

SECTION 43(5) OF THE SEXUAL OFFENCES ACT: THE LEGAL
DISPENSATION FOR MARITAL RAPE IN KENYA

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BY

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DECLARATION

I, OGOTI PATRICIA GERTRUDE, 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:

[Mrs. Catherine Ngina Mutava]

DEDICATION

I dedicate this work to my parents who have sacrificed tremendously to ensure I received the best education and to my siblings who have supported me in my studies throughout the years.

ACKNOWLEDGEMENTS

I convey my appreciation to the Almighty God for granting me the ability and will power to undertake and finalize this project. I also acknowledge my supervisor, Mrs. Catherine Ngina Mutava for her valuable guidance and sincere criticism during this research.

LIST OF ABBREVIATIONS

ACCORD- Agency for cooperation and Research on Development

AU- African Union

CEDAW- Convention on Elimination of all forms of Discrimination against Women

CIET- Community Information Empowerment and transparency (CIET)

FIDA- Federation of Women Lawyer's

ICCPR- International Covenant on Civil and Political Rights

OSISA- Open Society initiative for Southern Africa

UDHR- Universal Declaration of Human Rights

UN- United Nations

UNGA- United Nations General Assembly

ABSTRACT

Law is an instrument to effect change in society and to protect rights of the marginalized.¹ Where law fails to do this, its objects fail to be realized. The Constitution of Kenya provides for gender equality and the freedom from prejudicial treatment on the basis of one's sex. This, nonetheless, is not attained in light of Section 43(5) of the Sexual Offences Act which provides for the marital rape exemption and thus puts one gender at unequal par with another. This paper will focus on marital rape in Kenya and how its legal dispensation has had an effect on married women.

¹Yale Law School Legal: The Function of Law in a Democratic Society' <http://www.yaleuniversity-the-functions-of-law-in-a-democratic-society> on 14th January 2017.

CHAPTER ONE: INTRODUCTION

1.1 DEFINITION OF RAPE

Rape is defined as an act involving the unlawful and intentional penetration of one's genital organs into those of another without their consent perpetuated through the use of force, threats or intimidation of any kind.²

1.2 DEFINITION OF MARITAL RAPE

Marital rape, therefore, is the intentional penetration of one's genital organs into those of their spouse without their consent perpetuated through the use of force, threats or any form of intimidation.

Marital rape can be perpetuated by either spouse. Contrary to the popular belief that only husbands can rape their wives, wives can also rape their husbands.³ This research paper will, however, focus on marital rape as perpetuated by husbands on their wives.

1.3 BACKGROUND OF MARITAL RAPE

In order to understand the history of marital rape, the context of marriage in the 19th century British law should be considered.

In the 19th Century English law, marriages were governed by the principle of coverture.⁴ Under the principle of coverture, the wife and husband were considered to be one person with the wife's legal identity subsumed in that of her husband at the time of marriage.⁵ This gave husbands control over their wives.

This form of control entitled the husband to a variety of rights over the wife including the authority to chastise the wife so long as the physical injury did not cause permanent injury.⁶ It was because of this form of legal control that husbands had over their wives that it was presumed that wives

² Section 3(1), *Sexual Offences Act* (2006).

³ 'Monica Steiner: Marital/Spousal Rape Laws and Penalties/ Criminal Law' <http://www.CriminalDefenseLawyer.com>marital-rape/> on 13 January 2017.

⁴ Jill Hasday: Contest and Consent: A legal History of Marital Rape' *California Law Review* (2000) <http://www.scholarship.law.berkeley.edu>vol88>iss5> on 7 December 2016.

⁵ 'William Blackstone: Commentaries on the Laws of England' Online Library of Liberty- Liberty Fund (1765) http://www.LibertyFund>files>Blackstone_Vol1 on 7 December 2016.

⁶ 'Jill Hasday: A legal History of Marital Rape' <http://www.scholarship.law.berkeley.edu>vol88>iss5> on 7 December 2016.

acted under their husbands' coercion and were thus not held liable for crimes committed under their husbands' presence provided they were not serious offences like murder.⁷

The exemption from spousal rape largely draws from this system of the law of coverture because it was implied that when the wife agreed to be married, she agreed to the obligations that arose from the marriage. As sexual relations with her husband form part of her duties as a wife and as she was under the control of her husband, her husband could do with her as he pleased.

1.3.1 The Marital Rape Exemption in the 19th Century

Rape in the 19th Century was considered to be executed only by any male of the age of fourteen and over but not the husband of the female.⁸

The warrant for the marital rape immunity in this century was drawn from the Hale doctrine propounded by Matthew Hale. He argued that the husband could not be at fault for rape as marriage indicated that the wife had given consent to sexual relations from which she could not retract.⁹

It is for this reason that the marital rape exemption did not cover forced marriages involving the wife's unlawful compulsion to marry.¹⁰ The husband was thus not exempted in this case because there was no consent from the wife at the time of marriage.¹¹

Forced marriages in the 19th century were mainly characterized by bride capture.¹² A man who did not get the consent of the woman's father to marry his daughter would abduct her and marry her.¹³ If the woman was a virgin and then raped, her abductor would be nonetheless instructed to

⁷Jill Hasday: A legal History of Marital Rape' <http://www.scholarship.law.berkeley.edu>vol88>iss5> on 7 December 2016.

⁸Jill Hasday: A legal History of Marital Rape' <http://www.scholarship.law.berkeley.edu>vol88>iss5> on 7 December 2016.

⁹ Hale M, *Historia Placitorum Coronae: The History of the Pleas of the Crown*, 1736), 629.

¹⁰ 'Jill Hasday: A legal History of Marital Rape' <http://www.scholarship.law.berkeley.edu>vol88>iss5> on 7 December 2016.

¹¹'Jill Hasday: A legal History of Marital Rape' <http://www.scholarship.law.berkeley.edu>vol88>iss5> on 7 December 2016.

¹² 'Melissa Anderson: Lawful Wife, Unlawful sex: Examining the Effect of the Criminalization of Marital Rape in England and the Republic of Ireland' <http://digitalcommons.law.uga.edu/gjicl/vol27/iss1/4> on 17 January 2017.

¹³'Melissa Anderson: Lawful Wife, Unlawful sex' <http://digitalcommons.law.uga.edu/gjicl/vol27/iss1/4> on 17 January 2017.

pay bride price for her to her father and would afterwards be stoned to death for the deed.¹⁴ Only the woman whom he raped could exempt him from the consequences of raping her by agreeing to marry him.¹⁵

However, there was a third-party caveat to the marital rape exemption.¹⁶ The caveat made husbands who had allowed another man to rape their wives liable for spousal rape.¹⁷ This illustrated that the determination of whether or not a wife was legally engaged in sexual intercourse was dependent on her marriage to her husband and not her consent.¹⁸

Drawing from the above, a wife could, therefore, not seek criminal prosecution of her husband for forcing her into sexual relations without her consent.

1.3.2 The Feminist Campaign against a husband's conjugal rights

This bias of the law against women in marriage led to feminist campaigns which advocated for women's rights. Feminists argued that despite the fact that women had been accorded full political and economic rights, these rights would not be enough to ensure their equality with men if they did not have the right to determine sexual relations with their husbands.¹⁹

According to them, women needed to be given more social and economic opportunities for their betterment as most married women submitted to their husband's sexual demands because they lacked more alternatives to their marriages.²⁰

Therefore, a woman could only have the ability to freely consent in circumstances in which she had the legal right to refuse her husband's sexual advances and had other alternatives instead of submitting.

¹⁴ 'Melissa Anderson: Lawful Wife, Unlawful sex' <http://digitalcommons.law.uga.edu/gjicl/vol27/iss1/4> on 17 January 2017.

¹⁵ 'Melissa Anderson: Lawful Wife, Unlawful sex' <http://digitalcommons.law.uga.edu/gjicl/vol27/iss1/4> on 17 January 2017.

¹⁶ Jill Hasday: A legal History of Marital Rape' <http://www.scholarship.law.berkeley.edu>vol88>iss5> on 7 December 2016.

¹⁷ Jill Hasday: A legal History of Marital Rape' <http://www.scholarship.law.berkeley.edu>vol88>iss5> on 7 December 2016.

¹⁸ 'Jill Hasday: A legal History of Marital Rape' <http://www.scholarship.law.berkeley.edu>vol88>iss5> on 7 December 2016.

¹⁹ Elizabeth Cady: History of woman suffrage' <http://www.internetarchive>details>historyofwomensuffrage.org> on 7 December 2016.

²⁰ <http://www.internetarchive>details>historyofwomensuffrage.org> on 7 December 2016.

Feminists argued that the legal, economic and social environment greatly influenced women's decision to marry and stay married.²¹ Single and divorced women were marginalized and could not support themselves given that laws and practices were prejudicial to women in regard to the type of jobs or the amount of wages accorded to them. This left them dependent on their husbands.²² And thus with no other means of negotiating their marital relationship they were forced to submit.

Lastly, taking care of children in the event that women conceived was the sole responsibility of wives. Feminists thus argued that women should control sexual access by their husbands as women were tasked with the responsibility of taking care of children.²³

1.3.3 Remedies available to women for marital rape in the 19th Century

The only avenue that women had to redress their grievances was on the basis of cruelty which was a ground for divorce. They had to prove that their husband's sexual advances constituted cruelty.²⁴ This is illustrated in the case below.

In *Shaw v Shaw*²⁵, seeking redress for marital rape on the ground of cruelty proved to be difficult. In this case, the wife could not engage in sexual relations for health reasons. Her husband had forced her repeatedly into sexual intercourse despite her making him aware that her health condition prevented her from engaging in sexual relations. The court, however, found in favor of the husband claiming it was impossible to determine on the evidence that the husband had known the state of her health and understood the consequences of his actions.²⁶ It was concluded that, "the court had to allow the husband room for irrationality and willful blindness where his marriage prerogatives were at stake."²⁷

²¹ 'Jill Hasday: A legal History of Marital Rape' <http://www.scholarship.law.berkeley.edu>vol88>iss5> on 7 December 2016.

²² Catherine MacKinnon: Toward a Feminist Theory of the state' <http://www.hupharvard.edu/catalog>feministtheory> on 7 December 2016.

²³ 'Jill Hasday: A legal History of Marital Rape' <http://www.scholarship.law.berkeley.edu>vol88>iss5> on 7 December 2016.

²⁴ 'Jill Hasday: A legal History of Marital Rape' <http://www.scholarship.law.berkeley.edu>vol88>iss5> on 7 December 2016.

²⁵ *Shaw v Shaw* [1954] 2 Q.B.429.

²⁶ *Shaw v Shaw*.

²⁷ *Shaw v Shaw*.

Therefore, the wife would only be granted divorce in very extreme circumstances where it could be proved beyond reasonable doubt that the husband knew of the wife's health condition and how his conduct would affect her.²⁸

This was the trend in the 19th century and thus the marital rape exemption remained intact.

1.3.4 The marital rape exemption in the 20th Century

In this century, developments towards the elimination of the marital rape exemption were observed.²⁹ The courts considered the issue of judicial separation of married couples and what that meant for consent of the wife to sexual relations with her husband which could not be retracted as provided for by the Hale doctrine.³⁰

This is illustrated in *R v Clarke*³¹, where it was concluded that if spouses had been judicially separated, it was deemed that the wife's assent to copulation with her husband had been nullified.³²

Similarly, in *R v Miller*³³ it was held that judicial separation meant that the wife's consent was revoked. Judicial separation meant that the wife and husband had mutually agreed to a separation.³⁴ However, if the wife departed from their marital home and petitioned for divorce, then her assent was not deemed to have been revoked as the wife had made that choice unilaterally.³⁵ Mutual consent for a separation could only be implied where the marriage has been terminated.³⁶

This was the course until 1984 when the marital rape exemption was overturned in the case of *Weishaupt v. Commonwealth*³⁷ where the court held that in marriage "there was an implied consent to sexual intercourse but that consent could be revoked."³⁸

²⁸ 'Jill Hasday: A legal History of Marital Rape' <http://www.scholarship.law.berkeley.edu>vol88>iss5> on 7 December 2016.

²⁹ 'Jill Hasday: A legal History of Marital Rape' =<http://www.scholarship.law.berkeley.edu>vol88>iss5> on 7 December 2016.

³⁰ 'Melissa Anderson: Lawful Wife, Unlawful sex' <http://digitalcommons.law.uga.edu/gjicl/vol27/iss1/4> on 17 January 2017.

³¹ *R. v. Clarke* [1949] 33 Cr. App. R. 216.

³² *R. v. Clarke*.

³³ *R. v. Miller* [1954] 2 Q.B. 282, 290.

³⁴ *R. v. Miller*.

