, safety, privacy, effective judicial recourse, physical and mental integrity and sexual and reproductive choice.⁸⁶

i. The right not to be subjected to torture or to cruel inhuman or degrading treatment

Domestic violence portrays several facets of torture or cruel, inhuman and degrading treatment. Marital rape on a narrow scale of domestic violence has satisfied the necessary constituents of the violation of torture as depicted in Article 1 of the Convention Against Torture since it is an act that (i) inflicts severe pain and suffering (ii) for a prohibited purpose that includes coercion, intimidation or discrimination and (iii) is acquiesced to or condoned by state actors. Marital rape just like all other forms of rape is an act of torture that is intentionally inflicted and one that often causes severe pain and suffering both physically and mentally.⁸⁷ Signatories, such as Kenya are obligated to stop, sanction and provide adequate and efficient remedies to victims of marital rape. The Committee Against Torture, General Comment No. 2 states that liability will fall on the state and other relevant actors in the event that they in one way or another permit these form of torture and inhuman treatment. In addition to the need to legitimize spousal rape in national legislation of the state actors, The Committee Against Torture mandates other remedies in order to curb torturous and cruel acts. Other measures obligated to states include training both the public and private actors involved. This would include training the police on how to deal with charges brought against

⁸⁴ Crichton J, Musembi N C, Ngugi A, Painful Trade-offs: Intimate-partner Violence and Sexual Reproductive Health Rights in Kenya.

⁸⁵ Randall M, Venkatesh V, 'The Right to No: The Crime of Marital Rape, Women's Human Rights AND International Law,' 41, *Brooklyn Journal of International Law*, 2015, 177.

⁸⁶ Randall M, Venkatesh V, 'The Right to No: The Crime of Marital Rape, Women's Human Rights AND International Law,' 41, *Brooklyn Journal of International Law*, 2015, 178.

⁸⁷ 1 Randall M, Venkatesh V, 'The Right to No: The Crime of Marital Rape, Women's Human Rights AND International Law,' 41, *Brooklyn Journal of International Law*, 2015, 79.

perpetrators of marital rape. It further includes educating the general public in order to eliminate instances where the victim is neither aware nor acquainted with the fact that forced sexual relations in a marriage is an infringement of their rights. Education will also aid in the eradication of social stigma as the society will have a better understanding of the crime at hand.

ii. The Right to Life

Marital rape has quite adverse health effects that often have life implications such as miscarriages, bladder infections and other sexually transmitted diseases such as HIV that often have incidental effects. In certain extreme cases, marital rape has been a threat to the life of the victim as crimes connected to marital murder have gained prominence. These crimes include situations in which men have killed their wives often with impunity and under various defences such as “defence of honour” or “crimes of passion.”⁸⁸

The right to life is a fundamental right that is guaranteed in various international laws that Kenya is party to. The inherent right to life is recognized under Article 6 of the ICCPR.⁸⁹ The Human Rights Committee declared that violence against women was an imminent threat to the right to life of the victim.⁹⁰ The Committee’s General Comment 28 on the equality of rights between men and women mandates that states should put in place measures that are aimed at protecting the women from practices that violate their right to life.⁹¹

Criminalization of marital rape, therefore, is an essential element of the state’s obligation to protect women from practices that violates their right to life.⁹²

iii. The right to liberty and security of person

The marital rape exemption is an extreme violation to the physical and psychological security of the person and as such hinders the full and complete enjoyment of the right to liberty.⁹³ Article 9 of the ICCPR ensures the right to liberty and security.⁹⁴

⁸⁸World Health Organization[WHO], Understanding and Addressing Violence Against Women: Sexual Violence, (2012), http://apps.who.int/iris/bitstream/10665/77434/1/WHO_RHR_12.37_eng.pdf.

⁸⁹Article 6, *International Convention on Civil and Political Right*.

⁹⁰For example, in *Prosecutor versus Akayesu*, the ICTR, while finding rape to be a crime against humanity, stated that “sexual violence was a step in the process of destruction of the spirit, of the will to live, and of life itself.” As was cited in Randall M, Venkatesh V, ‘The Right to No: The Crime of Marital Rape, Women’s Human Rights and International Law,’ *Brooklyn Journal of International Law* [Volume 41, 2015] 184.

⁹¹General Comment No. 28: Article 3 *U.N. Human Rights Committee* (The Equality of Rights Between Men and Women), para. 10, (Mar. 29, 2000).