³⁵ *R. v. Miller*.

³⁶ *R. v. Miller*.

³⁷ *Weishaupt v Commonwealth* [1984] All ER.

³⁸ *Weishaupt v Commonwealth*.

This was followed by the case of *R v R*³⁹ in 1991, which abolished the marital rape exemption completely.⁴⁰

Thereafter, in 1993, the Vienna Declaration Program for Action backed for eradication of violence against women inclusive of sexual based violence.⁴¹

Later the Parliament of England enacted the Criminal Justice and Public Order Act of 1994, which repealed the statutory marital rape exemption.⁴²

In 1995, the Beijing Declaration and Platform for Action established measures for monitoring state accountability covering issues like, violence against women.⁴³

Following this, there was passing and adoption of international and regional instruments concerning violence against women.⁴⁴

1.3.5 The marital rape exemption in the 21st century

This century was characterized by the evolution of human rights the world over.⁴⁵ The human rights treaties and conventions that were passed greatly discouraged marital rape and as states ratified or acceded to the treaties, they proscribed marital rape laws in their countries.⁴⁶

For instance, the United Nations Convention on Elimination of all forms of Discrimination against Women⁴⁷ disallows all forms of discrimination against women. This includes any form of violence against women.⁴⁸ Thus outlawing marital rape. Most states that have ratified this treaty have subsequently banned the marital rape exemption in their countries.⁴⁹ For example, Ghana ratified

³⁹ *R v R* [1991] 3 WLR 767.

⁴⁰ *R v R*.

⁴¹ UNGA *Vienna Declaration and Program for Action*, UN A/CONF.157/ 24 1993.

⁴² *Justice and Public Order Act*, [1994].

⁴³ *UN Beijing Declaration and Platform of Action*, 27 October 1995.

⁴⁴ African Union, *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, 11 July 2003.

⁴⁵ <http://www.internationalhumanrights.dk> on 17 January 2017.

⁴⁶ <http://www.internetarchive>details>historyofwomensuffrage.org> on 7 December 2016.

⁴⁷ *UN Convention on Elimination of all forms of Discrimination against Women* (1979).

⁴⁸ *UN Report of the Committee on the Elimination of Discrimination against Women*, UN /A/Res/44/38(1992).

⁴⁹ <http://www.internetarchive>details>historyofwomensuffrage.org> on 7 December 2016.

the convention in 1980 and consequently repealed the marital rape exemption in 2007. South Africa ratified the convention in 1993 and outlawed marital rape in the same year.⁵⁰

Though Kenya acceded to the convention in 1984, marital rape is still not illegal in Kenya. However, a husband is entitled to a fault-based divorce where his wife denies him sexual intercourse.⁵¹

1.4 BACKGROUND OF MARITAL RAPE IN KENYA

The background of marital rape in Kenya will be discussed under pre-colonial, colonial and post-colonial eras.

1.4.1 The marital rape exemption in the pre-colonial era

The background of marital rape in Kenya dates back to pre-colonial times.⁵² Marriage was of great importance in traditional African societies to both women and men.⁵³ For men, it was the standard of measure of wealth and status in society.⁵⁴ If a man had more wives and children and was able to financially support them, he was deemed to be wealthy and of a higher social ranking.⁵⁵ Children were also of crucial importance in a marriage as they continued a man's lineage.⁵⁶ However, children could only be born in marriage or they would be considered illegitimate by society.⁵⁷

Women who stayed unmarried past the marriage age were marginalized in society.⁵⁸ Marriage was, therefore, important for women as well as it ensured that they fulfilled their obligations to society.⁵⁹ For example, to bear children for their husband. Married women without children had a limited access to property in the home as compared to women with children.⁶⁰

⁵⁰ <http://www.internationalhumanrights.dk> on 17 January 2017.

⁵¹ 'The Law Relating to Breach of Promise of Marriage' <http://www.lawreform.ie> on 16 December 2016.

⁵² 'Roseline Njogu: Decolonizing Sex: Fifty Shades of Rape'

<http://www.riarauniversity.ac.ke/decolonisingsexfiftyshadesofrape> 13 January 2017.

⁵³ 'Cormac Burke: Marriage and the Family in Africa' <http://www.cormacburke.or.ke> on 13 January 2017.

⁵⁴ <http://www.africanmarriage.info>

⁵⁵ <http://www.cormacburke.or.ke> on 13 January 2017.

⁵⁶ 'Roseline Njogu: Decolonizing Sex' <http://www.riarauniversity.ac.ke/decolonisingsexfiftyshadesofrape> 13 January 2017.

⁵⁷ 'Roseline Njogu: Decolonizing Sex' <http://www.riarauniversity.ac.ke/decolonisingsexfiftyshadesofrape> 13 January 2017.

⁵⁸ <http://www.cormacburke.or.ke> on 13 January 2017.

⁵⁹ <http://www.cormacburke.or.ke> on 13 January 2017.

⁶⁰ 'Roseline Njogu: Decolonizing Sex' <http://www.riarauniversity.ac.ke/decolonisingsexfiftyshadesofrape> 13 January 2017.

Marriage, hence, was important in society as it ensured that the rights of a man were fulfilled by the woman. These rights included the right of the man to have sexual relations with his wife as it was unacceptable to have sex with an unmarried girl.⁶¹ Thus the rights of men were vested in their wives.

Therefore, how marriage was viewed by traditional African communities and the cultural practices associated with it which emphasized the subordinate status of women as compared to men and played a big role in the marital rape exemption will be described below.⁶²

Firstly, due to practices such as the payment of dowry, it was considered that men had a vested property right in their women.⁶³ Since one can generally do as they please with their property, this was a breeding ground for men to have unlimited and unconsented sexual relations with their wives and hence the basis of the marital rape exemption in traditional African societies.⁶⁴

Secondly, wife inheritance was practiced by many communities.⁶⁵ The practice was that on the death of her husband, the widow would be married off to a close relative of her husband.⁶⁶ Whether she consented to the new marital relationship or the consequent sexual relations was not considered.⁶⁷

In addition, the rite of passage of womanhood of Female Genital Mutilation undertaken on females in most communities was a way to determine and contain the sexual relations of a woman.⁶⁸ This is so because no man would marry a woman who had not been ‘circumcised.’⁶⁹

⁶¹ ‘Roseline Njogu: Decolonizing Sex’ <http://www.riarauniversity.ac.ke/decolonisingsexfiftyshadesofrape> 13 January 2017.

⁶² ‘Christine Kung’u: Criminalization of Marital Rape in Kenya’ <http://tspace.library.utoronto.ca> on 20 February 2016.

⁶³ ‘Winnie Kamau: The Legal Impunity for Marital Rape in Kenya’ <http://theequakityeffect.org/wp-content...> on 20 February 2016.

⁶⁴ ‘Roseline Njogu: Decolonizing Sex’ <http://www.riarauniversity.ac.ke/decolonisingsexfiftyshadesofrape> 13 January 2017.

⁶⁵ ‘Christine Kung’u: Criminalization of Marital Rape in Kenya’ <http://tspace.library.utoronto.ca> on 20 February 2016.

⁶⁶ ‘Christine Kung’u: Criminalization of Marital Rape in Kenya’ <http://tspace.library.utoronto.ca> on 20 February 2016.

⁶⁷ ‘Christine Kung’u: Criminalization of Marital Rape in Kenya’ <http://tspace.library.utoronto.ca> on 20 February 2016.

⁶⁸ ‘World Health Organization: Female Genital Mutilation and Other Harmful Practices’ <http://www.who.int-female-genital-mutilation> on 17 January 2017.

⁶⁹ <http://www.who.int-female-genital-mutilation> on 17 January 2017.

Lastly, early marriages also contributed to the marital rape exemption.⁷⁰ Young girls would be wedded to men who were much older than them.⁷¹ Due to the significant age difference, the young girl could easily be manipulated by her husband to do whatever he wanted and she did not have a say in whether to engage in sexual relations with him or not.⁷²

1.4.2 The marital rape exemption in the colonial era

This era was characterized mainly by British common law. With the reign of the British colonizers in Kenya, English law was applied to the people of Kenya.⁷³ As a result, the doctrine of coverture applied to all married women.⁷⁴ Through marriage, the wife's legal identity was incorporated into that of her husband thus making it impossible for a husband to rape his wife as she was included in his person leading to the marital rape exemption.⁷⁵ Thus the English law further limited the rights of married women and reinstated the patriarchal system perpetuated by African societies.

A wife's existence and her freedoms and rights under this system of law were hinged on her husband. For instance her property rights were vested in her husband, her ability to enter into contracts and even her legal responsibilities were linked to her husband.⁷⁶ She could, for example, not be convicted for crimes committed in her husband's presence.⁷⁷

Moreover, common law emphasized the right of a husband to have unlimited access to sexual relations with his wife.⁷⁸ This was demonstrated in *Re Cochrane*⁷⁹ where it was decided that the husband was entitled to consortium⁸⁰ and thus a wife could not deny her husband sexual relations.

⁷⁰ 'Winnie Kamau: The Legal Impunity for Marital Rape in Kenya' <http://theequakityeffect.org/wp-content...> on 20 February 2016.

⁷¹ 'Winnie Kamau: The Legal Impunity for Marital Rape in Kenya' <http://theequakityeffect.org/wp-content...> on 20 February 2016.

⁷² 'Winnie Kamau: The Legal Impunity for Marital Rape in Kenya' <http://theequakityeffect.org/wp-content...> on 20 February 2016.

⁷³ 'Winnie Kamau: The Legal Impunity for Marital Rape in Kenya' <http://theequakityeffect.org/wp-content...> on 20 February 2016.

⁷⁴ Blackstone W, 'Commentaries on the Laws of England' 430.

⁷⁵ 'Winnie Kamau: The Legal Impunity for Marital Rape in Kenya' <http://theequakityeffect.org/wp-content...> on 20 February 2016.

⁷⁶ 'Roseline Njogu: Decolonizing Sex' <http://www.riarauniversity.ac.ke/decolonisingsexfiftyshadesofrape> on 13 January 2017.

⁷⁷ 'Jill Hasday: A legal History of Marital Rape' <http://www.scholarship.law.berkeley.edu>vol88>iss5> on 7 December 2016.

⁷⁸ 'Roseline Njogu: Decolonizing Sex' <http://www.riarauniversity.ac.ke/decolonisingsexfiftyshadesofrape> on 13 January 2017.

⁷⁹ *Re Cochrane* (1840) 8 Dow PC 630.

⁸⁰ *Re Cochrane* (1840).

Hence, English law supported the marital rape exemption in Kenya further and even though the exemption was overturned later in English law,⁸¹ it still stands in Kenya.

1.4.3 The marital rape exemption in the post-colonial era

Even after Kenya gained independence from the British, the marital rape exemption still remained intact in Kenyan law.⁸²

The common law provisions on marital rape were rehashed in the Penal code.⁸³ Section 144⁸⁴ of the Penal Code defined rape as “unlawful carnal knowledge of a woman or girl without her consent.”⁸⁵

This meant that if the person committing the forced sexual relations with the victim of the rape was her husband, then the act would not amount to rape.

As not all sexual offences were provided for under the penal code, there was need for the enactment of a legislation that would deal with sexual offences comprehensively.⁸⁶ This paved the way for the drafting of the current Sexual Offences Act.⁸⁷

When the Sexual Offences Act was at Bill stage, it criminalized marital rape.⁸⁸ During the second reading of the Sexual Offences Bill in 2004, a Member of Parliament (MP) fervently opposed a provision for marital rape in the Sexual Offences Bill citing that a man cannot rape a wife for whom he has paid dowry for.⁸⁹ This was supported by other MPs in parliament.⁹⁰ Another stressed

⁸¹ *R v R* [1991] 3 WLR 767.

⁸² ‘Winnie Kamau: The Legal Impunity for Marital Rape in Kenya’ <http://theequakityeffect.org/wp-content...> on 20 February 2016.

⁸³ *The Penal Code* (No 4 of 2014).

⁸⁴ Section 144, *The Penal Code* (No. 8 of 1963).

⁸⁵ Section 144, *The Penal Code* (1963).

⁸⁶ ‘Winnie Kamau: The Legal Impunity for Marital Rape in Kenya’ <http://theequakityeffect.org/wp-content...> on 20 February 2016.

⁸⁷ ‘Winnie Kamau: The Legal Impunity for Marital Rape in Kenya’ <http://theequakityeffect.org/wp-content...> on 20 February 2016.

⁸⁸ ‘Christine Kung’u: Criminalization of Marital Rape in Kenya’ <http://tspace.library.utoronto.ca> on 20 February 2016.

⁸⁹ *Kenya National Assembly Official Record (Hansard), Second Reading of the Offences Bill* (2004).

⁹⁰ ‘Winnie Kamau: The Legal Impunity for Marital Rape in Kenya’ <http://theequakityeffect.org/wp-content...> on 20 February 2016.

that rights to sexual relations with one's wife were given as a result of the marriage they could thus not be subsequently denied.⁹¹

Most MPs were reluctant to have a law against marital rape out of fear that majority of women would falsely accuse their husbands of rape out of malice or vengeance.⁹²

A few MPs, majority of whom were women, opined for the criminalization of marital rape in light of women's rights to bodily integrity and disputed the notion that marriage meant that a woman had consented to sexual relations with her husband indefinitely.⁹³

However, the provision was deleted from the Sexual Offences Bill with the Sexual Offences Act excluding rape from occurring between persons who are married.⁹⁴

Thus, the only redress that victims of marital rape have in Kenya is under the criminal offence of assault provided for under Sections 250 and 251 of the Penal Code.⁹⁵ This is, nonetheless, not a sufficient remedy as it requires physical injury or a threat thereof to accompany the act.⁹⁶

Alternatively, victims can seek divorce from their husbands on the ground of cruelty.⁹⁷ This was illustrated in the case of *Esther Nangwanaa Nandi v Jones Chewo Bobo*⁹⁸. In this case the petitioner sought a divorce from the respondent on the ground of cruelty. She testified that the respondent would physically abuse her and force her into sexual relations when he was intoxicated. The judge granted her divorce on the basis of cruelty.⁹⁹

⁹¹ Onyango-Ouma, Njoki Ndungu, Nancy Baraza & Harriet Birungi: The Making of the Sexual Offences Act, 2006: behind the scenes http://www.popcouncil.org/pdfs/2009RH_KenyaSexOffenses.pdf on 17 January 2017.

⁹² http://www.popcouncil.org/pdfs/2009RH_KenyaSexOffenses.pdf on 17 January 2017.

⁹³ http://www.popcouncil.org/pdfs/2009RH_KenyaSexOffenses.pdf on 17 January 2017.

⁹⁴ Section 43(5), *Sexual Offences Act* (2006).

⁹⁵ Section 250, Section 251, *The Penal Code* (2014).

⁹⁶ 'Christine Kung'u: Criminalization of Marital Rape in Kenya' <http://tspace.library.utoronto.ca> on 20 February 2016.

⁹⁷ 'Christine Kung'u: Criminalization of Marital Rape in Kenya' <http://tspace.library.utoronto.ca> on 20 February 2016.

⁹⁸ *Esther Nangwanaa Nandi v Jones Chewo Bobo* [2006] eKLR.

⁹⁹ *Esther Nangwanaa Nandi v Jones Chewo Bobo*.

Later in 2015, the Protection Against Domestic Violence Act¹⁰⁰ was enacted. The Act provides in Section 3 that violence includes sexual violence within marriage.¹⁰¹ Victims of marital rape can thus seek redress under this Act.

1.5 BACKGROUND TO THE PROBLEM

Pursuant to Section 3 of the Judicature Act of Kenya,¹⁰² common law and the doctrines of equity are sources of law in Kenya. Therefore, there is still a linkage between English and Kenyan law.

Notwithstanding the aforementioned, Section 43(5) of the Sexual Offences Act excludes marital rape from sexual offences in Kenya. The only avenue for the protection accorded to women victims in such cases is to institute court proceedings against perpetrators on the basis of cruelty or assault which is inadequate as it often requires witnesses.¹⁰³ This is often impossible as marital rape occurs in the privacy of the couple's home.

In addition to common law there are various legislations in Kenya that discourage marital rape. First and foremost is the Constitution of Kenya which is the supreme law of the land¹⁰⁴ and therefore any law contrary to it is void.¹⁰⁵ The Constitution provides for equal rights for parties to a marriage¹⁰⁶ and further pledges protection against any kind of violence from public or private sources.¹⁰⁷

International covenants ratified by Kenya are another source of law which are applicable in Kenya pursuant to Article 2 (5) of the Constitution. For instance, the UN Convention on the Elimination of all Forms of Discrimination against Women ratified by Kenya defines discrimination to include gender based violence including sexual violence and urges state parties to criminalize such violence.¹⁰⁸

¹⁰⁰ *Protection Against Domestic Violence Act* (No.2 of 2015).

¹⁰¹ Section 3, *Protection Against Domestic Violence Act*.

¹⁰² Section 3, *Judicature Act of Kenya* (2010).

¹⁰³ 'Making the law count: An audit of legal practice on sexual violence in Kenya'
<http://www.acordinternational.org>... on 20 February 2016.

¹⁰⁴ Section 3, *Judicature Act of Kenya* (2010).

¹⁰⁵ Article 2 (5), *Constitution of Kenya* (2010).

¹⁰⁶ Article 45(3), *Constitution of Kenya*.

¹⁰⁷ Article 29 (c), *Constitution of Kenya*.

¹⁰⁸ UNGA Recommendation 19, *Convention on the Elimination of all forms of Discrimination against Women*, 1979.

In addition, the Universal Declaration of Human Rights (UDHR) states that all human beings are born free and equal in dignity and rights.¹⁰⁹ It further entitles everyone regardless of who they are to the rights and freedoms in the Declaration.¹¹⁰ It also prohibits subjection to torture or to cruel, inhuman or degrading treatment or punishment.¹¹¹ Thus any form of conduct towards women amounting to torture, cruelty, inhumane or demeaning treatment is against the object of the UDHR and demonstrates a violation by the member state of its obligations under the Declaration.¹¹²

Moreover, the UN Convention on Elimination of all forms of Discrimination against Women (CEDAW) defines violence as “any act or threat of an act of gender-based violence that poses physical, sexual or psychological harm or suffering to women regardless of whether it occurs in public or private life”.¹¹³ Such violence includes marital rape.¹¹⁴

Lastly, the African Charter on Human and Peoples Rights prompts states to affirm and put into effect suitable measures to safeguard women’s rights including respect for their dignity and their protection from all kinds of violence, including sexual violence.¹¹⁵

1.6 STATEMENT OF THE PROBLEM

The Kenya Demographic and Household Survey, discovered that 49% of women had experienced violence from the age of 15 years.¹¹⁶ Approximately one in four married, divorced or separated women had endured emotional violence by their present or latest husband. 40% had been subjected to physical violence, while 16% had suffered sexual violence.¹¹⁷ This statistics show the prevalence of marital rape in Kenya and the pressing concern for its address.

The question thus arises whether Section 43(5) of the Sexual Offences Act being contrary to the objects of the Constitution should be amended to allow for the criminalization of marital rape.

¹⁰⁹ Article 1, *Universal Declaration of Human Rights*, (1948).

¹¹⁰ Article 2, *Universal Declaration of Human Rights*.

¹¹¹ Article 5, *Universal Declaration of Human Rights*.

¹¹² ‘FIDA Kenya: Gender- Based Domestic Violence in Kenya’ <http://fidakenya.org/wp-content...> on 20 February 2016.

¹¹³ Article 1, *Convention on the Elimination of all forms of Discrimination against Women* (1992).

¹¹⁴ <http://fidakenya.org/wp-content...> on 20 February 2016.

¹¹⁵ Article 3 (4), *African Charter on Human and Peoples Rights*, (1987).

¹¹⁶ <http://fidakenya.org/wp-content...> on 20 February 2016.

¹¹⁷ <http://fidakenya.org/wp-content...> on 20 February 2016.

1.7 PURPOSE OF THE STUDY/GENERAL OBJECTIVE

This study will evaluate the relationship between the existing laws on marital rape and its occurrence.

1.8 SPECIFIC OBJECTIVES

1. To determine what the current laws on marital rape in Kenya are.
2. To assess what factors limit the implementation of laws against rape in Kenya.
3. To evaluate whether other avenues exist that can protect women from marital rape in addition to its criminalization.

1.9 RESEARCH QUESTIONS

1. Do any laws exist in Kenya that proscribe marital rape?
2. Are there factors that limit the implementation of laws against rape in Kenya?
3. Do other avenues exist from which women can be protected from marital rape in addition to its criminalization?

1.10 HYPOTHESIS

The enactment of a law proscribing marital rape in Kenya will not have a significant impact in its prevention.

1.11 JUSTIFICATION OF THE STUDY

The study will help in establishing the status of marital rape in Kenya. It will bring to light the loopholes that exist in the domestic laws concerning the same especially in comparison with international human rights instruments. It will explore avenues of dealing with marital rape in Kenya, for example, by criminalizing it and whether such an approach would be adequate in the phase of existing rape laws.

1.12 LITERATURE REVIEW

Scholarly literature on marital rape was examined to ascertain the lacuna that exists in the knowledge on the subject in Kenya. Research conducted by Kung'u Christine¹¹⁸, Amos Wako¹¹⁹,

¹¹⁸Christine Kung'u: Criminalization of Marital Rape in Kenya' <http://tspace.library.utoronto.ca> on 20 February 2016.

¹¹⁹ Wako A, 'During the 16 Days of Activism against Women,' 10 December, 1999.

Tom G. Ondicho¹²⁰, Winnie Kamau¹²¹, Raquel Kennedy Bergen¹²², Susan Griffin¹²³, Roseline Njogu¹²⁴, Celestine Nyamu¹²⁵, Patricia Kameri-Mbote¹²⁶ and Betty Murungi¹²⁷ are among those considered in the study.

Wako argues that the gender stereotypical culture that exists in Kenya affects how the various groups in society relate to each other and that some cultural practices and ideologies have downgraded women to second class status.¹²⁸ These cultural practices are not only legal but also are justifications for violence against women.¹²⁹ This has encouraged discrimination against women.¹³⁰

This is true especially for cultural practices such as wife inheritance where no consideration is given to whether the widow assents to the new 'marriage' or to sexual relations with her new 'husband'.¹³¹ Non-discriminatory conformity to traditional customs and state tolerance concerning these practices has encouraged the prevalence of spousal rape.¹³² There is thus need for the re-examination of masculinity and education of both men and women to deal with the gender stereotype that still exists.

Kung'u contends that the Kenyan laws and practice treat married men and women differently on the basis of the wrongful notion that married women are the sexual property of their husbands. She states that the marital rape exemption under section 43(5) of the Sexual Offences Act creates a

¹²⁰ Ondicho T, 'Battered Women: A social-legal Perspective of their Experiences in *Nairobi*' 160.

¹²¹ Winnie Kamau: 'The Legal Impunity for Marital Rape in Kenya' <http://theequakityeffect.org/wp-content...> on 20 February 2016.

¹²² 'Raquel Kennedy Bergen: Marital Rape' (1999) VAWnet Applied Research Forum p-1 <http://www.hawaii.edu/hivandaids?Marital%20Rape.pdf> on 20 February 2016.

¹²³ Griffin, *In Forty-Four States, It's Legal To Rape Your Wife*, STUDENT Law, (1980).

¹²⁴ 'Roseline Njogu: Decolonizing Sex' <http://www.riarauniversity.ac.ke/decolonisingsexfiftysadesofrape> 13 January 2017.

¹²⁵ Nyamu C, Kameri-Mbote P, Kamau W & Baraza N: *Promoting the Human Rights of Women: A Comparative Review of the Domestic Laws* (UNIFEM Regional Office for East & Horn of Africa, 2010).

¹²⁶ 'Patricia Kameri-Mbote: Violence against Women in Kenya: An Analysis of Law, Policy and Institutions' <http://www.ielrc.org>content> on 14 January 2017.

¹²⁷ 'Betty Murungi: The International Centre for Transitional Justice: Is the International Community Abandoning the Fight against Impunity' <http://www.ictj.org>debate>article>fightagainstimpunity> on 14 January 2017.

¹²⁸ Wako A, 'During the 16 Days of Activism against Women,' 10 December, 1999.

¹²⁹ Wako A, 'During the 16 Days of Activism against Women'.

¹³⁰ Wako A, 'During the 16 Days of Activism against Women'.

¹³¹ 'Christine Kung'u: Criminalization of Marital Rape in Kenya' <http://tspace.library.utoronto.ca> on 20 February 2016.

¹³² 'Amnesty International Kenya: Rape the invisible crime' <http://www.amnesty.org/en/documents> on 20 February 2016.

distinction between married women and married men with married women being viewed to have agreed to never-ending sexual relations with their husbands.¹³³

Married women are treated differently from unmarried women, as married women have no recourse to justice when they are sexually violated by their partners, while unmarried women can apply the provisions against rape under the Sexual Offences Act.¹³⁴ Being contrary to the constitutional provisions of equality between men and women regardless of marital status,¹³⁵ there is a need to eliminate the unequal treatment accorded to wives.