⁹²Randall M, Venkatesh V, ‘The Right to No: The Crime of Marital Rape, Women’s Human Rights AND International Law,’ 41, *Brooklyn Journal of International Law*, 2015, 184.

The marital rape exemption legitimizes the idea that women cannot refuse sex in marriage and this results in a situation in which victims continuously live with a sense of extreme vulnerability. It also gives rise to a situation in which victims feel at a complete loss of their bodily rights and sexual integrity.⁹⁵ Women who are therefore victims of marital rape that are left with no remedy due to the marital rape exemption are often the victims of social stigma and continuously face the threat of violence by their husbands. Not only is she profoundly powerless and in continuous threat of her right to liberty and security but she is also subject to disbelief by those around her should she choose to speak of the violations caused against her.⁹⁶ This form of false security is especially prone to happen in the legal and police systems, should she disclose that her perpetrator is her husband.

3.5. CONCLUSION

The marital rape exemption in Kenya illustrates the tolerance on the part of the government towards the violation of certain fundamental and profound human rights. It demonstrates the lack of protection for all its citizens hence inferring to the discriminatory nature of this situation. The marital rape exemption also continues to increase situations of inhuman and degrading treatment for the victims of such acts. It also infers to the laxity of the government of Kenya in protecting the right to life of the victims of marital rape.

It is evident that international human rights law provides crucial forms of legal support for the kind of law reform and social change needed to end marital rape. Criminalization of intimate partner rape therefore must be undertaken as part of the broader scope of ending gender based violence.⁹⁷ Kenya therefore has the duty to exercise due diligence to ensure the fulfilment of rights that are legally guaranteed from both the national and international legal framework. This therefore entails the criminalization of marital rape. Criminalization not only codifies rights but creates a potential source of power of marital rape.⁹⁸ Due diligence

⁹³ Randall M, Venkatesh V, 'The Right to No: The Crime of Marital Rape, Women's Human Rights AND International Law,' 41, *Brooklyn Journal of International Law*, 2015, 186.

⁹⁴ Article 9, *International Covenant on Civil and Political Rights*, 23 March 1976: Everyone has the right to liberty and security of person.

⁹⁵ Hasday J E ,Contest and Consent: A Legal History of Marital Rape,88 *California Law Review* 1373(2000); Jo Fidgen, Zambia's Celebrity Couple Reveal Wife-Beating Past, BBC NEWS, [http://news.bbc.co.uk/2/hi/africa/8375291.stm\(lastupdatedNov.30,2009](http://news.bbc.co.uk/2/hi/africa/8375291.stm(lastupdatedNov.30,2009) .

⁹⁶ Hasday J E ,Contest and Consent: A Legal History of Marital Rape,88 *California Law Review* 1373(2000); Jo Fidgen, Zambia's Celebrity Couple Reveal Wife-Beating Past, BBC NEWS, [http://news.bbc.co.uk/2/hi/africa/8375291.stm\(lastupdatedNov.30,2009](http://news.bbc.co.uk/2/hi/africa/8375291.stm(lastupdatedNov.30,2009) .

⁹⁷ Randall M, Venkatesh V, 'The Right to No: The Crime of Marital Rape, Women's Human Rights AND International Law,' 41, *Brooklyn Journal of International Law*, 2015, 156.

⁹⁸ Randall M, Venkatesh V, 'The Right to No: The Crime of Marital Rape, Women's Human Rights AND International Law,' 41, *Brooklyn Journal of International Law*, 2015, 156.

required from the government of Kenya also encompasses the need to not only pursue civil remedies but to have criminal remedies in equal measure.

CHAPTER 4: CHALLENGES OF CRIMINALIZING MARITAL RAPE

4.1 INTRODUCTION

There is no shadow of a doubt that rape as a crime already poses a myriad of problems from the perspective of the victim, the accused and the state.⁹⁹ These issues become more prominent and complex in the context of a marriage where the assailant is someone that is both known and trusted by the victim.

Obvious difficulties such as proving consent, collection of evidence and other relatable problems begin to surface.¹⁰⁰ Social hindrances relating to the issue of marital rape have also played a substantial role in this contentious issue. Misconstrued understandings as to what gender roles entail in the marriage institution, underreporting and social stigma on women that have undergone marital rape are just but a few of the deterrents that continue to curb the

⁹⁹Kung'u W C, "Criminalization of marital rape in Kenya," Published LLM, University of Toronto, 2011, 8.