Ondicho emphasizes that sexual abuse perpetuated by a spouse is rarely reported.¹³⁶ According to him, the most typical perception of rape is coerced sex with an unknown person, which takes place in a foreign and dangerous venue.¹³⁷ Victims may thus not consider it rape when their husbands demand sex without their consent as their husbands are known to them and an emotional bond exists between them.¹³⁸ He argues that it may be difficult for the victim to keep record of when they are raped.¹³⁹ The above is true. Due to the cultural and religious views existing in Kenya many women fear talking about the sexual abuse they undergo.

Ruth Aura¹⁴⁰ asserts that though the Kenyan legal framework stipulates the means of dealing with Sexual Gender Based Violence, for example, through the enactment of the Sexual Offences Act of 2006, how it has responded to the plight of the survivors is questionable.¹⁴¹ The state has more often perpetrated or tolerated violence against women by considering custom or tradition over the respect of fundamental freedoms and rights entitled to women.¹⁴²

¹³³ 'Christine Kung'u: Criminalization of Marital Rape in Kenya' <http://tspace.library.utoronto.ca> on 20 February 2016.

¹³⁴ 'Christine Kung'u: Criminalization of Marital Rape in Kenya' <http://tspace.library.utoronto.ca> on 20 February 2016.

¹³⁵ Article 45 (3), Article 27 (4), *Constitution of Kenya*.

¹³⁶ Ondicho T, 'Battered Women: A social-legal Perspective of their Experiences in Nairobi' 132.

¹³⁷ Ondicho T, 'Battered Women: A social-legal Perspective of their Experiences in Nairobi' 160.

¹³⁸ Ondicho T, 'Battered Women: A social-legal Perspective of their Experiences in Nairobi' 160.

¹³⁹ Ondicho T, 'Battered Women: A social-legal Perspective of their Experiences in Nairobi' 132.

¹⁴⁰ Ruth Aura: Situational Analysis and the Legal Framework on sexual and Gender Based violence in Kenya' <http://www.ielrc.org/content/w001.pdf> on 20 February 2016.

¹⁴¹ <http://www.ielrc.org/content/w001.pdf> on 20 February 2016.

¹⁴² <http://www.ielrc.org/content/w001.pdf> on 20 February 2016.

Bergen¹⁴³ claims that marital rape ought to be identified as a distinct issue apart from domestic violence.¹⁴⁴ The above should be considered especially in light of the rights that are violated owing to the vice such as the right to bodily integrity, privacy et cetera.

Griffin¹⁴⁵ advances that the physical and psychological effects of rape with an unknown person are more severe than the same effects resulting from marital rape.¹⁴⁶ He states that in marriage there is consent to have sexual intercourse, which hinders the ability of the wife to ascertain that she was raped by her husband.¹⁴⁷ The above argument is not true as owing to the fact that the perpetrator is the victim's spouse then this form of rape is just as traumatic as the victim is prone to multiple attacks.¹⁴⁸

Njogu¹⁴⁹ maintains that it is the patriarchal society that has influenced the form of law against rape and hence its ability to fully protect women.¹⁵⁰ She insists that "only when the law is reconstructed to reflect the experiences of the sexual activity of the victims" can it achieve its purpose.¹⁵¹ The stated argument is true as the attitude society has towards women has had an impact on the kind of legislations it has enacted.

Murungi¹⁵² discusses the inaction or under-investigation of violence crimes committed against women when left solely to officials.¹⁵³ This is a clear indication of the bias of law enforcers on matters affecting women.

¹⁴³ Raquel Kennedy Bergen: Marital Rape' <http://www.hawaii.edu/hivandaids?Marital%20Rape.pdf> on 20 February 2016.

¹⁴⁴ 'Raquel Kennedy Bergen: Marital Rape' <http://www.hawaii.edu/hivandaids?Marital%20Rape.pdf> on 20 February 2016.

¹⁴⁵ Griffin, *In Forty-Four States, It's Legal To Rape Your Wife*, STUDENT Law, (1980) 42.

¹⁴⁶ Griffin, *In Forty-Four States, It's Legal To Rape Your Wife*, 47.

¹⁴⁷ Griffin, *In Forty-Four States, It's Legal To Rape Your Wife*, 50.

¹⁴⁸ 'Raquel Kennedy Bergen: Marital Rape' <http://www.hawaii.edu/hivandaids?Marital%20Rape.pdf> on 20 February 2016.

¹⁴⁹ 'Roseline Njogu: Decolonizing Sex' <http://www.riarauniversity.ac.ke/decolonisingsexfiftyshadesofrape> 13 January 2017.

¹⁵⁰ 'Roseline Njogu: Decolonizing Sex' <http://www.riarauniversity.ac.ke/decolonisingsexfiftyshadesofrape> 13 January 2017.

¹⁵¹ 'Roseline Njogu: Decolonizing Sex' <http://www.riarauniversity.ac.ke/decolonisingsexfiftyshadesofrape> 13 January 2017.

¹⁵² 'Betty Murungi: Is the International Community Abandoning the Fight against Impunity' <http://www.ictj.org>debate>article>fightagaisntimpunity> on 14 January 2017.

¹⁵³ 'Betty Murungi: Is the International Community Abandoning the Fight against Impunity' <http://www.ictj.org>debate>article>fightagaisntimpunity> on 14 January 2017.

Kameri- Mbote¹⁵⁴ holds that Kenyan law in its revision of the law against marital rape needs to consider prevailing social and cultural perceptions of women in addition to the relationship they have with their husband in the marriage.¹⁵⁵ She notes that women will not be in a position to determine their conjugal rights if they remain economically dependent on their husbands.¹⁵⁶

Nyamu¹⁵⁷ professes the constitutional right to marriage based on free consent of the parties and how all marriages are subject to the Constitution inclusive of the Bill of rights, equality and non-discrimination provisions.¹⁵⁸ The marital rape exemption can thus be challenged on this basis.

Also, law enforcers are inefficient in implementing the law against rape as was the case in *C.K. (A Child) Through Ripples International as Her Guardian and Next Friend) & 11 others v. Commissioner of Police/Inspector General Of the National Police Service & 3 Others*.¹⁵⁹ The High Court found that “the failure of the law enforcers to execute Section 8 of the Sexual Offences Act encouraged a habit of permissiveness regarding sexual violence against girl children. This violated their constitutional right to be equally protected by the law.”

Lastly, research conducted by the Agency for Cooperation and Research in Development (ACCORD) shows that the effective application of laws proscribing violence against women is obstructed by weak institutional structures and systems in addition to minimal resources to adequately investigate, prosecute, sentence the perpetrators¹⁶⁰.

1.13 RESEARCH METHODOLOGY

The research methodology to be incorporated in the study will include a summary of literature on the subject of primary and secondary sources. Treaties, case law, journal articles and books,

¹⁵⁴ ‘Patricia Kameri- Mbote: Violence against Women in Kenya: An Analysis of Law, Policy and Institutions’ <http://www.ielrc.org>content> on 14 January 2017.

¹⁵⁵ ‘Patricia Kameri- Mbote: Violence against Women in Kenya: An Analysis of Law, Policy and Institutions’ <http://www.ielrc.org>content> on 14 January 2017.

¹⁵⁶ ‘Patricia Kameri- Mbote: Violence against Women in Kenya: An Analysis of Law, Policy and Institutions’ <http://www.ielrc.org>content> on 14 January 2017.

¹⁵⁷ Nyamu C, Kameri-Mbote P, Kamau W & Baraza N: Promoting the Human Rights of Women: A Comparative Review of the Domestic Laws’, 13.

¹⁵⁸ Nyamu C, Kameri-Mbote P, Kamau W & Baraza N: Promoting the Human Rights of Women: A Comparative Review of the Domestic Laws’, 16.

¹⁵⁹ *C.K. (A Child) Through Ripples International as Her Guardian and Next Friend) & 11 others v. Commissioner of Police/Inspector General of the National Police Service & 3 Others* [2013] eKLR.

¹⁶⁰ ‘Making the law count: An audit of legal practice on sexual violence in Kenya’ <http://www.acordinternational.org...> on 20 February 2016.

theses and dissertations, national constitutions and policies on sexual gender based violence and marital rape will be referred to.

The research will also include a comparative study with South African law which has criminalized marital rape given that Kenya and South Africa have the same African patriarchal culture.

1.14 SCOPE AND LIMITATION OF THE STUDY

This study will strive to illustrate the status of marital rape in Kenya and the gaps that exist in the law of Kenya as concerning the same. The study will be limited mostly to secondary sources of information as due to the sensitivity of the issue getting first-hand information from the main primary source which is the victims will be difficult and close to impossible.

1.15 CHAPTER SUMMARY

1.15.1 Chapter one: Introduction

This chapter will familiarize the reader with the subject of the research. It will cover a background to the study, presents the problem statement, research questions and objectives, methodology, literature review and outline of the study.

1.5.2 Chapter two: Theoretical Framework of Marital Rape

The chapter will discuss the theories justifying the marital rape exemption as a criminal offence and later the theory advocating for its elimination.

1.15.3 Chapter three: Marital rape in Kenya

This chapter will discuss marital rape in Kenya, the reasons for its occurrence and whether there are any legislations in place to hinder its occurrence.

1.15.4 Chapter four: Comparative study of Marital Rape in South Africa

Marital rape with regards to South African law and the challenges encountered by the courts regarding the interpretation of the concept of marital rape will be discussed. The lessons Kenya can learn from the jurisprudence of South Africa will be explored.

1.15.5 Chapter five: Discussion

A discussion into the findings of the research will be undertaken.

1.15.6 Chapter six: Conclusion and Recommendations

A conclusion and recommendations will be given depending on the findings of the research.

CHAPTER TWO: THEORETICAL FRAMEWORK

2.1 THEORIES BEHIND THE MARITAL RAPE JUSTIFICATION

Various theories have been adopted to explain the occurrence of marital rape. The theories for and against marital rape will be discussed briefly below.

2.1.1 The hale doctrine

This theory was propounded by Matthew Hale in 1736.¹⁶¹ The theory argues that “the husband could not be liable for rape committed by himself upon his legal wife as marriage entailed the wife’s consent to sexual relations with her husband from which she could not retract.”¹⁶² This doctrine was the foundation for the marital rape exemption in the 19th century.¹⁶³ It applied to sexual relations between spouses for as long as they were married.¹⁶⁴ Whether the wife and husband were agreeable to this was of no relevance before the law.¹⁶⁵

Once consent had been made at the time of marriage, the wife could not change her mind later.¹⁶⁶ This was so as the couple’s decision to marry subjected them to rights and obligations.¹⁶⁷ It was a wife’s obligation to fulfil her husband’s sexual desires.¹⁶⁸ As stated by Hale, “The wife hath given up herself in this kind unto her husband.”¹⁶⁹

To have sexual relations with her husband was a wife’s duty but having sex with another man who was not the wife’s husband was socially unacceptable.¹⁷⁰ Husbands were entitled to payment of

¹⁶¹ ‘Jennifer Bennice and Patricia Resick: Marital rape history, Research, and Practice’ (2003) <https://www.ncbi.nlm.nih.gov/pubmed> on 12 December 2016.

¹⁶² Hale M, ‘The History of the Pleas of the Crown’, 629.

¹⁶³ ‘Jill Hasday: A legal History of Marital Rape’ <http://www.scholarship.law.berkeley.edu>vol88>iss5> on 7 December 2016.

¹⁶⁴ ‘Jill Hasday: A legal History of Marital Rape’ <http://www.scholarship.law.berkeley.edu>vol88>iss5> on 7 December 2016.

¹⁶⁵ ‘Jill Hasday: A legal History of Marital Rape’ <http://www.scholarship.law.berkeley.edu>vol88>iss5> on 7 December 2016.

¹⁶⁶ ‘Jill Hasday: A legal History of Marital Rape’ <http://www.scholarship.law.berkeley.edu>vol88>iss5> on 7 December 2016.

¹⁶⁷ ‘Jill Hasday: A legal History of Marital Rape’ <http://www.scholarship.law.berkeley.edu>vol88>iss5> on 7 December 2016.

¹⁶⁸ ‘Jennifer Bennice and Patricia Resick: Marital rape history, Research, and Practice’ <https://www.ncbi.nlm.nih.gov/pubmed> on 12 December 2016.

¹⁶⁹ Hale M, ‘The History of the Pleas of the Crown’, 629.

¹⁷⁰ Hale M, ‘The History of the Pleas of the Crown’, 629.

damages from another man if his wife cheated on him as only he had the right to his wife sexually.¹⁷¹

Consent at the time of marriage was crucial for the imposition of this doctrine to the married couple.¹⁷² Forced marriages were, therefore, not governed under it.¹⁷³ Since a woman who had been forced to marry had not consented at first instance to the marriage her irrevocable consent to sexual relations with her husband could not be implied.¹⁷⁴

2.1.2 The unities theory

This theory was advocated by Blackstone.¹⁷⁵ According to him, “marriage constituted the coming together of a husband and wife to become one with the husband being that one.”¹⁷⁶ The essential nature of the woman is integrated into that of her husband which suspends the legal existence of the woman.¹⁷⁷ The wife is therefore not a separate being from the husband capable of being raped by the husband as the husband cannot rape himself.¹⁷⁸

It is from this union that legal rights and duties of the husband and wife in the marriage were drawn.¹⁷⁹ The husband was the head of the union and the wife had a duty to obey.¹⁸⁰

¹⁷¹ Hale M, ‘The History of the Pleas of the Crown’, 629.

¹⁷² Hale M, ‘The History of the Pleas of the Crown’, 629.

¹⁷³ Hale M, ‘The History of the Pleas of the Crown’, 629.

¹⁷⁴ ‘Jill Hasday: A legal History of Marital Rape’ <http://www.scholarship.law.berkeley.edu>vol88>iss5> on 7 December 2016.

¹⁷⁵ ‘Jennifer Bennice and Patricia Resick: Marital rape history, Research, and Practice’ <https://www.ncbi.nlm.nih.gov>pubmed> on 12 December 2016.

¹⁷⁶ ‘Jennifer Bennice and Patricia Resick: Marital rape history, Research, and Practice’ <https://www.ncbi.nlm.nih.gov>pubmed> on 12 December 2016.

¹⁷⁷ ‘Jennifer Bennice and Patricia Resick: Marital rape history, Research, and Practice’ <https://www.ncbi.nlm.nih.gov>pubmed> on 12 December 2016.

¹⁷⁸ ‘Jennifer Bennice and Patricia Resick: Marital rape history, Research, and Practice’ <https://www.ncbi.nlm.nih.gov>pubmed> on 12 December 2016.

¹⁷⁹ ‘William Blackstone: Commentaries on the Laws of England’ http://www.LibertyFund>files>Blackstone_Vol1 on 7 December 2016.

¹⁸⁰ ‘Jill Hasday: A legal History of Marital Rape’ <http://www.scholarship.law.berkeley.edu>vol88>iss5> on 7 December 2016.

As the head of the union, the husband acquired significant rights over his wife including the right to chastise his wife so long his act did not cause permanent injury.¹⁸¹ He also had the right to confine his wife in their house and to bring her back if she had gone to be with another man.¹⁸²

Under this theory, the rights that the wife had as an individual before she got married were blended with those of her husband.¹⁸³ The wife thus was unable to form contracts, draft wills, have title to property and become a party to legal suits.¹⁸⁴

2.2 THEORIES AGAINST THE MARITAL RAPE EXEMPTION

2.2.1 The Radical theory of Feminism

The feminist theory has been applied by many writers to explain the root cause of marital rape. The radical feminist theory was selected for this section as it propounds on the issues of male superiority in a male dominated society, the unequal treatment of women based on their gender and advocates for women to be treated equal to their male counterparts.¹⁸⁵ Marital rape is centered on all these issues as it is a result of women's oppression in a male dominated society.¹⁸⁶

The focal point of any feminist theory is gender.¹⁸⁷ Gender is defined as a set of culturally shaped and defined characteristics associated with masculinity and femininity.¹⁸⁸ Therefore, contingent on whether a subject is male or female, there are socially constructed roles ascribed to them.¹⁸⁹

¹⁸¹ 'Jill Hasday: A legal History of Marital Rape' <http://www.scholarship.law.berkeley.edu>vol88>iss5> on 7 December 2016.

¹⁸² 'Jill Hasday: A legal History of Marital Rape' <http://www.scholarship.law.berkeley.edu>vol88>iss5> on 7 December 2016.

¹⁸³ 'Melissa Anderson: Lawful Wife, Unlawful sex' <http://digitalcommons.law.uga.edu/gjicl/vol27/iss1/4> on 17th January 2017.

¹⁸⁴ 'Igor Primorac: Radical Feminism on Rape' <http://www.unisg.hr/akademski-iskaznica-radical-feminism-on-rape> on 16 January 2017.

¹⁸⁵ 'Igor Primorac: Radical Feminism on Rape' <http://www.unisg.hr/akademski-iskaznica-radical-feminism-on-rape> on 16 January 2017.

¹⁸⁶ 'Marital Rape as a Human Rights Violation in Ethiopia: A case study of Alumni association of the faculty of law of Addis Ababa University and Ethiopian Women's Lawyers Association' <http://www.etd.aau.edu.et/bitstream/123456789/.../Kebkab%20Sirgew%20Gelaw.pdf> on 12 December 2016.

¹⁸⁷ 'Marital Rape as a Human Rights Violation in Ethiopia' <http://www.etd.aau.edu.et/bitstream/123456789/.../Kebkab%20Sirgew%20Gelaw.pdf> on 12 December 2016.

¹⁸⁸ Tickner A, 'Gender in International Relations: Feminist Perspectives on Achieving Global Security' (New York: Columbia University Press, 1992) 7.

¹⁸⁹ *United Nations, General Assembly, Implementation of the Outcome of the Fourth World Conference on Women Report of the Secretary General* <http://www.un.org/documents/ga/docs/51/plenary/a51-322.htm> on 7th December 2016.

The defined characteristics associated with masculinity and femininity include the notion that the male is by nature superior and the female inferior and thus the male rules and the female is ruled.¹⁹⁰ This structure of dominance and submission is perpetuated by both genders.¹⁹¹ It is from this notion that the Hale doctrine was founded in which the wife's legal personality was deemed to be submerged in that of her husband and thus making it impossible for her husband to be guilty of rape as he cannot commit rape against his own person.¹⁹²

Thus, the main point of concern for radical feminists is the existence of the patriarchal society which is detrimental to women. Patriarchy is a system of society or government in which men have the power and women are largely excluded from it.¹⁹³ Patriarchy has existed across many cultures and societies.¹⁹⁴

The radical feminist theory reveals the masculine bias of the law which makes it difficult for the female to attain justice in all spheres of their life.¹⁹⁵ It instead advocates for equality of the male and female sexes to correct the injustices faced by women. Equality of the sexes is achieved by the treatment of women as being equal to men.¹⁹⁶ Women just like men have the ability and capability to rationalize and engage on the same level as men in all realms of life and where they are unable to, it is not so because they are women but rather because of the education and opportunities afforded to them as a result of the patriarchal society.¹⁹⁷

Radical feminists, therefore, emphasize on the importance of understanding the role the law plays in advancing the power of the male and how it can be instrumentalized to uncover such support

¹⁹⁰ <http://classics.mit.edu/Aristotle/politics.1.one.html> on 7 December 2016.

¹⁹¹ <http://classics.mit.edu/Aristotle/politics.1.one.html> on 7 December 2016.

¹⁹² 'Raquel Kennedy Bergen: Marital Rape' <http://www.hawaii.edu/hivandaids?Marital%20Rape.pdf> on 20 February 2016.

¹⁹³ Merriam Webster, 'Patriarchy/Definition of Patriarchy', [www.merriamwebster.com/dictionary/patriarchy.com](http://www.merriamwebster.com/dictionary/patriarchy) on 12 December 2016.

¹⁹⁴ 'Liz Kelly: Surviving sexual violence' (1988) www.polity.co.uk/book.asp?ref=9780745604633 on 12 December 2016.

¹⁹⁵ 'Marital Rape as a Human Rights Violation in Ethiopia' <http://www.etd.aau.edu.et/bitstream/123456789/.../Kebkab%20Sirgew%20Gelaw.pdf> on 12 December 2016.

¹⁹⁶ 'Marital Rape as a Human Rights Violation in Ethiopia' <http://www.etd.aau.edu.et/bitstream/123456789/.../Kebkab%20Sirgew%20Gelaw.pdf> on 12 December 2016.

¹⁹⁷ 'Valerie Bryson: Feminist Political Theory' http://www.ebook.unived.ac.id/.../%5BValerie_Bryson%5D_Feminist_Political_Theory on 12 December 2016.

for male bias and the means through which legal principles can be engaged to ensure the accomplishment of equality of both sexes.¹⁹⁸

Marital rape, one of the ways through which the male dominates in the family, is a direct reflection of patriarchy characteristics of which include use of force.¹⁹⁹ Men's violence arises out of men's power and women's resistance to it.²⁰⁰ Wives are forced into sexual relations by their husbands, when they resist sexual requests from them and thus have to be forced to submit as required by society. Hence, marital rape is used as a means of maintaining the patriarchal structure of the society.²⁰¹

This research will rely on the radical theory of feminism. This is because the main focus of this paper is the advocacy of the promulgation of a law against marital rape of which the radical theory of feminism is centered on.

¹⁹⁸ 'Marital Rape as a Human Rights Violation in Ethiopia' <http://www.etd.aau.edu.et/bitstream/123456789/.../Kebkab%20Sirgew%20Gelaw.pdf> on 12 December 2016.

¹⁹⁹ 'Marital Rape as a Human Rights Violation in Ethiopia' <http://www.etd.aau.edu.et/bitstream/123456789/.../Kebkab%20Sirgew%20Gelaw.pdf> on 12 December 2016.

²⁰⁰ 'Liz Kelly: Surviving sexual violence' www.polity.co.uk/book.asp?ref=9780745604633 on 12 December 2016.

²⁰¹ 'Marital Rape as a Human Rights Violation in Ethiopia' <http://www.etd.aau.edu.et/bitstream/123456789/.../Kebkab%20Sirgew%20Gelaw.pdf> on 12 December 2016.

CHAPTER THREE: MARITAL RAPE IN KENYA

3.1 INTRODUCTION

This chapter will discuss marital rape in Kenya, the reasons for its occurrence and prevalence and whether there are legislations and institutions in place to curb its incidence.

3.2 BACKGROUND

Marital rape is not a criminal offence in Kenya. This is pursuant to section 43(5) of the Sexual Offences Act²⁰² which states that sexual offences shall not apply “in respect of persons who are lawfully married to each other.” Thus women who are raped by their husbands have no recourse.

The marital rape exemption in Kenya dates back to the British colonial period.²⁰³ The British colonial administration was characterized by the application of common law rules on the people of Kenya.²⁰⁴ As a result, the doctrine of coverture²⁰⁵ which submerges a wife’s legal identity in that of her husband was applied to all married women in Kenya.²⁰⁶

It was easy to propagate the marital rape exemption because of the nature of the society in Kenya. Kenya is a patriarchal society, as male dominance over women characterizes most spheres of life especially the institutions of family and marriage.²⁰⁷ Where such dominance was threatened, violence would mostly be applied to reassert the men’s authority over women.²⁰⁸

This is perpetuated by traditional practices like payment of dowry which vest a property interest in women.²⁰⁹ Since a woman became a man’s property once she got married, the husband could do with her as he pleased including engaging her in sexual relations without her consent.²¹⁰

²⁰² *Sexual Offences Act* (Act No 3 of 2006).

²⁰³ ‘Winnie Kamau: The Legal Impunity for Marital Rape in Kenya’ <http://theequalityeffect.org/wp-content...> on 20 February 2016.

²⁰⁴ ‘Winnie Kamau: The Legal Impunity for Marital Rape in Kenya’ <http://theequalityeffect.org/wp-content...> on 20 February 2016.

²⁰⁵ Blackstone W, ‘Commentaries on the Laws of England’, 430.

²⁰⁶ ‘Winnie Kamau: The Legal Impunity for Marital Rape in Kenya’ <http://theequalityeffect.org/wp-content...> on 20 February 2016.

²⁰⁷ ‘Sound and Fury: Newspaper coverage of the marital rape debate in New Providence newspapers’ <http://journals.sfu.ca/cob/index.php/files...> on 20 February 2016.

²⁰⁸ ‘Sound and Fury: Newspaper coverage of the marital rape debate’ <http://journals.sfu.ca/cob/index.php/files...> on 20 February 2016.

²⁰⁹ ‘Sound and Fury: Newspaper coverage of the marital rape debate’ <http://journals.sfu.ca/cob/index.php/files...> on 20 February 2016.

²¹⁰ ‘Winnie Kamau: The Legal Impunity for Marital Rape in Kenya’ <http://theequalityeffect.org/wp-content...> on 20 February 2016.