¹⁰⁰ Kung'u W C, "Criminalization of marital rape in Kenya," Published LLM, University of Toronto, 2011, 10.

progress towards criminalizing marital rape.¹⁰¹ Regardless of these hurdles, several estimates of the prevalence of the marital rape exemption state that about 10 to 25 per cent of married women are subjected to marital rape.¹⁰² This therefore proves that a lack of law does not translate to the absence of the crime.

In order to achieve increased protection for women there is a need to re-evaluate and address the relationship between customary and traditional practices, women's equality and marital rape issues.¹⁰³ Sexual assault within the institution of marriage cannot be completely abolished in the absence of addressing customary practices and societal perceptions that both disadvantage women and those that are inconsistent with human rights.

This chapter shall therefore scrutinize these challenges through three main spheres the legal, social, cultural realms. It shall also endeavour to look at the case of marital rape in South Africa. South Africa is one of the few African nations that has managed to criminalize marital rape. In this regard, this chapter shall look at the ways in which it has managed to overcome some of the universal challenges that are attributed to the process of criminalizing marital rape. South Africa is relevant to this study because Kenya and South Africa have similar legal, social and traditional structures. This therefore makes it easier to adopt some of the legal and social structures they have put in place to eliminate marital rape.

4.2 LEGAL FACTORS

Kenyan law as it currently stands has several shortcomings while dealing with the issue of rape and marital rape specifically. Issues regarding evidence often are of quite a fundamental challenge in the proper execution and criminalization of rape cases. This therefore begs the question, how well equipped is Kenyan law in dealing with marital rape?

4.2.1 CRIMINAL LAW AND EVIDENTIARY ISSUES

The criminal system in Kenya is not well equipped to adequately handle cases of marital rape. These issues emanate from the stage of collection of evidence. There is no doubt that marital rape is a difficult crime to prove, however this difficulty is magnified when the system is not well equipped to deal with the issue. Collection of evidence for instance proves

¹⁰¹ Kung'u W C, "Criminalization of marital rape in Kenya," Published LLM, University of Toronto, 2011, 10.

¹⁰²Finkelhor , David & K Yllo, 'License to Rape: Sexual abuse of Wives' (New York: Holt, Rinehart and Winston 1985).

¹⁰³ Kung'u W C, "Criminalization of marital rape in Kenya," Published LLM, University of Toronto, 2011, Toronto 12.

to be quite a challenge as there is a very thin line that distinguishes that act was one of loving nature as opposed to that of marital rape.

Furthermore, the Sexual Offences Act brings an additional burden and increases intimidation of the victims by declaring that “any person who makes false allegations against another person to the effect that the person committed an offence under this Act is guilty of an offence and shall be liable to punishment equal to that for the offence complained of.”¹⁰⁴ This section can act as a double edged sword as it deters and limits chances of false accusations being brought against innocent parties. This is fundamental as opponents of the criminalization of marital rape state that the charge of marital rape often gives malicious and vindictive women the chance to fabricate charges against their husbands.¹⁰⁵ On the other hand, this provision increases the chances of victims of marital rape shying away from seeking redress as marital rape is already a difficult act to prove and as such the victim would be deemed to have contrived the occurrence of such an act.¹⁰⁶

Moreover, the lack of a judiciary that handles sexual violence cases in a speedy and expeditious manner is a deterrent in the successful establishment and implementation of marital rape cases.¹⁰⁷ The Kenyan judiciary is characterised by a backlog of cases that often limit the successful churning out of cases.¹⁰⁸ This demoralizes and decreases the faith in the judiciary to hear matters such as marital rape that are often of a time sensitive nature. Furthermore, the lack of expeditiousness on the part of the judiciary becomes a costly affair for those that are out to seek justice.¹⁰⁹

The judiciary should therefore uphold its mandate of being an institution that alleviates the adversities done to its people and as such restore faith in the people of Kenya. This will ease the enforcement of marital rape as criminal offence.

¹⁰⁴ Section 30, Sexual Offences Act, No.4 of 2006

¹⁰⁵ Kung'u W C, “Criminalization of marital rape in Kenya,” Published LLM, University of Toronto, 2011, 28.

¹⁰⁶ Bonita Meyersfeld, *Domestic Violence & International Law* (Oregon: Oxford & Portland, 2010) as cited in Kung'u W C, “Criminalization of marital rape in Kenya,” Published LLM, University of Toronto, 2011, 27.