In addition, other practices like polygamy further encouraged marital rape.²¹¹ A man who had many wives was considered to hold a prestigious place in society.²¹² This view encouraged men to marry as many wives as they could support. Because wives were a basis of a high ranking status in society, their husbands did not view them as human beings with dignity but rather a source of self-gratification and thus treated them as they pleased.²¹³

Moreover, marriage granted husbands and wives rights and duties. The husband had complete sexual rights over his wife and wives had the duty to oblige.²¹⁴

Other cultural practices included widow cleansing in which a widow was forced to have sexual relations with other men as part of a ritual. This illustrated that whether or not a woman consented to sexual relations was not of importance.²¹⁵

The above cultural practices encouraged the marital rape exemption. Even though, they are not practiced on large scale as they were in the past, they have created an attitude in men, specifically those who have women betrothed to them, that they have a right to sexual relations with their wives whenever and wives have no right to refuse.²¹⁶

3.3 THE PREVALENCE OF MARITAL RAPE IN KENYA

Statistics carried out by Federation of Women Lawyers (FIDA) involving 4876 married women aged 15-49 revealed that 13% are raped.²¹⁷ This number could even be higher as majority of married women suffer in silence.²¹⁸ From the statistics it is safe to conclude that marital rape does occur in Kenya.

²¹¹ ‘The Concept of Marriage and Family: Dowry, Relatives, Network’ <https://www.family.jrank.org>pages>kenya-conceptoffamilyandmarriage> on 6 January 2017.

²¹² <https://www.family.jrank.org>pages>kenya-conceptoffamilyandmarriage> on 6 January 2017.

²¹³ ‘Winnie Kamau: The Legal Impunity for Marital Rape in Kenya’ <http://theequakityeffect.org/wp-content...> on 20 February 2016.

²¹⁴ ‘Fleur Norton: The Role of the Law in Combating Rape’ (A case study of Ghana) <http://www.repository.up.ac.za/handle.net/2263/12466> on 6 January 2017.

²¹⁵ ‘Fleur Norton: The Role of the Law in Combating <http://www.repository.up.ac.za/handle.net/2263/12466> on 6 January 2017.

²¹⁶ [http://www.DocPlayer.net>8223627-Federation-of-Women-Lawyers\(FIDA\)-Kenya:Gender-Based-Domestic-Violence-in-Kenya](http://www.DocPlayer.net>8223627-Federation-of-Women-Lawyers(FIDA)-Kenya:Gender-Based-Domestic-Violence-in-Kenya) on 13 December 2016.

²¹⁷ [http://www.DocPlayer.net>8223627-Federation-of-Women-Lawyers\(FIDA\)-Kenya:Gender-Based-Domestic-Violence-in-Kenya](http://www.DocPlayer.net>8223627-Federation-of-Women-Lawyers(FIDA)-Kenya:Gender-Based-Domestic-Violence-in-Kenya) on 13 December 2016.

²¹⁸ [http://www.DocPlayer.net>8223627-Federation-of-Women-Lawyers\(FIDA\)-Kenya:Gender-Based-Domestic-Violence-in-Kenya](http://www.DocPlayer.net>8223627-Federation-of-Women-Lawyers(FIDA)-Kenya:Gender-Based-Domestic-Violence-in-Kenya) on 13 December 2016.

Its prevalence can be attributed first and foremost to the marital rape exemption. As no legal action can be taken against men who force their wives into having sex, they continue to do so without fear of any repercussions.

Secondly, social, political and economic factors play a key role in promoting marital rape.²¹⁹ For instance, women are still not accorded the same education opportunities as men.²²⁰ As a result, women who drop out of school or are not able to attain high ranking jobs with a good salary end up being economically dependent on their husbands.²²¹ Therefore because they lack an alternative means of livelihood they chose to remain in the union regardless of the treatment they are subjected to.

Free education in Kenya is a perfect illustration of the unequal opportunities women have compared to men when it comes to education.²²² Despite the introduction of free education in Kenya not all girls get to go school.²²³ In addition though the Education Act²²⁴ provides for the right of pregnant girls to continue with their schooling, they are still expelled from schools.²²⁵ Such girls may end up getting married to the father of their child and be stay at home mothers without an alternative means of livelihood they would rely on their husbands who would exert control over them.

Therefore, economic dependency of women on men plays a major role in propagating marital rape. In most cases, husbands are either the sole bread winners in the family or the providers of the majority of the family resources.²²⁶ This grants them status and power in their house and gives

²¹⁹ ‘Annemette Sorensen and Sara Mclanahan: Women’s Economic Dependency and Men’s Support Obligations: Economic Relations within Households’ <http://www.ssc.wisc.edu>cde>cdewp> on 13 December 2016.

²²⁰ ‘Annemette Sorensen and Sara Mclanahan: Women’s Economic Dependency and Men’s Support Obligations’ <http://www.ssc.wisc.edu>cde>cdewp> on 13 December 2016.

²²¹ ‘Barbara Hobson: No Exit, No Voice: Women’s Economic Dependency and the Welfare State’ <http://www.sagepublications>womeneconomicdependencyandthewelfarestate>asj>235.full.pdf> on 13 December 2016.

²²² [http://www.DocPlayer.net>8223627-Federation-of-Women-Lawyers\(FIDA\)-Kenya:Gender-Based-Domestic-Violence-in-Kenya](http://www.DocPlayer.net>8223627-Federation-of-Women-Lawyers(FIDA)-Kenya:Gender-Based-Domestic-Violence-in-Kenya) on 13 December 2016

²²³ ‘Global Development Education: Education for girls in Kenya-Girl Effect’ <http://www.girleffect>educationforgirlsinkenya> on 13 December 2016.

²²⁴ ‘Global Development Education: Education for girls in Kenya-Girl Effect’ <http://www.girleffect>educationforgirlsinkenya> on 13 December 2016.

²²⁵ ‘Winnie Kamau: The Legal Impunity for Marital Rape in Kenya’ <http://theequakityeffect.org/wp-content...> on 20 February 2016.

²²⁶ ‘Annemette Sorensen and Sara Mclanahan: Women’s Economic Dependency and Men’s Support Obligations’ <http://www.ssc.wisc.edu>cde>cdewp> on 13 December 2016.

them the ability to arbitrarily make decisions.²²⁷ This negatively impacts women in their quest for their individual interests.²²⁸ Thus even though, they are subjected to demeaning acts by their husbands, they would still stay in the marriage as they have no alternative means of a support system except that provided for by their husbands.²²⁹

Moreover, cultural and social factors also play a role in encouraging marital rape. For example, for a long time it was considered socially acceptable for a man to beat his wife as a way to ascertain his authority over her.²³⁰ Though this has since been outlawed it is still socially acceptable for a man to force his wife to have sexual relations and is it deemed the duty of women to submit to and satisfy their husbands.²³¹

Majority of men are raised in cultures that instill a sense of authority and superiority in them.²³² This upbringing has a lasting impact on men. For example, in the family children are taught about division of labour based on gender.²³³ Women are given roles relating to domestic duties like cooking and cleaning.²³⁴ Men are charged with the duty to provide for the family.²³⁵ They are granted the status of the head of the family while the women are expected to obey their husbands as they are deemed to have a status lower than that of men.²³⁶ This is used to justify the authority of men over women.²³⁷

Religion is also factor that has encouraged marital rape. The Bible asks women to submit to their husbands.²³⁸ However, many people misinterpret this to mean that a wife is to be mistreated but

²²⁷ 'Barbara Hobson: No Exit, No Voice: Women's Economic Dependency and the Welfare State' <http://www.sagepublications>womeneconomicdependencyandthewelfarestate>asj>235.full.pdf> on 13 December 2016.

²²⁸ 'Annemette Sorensen and Sara Mclanahan: Women's Economic Dependency and Men's Support Obligations' <http://www.ssc.wisc.edu>cde>cdewp> on 13 December 2016

²²⁹ 'Barbara Hobson: No Exit, No Voice: Women's Economic Dependency and the Welfare State' <http://www.sagepublications>womeneconomicdependencyandthewelfarestate>asj>235.full.pdf> on 13 December 2016

²³⁰ [http://www.DocPlayer.net>8223627-Federation-of-Women-Lawyers\(FIDA\)-Kenya:Gender-Based-Domestic-Violence-in-Kenya](http://www.DocPlayer.net>8223627-Federation-of-Women-Lawyers(FIDA)-Kenya:Gender-Based-Domestic-Violence-in-Kenya) on 13 December 2016.

²³¹ 'Winnie Kamau: The Legal Impunity for Marital Rape in Kenya' <http://theequakityeffect.org/wp-content...> on 20 February 2016.

²³² 'Federation of Women Lawyers (FIDA) Kenya: A Gender Audit Study of the 10th Parliament' <http://www.FIDA-Kenya>uploads>2013/08>Gender-Audit-Study-10th-Parliament> on 6 January 2017.

²³³ <https://www.family.jrank.org>pages>kenya-conceptoffamilyandmarriage> on 6 January 2017.

²³⁴ <https://www.family.jrank.org>pages>kenya-conceptoffamilyandmarriage> on 6 January 2017.

²³⁵ <https://www.family.jrank.org>pages>kenya-conceptoffamilyandmarriage> on 6 January 2017.

²³⁶ <http://www.FIDA-Kenya>uploads>2013/08>Gender-Audit-Study-10th-Parliament> on 6 January 2017.

²³⁷ <http://www.FIDA-Kenya>uploads>2013/08>Gender-Audit-Study-10th-Parliament> on 6 January 2017.

²³⁸ Ephesians 5:22, *New King James Version*, Harper Collins Press, 1982.

through it she should submit. Nevertheless, husbands are asked to love their wives.²³⁹ Husbands demonstrating true love for their wives would not force them into having sexual relations to gain sexual gratification.

Furthermore, many married women are ignorant of the fact that they are being raped by their husband as they were brought up to believing that it is their responsibility to fulfil their husband's sexual needs without any limitations.²⁴⁰ They therefore continue to suffer in silence.

In addition to the above, the view that the law should not be involved in private family affairs like the sexual affairs between a man and his wife has also deterred women who are raped by their spouses from reporting them.²⁴¹

Where women report the cases, the police are unwilling to take up the matter. A story is told of a woman who was forced into sexual intercourse a few weeks after she had given birth to her husband's child. As a result, the bleeding caused by child birth reoccurred. She reported the matter to the police who dismissed the case with the view that it was the duty of a wife to satisfy her husband sexually.²⁴²

3.4 IMPACT OF MARITAL RAPE ON WOMEN IN KENYA

Women who are raped by their spouses experience more trauma because of the emotional bond they share with their spouses.²⁴³ Some may sustain injuries especially if the spousal rape is accompanied with physical violence.²⁴⁴ Others are exposed to health risks such as HIV/AIDS or STIs especially where their husbands are unfaithful.²⁴⁵

²³⁹ Ephesians 5:25, *New King James Version*.

²⁴⁰ [http://www.DocPlayer.net>8223627-Federation-of-Women-Lawyers\(FIDA\)-Kenya:Gender-Based-Domestic-Violence-in-Kenya](http://www.DocPlayer.net>8223627-Federation-of-Women-Lawyers(FIDA)-Kenya:Gender-Based-Domestic-Violence-in-Kenya) on 13 December 2016.

²⁴¹ 'Fleur Norton: The Role of the Law in Combating Rape' <http://www.repository.up.ac.za/handle.net/2263/12466> on 6 January 2017.

²⁴² 'Ruth Nekura Lekakeny: The Elusive Justice for Women: A Critical Analysis of Law and Practice in Kenya' <http://www.universityofcapetown>open>handle/1142> on 6 January 2016.

²⁴³ 'Fleur Norton: The Role of the Law in Combating Rape' <http://www.repository.up.ac.za/handle.net/2263/12466> on 6 January 2017.

²⁴⁴ [http://www.DocPlayer.net>8223627-Federation-of-Women-Lawyers\(FIDA\)-Kenya:Gender-Based-Domestic-Violence-in-Kenya](http://www.DocPlayer.net>8223627-Federation-of-Women-Lawyers(FIDA)-Kenya:Gender-Based-Domestic-Violence-in-Kenya) on 13 December 2016.

²⁴⁵ 'Ruth Nekura Lekakeny: A Critical Analysis of Law and Practice in Kenya' <http://www.universityofcapetown>open>handle/1142> on 6 January 2016.

3.5 EXISTING LEGISLATIVE FRAMEWORK

3.5.1 National

The primary legislation for sexual offences in Kenya is the Sexual Offences Act of 2006²⁴⁶ Section 43(5) of the Sexual Offences Act, provides that sexual offences shall not apply “in respect of persons who are lawfully married to each other.”²⁴⁷ Hence marital rape is not a criminal offence in Kenya.

Victims of spousal rape thus do not have recourse under the Sexual Offences Act. The only redress available is through assault, which is a criminal offence under the Penal Code.²⁴⁸ The number of victims who can use this avenue is therefore limited.

The Constitution of Kenya²⁴⁹ guarantees the right to freedom and security of the person.²⁵⁰ Married women therefore have a right to make decisions about their bodies. Article 29 further provides that no one is to be predisposed to any kind of violence from public or private sources or to be treated in a cruel, inhuman or degrading manner.²⁵¹ Private sources includes one’s family. The constitution thus impliedly outlaws marital rape.

Section 124 of the Evidence Act²⁵² provides that corroboration is not necessary for sexual violence cases where the court is convinced of the truth in the witness’ statement.²⁵³ This section facilitates the reporting of rape cases and especially marital rape which occurs in the privacy of the couple’s home and thus corroboration may be impossible. However, this section is currently inapplicable to marital rape as it is not considered to be a sexual offence.

3.5.2 International Legislation applicable in Kenya

International law can be used as a guideline to determine the adequacy, effectiveness and implementation of laws against rape in Kenya.

²⁴⁶ *Sexual Offences Act No 3 of 2006.*

²⁴⁷ Section 43(5), *Sexual Offences Act.*

²⁴⁸ *Penal Code Cap 63 of 2014.*

²⁴⁹ Article 48, *The Constitution of Kenya.*

²⁵⁰ Article 26, *The Constitution of Kenya.*

²⁵¹ Article 29, *The Constitution of Kenya.*

²⁵² *Evidence Act (Cap 80 of 2014).*

²⁵³ Section 124, *Evidence Act.*

International law applies in Kenya pursuant to Articles 2(5) and 2 (6) of the constitution which allow international law to part of Kenyan law once it is ratified.²⁵⁴ Thus international laws ratified by Kenya are applicable and binding in Kenya. The following treaties are applicable in Kenya;

Firstly, the Universal Declaration of Human Rights.²⁵⁵ Though it is a declaration and thus not legally binding, it is applicable to all by virtue of them being human beings. Article 1 of the Declaration recognizes that all human beings are equal in dignity and rights.²⁵⁶ Marital rape, on the other hand, affords women unequal treatment compared to men and it is degrading to the dignity of women as persons.

In addition, Article 16(2) provides for “free and full consent of the intending spouses.”²⁵⁷ Marital rape is contrary to this provision as the wife is not given a choice of whether or not to consent to sexual relations.

Secondly, the UN Convention on Elimination of all forms of Discrimination against Women²⁵⁸ prohibits all forms of discrimination against women. This includes any form of violence against women.²⁵⁹ Marital rape is a form of sexual violence in which wives are forced into sexual relations without their consent. It is therefore outlawed by this convention.

In addition, Articles 1-4 of the Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa,²⁶⁰ forbid violence against women including forced sex regardless of whether it is occurring in private or public.²⁶¹ It further places a responsibility on law enforcement organs to enforce gender equality rights.²⁶² Law enforcers thus have the mandate to safeguard the rights of women and should not be prejudiced against marital rape cases.

Also, the International Covenant on Civil and Political Rights (ICCPR),²⁶³ Article 7, recognizes that no one shall be subjected to torture or to cruel, inhuman or degrading treatment.²⁶⁴ Marital

²⁵⁴ Article 2(5) and Article 2(6), *The Constitution of Kenya*.

²⁵⁵ *The Universal Declaration of Human rights* (1948).

²⁵⁶ Article 1, *The Universal Declaration of Human Rights*.

²⁵⁷ Article 16(2), *The Universal Declaration of Human Rights*.

²⁵⁸ *UN Convention on Elimination of all forms of Discrimination against Women* (1979).

²⁵⁹ *UNGA Recommendation 19, Convention on the Elimination of all forms of Discrimination against Women*, 1979.

²⁶⁰ *African Charter on Human and People’s Rights on the Rights of Women in Africa* (1986).

²⁶¹ Article 1, 2, 3, 4, *African Charter on Human and People’s Rights on the Rights of Women in Africa*.

²⁶² Article 1, 2, 3, *African Charter on Human and People’s Rights on the Rights of Women in Africa*.

²⁶³ *The International Covenant on Civil and Political Rights* (1976).

²⁶⁴ Article 7, *The International Covenant on Civil and Political Rights*.

rape violates the dignity of women. It is enslavement and torturous as women have no complete autonomy to their bodies. Further Article 24(4) imposes a responsibility on states to ensure the equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution.²⁶⁵

Lastly, the African Charter on Human and People's Rights, Article 2, proscribes discrimination on the basis of sex and Article 3 of the charter provides for the right of every individual to have equal protection under the law.²⁶⁶ Victims of marital rape therefore have a right to the law's protection without discrimination based on their marital status.

3.6 CONCLUSION

It is evident that marital rape does occur in Kenya. The reasons for its prevalence are majorly based on society's view of women as occupying an inferior position compared to men and their being objects of gratification for men. The marital rape exemption serves to further proliferate the vice.

I argue for the enactment of a law against marital rape because of the following reasons; Firstly, a principal purpose of the law is to secure the entitlements of the marginalized.²⁶⁷ It is, therefore, the role of the law to protect married women against the danger posed to their welfare by their spouses. Currently victims of marital rape have no source of protection and a law against the vice will serve this purpose.

Secondly, criminal law is an effective way of deterring bad behavior through the penal sanctions.²⁶⁸ Private ways of the dealing with the issue will not be effective for all men, therefore men need to be deterred by more punitive measures and criminal law will achieve this.

²⁶⁵ Article 24(4), *The International Covenant on Civil and Political Rights*.

²⁶⁶ Article 3, *African Charter on Human and People's Rights on the Rights of Women in Africa*.

²⁶⁷ <http://www.whatisthepurposeoflaw-capitalism.org> on 3 January 2017.

²⁶⁸ Robinson P and Darley J, 'Role of Deterrence in the Formulation of Criminal Law Rules: At its Worst When Doing its Best' (2002-2003) 91 Geo. L.J. 949 at 950.

CHAPTER FOUR: COMPARATIVE JURISDICTION – SOUTH AFRICA

South Africa was selected for a comparative analysis with Kenya for the following reasons. To begin with it is an African country therefore susceptible to the same cultural traits as Kenya specifically the patriarchal culture as men are largely considered to be the head of society just as they are in Kenya. Secondly, South Africa is among the first African countries to criminalize marital rape and has constitutionally recognized it as a crime for close to 23 years. Kenya can therefore learn from her experiences.

South Africa was governed under the Roman-Dutch law arising from her colonization by the Dutch. The Roman- Dutch law allowed for the marital rape exemption. It was thus viewed that a man could not be guilty of raping his wife because he has full right to the person of his wife with whom he has consummated a marriage.²⁶⁹

This was the view until 1993 when the law allowing for marital rape was reviewed. The exemption was considered in the case of *S v Ncanywa*²⁷⁰ where it was held that the absence of consent to sexual relations by a wife to her husband's advances should not be ignored. The judge held that the husband and wife were considered to be equal partners with full dominion over their bodies. "Withholding consent to sexual intercourse may be contrary to marital obligation but that does not entitle a husband to have sexual relations with his wife against her will."²⁷¹

The Prevention of Family Violence Act²⁷² was passed later in 1993 which criminalized marital rape. It provided that "notwithstanding anything to the contrary contained in any law or in the common law, a husband may be convicted of the rape of his wife."²⁷³ This included marital rape as part of sexual offences²⁷⁴ which was considered to amount to domestic violence.²⁷⁵

²⁶⁹ 'Swartz NP: Is a husband criminally liable for raping his wife? A Comparative Analysis' www.idpublications.org/.../IS-A-HUSBAND-CRIMINALLY-LIABLE- on 17 December 2016.

²⁷⁰ *S v Ncanywa* (1991) (2) SA (CK).

²⁷¹ 'Nico Swartz: Is a husband criminally liable for raping his wife?' www.idpublications.org/.../IS-A-HUSBAND-CRIMINALLY-LIABLE- on 17 December 2016.

²⁷² *Prevention of Family Violence Act, No. 133 of 1993.*

²⁷³ Section 5, *Prevention of Family Violence Act.*

²⁷⁴ Section 5, *Prevention of Family Violence Act.*

²⁷⁵ Section 5, *Prevention of Family Violence Act.*

There were subsequent amendments to the Prevention of Family Violence Act and in 2000 the Domestic Relations Act was enacted which recognized marital rape as a crime in South Africa.²⁷⁶

Under the Domestic Relations Act²⁷⁷, there are three types of rape that are considered; firstly, force only rape, where the husband is violent but only to the extent that is necessary to pressure his wife to sexual relations.²⁷⁸ Secondly, battering rape, where the husband's forced sexual relations with his wife are part and parcel of violence against his wife.²⁷⁹ Lastly, obsessive rape where the husband is preoccupied with sex all the time and the sexual act itself is violent. The abuser may use violence to become aroused.²⁸⁰

Later in 2007, the *Criminal Law (Sexual Offences and Related Matters) Amendment Act, No. 32 of 2007* was promulgated. This is the current law governing sexual offences in South Africa. Section 60 of the Act provides 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.”²⁸¹

In doing so the Act abolishes the discretion of the judge to discredit the credibility of a rape victim when her testimony is not corroborated.²⁸²

Section 59 of the Act further provides that for criminal proceedings involving the alleged commission of a sexual offence, the length of time between the commission of the offence and when it is reported, should not be the only point of consideration by the court.²⁸³ Therefore victims of rape do not have to report the incident immediately.²⁸⁴

Section 3(Aa) of the *Criminal Law (Sentencing) Amendment Act 2007* stipulates that when the court imposes a sentence regarding the commission of a rape, it should not consider; the complainant's previous sexual history, an apparent lack of physical injury to the complainant, the

²⁷⁶ www.osisa.org/buwa/south-africa/marital-rape-south-africa on 17 December 2016.

²⁷⁷ *Domestic Relations Act of South Africa* (No.4 of 2000).

²⁷⁸ www.osisa.org/buwa/south-africa/marital-rape-south-africa on 17 December 2016.

²⁷⁹ ‘Nico Swartz: Is a husband criminally liable for raping his wife?’ www.idpublications.org/.../IS-A-HUSBAND-CRIMINALLY-LIABLE- on 17 December 2016.

²⁸⁰ ‘Nico Swartz: Is a husband criminally liable for raping his wife?’ www.idpublications.org/.../IS-A-HUSBAND-CRIMINALLY-LIABLE- on 17 December 2016.

²⁸¹ Section 60, *The Criminal Law (Sexual Offences and Related Matters) Amendment Act* (2007).

²⁸² Section 60, *The Criminal Law (Sexual Offences and Related Matters) Amendment Act*.

²⁸³ Section 60, *The Criminal Law (Sexual Offences and Related Matters) Amendment Act*.

²⁸⁴ Section 60, *The Criminal Law (Sexual Offences and Related Matters) Amendment Act*.

accused person's cultural or religious beliefs about rape or the relationship between the accused person and the complainant prior to the commission of the offence.²⁸⁵

As can be depicted from the above, the law governing marital rape in South Africa has tried to curb some of the problems that may be associated with prosecuting marital rape. For example, it has abolished the need for the victim's testimony to be corroborated as this is close to impossible for spousal rape as it is usually happens in the privacy of the home of the couple. Secondly, marital rape may not always involve physical violence. Therefore lack of apparent physical injury does not discredit a victim's testimony.

Even though the enactment of the above legislations has sealed some loopholes that may inhibit the prosecution of marital rape, the rate of the commission of marital rape is still high in South Africa.²⁸⁶ This is greatly attributable to the cultural beliefs and practices which has made the enforcement of the legislation against spousal rape difficult. A research conducted by the Open Society Initiative for Southern Africa (OSISA) into the enforcement and implementation of marital rape in South Africa reveals that the patriarchal attitudes influence how courts handle cases of marital rape.²⁸⁷

For example in 2012, OSISA's report recounted a case where the complainant was abducted and raped by her husband who thought it was his right to have his way with her as he had paid and was not reimbursed her bride price. In his holding, the judge considered that even though the defendant's actions were contrary to the law, "they were influenced by the norms, beliefs and customary practices by which he lived his life."²⁸⁸

The report also relayed a case, *S v Modise*,²⁸⁹ in which a judge dismissed marital rape charges on the ground that he had consideration for the fact that the husband's urge to have sex with his wife must have overpowered him to the point of him exhibiting violent behavior.²⁹⁰

²⁸⁵ Section 3(Aa), *The Criminal Law (Sentencing) Amendment Act* (2007).

²⁸⁶ Gemma Hancox: Marital Rape in South Africa' <file:///C:/Documents%20and%20Settings/saron/My%20Documents/marital-rape-south-africa.htm> on 17 December 2016.