¹⁰⁷ Bonita Meyersfeld, *Domestic Violence & International Law* (Oregon: Oxford & Portland, 2010) as cited in Kung'u W C, “Criminalization of marital rape in Kenya,” Published LLM, University of Toronto, 2011, 27.

¹⁰⁸ Bonita Meyersfeld, *Domestic Violence & International Law* (Oregon: Oxford & Portland, 2010) as cited in Kung'u W C, “Criminalization of marital rape in Kenya,” Published LLM, University of Toronto, 2011, 27.

¹⁰⁹ Bonita Meyersfeld, *Domestic Violence & International Law* (Oregon: Oxford & Portland, 2010) as cited in Kung'u W C, “Criminalization of marital rape in Kenya,” Published LLM, University of Toronto, 2011, 18.

4.3 TRADITIONAL AND CULTURAL FACTORS

Social and cultural tolerance poses a great challenge while dealing with the issue of marital rape. The ultimate criminalization of non-consensual sex in the marriage institution requires more consideration than meets the eye.

Domestic violence in most traditions in Kenya is often never dealt with and in the instances that they are addressed they are often addressed with a lot of laxity. Most cultural practices tend to subjugate women and place men on a pedestal.

Furthermore, customary systems are built around chiefs, council of elders and other traditional authorities.¹¹⁰ These elders wield a considerable amount of authority especially in the larger parts of Kenya. They often are used as substitutes to the already established forms of dispute resolution mechanisms. Majority of these local authorities refuse to be bound by the regional and domestic legal obligations as they have already established means and ways of dealing with domestic disputes.¹¹¹ This poses a great challenge to the successful implementation of marital rape for several reasons.

In addition to the difference between the cultural framework vis-a-vis the international and national legal framework, the blind adherence to traditional practices that often tolerate a culture of demeaning women that more often than not encourages violence perpetrated against women. These customs are still widely practiced and as such enable a culture that deems women as the property of the man. Such practices continue to bring to life the unity theory,¹¹² which was an ancient justification for the marital rape exemption.

One such custom is the widely accepted practice of dowry payment or bride price.¹¹³ The payment of dowry is a common practice within several Kenyan tribes, such as the Kisii, Agikuyu and Masai among others. According to the Kikuyu tribe, the legal effect and completion of the marriage contract is sealed once the dowry has been paid and the man therefore acquires the sole right to sexual intercourse with the woman or in certain circumstances women whom he marries.¹¹⁴ The man therefore obtains sole rights over the

¹¹⁰ Norton F, *The Role of the Law in Confronting Marital Rape (A case study of Ghana)*.

¹¹¹ Norton F, *The Role of the Law in Confronting Marital Rape (A case study of Ghana)*.

¹¹² Norton F, *The Role of the Law in Confronting Marital Rape (A case study of Ghana)*.

¹¹³ Kung'u W C, "Criminalization of marital rape in Kenya," Published LLM, University of Toronto, 2011. 18.

¹¹⁴ Jomo Kenyatta, *Facing Mount Kenya: The Tribal Life of the Gikuyu* (London: Secker and Warburg, 1953) at 163 as cited in Kung'u W C, "Criminalization of marital rape in Kenya," Published LLM, University of Toronto, 2011. 18.

wife and this gives him the leeway to treat her as he pleases as she is often perceived as part of his property. The practice of dowry payment therefore portrays the inferiority and subjugation of women with respect to the man and the marriage institution as a whole.

Although the Constitution provides for equality within the marriage,¹¹⁵ the practice of dowry payment often asserts the intimate partner rape.¹¹⁶ This perception was on full display during the debate of the Sexual Offences Bill when one Member of Parliament arguing against the criminalization of marital rape stated that,

*“I have paid dowry for my wife and we are formally married. I cannot rape her by any chance. You can see the damage that western indoctrination has done to me. I cannot rape my wife! I don’t think there is one man who can rape his wife, you can only rape someone else.”*¹¹⁷

It is clear from this statement that the general perception is that once a man has paid dowry, the wife becomes the property of the man and as such it is impossible to view forced sexual intercourse within marriage as rape.

Another practice that perpetuates marital rape and general suppression of women in several communities in Kenya is that of wife inheritance.¹¹⁸ This custom is often practiced in the majority of Nilotic tribes.¹¹⁹ Wife inheritance provides that on the death of a wife’s husband, the widow is inherited by the deceased brother or close relative. Amnesty International reports that children will marry off their mothers, usually to the deceased elder brother. Prior to that, the children cannot do any cultivation on the land until the elder brother has had sexual intercourse with his new wife.¹²⁰

Unlearning and dismantling this form of mentality and cultural practices that often defines us as Kenyans is going to be an uphill task.

In order to reduce and all together eliminate sexual violence in Kenya, there needs to be a total restructuring and realignment of customary practices with the national and international

¹¹⁵ Article 45, Constitution of Kenya, 2010: Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.

¹¹⁶ Amnesty International, Kenya: Rape- The Invisible Crime,(2002), AI Index: AFR 32/001/2002 8.

¹¹⁷ Kenya National Assembly Official Record (Hansard), Second Reading of the Sexual Offences Bill, April 27, 2006 at 780.

¹¹⁸ Esther Nangwanaa Nandi v Jones Chewo Bobo Divorce Cause 84 of 2005 at High Court of Kenya, Nairobi

¹¹⁹ Kung’u W C, “Criminalization of marital rape in Kenya,” Published LLM, University of Toronto, 2011, 18.

¹²⁰ Amnesty International, Kenya: Rape- The Invisible Crime,(2002), AI Index: AFR 32/001/2002 at 8.

legal standards that often have differing principles in terms of gender related issues.¹²¹ This can mostly be achieved through creating awareness and educating all people especially those that live in rural areas and are constantly subjected to traditional and cultural practice and to the elders and council of elders that instil and reinforce prejudicial practices.

4.4 SOCIAL AND INSTITUTIONAL CHALLENGES

In a survey conducted by the Federation of Women Lawyers in 2002 it was stated that more than half of the women who reported being physically or sexually abused by their partners remained silent about their misgivings because they consider violence to be a normal part of life.¹²² Retrogressive attitudes and stereotypes surrounding rape, which form the basis of questioning the credibility and believability of a rape victim, affect the entire society. Women are often viewed as inferior to their male counterparts and as such women are unable to openly discuss any injustices done to them by men.

This perception has not only been adapted by normal citizens but has also been infiltrated into the police system. This is particularly problematic because they have grave implications for the quality of investigations conducted by the police given that the police set the tone of the investigation.¹²³ For instance, the police may be biased when dealing with a case as they have a pre-determined mind set on marital rape. This challenge, however, becomes predominantly intricate and magnified in scenarios where the victim of marital rape is mentally challenged.¹²⁴ Their credibility is often questioned because of their disability, hence making them more vulnerable to this form of injustice.¹²⁵

The competence of mentally impaired people to credibly recount their victimization in court is likely to be challenged and they are almost invariably seen as lacking credibility, embodying for many, ‘the stereotypical crazy woman who fantasizes and lies about being

¹²¹ Kung’u W C, “Criminalization of marital rape in Kenya,” Published LLM, University of Toronto, 2011, 28.

¹²² African Population and Health Research Centre, “The reality behind the words: An information resource about marital rape in Kenya” Policy Brief No. 14 of 2010.

¹²³ Lekakeny N R, *The Elusive Justice for women: A critical analysis of rape law and practice in Kenya*, University of Cape Town.

Kung’u W C, “Criminalization of marital rape in Kenya,” Published LLM, University of Toronto, 2011,

¹²⁴ 18.

¹²⁵ Kung’u W C, “Criminalization of marital rape in Kenya,” Published LLM, University of Toronto, 2011, 18.

raped¹²⁶ A recent survey of police practice with respect to mentally challenged victims of rape, conducted in Nairobi and Kiambu counties, reveals similar trends in Kenya.¹²⁷

Other issues that relate to the police include delays in commencing or following through with investigations. There are several instances of failure to apprehend an accused even where he is known.¹²⁸ Often the police required the victims to be actively engaged in investigations to the extent of requiring them to participate in apprehending the accused. In one case the police colluded with the perpetrator against the victim in exchange for money.¹²⁹ It therefore appears that, in addition to the resources and capacities of justice institutions, their effectiveness depends on the personal attitudes of the officials as well as the economic and social resources at the disposal of the individuals asserting their claims. This therefore poses a difficulty in dealing with marital rape charges on the social and institutional scale.

In addition to the police and judicial system other stakeholders that have fostered the laxity in marital rape issues is the media. The media is invaluable in creating the much needed headway in dealing with issues of domestic violence. Journalists have the power to dramatically impact the perceptions and worldviews of their target audiences since their reports can shape understandings of spousal rape and also affect attitudes towards both the survivors and perpetrators of violence. This will therefore create the much needed shift in perception and attitudes regarding marital rape. Sex stereotypes must be eliminated as these are part of the reason behind marital rape and discrimination against women.