²⁸⁷ 'Marital Rape in South Africa' www.osisa.org/buwa/south-africa/marital-rape-south-africa on 17 December 2016.

²⁸⁸ www.osisa.org/buwa/south-africa/marital-rape-south-africa on 17 December 2016.

²⁸⁹ *S v Modise* (2007) (3) BLR 105 (HC).

²⁹⁰ www.osisa.org/buwa/south-africa/marital-rape-south-africa on 17 December 2016.

The above scenarios clearly illustrate that even though marriage to the victim is no longer a defence for husbands who rape their wives in South Africa, courts in passing their judgment still consider the subsistence of a legal marriage between the accused and the victim.²⁹¹

Despite the enactment of the law against marital rape the rate of sexual violence in South Africa is among the highest in the world. A report conducted by the United Nations Office on Crimes and Drugs for the period between 1998-2000(just five years after the enactment of the legislation against rape) ranked South Africa first for rape crimes.²⁹² Research conducted by the Community Information Empowerment and Transparency (CIET) in 1998 led to the discovery that 1 in 3 of 4000 women questioned in Johannesburg were raped.²⁹³

In conclusion and judging from the above statistics the enactment of legislation against marital rape in South Africa has not been sufficient to deal with the problem.

²⁹¹ Hiwott M, 'Analysis of Marital Rape in Ethiopia in the context of International Human Rights' Unpublished LLM Thesis, University of South Africa, 20th June 2013,48.

²⁹² Gemma Hancox: Marital Rape in South Africa'
<file:///C:/Documents%20and%20Settings/saron/My%20Documents/marital-rape-south-africa.htm> on 17 December 2016.

²⁹³ Gemma Hancox: Marital Rape in South Africa'
<file:///C:/Documents%20and%20Settings/saron/My%20Documents/marital-rape-south-africa.htm> on 17 December 2016.

CHAPTER FIVE: DISCUSSION

5.1 RESEARCH FINDINGS

From the research it was concluded that marital rape is prevalent in Kenya. Cultural beliefs and practices are the highest cause of the vice. This is so because it is from culture that various stereotypes are held concerning women. This is specifically the stereotype that women are inferior to men and are objects of their self-gratification. It is this perception that influences the police in whether or not to conduct investigations regarding marital rape and this perception that impacts society on their view regarding marital rape and the lens to which it holds the victims. It is also this perception that influences the law makers on the type of laws they promulgate and to what extent they protect the female members of society.

For instance, the Sexual Offences Act Bill prior to its enactment, criminalized marital rape. However, the provision for marital rape was struck down by majority of the male members of parliament before the Sexual Offences Act could be passed as law.²⁹⁴ They believed that a man could not rape a wife for whom he had paid dowry for.²⁹⁵ They also held the opinion that the right to sexual relations with one's wife was given in marriage and thus could not later be denied.²⁹⁶

5.2 RESEARCH QUESTIONS

The study availed answers to the research questions. This will be expounded on further below.

1. Do any laws exist in Kenya that proscribe marital rape?

Currently, there are no laws that expressly proscribe marital rape in Kenya but some legislations exist that can be deemed to imply that marital rape should be outlawed. The Sexual offences Act specifically provides for the marital rape exemption.²⁹⁷

The constitutional provisions impliedly proscribe the marital rape exemption. For instance, it provides for entitlement of equal rights for the parties to a marriage²⁹⁸ and the right to freedom and

²⁹⁴ 'Christine Kung'u: Criminalization of Marital Rape in Kenya' <http://tspace.library.utoronto.ca> on 20 February 2016.

²⁹⁵ *Kenya National Assembly Official Record (Hansard), Second Reading of the Offences Bill (2004).*

²⁹⁶ 'Onyango-Ouma, Njoki Ndungu, Nancy Baraza & Harriet Birungi: The Making of the Sexual Offences Act http://www.popcouncil.org/pdfs/2009RH_KenyaSexOffenses.pdf on 17 January 2017.

²⁹⁷ Section 43(5), *Sexual Offences Act*.

²⁹⁸ Article 45(3), *Constitution of Kenya*.

security of a person inclusive of the right not to be subjected to any form of violence from public or private sources.²⁹⁹

As marital rape places a wife at an unequal standing with her husband and subjects her to violence especially where the forced sexual relations is accompanied by physical assault, it can be inferred that the practice is contrary to the Constitution.

International laws ratified by Kenya through treaties and conventions emphasize the right of spouses to have full and free consent in the marriage³⁰⁰ and prohibit any form of violence against women.³⁰¹

Therefore, though section 43(5) of the Sexual Offences Act is the legal dispensation for marital rape in Kenya, given that the Constitution is the supreme law of the land³⁰² and any law contrary to it is void to the extent of its inconsistency with the constitution³⁰³, Section 43(5) of the Sexual Offences Act should be repealed.

2. Are there factors that limit the implementation of laws against rape in Kenya?

Various factors limit the implementation of the laws against rape in Kenya. First and foremost, cultural views and practices are a major limit to the implementation of laws against rape. From an early stage in their lives, in most communities, boys are brought up with the notion that they are superior to women. Therefore, men think that they can deal with women in any way that they please. Also, there is the stereotype that where women are raped, it is usually their fault for instance, because they provoked the rapist by how they were dressed.³⁰⁴ This theory does not hold as men have been known to rape aged women and children younger than one year old.

²⁹⁹ Article 29(c), *Constitution of Kenya*.

³⁰⁰ Article 16(2), *Universal Declaration of Human Rights*.

³⁰¹ UNGA *Recommendation 19, Convention on the Elimination of all forms of Discrimination against Women*, 1979.

³⁰² Article 2 (1), *Constitution of Kenya*.

³⁰³ Article 2 (4), *Constitution of Kenya*.

³⁰⁴ 'Christine Kung'u: Criminalization of Marital Rape in Kenya' <http://tspace.library.utoronto.ca> on 20 February 2016.

Another social practice that limits the implementation of laws against rape is the view that matters concerning sex are never to be spoken in public.³⁰⁵ This therefore makes the victim afraid to report rape incidents to the police.

It is because of such views concerning women and sexual relations that law enforcers like the police are usually reluctant to handle rape cases.

Secondly, as mentioned, the manner in which law enforcers handle rape cases is a problem. The police have been known to intimidate victims by asking them humiliating questions or not taking their cases seriously.³⁰⁶ This can be seen in the earlier mentioned case of C.K. (A Child) & 11 others vs. The Commissioner of Police & 2 others³⁰⁷ where the police failed to effectively, properly and promptly carry out investigations into complaints of a defilement by a group of girls thus denying them the right to justice, a constitutional provision.

Moreover, there is inadequacy of the resources available to the police force.³⁰⁸ For instance, after the enactment of the Sexual offences Act, there was a proposal to set up gender desks in all police stations in Kenya.³⁰⁹ These gender desks were to ensure that victims could report rape incidences to qualified personnel without fear of shame or stigmatization. However, due to inadequate resources, these desks were only set up in Nairobi and other major towns.³¹⁰ Where they were set up, there was unavailability of specialized personnel to deal with the cases.³¹¹ This in turn led to inadequate investigations and as a result poor outcomes.

Lastly, there are too many cases to be dealt with by the courts. Therefore, this results in majority of cases being dismissed for insufficient evidence without proper scrutiny of the available evidence or without proper investigations. In other cases, the prosecution enters into an agreement with the accused to have the charges dropped.³¹²

³⁰⁵ ‘Ruth Nekura Lekakeny: A Critical Analysis of Law and Practice in Kenya’ <http://www.universityofcapetown>open>handle/1142> on 6 January 2016.

³⁰⁶ Ford D, ‘Wife Battery and Criminal Justice: A Study of Victim Decision-Making’, Vol. 32 (1983) 463-475.

³⁰⁷ *C.K. (A CHILD) Through Ripples International As Her Guardian And Next Friend) & 11 Others V Commissioner of Police/Inspector General of the National Police Service & 3 Others.*

³⁰⁸ <http://www.FIDA-Kenya>uploads>2013/08>Gender-Audit-Study-10th-Parliament> on 6 January 2017.

³⁰⁹ Kenya IEA Research Series, ‘*Status of Gender Desks at Police Stations in Kenya: A Case Study of Nairobi Province*’ (2009).

³¹⁰ Kenya IEA Research Series, ‘*Status of Gender Desks at Police Stations in Kenya.*’

³¹¹ Kenya IEA Research Series, ‘*Status of Gender Desks at Police Stations in Kenya.*’

³¹² Judiciary Transformation Framework 2012-2016 <https://www.judiciary.go.ke>ke>downloads>reports> on 6 January, 2016.

3. Do other avenues exist from which women can be protected from marital rape in addition to its criminalization?

Even though there exists other avenues through which women can be protected from marital rape apart from its criminalization, criminalizing it will be the most effective way to reduce its occurrence. The other methods that have been suggested to contain it include dealing with the stereotype that exists in society about the inferior status of women to men.³¹³ Dealing with this is important as it has been illustrated above, as it influences how the police deal with rape cases and the kind of laws that are enacted.

Secondly, encouraging more peaceful methods of dealing with marital rape cases. For instance, counselling and advising the couple. Most married women fear reporting such cases because of the feeling that their spouse may retaliate.³¹⁴ Therefore peaceful reconciliation methods would be crucial in cases where victims are reluctant to report their spouses to the authorities.

However, the above alternatives to the criminalization of marital rape cannot be effective on their own as not everyone is likely to follow the law to the letter without punitive measures. Therefore, legislation against marital rape in addition to the above mentioned alternatives would go a long way. However, they need to work hand in hand.

³¹³ Ford D, 'Wife Battery and Criminal Justice: A Study of Victim Decision-Making', 463-475.

³¹⁴ 'Ruth Nekura Lekakeny: A Critical Analysis of Law and Practice in Kenya'
<http://www.universityofcapetown>open>handle/1142> on 6 January 2016.

CHAPTER SIX: CONCLUSION AND RECOMMENDATIONS

6.1 CONCLUSION

This research tested the hypothesis that the enactment of law against marital rape will not have a significant impact in its prevention and found it not to be true. It also reaffirmed that marital rape exists in Kenya even though it is not recognized as a criminal offence. It also brought to light the fact that its legal dispensation is a way through which the law continues to propagate discrimination against women contrary to the Constitution.

6.2 RECOMMENDATIONS

First and foremost, Kenya needs to repeal Section 43(5) of the Sexual Offences Act that creates the marital rape exemption.

Secondly, as Kenya is bound by International Law through the treaties and conventions it has ratified, it has a duty to abide by its international law obligations. International law especially the Convention on Elimination of all forms of Discrimination against Women³¹⁵ urges nations to effectuate all essential initiatives to safeguard the welfare of women. Legislating against marital rape will have a greater effect in certifying that the welfare of women is safeguarded.

Thirdly, as has been discovered previously, the wrongful stereotype that exists which views women to be inferior to men needs to be addressed. Men need to be taught from an early age that they are equal to women. Women also need to be made aware of this so that they do not wrongfully submit to men regardless of their will to do so. Once men realize that they are equal to women they would not force sexual relations on them as a way to ascertain their authority.

In addition, there should be additional oversight mechanisms to ensure the police undertake their responsibilities in taking action against sexual offenders. Too much discretion is left at the hands of the police and that is the reason a majority of rape cases are not dealt with. A sexual offences

³¹⁵ Article 2, *UN Convention on Elimination of all forms of Discrimination against Women*.

unit should be created in each police station with an overseer to ensure sexual offences are dealt with accordingly. This will encourage more victims to report rape incidences.

Moreover, a special unit of the police force to deal with rape offences should be created and more funds from the national budget should be allocated to this sector. The gender desks at every police station was a good initiative and would have been efficient had there been sufficient funds to support its function. Similarly due the backload of cases in the judiciary, a special unit would be efficient in dealing with cases relating to sexual offences.

Lastly, more care centers should be established for victims of sexual offences. The Thuthuleza Care Centers project in South Africa is a perfect example.³¹⁶ Victims of marital rape are counseled, given medical treatment and can file charges against their husbands for marital rape all in one place.³¹⁷ This effectively deals with the problem of non-reporting of sexual offences by women because of shame, stigmatization or humiliation.

Therefore, in consideration of the above recommendations, a law should be enacted against marital rape. However, for the law to be effective all the factors discussed above that are likely to limit the implementation of such law should be addressed.

³¹⁶ 'Ruth Nekura Lekakeny: A Critical Analysis of Law and Practice in Kenya' <http://www.universityofcapetown>open>handle/1142> on 6 January 2016.

³¹⁷ 'Ruth Nekura Lekakeny: A Critical Analysis of Law and Practice in Kenya' <http://www.universityofcapetown>open>handle/1142> on 6 January 2016.

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