4.5. GLOBAL PRACTICES: THE CASE OF SOUTH AFRICA

South Africa has legally strong and profound pieces of legislation that aim at combating marital rape. South Africa criminalized marital rape in the year 1993.¹³⁰ Despite having an early start in the process of eliminating marital rape research indicates that there has not led to the total and complete abolishment of marital rape.¹³¹

¹²⁶ Lekakeny N R, *The Elusive Justice for women: A critical analysis of rape law and practice in Kenya*, University of Cape Town.

¹²⁷ Coalition on Violence Against Women (COVAW) 'The knowledge, awareness, practice & prevalence rate of gender based violence (GBV) especially sexual violence among women and girls with intellectual disabilities May-June, 2013.

¹²⁸ Lekakeny N R, *The Elusive Justice for women: A critical analysis of rape law and practice in Kenya*, University of Cape Town.

¹²⁹ Lekakeny N R, *The Elusive Justice for women: A critical analysis of rape law and practice in Kenya*, University of Cape Town.

¹³⁰ Human Rights Watch/Africa, *Violence against women in South Africa*, November 1995.

¹³¹ Kaganas F, Murra C, "Law Reform and the Family: The New South African Rape-in Marriage Legislation," 18 *Journal of Law and Society*, 1991.

The Prevention of Family Violence Act is the genesis of the marital rape exemption in South Africa. Section 5 of the Act states that, “notwithstanding anything contrary contained in any law, or in common law, a husband may be convicted of the rape of his wife.”¹³² This provision therefore made the husband criminally liable for non-consensual sex within the marriage. This section of the Act was further reiterated by the implementation of the Domestic Violence Act which reinforced the need for the state to protect victims of domestic violence.¹³³

Furthermore, South Africa’s Criminal Law (Sexual Offences and Related Matters) Amendment Act also made a landmark contribution towards the total abolishment of certain discriminatory practices within the legal system while dealing with issues of sexual assault. Section 60 of the Act states that “notwithstanding any other law, a court may not treat the evidence of a complainant in criminal proceedings involving the alleged commission of a sexual offence pending before the court, with caution, on account of the nature of the offence.”¹³⁴ This therefore abolished the controversial “cautionary rule” which mandated the victims of sexual assault to have corroborated evidence when giving a testimonial account of how the sexual attack occurred.

Section 59 of the same Act also attempts to protect survivors stating that in criminal proceedings involving the alleged commission of a sexual offence, the court may not draw an inference only from the length of any delay between the alleged commission of such offence and the reporting thereof. This means that victims cannot be treated differently for not reporting an incident immediately.

The country has also made significant progress in trying to legally obliterate certain traditional practices that are often prejudicial to the victims of spousal rape. A case in point is that of *S v Mvumvu*.¹³⁵ This case brought to light the underlying problem of particular practice in South Africa that is known as *bogadi/lobola*. This practice highly hinges upon customary law.

¹³² Section 5 of the South African Prevention of Family Violence Act [No. 133 of 1993].

¹³³ Dr. Nico, P. Swartz, Odirile, O. Itumeleng, Annah, M. Danga, Kagiso Tshwene & Kediretse Mothabatau, “Is A Husband Criminally Liable For Raping His Wife? A Comparative Analysis,” 3(3) *International Journal of Academic Research and Reflection*, 2013.

¹³⁴ Dr. Nico, P. Swartz, Odirile, O. Itumeleng, Annah, M. Danga, Kagiso Tshwene & Kediretse Mothabatau, “Is A Husband Criminally Liable For Raping His Wife? A Comparative Analysis,” 3(3) *International Journal of Academic Research and Reflection*, 2013.

¹³⁵ *S vs. Mvumvu 1 All SA 435 (SCA) [2004]*

In this case the accused was convicted of multiple rape of his customary law wife.¹³⁶ The accused had all his life lived according to the traditions and customs of his tribe. In 1995, he entered into a customary marriage with the complainant. In April 1999, their marriage disintegrated which resulted in the complainant deserting her matrimonial home and opted to live with her brother. She therefore assumed that the marriage had been dissolved by virtue of leaving her matrimonial home. The accused, on the other hand, regarded the marriage still existent because the *lobola*¹³⁷ he had paid, in respect of the complainant. Furthermore, the *lobola* had not been returned as this act sealed the abolishment of the marriage.¹³⁸ He therefore kidnapped his estrange wife and raped her as a means of enforcing is conjugal rights. His actions though unacceptable in law, might well be explicable given his background. His actions were shaped and moulded by the norms, beliefs and customary practices by which he lived his life.¹³⁹ The Court however sentenced the accused to 10 years' imprisonment each in respect of two counts of raping his wife and 3 years' imprisonment on the count of abduction and 3 months imprisonment on account of assault.¹⁴⁰

Regardless of the legislative progress that South Africa has made, the overall patriarchal mentality still remains prevalent amongst the larger South African population.¹⁴¹ These views are still highly reflected in the judicial pronouncements made in South Africa. A case in point is that of *S v Modise* where the learned Judge Gura stated that "The desire to make love to his wife must have overwhelmed him, hence his somewhat violent behaviour...however...minimum force, so to speak, was resorted to in order to subdue the complainant's resistance." He then went on to conclude that, "This relationship, of husband and wife, should never be overlooked by any judicial officer."

¹³⁶ Dr. Nico, P. Swartz, Odirile, O. Itumeleng, Annah, M. Danga, Kagiso Tshwene & Kediretse Mothabatau, "Is A Husband Criminally Liable For Raping His Wife? A Comparative Analysis," 3(3) *International Journal of Academic Research and Reflection*, 2013.

¹³⁷ Bogadi is paid by the husband or his family to his new wife's family. The husband believes that the wife has become his property.

¹³⁸ Dr. Nico, P. Swartz, Odirile, O. Itumeleng, Annah, M. Danga, Kagiso Tshwene & Kediretse Mothabatau, "Is A Husband Criminally Liable For Raping His Wife? A Comparative Analysis," 3(3) *International Journal of Academic Research and Reflection*, 2013.

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¹⁴⁰ Dr. Nico, P. Swartz, Odirile, O. Itumeleng, Annah, M. Danga, Kagiso Tshwene & Kediretse Mothabatau, "Is A Husband Criminally Liable For Raping His Wife? A Comparative Analysis," 3(3) *International Journal of Academic Research and Reflection*, 2013.

¹⁴¹ Hancox G, Marital Rape in South Africa October 25 2012, Open Society Initiative for Southern Africa < <http://www.osisa.org/buwa/south-africa/marital-rape-south-africa>> .

4.6. LESSONS LEARNT

Kenya can borrow a leaf or two from the legislative progress that South Africa has made. For instance, the case of *S v Mvamvu* which entailed the payment of the *lobola* that is almost equivalent to dowry price in Kenya demonstrated that regardless of the presence of certain customs and traditions, such practices should not override and overshadow the certain human rights. Therefore culture should never be used as defence for social and gender injustice.

Yet another lesson derived from the case of South Africa is the general principle that in practice, law can reflect social change, even facilitate it, but can seldom if ever initiate it.¹⁴²

Although criminalizing marital rape is a step towards the right direction, more needs to be done to change the overall perception of gender inequality and more so sexual assault with marriage. This can only be achieved through increasing public awareness through trainings and other forms of education. Various stakeholders should therefore be involved in the quest towards eliminating society's gender stereotypes. These stakeholders include the government, non-profit organizations and most importantly, the media.

4.7. CONCLUSION

There are several systemic challenges that arise in the quest to criminalize marital rape. These challenges span from the legal, traditional and social spheres of life. However, the presence of these challenges is not sufficient for Kenya to fail in its duty to protect all its citizens. South Africa as a country of best practice in this research has managed to rise above the challenges and still continue to look into ways in which they can make the law more effective. Kenya can therefore benchmark itself against South Africa and make the necessary legislative progress needed to eliminate marital rape. In addition to that, there needs to be increased public awareness on the issue of marital rape as the law does not work

in isolation. The only means to make the law effective to its full extent is to have a populace that fully understands the rationale behind the law.

¹⁴² Fineman A M, *Transcending the Boundaries of Law: Generations of Feminism and Legal Theory*, [2001] Routledge Taylor & Francis Group p. 370 <
<https://books.google.co.ke/books?id=BpNaBwAAQBAJ&pg=PA370&dq=law+can+reflect+social+change,+even+facilitate+it,+but+can+seldom+if+ever+initiate+it&hl=en&sa=X&ved=0ahUKEwjUhI2ItL7RAhUHahokHYaqACMQ6AEIGjAA#v=onepage&q=law%20can%20reflect%20social%20change%2C%20even%20facilitate%20it%2C%20but%20can%20seldom%20if%20ever%20initiate%20it&f=false>> .

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

5.1 CONCLUSION

Rape in marriage is not a novel concept as it has been present in several societies across the globe for centuries upon centuries. It is an issue that has and continues to affect millions of women globally. As evidenced from several reports, marital rape causes adverse physical and emotional harm. Whether the harm is understood as a criminal attack or as a suffering that must be endured as part of a marriage, this does not take away from the fact that forced sex ultimately damages the overall wellbeing of its victims.

Historically there have been theories that supported the marital rape exemption including implied consent theory, unity theory and marital privacy and reconciliation theory. The

applicability and legality of these theories have however been challenged in this research. These theories have all together shown their shortcomings as they go against the ultimate prosperity and wellbeing of the human being. They permit and tolerate the violation of certain inherent human rights such as the right to be free from torture and inhuman treatment, the right to life and the right to liberty and security of person. Furthermore, they foster a society in which discrimination is both tolerated and legalized. This is because the marital rape exemption distinguishes and excludes victims of marital rape from equal protection by the law.

A central theme identified throughout this research is that marital rape cannot and should not be understood simply from an individual perspective alone. Marital rape is at the nexus of an intimate life, cultural norms, international and state obligation. Therefore for marital rape to be successfully implemented in Kenya, all the above mentioned sectors need to work as a well-oiled machine in order for it to be successful.

Furthermore, gender norms that often give rise to gender inequalities are fundamental to the experience and progress towards the regulation and criminalization of marital rape. The society's response to domestic violence and more so marital rape is shaped by its perception of gender roles. The silence and blame associated with marital rape means that victims of marital rape continue to remain silent on the violations done against them. This can however be changed if society chooses to look at the marriage institution through a different and all inclusive lens. The reverence for marriage can be redefined to include the health and well-being of both partners. This will therefore enable greater gender equity and shift the shame in the violation of marital rape from women to men.

5.2 RECOMMENDATIONS

i. Criminalize marital rape by repealing section 43(5) of the Sexual Offences Act

Criminalize marital rape by repealing section 43(5) of the Sexual Offences Act as this is imperative to eliminating this form of violence. Repealing this provision will enable victims of marital rape to seek redress and obtain justice for a wrong that harms and violates their fundamental human rights.

Alternatively, adding a provision within the law prescribing marital rape, which may also include cohabiting couples, may be a great stepping stone towards criminalizing marital rape. This may be done within the Sexual Offences Act.

ii. **Address traditional, cultural and social perceptions on marital rape**

Social and cultural perceptions regarding the role of the man and woman in a marriage has been one of the issues that hinder the criminalization of marital rape. It is quite evident that irrespective of progress made globally to tackle subordination of women, there is still much more that needs to be done especially in Africa.

There is therefore a need to focus on society and shift peoples' perspectives and attitudes. Sex stereotypes, such as ownership of women by men upon marriage, should be eliminated as these are part of the reason behind marital rape and discrimination against women.

Demystifying these stereotypes can be done through increased education and awareness for men and women on this matter. Awareness can be done through using channels such as the local administration that includes chiefs and Members of County Assemblies who have a strong presence in the grass root areas. They can conduct regular forums aimed at raising awareness on domestic violence within the counties.

Furthermore, the media is invaluable when it comes to dispensing information. Journalists should aim at dramatically impacting the perceptions and worldviews of their target audiences since their reports can shape understandings of particular crimes and also affect attitudes towards both the survivors and perpetrators of violence.

There is also a need to conduct comprehensive research to inform us on how the country can change certain perceptions that are shaped by discriminatory traditional and customary practices. Despite the recognition of traditional law in the constitution, the government and legislators need to reinforce the fact that certain discriminatory practices are repugnant to the achievement of justice for all.

iii. **Equip judicial and executive arm to better handle marital rape cases**

The law cannot stand alone, it needs to be properly implemented and enforced. The judiciary, police and overall executive arm of the government need to adopt a more hands on approach in dealing with marital rape. The police for instance need to be trained on how to deal with victims of marital rape and victims of rape in general. This is fundamental to the success of marital rape as a crime because the police are the first people that victims interact with on a legal scale. A well-equipped and trained police

force will translate to increased public confidence in the judicial system and as such more victims of marital rape will speak out.

The judiciary should also ensure that there is a swift and easy means of addressing case. This is help in not only instilling confidence for victims of marital rape but also in ensuring that there is justice where it is due.

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